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Cover Photograph:
Ditch riders helped maintain orderly distribution of water and, in some cases, settled disputes on the spot. (Salt River Project)

LAW AND THE CHINESE ON THE SOUTHWEST FRONTIER, 1850s - 1902

BY JOHN R. WUNDER

> The Chinese are the least desired immigrants who have ever sought the United States. They came in with the famous Burlingame treaty, which angled for the celestial empire, but caught the almond-eyed Mongolian with his pig-tail, his heathenism, his filthy habits, his thrift and careful accumulation of savings to be sent back to the flowery kingdom... No degree of inhibitions excludes him. The most we can do is to insist that he is a heathen, a devourer of soup made from the fragrant juice of the rat, filthy, disagreeable, and undesirable generally, an incumbrance that we do not know how to get rid of, but whose tribe we have determined shall not increase in this part of the world.[1]

These were the words with which a number of the readers of the Tombstone *Epitaph* could sympathize in 1882. Such words, however, were not confined to isolated southern Arizona. Anti-Chinese sentiment could be found throughout the Southwest in the nineteenth century, and it would eventually be subsumed in the law.

The first Chinese journeyed to the Southwest in the 1850s seeking economic opportunities, primarily in the mines and on the railroads. They also functioned in service capacities, ran general stores, laundries, and restaurants, and raised and sold vegetables, fruit stuffs, and meat for local consumption.[2] By 1880,

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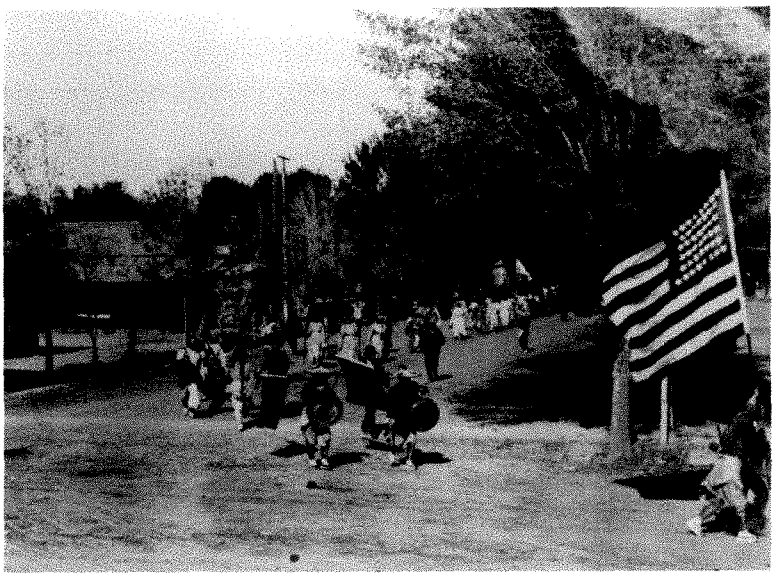
[1] "That Little Man from China," Tombstone, Arizona *Epitaph*, February 13, 1882.

[2] See, Roscoe G. Willson, "Chinese Had Rough Time," *Arizona Magazine*, in the Phoenix *Arizona Republican*, May 17, 1964; Lawrence M. Fong, "Sojourners and



Chinese parade in Phoenix, Arizona, ca. 1900. (Sharlot Hall Museum)

while Chinese constituted only .2% of the United States population, nine percent of all Nevadans were Chinese and one in every twenty-five Arizonans was Chinese. Chinese constituted one percent of all persons living in the Southwest according to the 1880 U.S. Census.[3]

The reception of the Chinese in the Southwest was generally hostile. Individual non-Chinese attacked Chinese with some frequency. In Deming, New Mexico Territory, when two Chinese attempted to claim a town lot, E. A. Kidder opposed them.

Settlers: The Chinese Experience in Arizona," *Journal of Arizona History* 21 (1980) 227-56; Heather S. Hatch, "The Chinese in the Southwest: A Photographic Record," *Journal of Arizona History* 21 (1980) 257-74; Gary P. BeDunnah, *A History of the Chinese in Nevada, 1855-1904* (San Francisco, 1973); Gregg Lee Carter, "Social Demography of the Chinese in Nevada: 1872-1880," *Nevada Historical Society Quarterly* 18 (1975) 73-90; Loren B. Chan, "The Chinese in Nevada: An Historical Survey, 1856-1970," *Nevada Historical Society Quarterly* 25 (1982) 266-314; George Kraus, "Chinese Laborers and the Construction of the Central Pacific," *Utah Historical Quarterly* 37 (1969) 41-57; Donald R. Abbe, *Austin and the Reese River Mining District* (Reno, 1985) 59-60.

[3] U.S. Dept. of Commerce, Bureau of the Census, *Ninth Census of the United States, 1870: Population* (Washington, D.C., 1870) I, 8, 18; *Tenth Census of the United States, 1880: Population* (Washington, D.C., 1880) I, 38-39; *Eleventh Census of the United States, 1890: Population* (Washington, D.C., 1890) I, 468, 474. To compare these figures with those of the Northwest, see John R. Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52 (1983) 192 [hereinafter cited as Wunder, "Chinese and the Courts"].

According to the Deming *Headlight*, "...when on Monday last two hop joint Celestials attempted to make a location[,] he [Kidder] enforced with a club a vigorous protest..." Kidder prevailed, and the paper urged someone to buy the property soon.[4] Bisbee, Arizona, had a reputation for being especially inhospitable to Chinese. No Chinese were allowed to stay overnight.[5] The situation was so bad in Flagstaff that Deputy Sheriff James L. Black took out an ad in the local newspaper:

> NOTICE: All boys that have been in the habit of throwing stones and clubs at Chinamen will take notice that hereafter they will be promptly arrested for any unnecessary assault on Chinamen.[6]

Eventually, organized efforts to expel the Chinese occurred in the Southwest. A strong anti-Chinese movement began in Nevada in Carson City in 1860. In 1876 two Chinese were killed in Eureka, and others were forced to leave. This anti-Chinese extralegal action continued into the twentieth century at Tonapah where a white mob murdered Chong Bing Long during an attempt to force all Chinese to leave the town.[7]

Many communities formed anti-Chinese cells who worked to develop an uncomfortable climate. In Tucson a petition was drafted arguing that the Chinese should be forced to a "Chinatown." "The present condition," its signers proclaimed, "is a disgrace and outrage to our city. There are 60 Chinese stores in Tucson which are dirty, carry cheap goods, and in most of which they smoke opium."[8] Silver City, New Mexico, also experienced much agitation. Citizens met and debated on taking forms of direct action.[9] In Graham County, Arizona Territory, in 1884 three Chinese men were lynched by a mob.[10] The largest mob action occurred in Denver in 1880, which resulted in the beating to death of a Chinese laundryman.[11]

[4] Deming, New Mexico Territory *Headlight*, September 28, 1888.

[5] Annie M. Cox, "History of Bisbee, 1877 to 1937," [Unpublished M.A. thesis, University of Arizona, 1938] 25-26.

[6] Flagstaff *Champion*, October 5, 1889.

[7] Chan, "Chinese in Nevada," supra note 1 at 312.

[8] Petition quoted in Claudette Simpson, "The Chinese: Early Arizonans Gave These Hard Working Orientals a Rough Time," Prescott, Arizona *Westward*, February 7, 1975, 3-4.

[9] *Silver City Enterprise*, November 27, December 11, 25, 1885; January 1, 15, 22, 1885.

[10] Ibid., April 11, 1884.

[11] Roy T. Wortman, "Denver's Anti-Chinese Riot, 1880," in Roger Daniels, ed. *Anti-Chinese Violence in North America* [New York, 1978] 275-91.

Given the nature of this hostile reaction, the Chinese in the Southwest sought legal protection in American law through American courts and legislatures. In the Southwest this took many forms, and the Chinese quickly found that their legal situation somewhat mirrored their initial societal problems. One way to examine the issues central to the Chinese and non-Chinese on the Southwest frontier is to analyze the cases decided by territorial and state supreme courts in Utah, Colorado, Arizona, Nevada, and New Mexico. Four categories will be used to facilitate the analysis: (1) civil cases appealed before passage of the first Chinese Exclusion Act (1882); (2) criminal cases appealed before passage of the act; (3) civil cases appealed from 1883 to 1902; and (4) criminal cases appealed from 1883 to 1902.[12]

SOUTHWEST CIVIL CASES BEFORE THE FIRST CHINESE EXCLUSION ACT

Only two civil cases involving Chinese litigants before state and territorial supreme courts were decided in the Southwest before 1883.[13] The paucity of Chinese litigation stems from several factors. Foremost, few Chinese migrated to four of the five Southwest areas. The combined Chinese population in Arizona, New Mexico, Colorado and Utah in 1870 and 1880 did not match the numbers of Chinese in Nevada or other areas of the West. Those Chinese who came first to the Southwest were not in control of their own economic destiny. Time and stability were required before a merchant class could develop. In 1881, for example, there were twenty-five Chinese businesses listed for all of Arizona Territory, the most being located in Tucson — four restaurants, one drug store, and two Chinese mercantile owners.[14] There were only three Chinese businesses in Phoenix. By 1898 in Phoenix the Chinese business community numbered twenty-two separate establishments.[15]

Most of the Chinese in the Southwest prior to 1883 were living in Nevada. Here a significant civil case involving a Chinese

[12] The same model is used in Wunder, "Chinese and the Courts," supra note 3 at 194. See also supra note 6. Chinese Exclusion Acts: 22 Stat. 58-61 (1882); 25 Stat. 476-79 (1888); 27 Stat. 25-26 (1892); 32 Stat. 176-77 (1902).

[13] *Hagerman v. Tong Lee*, 12 Nev. 331 (1887); *Lehow v. Simonton et al.*, 3 Colo. 346 (1877).

[14] *Arizona Business Directory and Gazetteer* (San Francisco, 1881) 125, 129, 141, 143, 157, 161, 164-65, 176, 178, 181, 183, 189-91, 193, 196, 202, 230, in Arizona Historical Foundation Room, Arizona State University Library, Tempe, AZ.

[15] Ibid. at 154, 230; *City Directory of Phoenix, Arizona* (Phoenix, 1898) 11, 14, 59, 67, 93, 99-101, 106, 109, 111, 117-18, 120, 143, in Arizona Historical Foundation Room, Arizona State University Library, Tempe, AZ.

defendant evolved, *Hagerman v. Tong Lee*.[16] Tong Lee made a contract with P. N. Marker to cut wood. It appears Marker was to supply wood to Tong Lee who in turn sold wood to other customers, including J. C. Hagerman. Hagerman paid Tong Lee a sum in excess of $600 for cut wood but Tong Lee did not supply it because Marker had not supplied him. Thus, Hagerman claimed a breach of contract and sued Tong Lee in Nevada district court.[17]

At the district court level, the judge appointed a referee to make a determination. The referee ordered P. N. Marker & Co. to pay $669.11 "... in satisfaction of the judgment recovered by the respondent Hagerman, against the defendant, Tong Lee." If the Markers, P. N. and John, refused to pay, they would be held in contempt and sent to the Washoe County jail. P. N. Marker appealed this decision to the Nevada Supreme Court.[18]

The issue before Nevada's highest court was procedurally limited to the powers of a court-appointed referee, but there were significant economic ramifications to this case. Business activities in a frontier community were dependent upon the kind of contractual relationships these litigants had developed, and the referee's decision placed a chilling effect upon third parties, in this case, the Markers. Moreover, the factual situation involved the timber supply business, a business that could ill afford legal interruption. The scarcity of wood was a fact of life for Nevadans, let alone for the mining and railroad industries.[19]

In a decision by Chief Justice Thomas P. Hawley, the Nevada Supreme Court reversed the referee's decision and ordered further proceedings if they were necessary. The court decided that an order reaching to a third party over an uncompleted contract could not stand. It found that the referee had the power to issue an order and to hold defendants in contempt, but that no court could demand a sum due a creditor from a third party unless it was clear that the third party owed the debtor. In this case P. N. Marker & Co. had not completed the contract with Tong Lee, and the Markers implied that they intended to complete the contract. Thus, Tong Lee was liable, and Hagerman would need to go back to court.[20] There is no evidence that Hagerman returned to the legal system. Presumably Tong Lee supplied the wood or the funds requested.

In the other civil case decided by Southwest frontier supreme courts, the Chinese litigant fared better. W. G. Phifer and Thomas

[16] *Hagerman v. Tong Lee*, 12 Nev. 331 (1877).

[17] Ibid.

[18] Ibid. at 333.

[19] See, Gordon Bakken, *The Development of Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912* (Westport, CT, 1983).

[20] *Hagerman v. Tong Lee*, 12 Nev. 334-37 (1877).

H. Simonton were in partnership in the city transfer business. While in partnership, Phifer and Simonton contracted with Lehow [Lee How] to supply them with $2000 worth of merchant goods. The materials were provided by Lehow, but the city transfer company did not pay. Before Lehow could sue, William H. Pierce bought out Phifer's share of the company.[21]

Lehow sued Simonton and Phifer in Arapahoe County probate court. Here the court decided in favor of the defendants, adopting the common law rule that "... a stranger to the consideration [the buy-out contract of Pierce and Phifer] cannot enforce the contract by an action thereon in his own name, though he be avowedly the party intended to be benefited."[22]

On appeal to the Colorado state supreme court, Lehow alleged fraud may have been committed and that American court precedents precluded the new partnership from preventing his recovery. The court decided for Lehow. It did not believe a fraud had been committed, but adopted the rule of fourteen other states which had dispensed with the common law in this third party action. Colorado's court reasoned that to deny Lehow would be to cause a grave injustice needlessly.[23]

Thus, in the two civil cases decided by Southwest supreme courts prior to 1883, Chinese litigants were treated fairly. Both situations involved complex contractual matters in which third party good faith purchases were involved. The courts chose to establish a commercial atmosphere free from procedural restriction, and their opinions were noticeably free of any inflammatory remarks directed at Chinese litigants or business practices.[24]

SOUTHWEST CRIMINAL CASES BEFORE THE FIRST CHINESE EXCLUSION ACT (1882)

Prior to 1883, Southwest appellate courts heard seventeen criminal cases involving Chinese defendants.[25] Of the seventeen, fourteen cases affirmed convictions while only three cases were

[21] *Lehow v. Simonton et al.*, 3 Colo. 346 (1877).

[22] Ibid. at 348.

[23] Ibid. at 348-49.

[24] This balanced treatment of the Chinese in the public sector prior to 1883 compares similarly to the actions of appellate courts of the Northwest during the same era. See, Wunder, "Chinese and the Courts," supra note 3 at 194-95.

[25] *State of Nevada v. Ah Tong*, 7 Nev. 148 (1871); *State of Nevada v. Ah Tom et al.*, 8 Nev. 213 (1873); *State of Nevada v. On Gee How*, 15 Nev. 184 (1880); *State of Nevada v. Ah Loi*, 5 Nev. 99 (1869); *State of Nevada v. Ah Sam and Ah See*, 7 Nev. 127 (1871); *State of Nevada v. Ah Chuey*, 14 Nev. 79 (1879); *State of Nevada v.*

Charley Lee Grocery, Tucson, Arizona, ca. 1890. (Arizona Historical Society Library)

reversed ordering new trials for Chinese defendants.[26] Crimes of violence, unlawful taking of property, and use of opium were of primary concern to law enforcement officials. All of the criminal cases appealed were in Nevada.

In the fall of 1871, Ah Fung arrived in Reno with a trunk full of his belongings. He met Ah Tom, a friend of several years, and asked him if he could leave his trunk at Ah Tom's cabin while he went to San Francisco. No one lived at Ah Tom's except his relatives, Ah Ping, Ah Mok, and Ah Loy. They saw the contents of the trunk — a watch, a chain, a pistol, and over $500 worth of coins — when Ah Fung returned to take twenty dollars out to pay for his trip. Later, when Ah Fung went with Ah Tom to move his trunk from the cabin, the trunk and its contents were missing.[27]

Charley Hing, 16 Nev. 307 (1881); *State of Nevada v. Ah Sam*, 15 Nev. 27 (1880); *State of Nevada ex rel. Ah Chew v. Richard Rising*, 15 Nev. 164 (1880); *State of Nevada v. Ah Chew*, 16 Nev. 50 (1881); *State of Nevada v. Ching Gang*, 16 Nev. 62 (1881); *State of Nevada v. Ah Gonn*, 16 Nev. 61 (1881); *Ex parte Ah Bau and Ah You*, 10 Nev. 264 (1875); *State of Nevada v. Ah Mook*, 12 Nev. 369 (1877); *State of Nevada v. Chin Wah*, 12 Nev. 118 (1877); *State of Nevada v. Ah Hung*, 11 Nev. 28 (1876); *State of Nevada v. I. En*, 10 Nev. 277 (1875).

[26] This is a decidedly different ratio of affirmations/reversals compared to Northwest criminal cases of the same era: in the Southwest 3 to 14, in the Northwest 9 to 6. Wunder, "Chinese and the Courts," supra note 3 at 209.

[27] *State of Nevada v. Ah Tom et al.*, 8 Nev. 214 (1873).

Evidently Ah Fung suspected all four cabin inhabitants, including Ah Tom. Ah Fung went to San Francisco and demanded satisfaction before a Chinese meeting where he confronted Ah Tom. Ah Tom stated that he had not stolen the contents of the trunk, but that his three relatives had.

After this event the Washoe County district court convened and convicted Ah Tom and his three relatives of grand larceny. At the trial, evidence from the Tong proceeding was admitted, and the defendants objected. In addition, Ah Fung told how after he had returned to Reno, Ah Ping and Ah Loy admitted to taking the trunk and gambling the contents away. They had offered to pay him one hundred dollars to drop the charges.[28]

On appeal the Nevada Supreme Court overruled the trial court and ordered a new trial. Justice Thomas Hawley wrote that the Tong proceeding testimony should not have been admitted because "... admission of this testimony was calculated to mislead the jury to the prejudice of the defendants...."[29] Thus, a confession by a Chinese defendant before his peers was not acceptable in a non-Chinese court setting. Although this case was decided in favor of the Chinese defendants, it restricted the role the Chinese as a community might have in criminal dispute resolution.

The other two criminal cases decided in favor of Chinese defendants were primarily concerned with misinterpreted legal language. In *State of Nevada v. On Gee How*, the state supreme court ruled that a statute suppressing the smoking of opium was constructed so as to prevent opium dens from operating.[30] Therefore, any indictment had to focus on the frequenting of "a place of resort" rather than simply any room or building.[31] Similarly, in *State of Nevada v. Ah Tong* the defendant had been convicted of murdering Ah Wy in Carson City, but was discharged because the trial judge charged the jury in an offensive way. After explaining the definition of murder, the judge lectured the jury: "Such is the law which you, the jurors, are called upon to vindicate, and such is the charge against the defendant."[32] He went on to state that no jury can err in making its decision. Nevada's state supreme court was not inclined to let such instructions stand.

In the opium and murder cases, Nevada's highest court participated in a common nineteenth-century legal ritual. It felt

[28] Ibid.

[29] Ibid. at 217.

[30] *State of Nevada v. On Gee How*, 15 Nev. 184 (1880); 1879 Nev. Stat. 121. The state of Washington took a similar stance. See *State of Washington v. Ah Lim*, 1 Wash. 156 (1890); Wunder, "Chinese and the Courts," supra note 3 at 205-6.

[31] *State of Nevada v. On Gee How*, 15 Nev. 187 (1880).

[32] *State of Nevada v. Ah Tong*, 7 Nev. 150 (1871).

constrained to rectify mistaken legal language. This incidentally benefitted Chinese defendants, and in the *Ah Tong* case there appear some dicta to suggest the trial court was somewhat hostile to the Chinese defendant. Other western courts took note, and lawyers in Utah tried to use the *Ah Tong* precedent to argue in favor of John Lee and other defendants in the Mountain Meadows Massacre case. Utah's supreme court would not accept the *Ah Tong* decision.[33]

Although some Chinese involved in criminal disputes received positive treatment before pre-1883 Southwest appellate courts, most did not. Those who lost were primarily involved in cases concerning opium use, violent crimes against persons, and crimes against property.

Unlike On Gee How, Chinese who raised questions regarding Nevada's attack on opium usually lost. In 1880 Ah Sam challenged the constitutionality of Nevada's Opium Act. The act had been amended to include prohibitions against places where opium was frequently smoked. Nevada's supreme court upheld the constitutionality of the act. The court reasoned that Nevada had the police power necessary to justify the need for the law, and that the law itself, while prohibiting the sale or use of opium and the maintenance of a place where the sale or use of opium occurs, did not embrace more than one subject. The court argued that the act did not oppress opium dens generally, but specifically; this position, however, seemed to beg the defendants' assertions.[34]

Immediately following *Ah Sam* was *State of Nevada v. Ah Chew*.[35] Having failed to dislodge Nevada's anti-opium legislation, the Chinese defendant charged discrimination based upon the Fourteenth Amendment. Chinese in Nevada were not serving on juries. E. R. Garber and Alexander Wilson argued for Ah Chew that under the U.S. Constitution "... civil rights of a Mongolian or yellow person are identical with those of an African, or black person, and are protected by the constitutional amendments and the acts of Congress in relation thereto in precisely the same manner as the rights of an African."[36] The Nevada Supreme Court was not convinced. It was of the opinion that the Constitution as amended following the Civil War must be narrowly construed. The justices believed that it applied almost exclusively to blacks. Justice Hawley wrote, "The language used necessarily extends some of the provisions to all persons of every race and color; but their general purpose is so clearly in favor of the African race, that

[33] *The People v. John D. Lee et al.*, 2 Utah 443 (1876).

[34] *State of Nevada v. Ah Sam*, 15 Nev. 27-31 (1880).

[35] *State of Nevada v. Ah Chew*, 16 Nev. 50 (1881).

[36] Ibid. at 51.

it would require a very strong case to make them applicable to any other."[37] The court went on to note that Chinese, like women, were not qualified "electors" to serve on juries.[38]

Two more cases decided that same term cited *Ah Chew* as controlling.[39] The Nevada Supreme Court clearly hoped it had put all issues concerning opium to rest. Nevertheless, one exclusion needed to be clarified. The opium act allowed physicians to distribute legal portions of opium. Ching Gang was arrested and convicted, and he claimed he was a physician. The court ruled he must prove he was a certified physician under Nevada rules, rules that all but openly denied the Chinese a physician's status.[40] The door was closed.

It appeared that Chinese were often involved in crimes of violence. Many non-Chinese complained that this was a natural predisposition of the Chinese, and it was justification alone for their removal. Courts logically became the focus of the debate, and Nevada's courts before 1883 heard a significant number of criminal cases involving Chinese.

The Nevada Supreme Court appeared to embrace the anti-Chinese attitudes prevalent in the general population. In *State of Nevada v. Ah Mook*, the defendant was tried and convicted of second-degree murder.[41] Ah Mook had shot Ah Long while the latter was in custody for having wounded Ah Mook's brother. Ah Long was being carried into jail at the time he was killed by Ah Mook. At the trial the judge neglected to tell the jury that a manslaughter verdict could be found if the crime was committed in a moment of passion. A divided Nevada Supreme Court affirmed the decision of the district court even though it strongly criticized the trial court judge. Justice Hawley submitted a lengthy dissent.[42]

An unusual rehearing was granted whereupon the attorneys for Ah Mook directly attacked the court. The justices were accused of

[37] Ibid. at 58. California also adopted this reasoning in cases concerning Chinese testimony against whites and blacks. See *People v. Washington*, 36 Cal. 568 (1869) and *People v. Brady*, 40 Cal. 198 (1870). See also, J.A.C. Grant, "Testimonial Exclusion Because of Race: A Chapter in the History of Intolerance in California," 17 *UCLA Law Review* (1969) 192-201, and John R. Wunder, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," *Western Historical Quarterly* 17 (1986) 25-41.

[38] *State of Nevada v. Ah Chew*, 16 Nev. 59 (1881).

[39] *State of Nevada v. Ah Gonn*, 16 Nev. 61 (1881); *State of Nevada v. Ching Gang*, 16 Nev. 62 (1881). Idaho also used this mechanism, and it became a focus of litigation. John R. Wunder, "The Courts and the Chinese in Frontier Idaho," *Idaho Yesterday* 25 (1981) 23-32.

[40] *State of Nevada v. Ching Gang*, 16 Nev. 62-63 (1881); 1875 Nev. Stat. 47.

[41] *State of Nevada v. Ah Mook*, 12 Nev. 369 (1877).

[42] Ibid. at 369-92.

arriving at a decision "... upon no hypothesis except that it was the result of hatred for Chinamen, with the fear of newspaper censure, together with the bold and glaring misstatements of the law by the court below."[43] Justice William H. Beatty responded testily. He charged the attorneys with being too sympathetic to the Chinese. Such a trait "... in cases of this character may always be expected to cloud their judgment to a greater or less extent."[44] No minds were changed except that a prejudice had clearly surfaced.

Two years later another similar situation resulted in the execution of the defendant Ah Chuey. At his trial white witnesses testified that Ah Chuey was in Reno near a Chinese washhouse that burned. A body was found in it that could not be identified. The owner of the washhouse, Ah Tong, never surfaced after the fire. The defendant claimed he was Sam Good, not Ah Chuey. He also was forced to reveal a tattoo on his arm that was identified by a questionable witness as a mark found on Ah Chuey.[45]

The defendant appealed the conviction on the basis that he had been compelled to testify against himself, a violation of the Nevada constitution; and that there was no identifiable *corpus delicti*. The court ruled that unless torture or the rack had been used, the testimony was acceptable, and it found reason to believe the dead person was the washhouse owner.[46] Justice Orville R. Leonard vigorously dissented. In a twenty-two-page dissent Leonard remonstrated the majority. There was overwhelming doubt as to the identity of the defendant and the body. Moreover, Leonard found the tattoo-showing to violate Nevada's constitution and the common law.[47] He wrote, "I think the error is as great as it would have been had the court compelled the defendant to admit that he was Ah Chuey."[48]

Thus, by 1883, Chinese defendants in violence-to-person cases were in trouble. Southwest appellate courts were willing to overlook what seemed to be significant legal issues in order to affirm conviction. The same was also true in cases appealed which concerned crimes to property (grand larceny, burglary, and robbery).[49] The message was clear to lower courts: appeals would

[43] Ibid. at 384.

[44] Ibid.

[45] *State of Nevada v. Ah Chuey alias Sam Good*, 14 Nev. 79 (1879).

[46] Ibid. at 81-93.

[47] Ibid. at 93-115; Nevada *Constitution*, Sec. 8, 18.

[48] *State of Nevada v. Ah Chuey alias Sam Good*, 14 Nev. 115 (1879).

[49] *State of Nevada v. Chin Wah (Chinaman)*, 12 Nev. 118 (1877); *State of Nevada ex rel. Ah Chew v. Richard Rising*, 15 Nev. 164 (1880); *State of Nevada v. Ah Sam and Ah See*, 7 Nev. 127 (1871); and *State of Nevada v. Ah Loi*, 5 Nev. 99 (1869).

be sustained for questionable procedures in cases involving Chinese defendants.[50]

Perhaps the most notorious case decided occurred in 1875. Ah Bau and Ah You were convicted of attempting to break out of jail, and Nevada's supreme court affirmed the decision. This was in the face of evidence showing neither defendant was charged with a crime. Both had just been acquitted of a kidnapping charge. The justice of the peace had not wanted to discharge the defendants, and he had ordered them to stay in the custody of the sheriff. For the court, the fact that a charge was contemplated was sufficient to warrant temporary incarceration of Ah Bau and Ah You.[51] Such was the state of civil liberties in the Southwest for Chinese at the time of the passage of the first Chinese Exclusion Act in 1882.

SOUTHWEST CIVIL CASES AFTER THE PASSAGE OF THE FIRST CHINESE EXCLUSION ACT

Eleven civil cases involving Chinese litigants were decided in Southwest appellate courts from 1883 to 1902. They included four from Arizona, four from Colorado, two from Nevada, and one from New Mexico.[52] Three of the eleven involved Chinese suing Chinese. Of the eight cases concerning a Chinese versus a non-Chinese litigant, four were decided in favor of the Chinese party.[53]

The Ethel Mine in Eureka County, Nevada, was the subject of a legal dispute in 1895. Ah Tone owned and worked the mine, and he had as his agent M. McGarry. Ah Tone gave McGarry ore to sell. McGarry sold it for $2077.20 but reimbursed Ah Tone for only $1384.80, and Ah Tone took McGarry to court.

At the trial McGarry claimed he owned or was leased a portion

[50] See also *State of Nevada v. Ah Hung*, 11 Nev. 428 (1876) and *State of Nevada v. Charley Hing*, 16 Nev. 307 (1881). In the latter case a juror claimed he opposed capital punishment. He was removed, and this action was sustained by the high court.

[51] *Ex parte Ah Bau and Ah You*, 10 Nev. 264 (1875).

[52] *Wong Fat et al. v. Woo Park et al.*, 8 Ariz. 110 (1902); *Ah You v. Don Yan*, 3 Ariz. 443 (1892); *Don Yan v. Ah You*, 4 Ariz. 109 (1893); *Look Ding v. Kennedy*, 7 Colo. App. 72 (1895); *Denver & Rio Grande Railway Co. v. Tong*, 11 Colo. 539 (1888); *Lee v. Justice Mining Company*, 2 Colo. App. 112 (1892); *Lee et al. v. Stahl*, 9 Colo. 208 (1886); *In re Roe Chung*, 49 P. 952 (1897); *Wang How et al. v. William Dee*, 3 Ariz. 314 (1891); *State of Nevada ex rel. Fook Ling v. C.S. Preble*, 18 Nev. 251 (1884); *Ah Tone v. McGarry* 22 Nev. 310 (1895).

[53] Cases decided in Southwest courts from 1883 to 1902 are fewer and more jurisprudentially balanced than in the Northwest for the same period. The ratio of cases in the Southwest was 5½ pro-Chinese to 5½ anti-Chinese (cases with two Chinese litigants were designated ½ each); in the Northwest the ratio was 12 pro-Chinese to 17 anti-Chinese. Wunder, "Chinese and the Courts," supra note 3 at 209.

Chinese-run dining room and kitchen, Ryland Mine, Arizona, ca. 1900. (Sharlot Hall Museum)

of the mine. He had given one-third of his interest to a man named McCaffery and two-thirds to his lawyer, Frank X. Murphy. They in turn conveyed these interests to McGarry's wife. The judge, however, found no evidence existed of this ownership, and the jury agreed that Ah Tone should be given $692.40. On appeal to the Nevada Supreme Court, McGarry argued he was a multiple agent and entitled to the money, but Nevada's highest court did not agree. In this instance Chinese mining interests were protected.[54]

Chinese also fought successfully to own non-mining lands in Nevada.[55] In 1884, Nevada Attorney General W. H. Davenport attempted to deny Fook Ling the right to own property. Davenport argued the Chinese were not persons within the meaning of the Nevada constitution. Indeed, like California's *People v. Hall* (1854), Nevada's highest legal official hoped to have Chinese classified as Indians under Nevada law.[56] Nevada's supreme court was not convinced, and determined that Chinese were foreigners entitled

[54] *Ah Tone v. McGarry*, 22 Nev. 310 (1895).

[55] *State of Nevada ex rel. Fook Ling v. C. S. Preble*, 18 Nev. 251 (1884).

[56] *People v. Hall*, 4 Cal. 399 (1854).

to own Nevada lands.[57] Clearly, by the late nineteenth century some Southwest appellate courts were not willing to give in to attempts to strip the Chinese of their real property rights.

The Chinese also used the civil courts to settle internal community disputes, although this was usually a rare occasion. More often than not, a filing settled a dispute. For example, in Grant County, New Mexico Territory, Chang Hung sued Mok Che Ling in district court. One day later the defendant announced that the plaintiff would not appear. The court dismissed the case charging the defendant court costs but authorizing him to collect from Chang Hung.[58]

In Arizona Territory an internal Chinese civil action was heard by the territorial supreme court. Ah You was cleaning out an irrigation ditch when he was attacked and mauled to death by a vicious boar. His widow and children brought a wrongful death action against Don Yan, who may or may not have had a financial interest in the hog. Don Yan was accused of negligence because he had kept a known-to-be dangerous animal. At the trial level, the widow won. The defendant appealed based upon what he termed a misinterpretation of the Arizona Territory's wrongful death statute.[59]

Under Arizona Territory law a person could sue another for the cost of injuries leading to a death if negligence was caused by a proprietor of a vehicle or his agent or if "... the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another."[60] Thus, Don Yan, possibly not the owner of the hog, might not be liable, nor would the owner be liable for his agent. The court noted Arizona's statute copied Texas' wrongful death act verbatim, and that Texas' supreme court had made the same narrow determination. Thus, the decision was reversed, and Ah You's relatives lost on appeal.[61] In this particular dispute, Chinese litigants became central to the formation of an important interpretation of Arizona law. Given the economic status of most Chinese, the result was not necessarily a positive one for Chinese Arizonans.

Chinese litigants lost out in two other important cases during this era. In Colorado a Mr. Kennedy rented a store to the Sing Wah Company. When the rent of $141 was not paid, Kennedy sued Look Ding, the only person identified with the Sing Wah

[57] *State of Nevada ex rel. Fook Ling v. C. S. Preble*, 18 Nev. 253 (1884).

[58] Grant County District Court Records, Record Book No. 7a, 1883-1885, New Mexico State Records Center, Santa Fe, New Mexico, *Chang Hung v. Mok Che Ling*, No. 1040; *Chang Hung v. Sam Ling alias Mok Che Ling*, No. 1018.

[59] *Don Yan v. Ah You*, 4 Ariz. 109 (1893).

[60] Ibid. at 111.

[61] Ibid. at 112; *Hendrick v. Walton*, 69 Tex. 193 (1892).

Company. The jury rendered a verdict in favor of Kennedy, and Look Ding appealed arguing that the company, not an individual, should have been sued.[62]

The Colorado state court of appeals heard the case and seemed sympathetic to Look Ding. It noted, "The testimony on the question of fact was contradictory. It was found against appellant, on very meager and unsatisfactory evidence of former statements of appellant [Look Ding] that might have been misunderstood."[63] Nevertheless, the court refused to change the verdict. It reasoned, "juries are made judges of the veracity of witnesses,"[64] and in this instance discredited the evidence. In Colorado, white juries had great latitude to discount Chinese testimony.

Similarly, when Roe Chung attempted to fight New Mexico's physician regulations, he lost. New Mexico Territory passed a statute that fined doctors who practiced medicine without certification. A justice of the peace, H. H. Ribble, assumed jurisdiction, and fined Roe Chung. The Chinese defendant challenged the constitutionality of the act, but the New Mexico Territory supreme court found all arguments without merit.[65]

Certainly civil actions appealed from 1883 to 1902 in Southwest courts gave mixed messages to Chinese litigants. Some jurisdictions protected the Chinese, especially in basic property rights. Yet others quickly abrogated responsibilities to lower courts which allowed for discrimination to occur without sanction.

SOUTHWEST CRIMINAL CASES AFTER THE PASSAGE OF THE FIRST CHINESE EXCLUSION ACT

Criminal cases appealed in Southwest courts from 1883 to 1902 also met with a mixed reception for Chinese defendants.[66] This contrasts with the imbalance against Chinese defendants prior to the passage of the first Chinese Exclusion Act in 1882. The turn around was in part due to Nevada's supreme court adopting more favorable precedents from California courts for Chinese defendants.

[62] *Look Ding v. Kennedy*, 7 Colo. App. 72 (1895).

[63] Ibid. at 73.

[64] Ibid. Other appellate courts in the West went even farther than Colorado in allowing juror discrimination against the Chinese. See *In re North Pacific Presbyterian Board of Missions v. Ah Won and Ah Tie*, 18 Or. 339 (1890); *People v. Ah Too*, 2 Idaho 47 (1884); *Speer v. See Yup Company*, 13 Cal. 73 (1859).

[65] *In re Roe Chung*, 49 P. 952 (1897).

[66] *United States v. Lee Ching Goon*, 7 Ariz. 2 (1900); *State of Nevada v. Wong Fun*, 22 Nev. 336 (1895); *State of Nevada v. Charley Lung*, 21 Nev. 208 (1891); *Ex parte Ah Kee et al.*, 22 Nev. 374 (1895); *State of Nevada v. Ah Kung and Ong Gee*, 17 Nev. 361 (1883); *In the Matter of Chung Hong*, 3 Ariz. 246 (1890); *United States v. Chung*

After 1902, Southwest courts would reverse the balanced trend of two decades primarily because of its strict holdings in immigration and deportation cases.[67]

Of the ten criminal cases heard by Southwest supreme courts involving Chinese defendants, one-half resulted in favorable verdicts for the Chinese. These included murder, assault with intent to kill, attempted rape, and grand larceny cases along with an important immigration ruling.

Four of the favorable decisions for Chinese defendants occurred in Nevada. In 1895 Ah Kee and several other Chinese were arrested by the sheriff of Humboldt County for the crime of grand larceny, but upon a hearing the warrant was judged insufficient. The justice of the peace, however, thought Ah Kee and his friends were guilty, and he ordered them held. Three weeks later they were still detained. The state supreme court was not impressed by this illegal incarceration and ordered the Chinese defendants set free.[68] In a sense this case was a natural result of the *Ah Bau and Ah You* case decided twenty years earlier. The court in effect overruled *Ah Bau and Ah You* without mentioning its previous indiscretion.[69]

The Nevada Supreme Court also reversed the murder conviction of Wong Fun and the assault with intent to kill conviction of Ong Gee. In the former case Wong Fun was convicted of the first-degree murder of Hing Lee by an admittedly prejudiced jury on the basis of second-degree murder evidence and an incompetent judicial instruction. This conviction was overturned.[70] In the latter case, Ong Gee and Ah Kung were convicted of attempting to kill Ah See after a gambling dispute. Supposedly Ah Kung fired the pistol, but, for reasons unknown, Ong Gee was brought before a delirious Ah See who identified him as his assailant. Later, Ah See recanted this statement noting that Ong Gee was merely present at the gambling hall and fled after the shooting by Ah Kung.[71] The Nevada Supreme Court reversed the conviction and showed an uncharacteristic degree of toleration. Regarding Ong Gee's

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Sing, 4 Ariz. 217 (1894); *Territory v. Yee Dan*, 37 P. 1101 (1894); *State of Nevada v. Charley Dan*, 18 Nev. 345 (1884). Again, this ratio in the Southwest is more positive for Chinese litigants. From 1883 to 1902 in the Southwest, the ratio is 5 pro-Chinese to 5 anti-Chinese decisions; in the Northwest, it is 8 pro-Chinese to 19 anti-Chinese decisions. Wunder, "Chinese and the Courts," supra note 3 at 209.

[67] See *United States v. Gin Hing*, 4 Ariz. 416 (1904); *United States v. Wong Lee Foo*, 108 P. 488 (1910); *Jung Good Jow v. United States*, 108 P. 490 (1910); *Lee Kim Fong v. United States*, 108 P. 237 (1910); *United States v. Quong Chee*, 89 P. 525 (1907); *Quong Yu v. Territory*, 100 P. 462 (1909).

[68] *Ex parte Ah Kee et al.*, 22 Nev. 374 (1895).

[69] *Ex parte Ah Bau and Ah You*, 10 Nev. 264 (1875).

[70] *State of Nevada v. Wong Fun*, 22 Nev. 336 (1895).

[71] *State of Nevada v. Ah Kung and Ong Gee*, 17 Nev. 361 (1883).

attempt to flee, Justice Leonard excused him, noting, "He might have been afraid of the other Chinamen who accompanied the Sheriff. He might have thought they came to do something else beside causing his arrest for the crime of which he was charged. He may have thought the sheriff came to arrest him for the commission of some other crime of which he felt guilty."[72] Whatever the case, the verdict had not been sustained by the facts.

In a different case the Nevada Supreme Court found itself having to make new law. Charley Lung was convicted of attempted rape. He had given a woman *cantharides*, or Spanish fly, in a cup of coffee with the intent of having intercourse with her. From the facts of the case it was determined that Charley Lung never went any further than placing the Spanish fly in the coffee. He did not "offer or attempt to have the connection with her, by force or otherwise."[73] Yet he had been convicted of attempted rape. The Nevada court extensively reviewed case law from numerous jurisdictions and concluded that Spanish fly, although it caused nausea and irritation of the genital organs, could not render a woman helpless; therefore, she could not be raped without force. Furthermore, the court found that some form of physical preparation had to occur for an attempted rape conviction to be upheld. Charley Lung was allowed to go free.[74]

New law of even greater magnitude was created by Arizona Territory's supreme court. In the first of many immigration cases involving Chinese defendants, the court decided that United States statutes did not allow for appeals to state courts from hearings conducted by immigration commissioners.[75] Lee Ching Goon was arrested and brought before Commissioner Frank Dysart. United States Attorney Robert E. Morrison wanted Lee Ching Goon deported, but Dysart was of the opinion that the defendant was a "Chinese person of a privileged class,"[76] thereby entitling him to stay in the United States. The 1882 Chinese Exclusion Act did not apply. Morrison took the case to the Arizona Territory district court, and the judge ruled he had no jurisdiction. The high court agreed, stating that the commissioner had original and final jurisdiction.[77] This was a rather unusual opinion in view of most courts' normal predisposition toward expanding jurisdiction, and was particularly so in Arizona with its popular anti-Chinese feeling.

[72] Ibid. at 364.

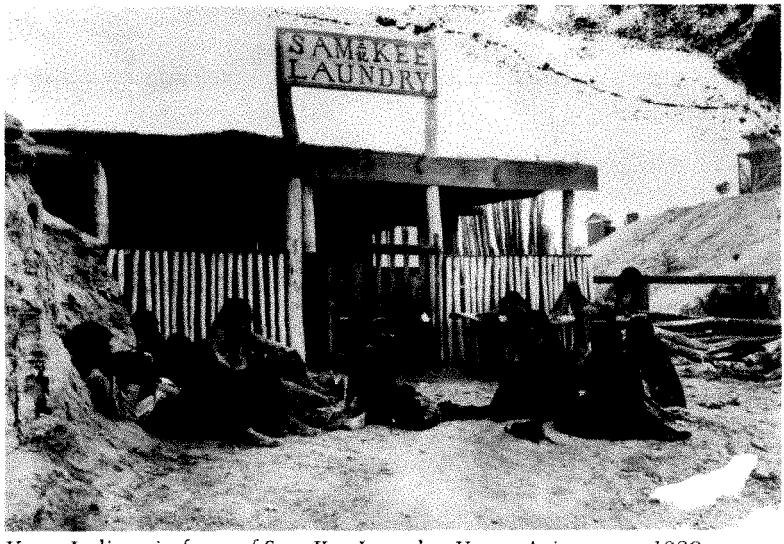
[73] *State of Nevada v. Charley Lung*, 21 Nev. 216 (1891).

[74] Ibid. at 217.

[75] *United States v. Lee Ching Goon*, 7 Ariz. 2 (1900).

[76] Ibid. at 3.

[77] Ibid. at 4.



Yuma Indians in front of Sam Kee Laundry, Yuma, Arizona, ca. 1890. (Reynolds Collection, Arizona Historical Society Library)

Although the Chinese were protected on some issues, they were not as fortunate with others. Chinese defendants in Southwest appellate courts from 1883 to 1902 lost on five separate occasions. These involved two murders, a *habeas corpus* proceeding, a burglary, and selling alcohol to Indians.

Charley Dan lost his appeal in Nevada because the court refused to accept his argument that when he broke into the vacant house owned by Joseph Olcovich he was not burglarizing a "dwelling."[78] Likewise, Chung Hong lost his application for a writ of *habeas corpus* in the Arizona Territory.[79]

More complex cases were heard in New Mexico Territory. Yee Dan was convicted for the murder of Yee Yot Woh. He bludgeoned the latter on the head with an iron pipe before being controlled. Yee Yot Woh was then taken to a hospital where a physician performed a trepanning on him. He died shortly thereafter. Yee Dan claimed that at this trial the interpreter was incompetent and that the deceased man died not because of his attack but because of a faulty operation. New Mexico Territory's supreme court would accept none of this. It summarily dismissed the interpreter argument allowing great latitude; and while it agreed with the defendant that the doctors were negligent, it found the jury had to determine the cause of death. They believed it to be Yee Dan.[80]

[78] *State of Nevada v. Charley Dan*, 18 Nev. 345 (1884).

[79] *In the matter of Chung Hong*, 3 Ariz. 246 (1890).

[80] *Territory v. Yee Dan*, 37 P. 1101 (1894).

Similarly, Yee Shun lost on his appeal of a murder conviction. He was charged with the killing of Jim Lee, proprietor of a laundry in East Las Vegas. He based his appeal on the oath Chinese witnesses were required to take before testifying, in which they had to discuss their religion within a Christian framework. The New Mexico Territory supreme court found nothing wrong with this oath, and the case became the controlling legal opinion on this matter throughout the trans-Mississippi West.[81]

As significant perhaps was *United States v. Chung Sing.*[82] Here the defendant was convicted of disposing of ardent spirits to Native Americans, a federal offense. At his trial Chung Sing wished to call a white witness, J. B. McNeil, to testify on his behalf. The trial judge refused to allow it. Arizona's appellate court agreed. The justices believed that all persons before the law were clothed in a presumption of innocence. They wrote, "It is a cardinal point, to be ever kept in view, and if followed, it is hardly possible for the stings of passion, prejudice, and suspicion to furnish a victim for judicial condemnation."[83] Passion, prejudice, and suspicion certainly describe many non-Chinese attitudes toward the Chinese. Arizona's justices chose not to confront the real world of the Gilded Age West.

Thus, in the two decades following the passage of the first Chinese Exclusion Acts, Southwest appellate courts proved to be cautious in their treatment of Chinese litigants. Blatant procedural irregularities were reversed, but numerous loopholes were opened so that anti-Chinese prejudice could flourish in the lower courts. One impact would be even less reliance upon the court systems of the states and territories of the Southwest.

Throughout the last half of the nineteenth century, Chinese came to settle in the Southwest portion of the United States. They met with limited economic success and some of the worst forms of racial bigotry. The interpretation of law proved to be of minimal help in Chinese attempts to assure themselves fundamental forms of fairness. Of forty cases heard before the highest regional courts, over twenty-five were decided against Chinese litigants — more than sixty-three percent. Setbacks, along with some advances, occurred in both civil and criminal law. Nevertheless, as regards the Chinese, law in the Southwest was not colorblind.

[81] *Territory v. Yee Shun*, 3 N.M. 100 (1884). For an extensive discussion of this case and its broader implications, see Wunder, "Chinese in Trouble," supra note 37 at 25, 29-32, 41; and John R. Wunder, *"Territory of New Mexico v. Yee Shun* (1884): A Turning Point in Chinese Legal Relationships in the Trans-Mississippi West," forthcoming in *New Mexico Historical Review.*

[82] *United States v. Chung Sing*, 4 Ariz. 217 (1894).

[83] Ibid at 219.

TABLE I
CHINESE LITIGANTS BEFORE SOUTHWEST SUPREME COURTS, 1849-1902

Cases Decided Before 1883

State or Territory	CIVIL			CRIMINAL		
	For Chinese Litigants	Against Chinese Litigants	Total Civil Cases	For Chinese Defendants	Against Chinese Defendants	Total Criminal Cases
Arizona	0	0	0	0	0	0
Colorado	1	0	1	0	0	0
Nevada	0	1	1	3	14	17
New Mexico	0	0	0	0	0	0
Utah	0	0	0	0	0	0
	1	1	(2)	3	14	(17)

Cases Decided From 1883 To 1902

State or Territory	CIVIL			CRIMINAL		
	For Chinese Litigants	Against Chinese Litigants	Total Civil Cases	For Chinese Defendants	Against Chinese Defendants	Total Criminal Cases
Arizona	1½*	2½*	4	1	2	3
Colorado	2	2	4	0	0	0
Nevada	2	0	2	4	1	5
New Mexico	0	1	1	0	2	2
Utah	0	0	0	0	0	0
	5½	5½	(11)	5	5	(10)

*Includes Chinese v. Chinese civil disputes (computed as ½ for and ½ against Chinese litigants)

A Reminiscence Of A Legal Career In Montana

By Hon. William J. Jameson

It seems appropriate to begin by recalling that the first meeting of the Montana Bar Association I attended was the meeting in Butte sixty years ago, in July, 1925. The year before, in my absence, I had been elected secretary of the association, largely because the president-elect, Thom Shea, knew I operated a typewriter. At the 1924 meeting, the president and the secretary were directed to prepare for publication the proceedings of the association from 1914 through 1924. We couldn't locate the necessary material for 1914 to 1921; but with my wife's assistance, I did prepare and publish the proceedings for 1921 to 1924, and continued to do so from 1925 through 1928. As a result, in 1925 I knew by name most of the 280 lawyers of the association and met many of them for the first time at the meeting at Butte.

If I am not mistaken, the only other person still living who was in attendance in 1925 is Judge Frank E. Blair. A special invitation was extended to Judge Blair to attend this meeting, but unfortunately by reason of illness he was unable to be here. There were two women lawyers in attendance, Jessie Roscoe of Butte and Emily Sloan, then practicing in Red Lodge. Sons and grandsons of many who attended the 1925 meeting are present today.

The 1925 meeting was an excellent meeting, which is true of all of our meetings in Butte. The theme of the meeting was not too different from that of many subsequent meetings — improving the administration of justice. The formal speakers were Governor John E. Erickson, who spoke on "Problems of the Bench and Bar"; C. F. Kelly, president of the Anaconda Company, who spoke on "Present Day Problems and Duties of the Bar"; Martin J. Hutchins, editor of

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Judge William J. Jameson, retired United States District Judge, lives in Billings, Montana. This article is a portion of his remarks made, by request of the Bar, at the annual meeting of the State Bar of Montana on June 21, 1985 in Butte.

the *Missoulian*, whose subject was "The Relation of the Lawyers to the Public"; Association President Thom Shea, who spoke on "Suggestions for Improving the Montana Bar Association"; and Judge George B. Winston of Anaconda, whose subject was "Proposed Reforms for Judicial and Administrative Proceedings."

Incidentally, at the 1927 session of the Montana legislature, Ben Knight of Anaconda and I introduced a bill drafted by Judge Wilson to accomplish one of the reforms he advocated in that address. Fortunately, Ben did a little research and we concluded that the bill was unconstitutional. When we called that to Judge Winston's attention, he readily agreed, but was quite embarrassed, particularly in view of the fact that he had been a member of the constitutional convention and helped draft that portion of the constitution.

The welcoming address at the 1925 meeting was given by J. Bruce Kremer, then a leader of the Montana Bar; and the proceedings also contained remarks, among others, by Charles R. Leonard of Butte, chairman of the executive committee, Loundes Maury, Tom Walker, Judge Joseph R. Jackson of Butte; A. N. Whitlock of Missoula; Sydney Sanner; E. C. Day; Lew L. Callaway and Ray Nagle of Helena; R. A. O'Hara of Hamilton; H. C. Crippen, O. F. Goddard and Emily Sloan of Billings; and G. J. Jeffries of Roundup.

A proposal for incorporating the bar was presented by Walter Aitken of Bozeman, and the following year in Great Falls the association officially endorsed a recommendation for integration of the bar. Ray Nagle and I introduced a bill at the 1927 session of the legislature providing for integration, but it failed to pass. Integration, of course, was eventually adopted by court order. In 1926 at the meeting in Great Falls the dues were increased from $2.50 to $3.00 a year to provide funds for publishing the proceedings.

In 1925 George M. Bourquin was the sole United States District Judge for Montana. He was a very fair, able, and industrious judge, but had the reputation of being rather stern and strict. I recall some thirty years later, when I was president of the American Bar Association, hearing many interesting stories about Judge Bourquin. Those, of course, were the days of prohibition, and Judge Bourquin was sent to many parts of the country to clean up congested calendars, which he did most effectively. Just one rather humorous incident. He was sent to Seattle, where he scheduled all of the cases for 9:30 on a Monday morning. It was customary at that time in the Western District of Washington to open court at ten o'clock, and the United States attorney and his staff overlooked the fact that the cases had been set for 9:30 that morning. The court was promptly opened at 9:30, and the first case was called. The government was not represented. "Case dismissed for want of prosecution. Call the next case." By the time the United States attorney and his staff had arrived about ten minutes to 10:00,

all of the cases on the calendar had been dismissed for want of prosecution.

A short time after I was appointed to the court, I accepted an assignment in Sacramento for two weeks. When I arrived on Saturday evening there was a note from Judge [Sherrill] Halbert that the cases set for Monday had been settled. On Monday afternoon he reported that the Tuesday cases had been settled. The same was true on Wednesday. At that time Judge Halbert said he had learned why all of the cases were being settled. The last Montana judge to sit in Sacramento was Judge Bourquin, and when the attorneys learned that another Montana judge was coming, they decided that they had better settle their cases. As a result I tried only one short case during the two weeks and was able to catch up on my own work.

I recall when I was admitted to the federal court before Judge Bourquin in Billings, he sent a deputy marshal to bring me to his chambers. He was most cordial, saying, "I presume you are the son of my old friend in Butte." He and my father had started the study of law when both were stationary engineers in the Butte mines. For the next half-hour we had a most interesting conversation. From then on, however, I was treated the same as all other counsel. At that time federal judges did not associate with counsel to the extent that they do today. Judge Bourquin retired and ran against Wheeler for the Senate in 1934, and I introduced him at a huge rally in Billings. He was a real orator, but 1934 was a poor year for a Republican to run for any office. Following the rally, Mildred and I took him on a ride around Billings before he took the train for his next meeting, and I again found him a delightful and entertaining conversationalist.

I started to practice law in what Judge Donald Lay aptly describes as the "horse and buggy" days. During my first year I spent a large part of my time foreclosing mortgages on abandoned homesteads, following a severe drought period. We received a flat fee of fifty dollars for mortgage foreclosures. The going rate for drafting contracts for deeds and wills was five dollars to fifteen dollars. Few, if any, Montana lawyers made $10,000 a year. The salary for a beginning lawyer was fifty dollars to seventy-five dollars a month, unless he could also serve as stenographer.

The 1920s saw the beginning of automobile liability insurance. That was before the days of "discovery," and a major question was whether the existence and amount of insurance should be divulged to opposing counsel, a question later settled by the Supreme Court.

A major problem, still with us in a different form, related to the adjudication of water rights. The first case I argued in the Supreme Court of Montana involved water rights on the Musselshell River.

There were very few tax cases, and virtually no civil rights cases. In sum, the practice of law in the 1920s involved the traditional

contract and tort cases, domestic relations and criminal cases, without subsequent repetitious *habeus corpus* and other post-conviction proceedings.

Turning to my bar association activities, I was elected president of the Montana Bar Association at the Golden Jubilee meeting at Bozeman in 1936. The following year was a significant one in two respects. It was during this year that the American Bar Association was reorganized. As president of the Montana Bar Association I attended the first meeting of the new House of Delegates on January 1, 1937, and since that time have attended eighty-two annual and mid-year meetings.

That was also the year of President Franklin Roosevelt's so-called "court packing" proposal, which was opposed by Senator Wheeler. Wheeler was working closely with the American Bar Association, and I spent a substantial amount of time contacting Montana lawyers, urging them to give Wheeler their support. I think it is safe to say that Senator Wheeler and Chief Justice Hughes, with the active support of the American Bar Association and various state associations, were primarily responsible for the defeat of the legislation. Incidentally, it was the beginning of a rather close friendship with Senator Wheeler. Prior to that time I had always supported his opponent: Dixon for governor in 1924 and for United States Senate in 1928 (serving on his campaign committee), and Judge Bourquin in 1934.

Some of you will recall that in 1937 we held a joint meeting with the Wyoming Bar Association in Yellowstone Park. The chief attraction was the appearance of Justice Van Devanter who had lived in Wyoming when he was appointed to the Supreme Court. The justice had just retired from the Court, in part to help resolve the court packing problem. I recall the first night that he was there his sister, who had accompanied him to the meeting, became alarmed about midnight when he had not returned to his room. She sought my help in locating him. We found him in a small room adjoining the Canyon lounge, reminiscing with Judge Goddard of Billings about early days in the practice of law in Montana and Wyoming. Both had started practice in territorial days.

Justice Van Devanter concluded a most interesting talk on his experiences on the Supreme Court with this comment: "I am proud of the Bar of Montana and I am proud of the Bar of Wyoming. A court never rises above the bar; and therefore, if you want to know what kind of court a state has, the first inquiry should be 'What kind of bar does it have?' And I am most happy to say to you that in my experience in Washington, that among the western states, the courts of Montana and those of Wyoming have uniformly had very high standing."

For the text of Justice Van Devanter's Remarks to the Montana and Wyoming Bar Associations, see the Supreme Court Historical Society's *Yearbook 1986*, 64-76.

Early Nevada And Indian Law

By Elmer R. Rusco

Nevada became a territory and later a state between 1850 and 1864. In 1865 the Nevada legislature passed the basic statutes required of a new state. During this period the outlines of Nevada law were drawn, including the establishment of patterns of law defining such important matters as property and social relations. These new patterns incorporated elements of frontier policy which had existed for decades, but the specific forms of the new entity were, as with other states, unique to Nevada.

Relations between Euro-Americans and Native Americans, or Indians, played an important role in this development. Unfortunately, however, for various reasons not all of which are clear, the legal nature of these relations was not always visible or operative. This fact has had important consequences down to today. This article will explore the significance of early relations with Indians and will address the current impact of those relations.

Indian Law By The Middle Of The Nineteenth Century

The legal status of Native Americans is not specified in detail in the United States Constitution, but was developed largely by the United States Supreme Court in interaction with Congress and the executive branch. The explicit references to "Indians" in the Constitution imply that the original inhabitants were, for the most part, outside the polity assumed, and to some extent created by, that document, but these references are too brief and scattered to answer many questions.

Three decisions written by John Marshall during his long tenure as Chief Justice of the United States in the first third of the nine-

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teenth century set the basic parameters of Indian law.[1] While much has happened in detail to this unique structure of law since the 1850s, the basic outline remains in place as it did when Nevada joined the Union.

Perhaps the most important of these decisions was *Johnson v. McIntosh* in 1823, in which Chief Justice Marshall stated that all the European nation-states had asserted a title to the lands occupied by various Indian societies based simply on "discovery":

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[2]

The most important part of Marshall's decision, however, went on to say that discovery did not extinguish Indians' property rights to their land. Rather, the chief significance of discovery was that it was the first step toward extinguishing a property right which Marshall called the "right of occupancy" still retained by the Indians. Marshall initially suggested that Indian title to land could be extinguished "either by purchase or by conquest";[3] subsequently there has been elaboration of the legal means by which extinguishment could take place. One of the most important elements of the law on this question is that only governments, not private individuals, can end Indian occupancy rights, or extinguish Indian title. In several opinions from 1823 into the 1860s, the Supreme Court deliberated the legal status of property rights arising from cessions to individuals by various Native societies, but in every case the crucial factor was whether a government had authorized the transaction which created the property right.[4]

In *Cherokee Nation v. Georgia*, in 1831, the Court determined that Indian nations were not "foreign states" within the meaning of the Constitution, but that they were "states" as that word was generally understood. Marshall wrote that the Cherokees

[1] Felix S. Cohen, *Handbook of Federal Indian Law* (Charlottesville, VA, 1982) 62-107.

[2] *Johnson v. McIntosh*, 21 U.S. 542, 590 (1823).

[3] Ibid. at 586.

[4] See *Mitchell v. United States*, 34 U.S. 464 (1835), and *United States v. Fernandez*, 35 U.S. 197 (1836), both involving property rights in Florida; *Marsh v. Brooks*, 55 U.S. 549 (1852), a Missouri case; *Choteau v. Molony*, 57 U.S. 216 (1853), from Iowa; and *United States v. Ritchie*, 58 U.S. 550 (1854), and *United States v. Wilson*, 66 U.S. 267 (1861), both from California.

> have been uniformly treated as a state, from the settlement of our country... The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[5]

Nevertheless, he wrote, Indian nations had a "relation to the United States [which] is, perhaps, unlike that of any other two people in existence."[6] In elaborating upon this notion, Marshall mentioned the unique status of Indian property rights and suggested that "their relation to the United States resembles that of a ward to his guardian."[7]

Perhaps the single most important Supreme Court opinion dealing with Indians is *Worcester v. Georgia*, written by Chief Justice Marshall in 1832. In it he repeated the conclusions of the *McIntosh* case, made an even more sweeping assertion than he had in the *Cherokee Nation* case that Indian nations were states, and added a discussion of the significance of the fact that Native societies had been dealt with largely through the treaty process. The treaty clause of the Constitution, which makes treaties part of the "supreme law of the land," overrides state laws and constitutions.

Later decisions of the Supreme Court have developed the suggestion of the *Cherokee Nation* case that the relationship between the United States government and Indians *resembles* that of a ward to a guardian into the notion that the national government has a far-reaching "trust responsibility" toward Native peoples.

As of 1850 the Supreme Court opinions interpreting the sparse constitutional language and the actual history of Indian-governmental relations amounted to assertions that all Native American societies were to be treated as though they were nation-states, except that the United States had assumed control of the foreign policy of these governments. This meant that Native peoples were presumed to have governments equivalent to those of the United States. Moreover, because under the Constitution the national government has exclusive authority over foreign policy, only the federal government can deal with Indians and, when it does so, its actions override state and local laws and state constitutions. Finally, Indian law as of 1850 stated that Indian societies had a legal right of occupancy over the lands they possessed and that only the federal government could extinguish this right of occupancy. This latter point was included in the first trade and intercourse act passed by Congress, in 1790. Section 4 of this act declared:

[5] *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

[6] Ibid.

[7] Ibid. at 15-17.

> no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, ... unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[8]

STATUTES AND ADMINISTRATIVE PRACTICE

In addition to the pattern of Indian law developed by the Supreme Court, several developments in statutory law and administrative practice may be mentioned. At first, Indians were dealt with under the Constitution largely through military and diplomatic means, and there was no specialized office concerned with Indian affairs. The earliest congressional statutes merely regulated trade with Indians, but gradually the activities of the federal government in this area expanded. As treaties added federal obligations toward Indians, the problems of criminal jurisdiction in Indian country became more complex, and military conflict continued. In response to these events, the Bureau of Indian Affairs came into being in 1834 (at first in the War Department, but shifted to the Interior Department in 1849). Beginning in the 1830s, the basic thrust of national policy became removing Indians from areas east of the Mississippi to Indian Territory in the West.[9]

In the 1850s, although there are no comprehensive statutes or clearcut statements of policy to mark the change, the major thrust of national policy shifted, this time toward the creation of reservations in or near the homelands of various Native peoples; no longer was the removal policy central. The Indian Territory remained until later forcibly converted into the state of Oklahoma, but the expansion of Indian Territory was not possible.[10] As Brigham Madsen has pointed out, it was the major territorial expansion into the Great Basin and the Pacific Coast which required this change in policy.[11] It was simply never feasible to remove the Native populations residing in this vast area to anywhere else, and the reservation policy developed on a piecemeal basis in response to changing circumstances.

[8] Act of July 22, 1790, ch. 33, 1 Stat. 138 (1790).

[9] For a discussion of much of this period see Francis Paul Prucha, *American Indian Policy in the Formative Years* (Cambridge, MA, 1962).

[10] Edmund J. Danziger, Jr., *Indians and Bureaucrats* (Urbana, 1974) 48-70.

[11] Brigham D. Madsen, *The Shoshoni Frontier and the Bear River Massacre* (Salt Lake City, 1985) 3-4 (hereinafter cited as Madsen, *The Shoshoni Frontier*).

THE TREATY OF GUADALUPE HIDALGO

Prior to 1848 the area which became Nevada was part of Mexico, and before that a possession of Spain. While there were a few Mexican or Spanish visitors to Nevada (mostly if not exclusively to Southern Nevada), neither Mexico nor Spain settled Nevada, issued any claims to land in the area over which they asserted control, or dealt systematically with the major Native American groups which inhabited the area. As one outcome of armed conflict between Mexico and the United States, the 1848 Treaty of Guadalupe Hidalgo transferred to the U.S. the jurisdiction of a vast area of what is now the Southwest, including what became Nevada.

The treaty did not provide specifically for Indian rights, but Article 8 gave Mexican citizens within the area transferred to the United States the option of becoming U.S. citizens. Article 9 then provided that such persons

> shall be incorporated into the Union of the United States, and be admitted at the proper time...to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without distinction.[12]

In cases arising from individual property claims by former Mexican citizens in California, Article 9 was interpreted by the courts to mean that property rights enjoyed under Mexican law continued under the laws of the United States. Since Mexican law provided specifically that all citizens, regardless of race, were to enjoy equal rights, the effect of this was to uphold the right of Native peoples to continue possession of property they had acquired under Mexican law. During the 1850s and 1860s the Supreme Court upheld the claims of individual Indians claiming property rights under Mexican law.[13]

The status of Indian occupancy rights within the Mexican cession, however, was less clear. Congress never specifically stated that such occupancy rights had been extinguished by the Treaty of Guadalupe Hidalgo, and in fact in at least one statute stated that such rights had not been extinguished. In the statute granting public lands to the companies who were to build the first transcontinental railroad, Congress included a provision stating:

[12] Act of February 2, 1862, 9 Stat. 929, 930 (1862).

[13] See *United States v. Ritchie*, 58 U.S. 550 (1854), and *United States v. Wilson*, 66 U.S. 267 (1861).

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.[14]

Due in part to this provision, the Treaty of Guadalupe Hidalgo was interpreted by the Supreme Court as late as 1941 as having made no change in what was then the legal doctrine regarding Indian occupancy; various Native societies held Indian title to

Paviotso (Northern Paiute) house at Walker Lake, Nevada. Photo by E. L. Curtis, 1924. (Special Collections, University of Nevada Reno Library)

[14] Act of July 27, 1866, cited in *United States v. Sante Fe Pacific RR Co.*, 314 U.S. 339, 344 (1941).

the lands acquired from Mexico unless this title had been extinguished specifically.[15] The question then became whether treaties or statutes dealing with specific groups had extinguished Indian occupancy rights.

The situation differed from state to state.[16] In California, for example, the situation was complicated by the fact that a number of treaties were negotiated with various Native societies but never ratified. Another complication in that state was that a statute was passed requiring that persons claiming property rights under Mexican law had to state these claims by March 3, 1853 or forfeit them. When various Indian societies failed to make timely claims, because of being ill-informed of the law, the Supreme Court held that their aboriginal occupancy rights had been extinguished.[17]

No attempt will be made within the scope of this article to describe the situation existing in any part of the Mexican cession except Nevada. It is necessary, however, to look at Utah in the 1850s due to the fact that what became Nevada was part of Utah Territory from 1850 to 1861.

LEGAL DOCUMENTS CREATING NEVADA

Utah Territory was established in 1850. The statute creating the territory contained language implying that the lands in the territory had become the property of the United States. This language was not stated specifically, and there was no mention of Indians. One section of the act prohibited the territorial legislature from passing any law "interfering with the primary disposal of the soil..." or imposing a tax "upon the property of the United States." Another part of the act provided that the territory was to have ownership of two sections in each township for the support of public schools "when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market."[18] Again, however, there was no specification of what these lands were or of their status at the time of the statute.

[15] Ibid. at 348. An earlier case had held that *individual* Indians could *acquire* occupancy rights in California after ratification of the treaty, but it did not address the central question of *preexisting* tribal occupancy rights; *Cramer v. United States*, 261 U.S. 219 (1923).

[16] For a general treatment see Edward Everett Dale, *The Indians of the Southwest* (Norman, OK, 1949).

[17] *Barker v. Harvey*, 181 U.S. 481 (1901). See also, Kenneth M. Johnson, *K-344, or the Indians of California v. the United States* (Los Angeles, 1966).

[18] Act of September 9, 1850, section 6, 15, 9 Stat. 453 (1850).

The Territory of Nevada was created by Congress in 1861, by a statute which provided that,

> nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits, or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Nevada, until said tribe shall signify their assent to the President of the United States, to be included within the said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed.[19]

The first part of this statute was clearly a recognition of Indian aboriginal rights, presumably including property rights, since the unspecified Indian rights are those which can be extinguished by treaty. Apparently there was no interpretation of this provision during the three years which Nevada spent as an independent territory.

The statute also exempted from state jurisdiction — without tribal consent — any Indian territory recognized by treaties. In 1861, however, neither of the treaties with Native societies inhabiting Nevada was in existence. The third part of the statute creating Nevada Territory merely stated the existing exclusive authority of the federal government to regulate Indians.

In 1883 the Nevada Supreme Court, citing the first and third portions of this statute, declared that Nevada's criminal law did not extend to the prosecution of an Indian for an offense committed against another Indian, although by this time several Indians had been incarcerated in the Nevada state prison for various crimes.[20] Yet there appears to have been very little interpetation of the statute creating Nevada Territory.

The 1864 Enabling Act specifying the conditions under which Nevada could become a state did not mention Indians specifically. Rather, it referred to "the unappropriated public lands lying within said Territory" and required that the new state accept several

[19] Act of March 2, 1861, ch. 83, section 1, 12 Stat. 210 (1861).

[20] *State v. McKenney*, 10 Nev. 182 (1883).

conditions applying to these unspecified public lands. Accordingly, the ordinance of the Nevada constitution contains the statement:

> That the people inhabiting said territory do agree and declare, that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States ... and that no taxes shall be imposed by said state on lands or property therein belonging to, or which may hereafter be purchased by, the United States, unless otherwise provided by the congress of the United States.[21]

This provision does not contain a definition of what constituted federal public lands in Nevada, nor does it refer specifically to Indians. A 1928 opinion by Nevada's attorney general declared that the absence in the enabling act of language applying to Indians, plus the fact that there were no treaties at the time Nevada became a territory, meant that the federal government did not have "exclusive jurisdiction" over Indian reservations. He reasoned as follows:

> That no treaties existed with any Indian tribes that would work an exclusion of any of the territory within the boundaries of Nevada is disclosed by the fact that neither the Enabling Act nor the Constitution of Nevada contained any provision excluding from the operation of State government any area within the boundaries as defined.[22]

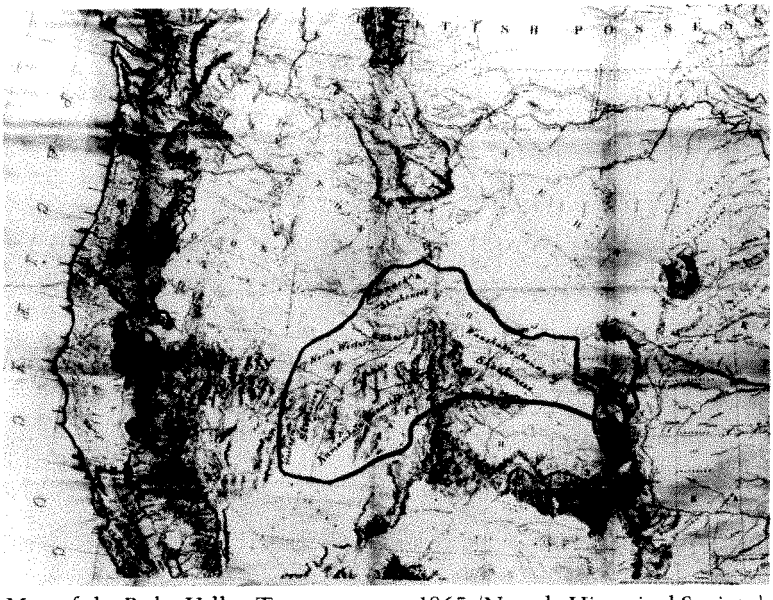
This opinion ignores the fact that by the time Nevada became a state, the Treaty of Tooele Valley with the Goshutes had been ratified by the United States Senate. Its fundamental error is that other provisions of the act creating Nevada Territory clearly did assert such "exclusive jurisdiction."

THE SHOSHONE TREATIES

Another element in the situation is the effect of treaties with Native American societies. In Nevada, treaties were concluded only with two groups of Shoshone Indians, and these extinguished only some of the Indians' property rights. In 1863, the United

[21] Cited in Eleanore Bushnell, *The Nevada Constitution: Origin and Growth* (Reno, 1968) 135-36.

[22] 316 *Opinions of the Att'y General* 72 (September 1, 1928).



Map of the Ruby Valley Treaty area, ca. 1865. (Nevada Historical Society)

States government negotiated treaties with five subdivisions of the Shoshone nation. Two of these groups were located primarily in what would become Nevada. The Ruby Valley Treaty with several bands designated as the Western Shoshones, and the Treaty of Tooele Valley with the Goshutes, are the only two treaties with Nevada Indians which were ever ratified by the United States Senate.

The negotiations which led to the signing of the Shoshone treaties followed twenty years of conflict between Shoshones and Euro-American emigrants and settlers. For ten years before the Treaty of Guadalupe Hidalgo, significant numbers of Americans had traversed what would become Nevada along the California Trail (usually designated the Humboldt Trail in its Nevada portion) and the Oregon Trail, both of which went through Shoshone territory. In 1849, after gold was discovered in California, the number of emigrants increased sharply.

At first, Shoshone responses to the emigrants were generally friendly, but a combination of violence by some whites, the emigrants' refusal to recognize Indian claims to ownership of land or resources, and the depletion of resources necessary to Indian survival led to violent responses from various Shoshone groups, including Western Shoshones and Goshutes.[23] Also, beginning in

[23] Madsen, *The Shoshone Frontier*, supra note 11 at 3-4.

1847, Mormon settlers took over Great Salt Lake Valley and began to expand into other parts of the Great Basin. Although it was Mormon leader Brigham Young's policy to feed the Indians rather than to fight them, it was also his policy to refuse to compensate Indians for the lands taken over by settlers. Consequently, some violence between Mormons and Indians also took place.[24]

At various times during the 1850s and early 1860s, various Indian agents proposed treaty-making as a means of reducing the violence. Utah Indian Agent Garland Hurt even went so far as to negotiate in 1855, on his own initiative, a treaty with Shoshone leaders "occupying the northern, and middle portion of the Humboldt River..." in what would become Nevada. This treaty provided for peace between the Shoshones and the United States, for the protection of rights of way through Shoshone lands, and for the establishment of farms in Shoshone territory. The Bureau of Indian Affairs disapproved of this action, and the treaty was never submitted to the Senate for ratification.[25]

Violent conflict along the Shoshone frontier reached a climax in the early 1860s, which led to the signing of the five treaties. This seems to have been partly a result of the Civil War. In 1861, army troops which had been stationed in Utah, but which had occasionally suppressed Indian attacks, were sent east to fight in the Civil War. Perhaps out of fear that Indian attacks would increase under these circumstances, Congress passed a statute appropriating the $20,000 which Utah Indian Superintendent James Duane Doty had been requesting to pay for the expenses of treaty-making and for annuities to the Indians.[26] Three commissioners were appointed to negotiate a treaty with the Shoshones in order to protect the overland trails. The Commissioner of Indian Affairs issued the following instructions to these men:

> It is not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the land, but it is believed that with the assurances you are authorized to make of the amicable relations which the United States desires to establish and perpetuate with them, and by the payment of Twenty thousand dollars of annuities ... you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgement as well of the

[24] Ibid.

[25] Intertribal Council of Nevada, *Newe: A Western Shoshone History* (Salt Lake City, 1976) 33-35 [hereinafter cited as Intertribal Council of Nevada, *Newe*]; Charles J. Kappler, *Indian Affairs, Laws and Treaties* (Washington, D.C., 1941), 5 vols., v:685-86; Madsen, *The Shoshoni Frontier*, supra note 11 at 64.

[26] Ibid. at 134, 143, 150-55.

> boundaries of the entire country they claim, as of the limits within which they will confine themselves, which limits it is hardly necessary to state should be as remote from said routes as practicable.[27]

These instructions also apparently looked forward to the creation of reservations for the Shoshones.

Actual negotiations did not begin until the summer of 1863, after the Bear River Massacre of approximately 250 Northwestern Shoshone men, women, and children by troops of the California Volunteers led by Colonel Patrick E. Connor.[28] The negotiations were led by Utah Indian Superintendent Doty, who concluded that a single treaty was impossible. He subsequently arranged meetings with five subdivisions of the Shoshone nation at various locations within a vast territory extending from Wyoming into California and from central Idaho to southern Nevada.

On October 1, 1863, Doty and Governor James W. Nye of Nevada Territory met at Ruby Valley, Nevada with two bands of Western Shoshones — the White Knives and the Unkoahs — and negotiated a treaty affecting all the Western Shoshones. The Treaty of Tooele Valley was concluded on October 12, when Doty met with about 350 members of Shoshone bands designated as Goshutes; Doty estimated that there were another 300 Goshutes, to whom the treaty also applied.

The circumstances leading to negotiation of these treaties, the instructions to Doty and the other commissioners, and Doty's report to Washington make it clear that their purpose was to secure peace for emigrants and the small number of settlers within Shoshone territory, not to secure the cession of their land to the United States. Doty closed a letter to the Commissioner of Indian Affairs on November 10, 1863 with the statement:

> The importance of these treaties to the government and to its citizens can only be appreciated by those who know the value of the continental telegraph and overland stage to the commercial and mercantile world, and the safety and security which peace alone can give to emigrant trains, and to the travel to the gold discoveries in the north, which exceed in richness — at least in the quality of the gold — any discoveries on this continent.[29]

[27] *Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642,651 (1941).

[28] Madsen, *The Shoshone Frontier*, supra note 11 at 179-94.

[29] *Report of the Sec. of Interior for 1864*, H.R. Misc. Doc. No. 320, 38th Cong., 2d Sess. (1864).

The content of the two treaties also supports this interpretation. Article 1 of the Ruby Valley and Goshute Treaties, for example, states that "Peace and friendship shall be hereafter established and maintained between [them] and the people and Government of the United States," and that the Indians "stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease." Article 2 added a provision authorizing the president to establish military posts within Shoshone territory, and provided that "offenders" against the treaty should be turned over to "proper officers of the United States" for punishment.

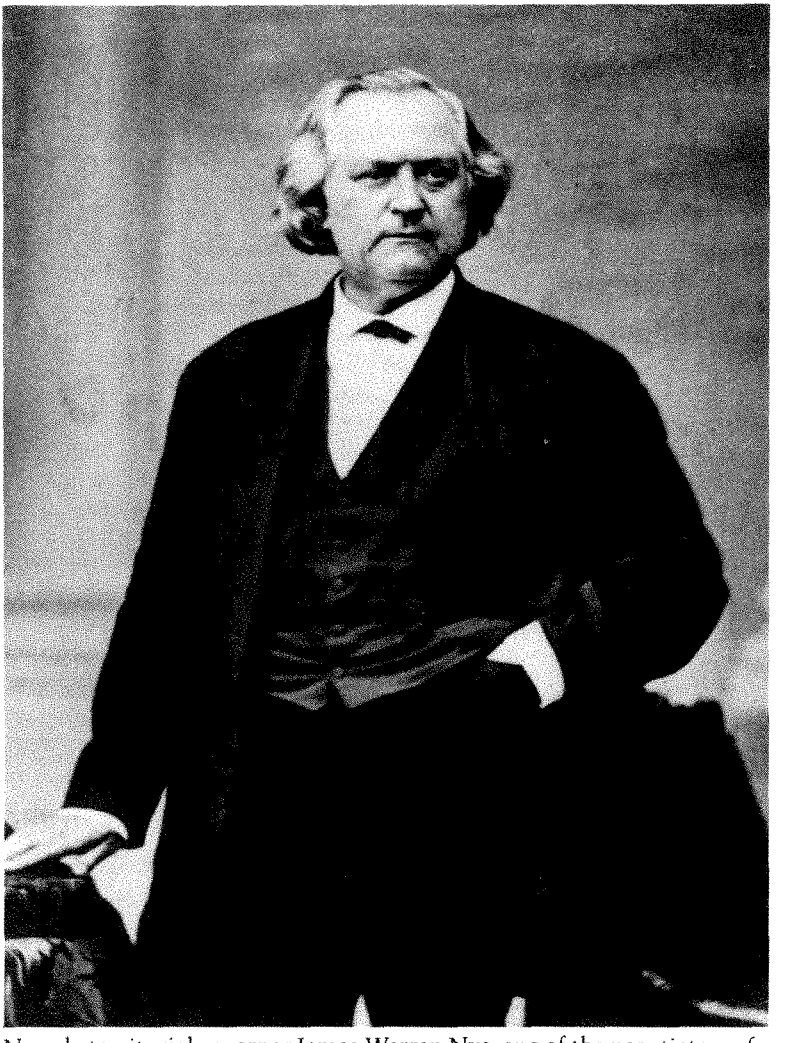
No provisions of the treaties provided for a general cession of land. Instead, various articles provided for the cession of land for certain specified purposes. These were, in addition to the establishment of military posts: the creation of "station houses...for the comfort and convenience of travellers or for mail or telegraph companies"; the maintenance of existing "telegraph and overland stage lines"; the formation of "mining and agricultural settlements,... ranches" and "mills"; and the cutting of timber for building and other purposes. The boundaries of the country covered by each treaty were outlined according to mountain ranges and other landmarks identified largely by their Shoshone names. Doty later prepared a map showing each territory.

Other treaty provisions stated that the Indians would move to reservations ("within the country" described in the treaty in the Western Shoshone case) and provided for the payment of annuities to the groups for twenty years (in a smaller amount for the Goshutes). The Goshute treaty as ratified also contained a provision which was subsequently insisted upon by the Senate in other treaties but which does not appear in the Ruby Valley Treaty. This provision stated:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

The meaning of this provision is not clear. Perhaps some persons believed, as attorneys for the government argued in the twentieth century, that the Treaty of Guadalupe Hidalgo had not recognized aboriginal occupancy. As noted above, there is substantial evidence that the treaties did not abolish Indian occupancy rights on a wholesale basis.

Subsequent events made the treaties' focus even clearer. In 1865 and 1867 Congress passed statutes authorizing the negotiation of



Nevada territorial governor James Warren Nye, one of the negotiators of the Ruby Valley Treaty, ca. 1870. (Nevada Historical Society)

new Shoshone treaties which would provide for the cession of their lands to the United States, although in fact only a treaty with the Eastern Shoshones, in which they agreed to give up the rest of their territory and move to the Wind River Reservation, was ever ratified.[30]

[30] *Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 677-78 (1942).

DE FACTO LOSS OF INDIAN LANDS AND RESOURCES

Regardless of law, the various Native peoples of Nevada lost control over most of their land and resources over a period of several decades following the signing of the Treaty of Guadalupe Hidalgo. Initially, the fact that they had signed treaties with the United States made surprisingly little difference in the cases of the Western Shoshones and the Goshutes.

Although there was never a treaty between the Northern Paiutes and the United States, the only reservations initially created in Nevada — the Pyramid Lake and Walker River Reservations, established in 1859 — were primarily for Northern Paiutes, although the Indian agent on whose advice these reservations were withdrawn recommended that Washoes be sent to them. There was an abortive attempt to establish a reservation for Western Shoshones in Ruby Valley in the 1850s, and a reservation was temporarily operated at Carlin Farms within the treaty territory during the 1870s. Carlin Farms, however, was abolished in 1879.[31] Not until 1877 was a lasting reservation — at Duck Valley — established for Western Shoshones, and then it was outside the territory outlined in the treaty.[32] The Goshutes, who had also been promised a reservation in their treaty, did not obtain one until 1914.[33] Due to the paucity of reservations, most Nevada Indians during the nineteenth century lived on land outside of reservations.

The clearest statements of what happened in legal terms are contained in opinions of the Indian Claims Commission. Congress created this quasi-judicial commission in 1946 to consider the validity of claims involving all surviving Native American societies. The Indians inhabiting Nevada filed claims before the commission, which ruled that they had possessed aboriginal title to their ancestral lands and that they had been illegally deprived of most of their property. As it interpreted its creating statute, the commission awarded monetary compensation to the Indian societies found to have sustained illegal losses, on the basis of the value of the lands at the time of taking and without interest. Their findings on the cases involving three major Nevada groups were as follows:

> As white settlers and travelers moved into and across the area they brought cattle which ate grass thereby destroying many

[31] Intertribal Council of Nevada, *Newe*, supra note 25 at 39-40, 45, 59-68; Steven J. Crum, "The Western Shoshone of Nevada and the Indian New Deal" (Ph.D. dissertation, University of Utah, 1983).

[32] Ibid.; Intertribal Council of Nevada, *Newe*, supra note 25 at 72-78.

[33] Ibid. at 82.

of the seeds and roots upon which the aboriginal Indians fed, and the white men cut pine nut trees for building and fuel thereby destroying one of the main sources of their food. Thus, by the gradual influx of white settlers, miners and travelers in various areas throughout the entire Northern Paiute territory, the Indians were deprived of many of the means by which they had exclusively used and occupied the area in their Indian fashion. There were numerous reports of starvation and great suffering by the aborigines as a result of the increasing encroachment of the whites upon their lands. There were also in some sections military actions taken by the United States to suppress Indian uprisings and to force the Northern Paiutes from their lands and onto various reservations where they could not interfere with the white man's use of the land. The government agents in the area were constantly striving to promote peaceful relations between the Indians and the white settlers who had moved onto their lands. Thus, without the payment of compensation, the United States acquired, controlled and treated the lands of the various Northern Paiute groups as public lands.[34]

* * *

At some date, or dates, at least prior to 1863, there was sufficient disruption of the Washoe way of life and interference with the overall use and occupancy of their lands to constitute an extinguishment of the Washoe Indian title in their lands... The Commission ... holds that petitioner has proven Indian title to the area of land described in Finding 16, and that said Indian title was acquired by the United States from the Washoe Indians without the payment of compensation therefor.[35]

* * *

The Commission ... finds that the Goshute Tribe and the Western Shoshone identifiable group exclusively used and occupied their respective territories ... until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands...The Commission...finds that the United States, without payment of compensation

[34] *The Northern Paiute Nation v. United States*, 7 Indian Cl. Comm. 322, 419 (1959).

[35] *The Washoe Tribes of the States of Nevada and California v. United States*, 7 Indian Cl. Comm. 266, 290 (1959).

> acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action...[36]

A significant finding in these three cases is that most of the taking of Native lands was by private persons, not the government. Occasionally the government's role is mentioned, but more frequently the commission's findings were that the government had not prevented the taking of Indian lands, and thus was ultimately responsible for the losses.

An instructive aspect of this portion of the findings has to do with the determination of the time of taking. (The commission had to determine such a date in order to make a determination of the value of the land as of that date.) In all three cases, the time of taking for portions of Indian lands now in the state of California was set at March 3, 1853, the date on which the Native societies lost their lands in the state by failing to file a claim. Also in all cases, the commission was initially unable to determine a time of taking for the lands in Nevada, because of the absence of any clearcut legal action by the United States ending Indian occupancy. In other words, the commission could find no explicit statement at any time by the United States that it considered Indian occupancy in Nevada to have been extinguished. Later, dates were agreed upon by stipulation between the parties; if the attorneys for the Indians and the government could agree on a date, the commission accepted it. The time of taking of Western Shoshone lands in Nevada was eventually determined by this process to be July 1, 1872, and the date for the time of taking of Northern Paiute lands was set at December 31, 1862.

Due to the fact that not even the federal government could point to any definite time of taking, and because a small minority of lands in Nevada has passed into private or state and local hands,[37] it has been possible to argue that the Indian title to most of their lands has never been extinguished at all.

A small group of Northern Paiutes took this position during the claims process, and their viewpoint was adopted by one of the judges of the United States Court of Claims when the commission's findings were appealed to that body. While not disagreeing with the main findings of the court, Judge Nichols argued that the stipulated date of December 31, 1862, established by the Indian Claims Commission, was incorrect. According to his argument, the acquiescence by the federal government in the actions of miners

[36] *Western Shoshone Identifiable Group v. United States*, 11 Indian Cl. Comm. 387, 416 (1963).

[37] By most estimates, eighty-five to eighty-six percent of Nevada is still public domain, forest service lands, Indian reservations, military installations, or otherwise federally-controlled land.

on the Comstock Lode involved the federal government in responsibility for the taking of Indian land. As that acquiescence began in 1859, the date of taking for Northern Paiute lands on the Comstock should have been at some time in 1859. In making this argument, however, he noted that "[n]o formal act of extinguishment of title is recited, from that day to this."[38] Moreover, he ended his separate opinion with a suggestion that while the date of taking of Northern Paiute lands on the Comstock should be 1859, "As to land adapted for agricultural or homestead purposes, the patent dates would control [which would mean a wide variety of dates]. As to land still in the public domain, still vacant, I do not think it has been taken yet."[39]

The most important challenge of this sort, however, has come from Western Shoshones. For decades, a significant segment of Western Shoshones has maintained that aboriginal sovereignty has never been extinguished within the Ruby Valley Treaty territory, except for the small amount of private, state, and local lands acquired under specific provisions of the treaty.[40]

Beginning in the 1970s, after the claims process was well underway, a group of Western Shoshones, eventually incorporated as the Sacred Lands Association, began legal challenges to the assumption that they had lost their lands. They were aided by a suit brought by the Bureau of Land Management which was designed to force two Western Shoshone ranchers, Mary and Carrie Dann, to pay grazing fees on lands they regarded as belonging to the Western Shoshones; this gave the Indians a legal opportunity to assert their continued ownership of most land covered by the treaty.[41] While the Danns won their individual case, the Supreme Court ruled that the Western Shoshones as a group

[38] *United States v. Northern Paiute Nation*, 183 Ct. Cl. 321, 353 (1968).

[39] Ibid. at 358.

[40] Richard O. Clemmer, "Directed Resistance to Acculturation: A Comparative Study of the Effects of Non-Indian Jurisdiction on Hopi and Western Shoshone Communities" (Ph.D. dissertation, University of Illinois, 1972); Stephen J. Crum, "The Western Shoshone People and Their Attachment to the Land: A Twentieth Century Perspective," *Nevada Public Affairs Review* 2 (1987) 15-18. Even in this case, however, oral tradition among the Western Shoshones maintains that takings for these purposes should have been accompanied by compensation. See statement by Glenn V. Holley, Sr., in XVII *Native Nevadan* 6 (1980)7.

[41] Originally, the Danns had argued also that the Ruby Valley Treaty had created recognized Indian title as well as acknowledged aboriginal Indian title. Under several opinions by the United States Supreme Court during the 1930s, holders of recognized title were entitled to compensation under the Fifth Amendment to the United States Constitution. Cohen, *Handbook of Federal Indian Law*, supra note 1 at 473-78, 486. Later this position was dropped, perhaps because the U.S. Court of Claims had ruled in a case involving another of the Shoshone treaties that the treaty had not created recognized title, *Northwestern Bands of Shoshone Indians v. the United States*, 95 Ct.Cl. (1942).

had lost their title to the lands within the treaty territory. This ruling, however, was based on a technicality involving an interpretation of the Indian Claims Act. Due to the Indian Claims Commission's decision on the total amount of compensation to be paid to Western Shoshones, and because this amount had been deposited in a federal government account, the Supreme Court ruled that the Indians had been compensated for their lands.[42]

This outcome leaves the Western Shoshones with several compelling arguments, even if these arguments have to be made outside legal forums. Principally, the Supreme Court regards as unimportant the acknowledged fact that "no monies have actually passed into the hands of the Western Shoshone group or its members, nor have any been used for their benefit."[43] In fact, no money can be paid to individual Indians until Congress passes a statute determining the method of payment and approving the roll of individuals eligible to receive payments, if it is determined that at least some of the money will be paid to individuals. A new entity, the Western Shoshone Nation, including reservations within the treaty area and organizations representing Western Shoshones no longer living on reservations, has been organized to resist payment of the claims money in order that a negotiated settlement of their continuing claim to ownership of the land can be reached. Given this circumstance, Congress is not likely to approve an act permitting actual payment to Western Shoshones in the near future.

Second, the Supreme Court's decision moved the date of taking of Western Shoshone land from July 1, 1872 to December 19, 1979, the date on which the claims money was deposited in a special account. At the very least, acceptance of this date would logically require compensation for Shoshone lands at 1979 prices rather than 1872 prices; at the most, it would make possible Western Shoshone claims for damages for use up to 1979, when the government supposedly acquired full title (taking into account whatever statute of limitations may apply).[44]

The only court which has actually considered the Western Shoshone claims in detail, the United States Court of Appeals for the Ninth Circuit, agreed with the claim that their aboriginal occupancy had never been extinguished. A brief examination of this court's findings will help explain historical events, regardless of the eventual outcome of the dispute. On May 19, 1983 a three-

[42] *United States v. Dann*, 470 U.S. 39 (1984).

[43] *United States v. Dann*, 706 F.2d 919, 926 (1983).

[44] In a decision handed down January 11, 1989, a three-judge panel of the Court of Appeals for the Ninth Circuit ruled that the date of taking should be July 1, 1872. *United States v. Dann*, No.86-2835, D.C. No. CV-R-74-60-BRT, slip op. Whether or not this is the final determination is not clear.

judge panel of the Ninth Circuit court considered and rejected three arguments presented by the federal government to show that extinguishment of aboriginal title to Western Shoshone lands had occurred in the nineteenth century. Briefly, these three arguments and the conclusions reached by this court are:

[1.] "The government first relies on the subjection of the aboriginally held lands to the homestead laws."[45] Two statutes dealing with preemption laws and the 1862 Homestead Act were considered in this connection, with the conclusion of the court being:

> We do not find in these provisions the clear expression of intent that would be required for us to hold that the homestead laws alone extinguished aboriginal Indian title in every state and territory where they were generally applicable... Nor do we think that the administration of the homestead laws by the executive within the aboriginal territory of the Western Shoshone extinguished aboriginal title to all those lands.[46]

The Treaty of Ruby Valley provided for cession of lands for specified purposes, and this meant to the court that,

> any loss of territory is only so large as the incursion requires, and the Shoshone retain the rest... Thus the granting of homesteads by the government could work, at most, an extinguishment of aboriginal title to the actual land granted and no more.[47]

[2.] "The government next contends that the establishment of the Duck Valley Reservation extinguished aboriginal title to the lands claimed in the Ruby Valley treaty."[48] The court decided that "the Duck Valley Reservation was not created from lands 'within the country above described'; that is, it was not within the aboriginal territories described in Article V of the Treaty."[49] Moreover, even if this had been the case, the *United States v. Santa Fe Pacific Railroad* case was cited for evidence that even the creation of a reservation does not extinguish aboriginal title except when it is accompanied by clear evidence that Congress wished this action to create such extinguishment. The court maintained, "We conclude that no extinguishment occurred when the Duck Valley

[45] *United States v. Dann*, 706 F.2d 919, 929 (1983).

[46] Ibid.

[47] Ibid. at 930.

[48] Ibid.

[49] Ibid.

Reservation was created."[50]

(3.) "The final action urged by the government as causing extinguishment of aboriginal title is administration of the lands in question under the provisions of the Taylor Grazing Act."[51] The court concluded that establishment of grazing districts under this act was not the same as establishing the ranches contemplated under the Ruby Valley Treaty and that,

> We do not find in the Taylor Grazing Act any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope... in the absence of a clear expression of congressional intent to extinguish title, the granting of a patent by the government and the acceptance of leases from that patentee have been held not to extinguish aboriginal title.[52]

The overall conclusion of this court therefore was that,

> aboriginal title had not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley Reservation, or by inclusion of the disputed lands in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act.[53]

ORIGIN OF ACTUAL LAND TITLES AND WATER RIGHTS

In actual practice, early land titles and water rights were acquired by processes which ignored Indian rights. It is difficult to determine whether early non-Indian settlers were simply ignorant of existing law or disagreed with it and felt justified in behaving as though it did not exist. Research into early land and water claims would shed some light on this question, but preliminary examination of early records of Carson Valley, in western Nevada, and the Truckee Meadows reveals very few explicit references to Indians.

[50] Ibid. at 931; see supra note 14.

[51] Ibid.

[52] Ibid. at 932.

[53] Ibid. at 933. The decision of the three-judge panel of the Ninth Circuit was that the Taylor Grazing Act had ended the possibility of individual aboriginal property rights for all Indians. As their view was that tribal aboriginal title had been extinguished in 1872, the panel decided that the *Dann* case dealt only with individual aboriginal rights. They ruled that the Dann sisters had whatever aboriginal title their parents had had as of the date the Taylor Grazing Act was implemented by the creation of grazing districts. *United States vs. Dann*, No. 86-2835, D.C. No. CV-R-74-60-BRT, slip op. Again, whether this is the end of the matter is unclear.

Clearly, much more research needs to be carried out in this area.

It is apparent that initially, in most parts of Nevada, acquisition of mining, land, and water claims proceeded on the basis of the principles of appropriation which had been developed under similar conditions in California, and which had been imported across the mountains. In 1859 there was no federal statute regulating mining or water rights in territories. The miners who arrived so quickly in the "rush to Washoe" in 1859 were accustomed to establishing mining claims by holding informal meetings which adopted rules and appointed recorders, and they quickly followed this pattern in the new territory. Such meetings on the Comstock were held as early as 1858,[54] and the procedure was followed elsewhere as well. As far as is known, none of these rules discusses Indian ownership to any extent.

The first Nevada territorial legislature passed a statute which declared:

> The legality of the execution, acknowledgement, proof, form, or record of any conveyance or other instrument, heretofore made, executed, acknowledged, proved, or recorded, shall not be affected by anything contained in this act; but shall depend for its validity or legality upon the laws and customs then in existence and in force in the mining and agricultural districts.[55]

In 1862 this provision was changed slightly and an even more precise provision added, as follows:

> The location and transfers of mining claims heretofore made, shall be established and proved, in contestation before Courts, by the local rules, regulations, or customs of the miners in the several mining districts of the Territory in which such location and transfers were made.[56]

At least two other 1861 statues also referred to mining claims; for example, they were exempted from local property taxation.[57] In 1866 the United States Supreme Court accepted the validity of mining claims established by miners' meetings, in the absence of national law dealing explicitly with mining, stating:

> [W]e cannot shut our eyes to the public history, which informs us that under [territorial] legislation [validating the

[54] Marion Ellison, comp., *An Inventory and Index to the Records of Carson County, Utah and Nevada Territories, 1855-1861* (Reno, 1984) 77.

[55] 1861 Nev. Stat., ch. 9, section 40.

[56] 1862 Nev. Stat., ch. 14, section 3.

[57] 1861 Nev. Stat., ch. 50, section 4.

> rules of the mining districts] and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.[58]

Also in 1866, Congress passed a law retroactively legitimizing the process of establishing claims on the public domain, and followed this by an 1872 law based on the same principle which remains to this day the fundamental national statute regulating mining. In all of this, there was no explicit statement by anyone that Indian occupancy rights in Nevada had been extinguished.

Water rights came about in California and later in Nevada in the same way, although usually only by the action of individual farmers or miners. In this way, a body of water law based on appropriation grew up, which differed in several ways from principles of riparian law which had long been followed in the eastern part of the country. In riparian law, the right to use water flows from ownership of land including or bordering on a water source, such as a river; in appropriation law, anyone can begin to use unappropriated water without regard to ownership of land. This difference arose out of the fact that in most parts of the West where the doctrine developed there existed relatively small areas of privately owned land. Under riparian law, water rights follow ownership rights, regardless of when land was purchased; under appropriation law, priority dates at which appropriation began are established, and water users have rights depending upon the date of their appropriation of water. In California and some other western states, and in Nevada for a time during the nineteenth century, a complex combination of riparian and appropriation laws developed. In most western states including Nevada, appropriation has been the entire basis of water law. Again, the federal government acted retroactively by statute to authorize rights asserted on the basis of local practices and statutes.

An implication of appropriation water law is that Indian rights to water do not exist when non-Indians first begin using that water. Interestingly, the first Nevada court case to uphold appropriation doctrine upheld the validity of Indian acquisition of water rights by appropriation, although it did not discuss aboriginal rights.

In 1860, J. B. Lobdell established a ranch on Desert Creek in Esmeralda County. The next year, Warren Hall and a Mr. Simpson set up a ranch on Desert Creek above Lobdell's ranch. The land they chose contained "an old ditch which had been dug by Indians many years before. This ditch, it appears, had been used by the Indians for running fish out on the meadow-land for the purpose of catching them." When the Indians claimed the ditch and objected

[58] *Sparrow v. Strong*, 70 U.S. 97 (1865).

to the whites' activity in the area, Hall and Simpson "bought out the Indians and made their location."[59] The two men made some kind of oral agreement with an unspecified group of Indians, but details are not available.

When it first considered a case arising out of conflict between the claims of Lobdell and Hall/Simpson, the Nevada Supreme Court began by discussing riparian law. As the plaintiff had made no claim based on land ownership, however, the court took it for granted that appropriation law developed in California should apply to the case:

> The anomalous condition of the settlers and miners upon the public land in California has induced the Courts of that State to depart from the strict rules of the common law, and to recognize priority of appropriation as a foundation of right to the use of running water.
>
> The rule adopted in California, when viewed in the light of the necessities which induced its adoption, is founded upon the clearest principles of justice. The right to land in that State, resting as it did for years upon no other titles but that of prior occupation and appropriation, the right to the use of running water was also acquired in the same way.[60]

The first time this case was before the state supreme court, two of the justices determined that it was not necessary to decide the question of whether the Indian (or Indians) who had diverted water from Desert Creek could legally acquire a water right by doing so. The second time the case came before them, however, this issue was decided. Justices Beatty and Johnson agreed that the Hall/Simpson appropriation had been a continuation of the right they had purchased from an Indian or Indians. They concluded:

> [W]e see no reason why an Indian who has appropriated water on the public lands of the United States might not maintain an action for the diversion of that water as well as any other person. If an Indian could maintain an action for diversion of water, then he certainly would have a fixed interest in the waters so diverted, and a clear right to repair any temporary damage in his ditch or dams ... If the Indians themselves had a right to repair the ditch, we think those who obtained the possession under them had the same right.[61]

[59] *Lobdell v. Hall*, 3 Nev. 507, 511 (1868).

[60] *Lobdell v. Simpson*, 2 Nev. 276, 277 (1866).

[61] *Lobdell v. Hall*, 3 Nev. 507, 516-17 (1868).

The attorneys for Lobdell had argued that no evidence had been presented to show that the Indian or Indians who had sold Hall and Simpson the right to use the ditch were the ones who had actually built and owned the ditch. Justices Beatty and Johnson replied to this by asserting that it did not matter how the transfer of the water right to Hall and Simpson had occurred, but only whether the right had existed before they acquired it. Denying a petition for rehearing, Justice Beatty, joined by Justice Johnson, asserted that, "If the ... Indians who built the ditch and dam ... had the right to repair the same, then according to my views the person who got possession of the land through which the ditch passed had the same right, even though that was acquired by a naked trespass."[62]

Justice J. F. Lewis disagreed with his colleagues, arguing that a congressional statute forbade purchase of land from Indians by private persons and therefore that Hall and Simpson "could acquire no title whatever from the Indian or Indians, from whom they claim." He also argued that, even if this law did not apply, "no legal conveyance was ever made by the Indian" because Nevada law required such a conveyance to be in writing.[63]

While this decision upheld the right of individual Indians to acquire water rights through appropriation, it did not even mention aboriginal rights but clearly assumed that these did not exist. After the turn of the century, the United States Supreme Court enunciated the Winters Doctrine, which states that Indians on reservations have water rights because they had possessed them aboriginally and because it was not to be assumed that the federal government, in creating reservations, had meant to deprive the Indians of such rights, in the absence of any clear-cut statement to the contrary.[64] The underlying logic of the Winters Doctrine was the same as that of the appropriation doctrine: the right to use water belonging to no particular person derives from actual use of the water, with such a right being strengthened by long usage. There is, however, no evidence that this logic was apparent to anyone at the time that Nevada water law was being established.

THE RACISM OF EARLY NEVADA LAW

Another relevant aspect of this early Nevada history with regard to Indians is that Nevada law was clearly racist, relegating all non-whites to an inferior position. This may be surprising in light of the fact that Nevada came into the Union at least partly because

[62] Ibid. at 526.

[63] Ibid. at 521. For the statute, see supra note 8.

[64] Cohen, *Handbook of Federal Indian Law*, supra note 1 at 578-93.

A photoportrait of Numaga (Young Winnemuca), a prominent leader of the Pyramid Lake Paiutes, ca. 1870. (Special Collections, University of Nevada Reno Library)

its votes were needed to end slavery, and that it was required to adopt a state constitution outlawing slavery as a condition of admission to the Union. Nevertheless, the facts are clear.

By 1865, as a result of Nevada constitutional provisions or legislation, voting, jury service, militia service, and the right to practice law were restricted to whites; non-whites were forbidden to marry or have sexual relations with whites; non-whites could not testify against whites in either civil or criminal cases (with the exception of any "negro, black or mulatto person, but the credibility of such...person shall be left entirely to the jury"); and non-white children could not be admitted to public schools, although local school districts were allowed, but not required, to establish separate schools for non-white children. On the other hand, the law made non-whites equally subject to taxation and obedience

to the laws they could not participate in making; early Nevada criminal laws made no exception for Indians, regardless of whether or not they lived on reservations. In other words, non-whites were granted none of the rights of citzenship, but were subject to the burdens of such citizenship. In spite of their unique legal situation, Indians were in most cases not distinguished from other non-whites. In fact, Nevada law did not recognize even in part the legal status of Indians under federal law until well after World War II.[65]

In interpreting such provisions in relation to Indians, it must be remembered that most Indians undoubtedly did not consider themselves part of Nevada society; in their own minds, they were still Newe or Numa, and did not desire to be considered citizens of the state. Also, Indians on reservations were protected to some extent, at least in theory, by the federal law which applied to them. It also must be remembered, however, that a minority of Nevada Indians lived on reservations until at least the 1930s. Indians had seemingly little choice but to be part of the new society which had come into existence within their homelands. Whether they desired it or not, they were considered by white Nevadans to be part of Nevada society. Clearly, however, they were consigned to an inferior position in this society.

CONCLUSION

This account of early Nevada law as it affected Indians justifies several conclusions. First, it is apparent that there was confusion within the federal government regarding Native rights. The lack of clarity about the impact of the Treaty of Guadalupe Hidalgo on Indian occupancy rights is the most obvious example of this confusion. The failure to interpret the Western Shoshone and Goshute treaties according to their manifest meaning for many decades is another example.

Second, the most important indication of confusion is that there is very little evidence that non-Indian settlers in Nevada from 1850 to 1865 made any attempt to act according to well-established principles of Indian law. This is crucial to the area of property rights, as rights to land, mining claims, and water were established not by the federal government but by settlers, although state and national governments later acquiesced to earlier decisions. In the absence of government officials spelling out the law and acting on the basis of it, Indian rights were virtually ignored.

Third, treatment of Indians in early Nevada is clearly part of a general pattern of racism; in the early and mid-1860s all non-whites

[65] Elmer R. Rusco, "Nevada Law and Race: A History" [Unpublished manuscript, 1972].

were deemed legally inferior people under territorial and state law, and there can be little doubt that these legal patterns also corresponded in varying degrees with actual practice. To some extent, most white settlers must have assumed that Indians had no legal rights which they were bound to acknowledge.

Fourth, the legal principles ignored at the time have become more important in recent decades. While no genuine compensation for the wrongs committed in the nineteenth century has been provided, Native Americans today at least have a legal tradition to which they can appeal in upholding their rights. Increasingly, they are asserting these rights. The Western Shoshone land claims controversy is the most obvious example of the current relevance of legal interpretations of the nineteenth century. The complex dispute over the fishing and water rights of the Pyramid Lake Paiute Tribe provides another such example.[66]

Finally, it is probable that most private property rights in Nevada were acquired illegally from Indians. Much land in private ownership today was acquired from the federal government, which illegally occupied Indian lands. A study of Nevada public lands as of 1932 concluded that "over half of the land in private ownership" was acquired by purchasing lands given to the state by the federal government.[67] The amount of private land in Nevada has increased since then, again by acquisition under various federal land laws, so that the proportion of land acquired from a government which it had no legal claim to is no doubt higher today.

[66] Martha C. Knack and Omer C. Stewart, *As Long as the River Shall Run* (Berkeley, 1984).

[67] E. O. Wooton, *The Public Domain of Nevada and Factors Affecting its Use* (Washington, D.C., 1932) 21.

EARLY CALIFORNIA JUSTICE: THE HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA 1849 - 1895

BY HON. GEORGE COSGRAVE

The steamship *Falcon*, sailing from New Orleans on March 20, 1849, for Chagres on the Isthmus of Panama, carried as probably its most prominent California bound passenger, Dr. William M. Gwin, destined to be one of the first two United States senators from the state.[1] Far more interesting among the passengers but perhaps less prominent was James McHall Jones,[2] lawyer, linguist, scholar, who before he reached the age of twenty-seven was to become the first United States district judge for the Southern District of California. He was destined never to preside at a session of the court, but to die at the very threshold of a career full of the promise of distinction and achievement.

Editor's Note: George Cosgrave was Judge of the United States District Court for the Southern District of California from 1930 until his death in 1945. This article is a reprint of excerpts from Judge Cosgrave's book, *Early California Justice*. The judge had completed the manuscript by 1944 and, following his death, the work of editing the material and preparing it for publication was undertaken by Roy V. Sowers. The book was printed in 1948 in an edition of four hundred copies by the Grabhorn Press of San Francisco.

[1] "Memoirs of Honorable William M. Gwin," *California Historical Quarterly* 19 (1940).

[2] C.W. Haskins, *The Argonauts of California, Being the Reminiscences of Scenes and Incidents that Occurred in California in the Early Mining Days* (New York, 1890) 479.

JAMES MCHALL JONES

Born in Georgetown, Scott County, Kentucky, on December 31, 1823, James McHall Jones was the only child of John M. and Arabella Brown Jones. The father, a country merchant, poet and philosopher, died when his son was eight years old, leaving him in the care of his mother. Between the two always existed an unusual affection even for that relationship. The widowed mother later became the wife of Dr. Joseph Hornsby, and the family resided at Plaquemine in the parish of Iberville in Louisiana. Here two other children were born, Arabella L. and Joseph D. Hornsby. The probate records there show that the latter died while still a boy. Arabella[3] became the wife of Richard F. Armstrong, second lieutenant on the Confederate steamer *Alabama*. When the *Alabama* was sunk off Cherbourg by the Kearsarge, Lieutenant Armstrong leaped into the sea, but was rescued. Refusing repatriation after the war, he went to live in Halifax and became a citizen of Canada.

Possessed of an extraordinarily active and inquisitive mind, Jones studied law under a Mr. Edwards, of Plaquemine. He was admitted to the bar by the Supreme Court of Louisiana on December 14, 1843, some two weeks before he reached the age of twenty, and practiced successfully in Plaquemine, the county seat, for something more than a year. Rather grave symptoms of pulmonary weakness developed at that time, and he hoped that by travel and change of climate he might cure a rather persistent cough. Accordingly in May 1845, he left for Europe, and arrived in Paris about July. In Paris he applied himself to the study of the modern languages, French, Italian, and Spanish, becoming quite proficient in French; also to drawing and fencing, all under tutors and with a consuming industry, moderated only by the positive orders of his physician. Letters to his mother every two weeks described his progress. He preferred fencing to boxing, for the latter did not belong to the accomplishments of a gentleman.[4]

On his return to Plaquemine in the fall of 1846, he went into partnership immediately with Mr. Edwards in whose office he had studied, and practiced with notable success for the next two years, even denying himself his favorite sport of duck hunting.

Unable to stay the insidious advance of disease, he hoped for improvement in the more favorable climate of California. Accordingly, he took passage from New Orleans on March 20, 1849.

[3] Arabella Armstrong lived to become the mother of a numerous family, and died at the age of ninety-two. Mrs. Ethel A. Worsham of Florida, a daughter and worthy representative of the family, survives and is the source of my information.

[4] Letters from Jones to his mother now in the possession of Mrs. Ethel A. Worsham.

Judge James McHall Jones of the U.S. District Court for the Southern District of California, ca. 1845. (Bancroft Library)

Serious delays were encountered by the immigrants of 1849 after they reached the Isthmus, due to the lack of vessels on the Pacific side, and the case of the passengers of the *Falcon* was no exception. The route was crowded with impatient travelers of all classes, occupations and stations, all eager for the opportunities that might await them in the new land. A well-known correspondent of the New Orleans *Delta*, himself one of the number, writing from the island of Tobago at that time, observed that of the two thousand passengers then between Chagres and Panama, there were about

six hundred lawyers, and of those, four hundred expected to be congressmen or members of the legislature: seventeen were then electioneering for governor and twenty-one for senator in the new state.[5]

Nothing is known of the details of the trip between Chagres and San Francisco beyond indirect references in a few highly interesting letters which Jones later wrote from California to his mother in Plaquemine. Few ships were available on the Pacific side of the Isthmus. Dr. Gwin arrived in San Francisco on the fourth of June, but Jones did not arrive until July.[6] Undoubtedly, however, if acquaintance had not already existed between the two in Louisiana, Gwin, himself seeking preferment in the new land, recognized in the young Jones qualities of distinction — pleasing address, cultured mind, and wide knowledge — that would inevitably bring him into prominence.

At this juncture the political future of California was all uncertainty; Governor Riley had just issued his proclamation for the election of delegates to a convention to form a constitution. This was the important pending event. Those among the rapidly increasing population who had had political experiences in the states from which they came, together with those politically minded in the larger sense, naturally took leading parts.

Scarcely had Jones landed in San Francisco in July of 1849 than his course was determined. He would seek election as a delegate to the convention. Delayed in his arrival in San Francisco, he found plans for the selection of delegates from that district already perfected. He learned later that, due to his acquaintance with the men prominent in the direction of affairs, he might easily have been chosen from that place had his arrival been timely. He turned to the rapidly filling district of the San Joaquin where the bulk of the population was assembled in the region now referred to as the "Mother Lode."

With polls opened and elections held in so many then remote localities — the names of the polling places never having been heard of outside the immediate vicinity, nor possibly before that day — and the transmission of the returns to Monterey depending on such change means by special messengers or otherwise, as might be available, it is not unnatural that confusion existed. Jones, after what he believed to be a successful campaign, when all precincts were heard from and counted, believing himself elected, returned to San Francisco, and remained there until the opening of the convention. Here it is easy to see he had abundant opportunities of associating with other delegates to the convention and all others

[5] San Francisco *Alta California*, December 24, 1849.

[6] Letters of James McHall Jones in the possession of Mr. Thomas W. Norris, of Livermore, CA. Several of these letters are lengthy and all are highly interesting.

prominent in the political affairs of the community. Doubtless, many plans were formulated for the structure of the coming state. Jones himself during this time foresaw the necessity of translating and publishing all of the Spanish laws existing at the time and also the advantage that his familiarity with that language would be to him.

Due to delay in the arrival of election returns and confusion in identification of localities, Jones found to his surprise that he was not recognized as a delegate in the report of the Committee on Privileges and Elections. But he was not so easily disposed of. He and his fellow delegates, O.M. Wozencraft and Benjamin F. Moore, who likewise had been excluded, were permitted to enter the meeting late on the evening of September 3 and urge their claims to seats. Although Jones was the youngest of the three, and indeed the youngest of the forty-eight that finally made up the convention, he was the first to address the meeting. Courteously, but quite emphatically, he claimed a seat in the convention, not at the discretion of any committee nor as a matter of sympathy but as of right; as a representative of a numerous and respectably body of voters in the district of San Joaquin.

The forty-eight members of the convention included fourteen lawyers, eleven farmers, six merchants, and men of various other occupations. It was a fair cross-section of the population of California at that day. Able, serious-minded men, well informed, they were possessed of the sincere and unselfish purpose of securing the admission of California as a state with a simple constitution along broad lines, as befitted the forthright, rough and ready population of the time. Providence mercifully withheld from this sturdy body of pioneer lawmakers a preview of the grotesque proportions to which the California constitution has grown at the present day. In the debates of the convention Jones took an important but not a prominent part. He complained at times of his "exhausted state of health" and his "present state of health." He spoke infrequently, discussing only questions with which he was familiar: notably, the property rights of married women; the judiciary system; banks; and finally, the boundary question.

A study of the proceedings of the convention shows nothing to justify the statements of Bancroft that James McHall Jones represented "the extreme Southern sentiments";[7] nor that of E.O. Crosby, a fellow member, who describes Jones as "an extreme Southerner and the only one who was persistent for the incorporation of a slave clause in the [state] Constitution."[8]

[7] Hubert Howe Bancroft, *History of California* (San Francisco, 1884-90) 6 vols., vi:287.

[8] Elisha O. Crosby, "Statement of Events in California," 1878, MS, Bancroft Library, University of California, Berkeley.

The judicial structure of the state even as it exists today [1948] is, to a very large extent, the work of Jones. The Select Committee on the Constitution had reported, in its article on the Judicial Department, a plan that could be most charitably described as ambiguous, complicated, and highly impractical — for instance, that the Supreme Court justices should also act as trial judges in circuits to be established. Its weaknesses were apparent and a considerable debate ensued. Jones said:

> Your Legislative and your Executive Departments might be faulty in design, the principles of liberty might be discarded and denied by the despot upon the throne, and the evils would be less felt than those under a bad judiciary system from the despot of the law, at the firesides of the people... The system which, above all others, I would support would be a system of three courts alone —... A Supreme Court with appellate jurisdiction only, a District Court with universal jurisdiction beyond a certain sum, and a Justices' Court with universal jurisdiction to a settled sum. Let us have a system which all the people can understand.[9]

Finally, late in the night a committee of three was appointed, of which Jones was a member, to revise the report in favor of a more workable system and to present the result at twelve o'clock on the following day. This special committee, working far into the early hours of the morning, presented their report at ten o'clock. It was largely the work of Jones himself and was adopted with but little further debate. It provided for a supreme court with definite jurisdiction and functions, and district courts with general jurisdiction. These existed until superseded by superior courts thirty years later. County courts, opposed by Jones, were provided for, proved unsatisfactory and were abolished when the new constitution was adopted in 1879.

The adjournment of the convention found Jones recognized as one of its most talented members. Tactful, ready, and effective in debate, with his extensive command of the Spanish language and the civil law, he took immediate rank as one of the state's leading lawyers. A pleasing personality and sound political sense, with the prestige attained in the convention, gave him favorable prominence among the political figures of the state.

The convention having determined on San Jose as the site of the capital, James McHall Jones immediately took up his residence in that city. Since coming into the state, he had formed a close personal friendship with John B. Weller, who had recently been a

[9] *Report of the Debates in the Convention of California* (Washington, D.C., 1850) 3-5.

candidate for governor of Ohio, and following that, a member of the commission to establish the boundary line between the United States and Mexico, and was later to become a United States senator and governor of California. Immediately on the adjournment of the convention on October 13, 1849, the two formed a partnership for the practice of the law under the name of Jones & Weller — Jones maintaining the office in San Jose and Weller the one in San Francisco.

The constitution having been adopted by the vote of the people on November 13, 1849, a governor, members of the legislature, and other officers were elected at the same time. The first legislature met in San Jose on December 15 of that year. Although Jones was talked of for election to the United States Senate, his youth precluded his serving in that body.

[Yet,] Jones did not lack in employment. Speaking of the problems confronting the courts and lawyers of the state at that period, Nathaniel Bennett, one of the first [California state] supreme court justices, says:

> All the other states of our confederacy had, previously to their admission into the union an established government, on which their state organizations were based. The people of California, however, were driven by extreme necessity, growing out of the political and legal chaos in which they found themselves, to the formation of a state government. A large amount of labor, consequent upon the unorganized state of society, was necessarily imposed upon the tribunal of last resort — the labor of searching for authorities in an unfamiliar language, and an unfamiliar system of juris-prudence; of ascertaining the law, as laid down in the codes of Spain; in the royal viceroyal [sic] ordinances and decrees; in the laws of the imperial congress of Mexico; in the acts of the republican congress; in presidential governors. Many ordinances and decrees, claimed to have the force of law, had not been printed even in Mexico; and they, as well as all other books upon Spanish and Mexican laws, could be procured only with great difficulty and at great expense and, indeed, at first they could not be procured at all. In addition to these causes of embarrassment, great doubts were entertained as to the force, as a rule of decision, which the laws of Spain and of Mexico, never but partially enforced in the remote province of California, should have, after the acquisition of the country by the Americans, in the construction of contracts made between American citizens, who had settled in California in such number as to greatly exceed the native population.[10]

[10] Preface, 1 Cal. 5 (1850).

To such problems were the ready abilities of Jones applied. His health improved and he devoted himself with an all-consuming industry to his profession. He first acquired the library of General Vallejo, which was then the largest in the country, consisting of between two and three hundred volumes. We find among the old Santa Clara County records that "Don Santiago M. Jones"[11] was made the attorney-in-fact of Zacarias Bernal, Jose Ygnacio Berreyesa, and other members of that family on November 7, 1849, with a view to protecting their title to the Rancho de San Vicenta against the machinations of one Shillaber. Indirectly connected was the litigation over the New Almaden quicksilver mine, and within a few days after the adjournment of the convention began the litigation, not settled until many years after his death, by which the Forbes people sought to protect their interests in the famous quicksilver mine. An important figure in the civic life of San Jose, reputed one of the best Spanish scholars in California, his professional services were in demand.[12]

The constitution of California was adopted at the election held on November 13, 1849. The first legislature met on December 15, following, and two United States senators were elected almost immediately. They, with two congressmen elected in November, presented themselves at the national capital with the petition for the admission of California as a state in February of 1850. They stood around the doors of Congress for almost nine months, for it was not until September that the state was admitted and representatives scathed in the national body.

The Federal Judiciary Act [of 1789] was extended to California by an act passed on September 28, 1850.[13] It divided California into two districts: all territory south of the 37th degree of north latitude was made the Southern District [this included Monterey]; and all north of that line, the Northern District. A United States district judge was provided for each district. The annual salary of the judge of the Northern District was fixed at $3,500 and that of the Southern District, at $2,800. The United States attorney in the Southern District was to receive double the fees received in the Southern District of New York and in addition a salary of $500 a year. Semi-annual sessions of the court were provided for the Southern District, one at Monterey in June and the other at Los Angeles in December. Senator [William] Gwin agreed to the terms of the bill in order to get it passed but gave notice that he would

[11] "Santiago" is permissible Spanish for "James." Jones' middle name appears in his signature only after the address "To the People of California" urging the adoption of the constitution. *Report of the Debates*, supra note 9 at 475.

[12] Frederic Hall, *The History of San Jose and Surroundings* [San Francisco, 1871] 376-78.

[13] Act of September 28, 1850, ch.86, 9 Stat. 521 [1850].

introduce a bill at the next session to increase the salaries. He was positive that it was enough to say that the president had appointed judges for California but because of the small salary none had accepted the positions.[14] It was pointed out, however, by some economically-minded senator, that the judge of the Southern District of New York got only $3,500 a year, and in New Hampshire the United States judge was paid only $1,000 a year.[15]

Gwin's statement finds justification in the fact that, prior to November 28, 1850, Judah P. Benjamin, later United States senator from Louisiana, member of the cabinet of Jefferson Davis, author of "Benjamin on Sales,"[16] had been appointed judge for the Northern District of California but had declined. The Senate files, now in the National Archives, reveal that he was nominated by President Fillmore in a message to the Senate on September 28, 1850. The Senate confirmed immediately and his commission was issued on the same day. In a letter dated October 18, 1850, Benjamin declined the appointment without giving any reasons, and John Currey of California was then nominated but rejected by the Senate on January 25, 1851.

California affairs received preferred attention on September 28, 1850, for on that date President Fillmore, at the solicitation of his Secretary of State, Daniel Webster, also nominated as judge of the Southern District, John P. Healy of Massachusetts — forty years old, partner of Webster, successively New Hampshire school teacher, Dartmouth College graduate, law student in Webster's office, and afterwards for twenty years, city solicitor and later, Corporation Counsel of the City of Boston. Healy was confirmed and his commission was issued on the same day. In his final letter declining the appointment, on December 7, 1850, he stated that he was restrained from accepting "by reasons of a private and domestic character." He had decided to accept the appointment and embark for remote California, but the prospect of parting from his aged father — Hon. Joseph Healy, long prominent in New Hampshire affairs — so affected him that he changed his mind and determined to remain in Boston.[17]

On September 28, 1850, the accumulating jam of California business seems to have been broken as far as federal appointments were concerned, for Jones also received an appointment, that of

[14] Cong.Globe, 31st Cong., 2d Sess. 25.

[15] Ibid. at 479.

[16] Judah P. Benjamin, *A Treatise on the Law of Sale of Personal Property with References to the American Decisions and to the French Code and the Civil Law* (New York, 1875). (The first English edition was published in 1868.)

[17] Godrey Morse, *Memoir of John Plummer Healy, LLD, Late City Solicitor and Corporation Counsel of the City of Boston* (1882). Furnished through the kindness of the Massachusetts Historical Society.

United States Attorney for the Southern District.[18] After the rejection of [John] Currey by the Senate, Ogden Hoffman was nominated and confirmed judge of the Northern District on February 27, 1851. There was some difficulty in securing his confirmation. William H. Seward objected on the ground that he was nothing but a boy, being only twenty-nine years old, and not qualified for so great and important an office. His confirmation was finally obtained largely through the influence of Daniel Webster, a friend of the senior Hoffman.[19]

The course of California appointments at that day does not seem to be entirely clear. During Fillmore's administration all the federal offices were held by Whigs. During the second session of the 31st Congress — that is, in December of 1850 — Gwin was the only senator present from California; and a Democratic Senate could easily oppose confirmations and no doubt did so many times.

Without doubt Gwin was influential in the appointment of Jones, in whose behalf he had rendered such signal service during the convention. Recognized as one of the leading lawyers of the day, a prominent, if not the leading, Whig in California, an esteemed friend of Senator Gwin, he seemed the logical appointee to the newly created judgeship. Hopeful that cessation of laborious law practice might avert his threatened end, it is easy to see that he may even have sought the position. The mild climate of Los Angeles, where he intended to reside, was known. He had declined the position of U.S. attorney for the Southern District because the remuneration was obviously inadequate. He regarded the judicial position as a sinecure, which indeed it was in the Southern District at that day, and in the pathetic hope that the mild climate and relief from strenuous effort might postpone if not avert the dread summons, he accepted the appointment.

Elevation to the federal judiciary was regarded in 1850, as it is today, as the honorable ambition of any lawyer. Not quite twenty-seven years of age, he was, on December 26, 1850, commissioned judge of the United States District Court for the Southern District of California by President Millard Fillmore. News of the appointment did not reach California until the arrival of the semi-monthly steamer at San Francisco on February 14, 1851.[20] He took his oath of office before the clerk of the Supreme Court of California soon thereafter, for on March 25, 1851 he advised Secretary of State Daniel Webster that his address would therefore be Los Angeles.[21]

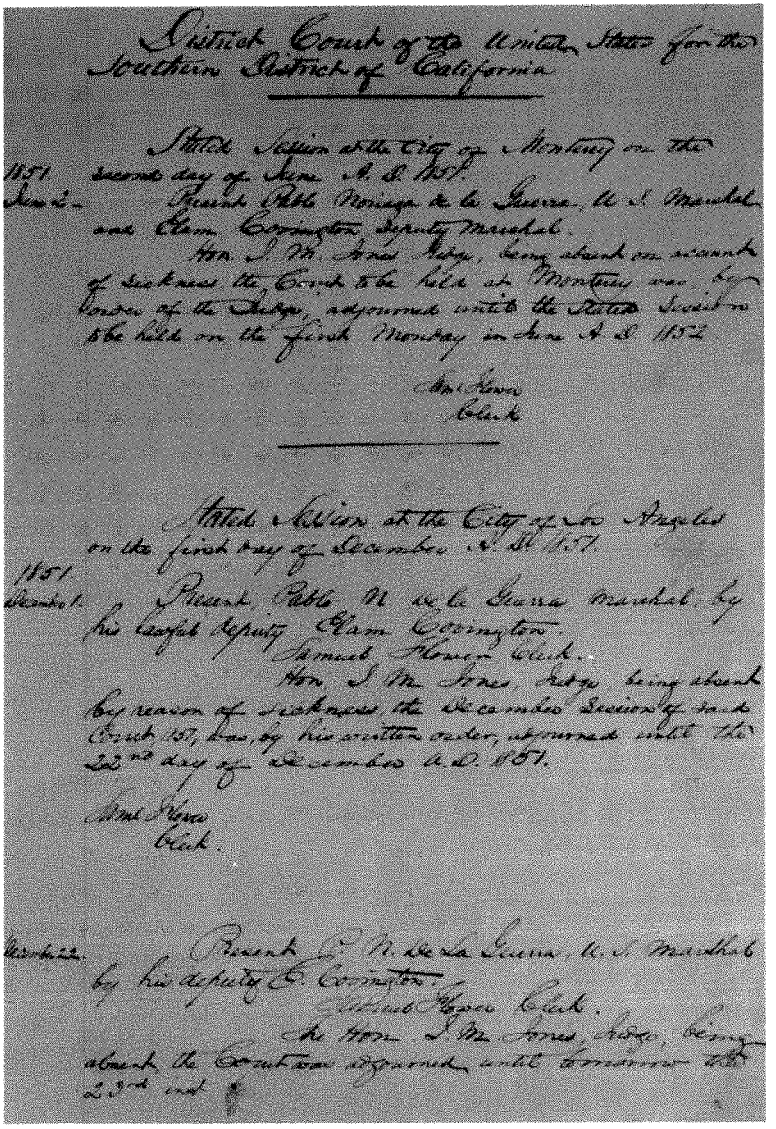
Despite Jones' weakened condition, he returned to Plaquemine, Louisiana, during the summer of 1851, for his last will shows its

[18] *Alta California*, November 22, 1850.

[19] Gwin, "Memoirs," supra note 1 at 266.

[20] *Alta California*, February 15, 1851.

[21] National Archives, Washington, D.C. [No record box cited.]



District Court of the United States for the Southern District of California

Stated Session at the City of Monterey on the second day of June A.D. 1851

1851 June 2 — Present Pablo Noriega de la Guerra, U.S. Marshal and Elam Covington Deputy Marshal.

Hon. I. H. Jones Judge, being absent on account of sickness the Court to be held at Monterey was by order of the Judge, adjourned until the Stated Session to be held on the first Monday in June A.D. 1852

Saml Hoyer
Clerk

Stated Session at the City of Los Angeles on the first day of December A.D. 1851

1851 December 1 — Present Pablo N. de la Guerra Marshal by his lawful Deputy Elam Covington.

Samuel Hoyer Clerk.

Hon. I. H. Jones, Judge, being absent by reason of sickness the December Session of said Court 1851, has, by his written order, adjourned until the 2nd day of December A.D. 1851.

Saml Hoyer
Clerk.

December 2 — Present P. N. de la Guerra, U.S. Marshal by his deputy E. Covington.

Samuel Hoyer Clerk.

Hon. I. H. Jones, Judge, being absent the Court was adjourned until tomorrow the 2nd inst.

June 2, 1851 court minutes showing Judge Jones not present due to illness. (National Archives, Pacific Southwest Region)

execution there on September 4, 1851. Other activities incidental to the establishment of the court in California occupied his time, but he was fated never to preside at one of its sessions.

The first official act of Judge Jones, of which record has been found, was the approval of the bond of Pablo de la Guerra as United States marshal for the Southern District. The first session

of court after his qualification came on the first Monday in June, 1851, at Monterey. On May 29 he signed an order to the United States marshal to adjourn the session to the first Monday in June, 1852. This order was duly executed by Elam Covington, deputy of Pablo N. de la Guerra, marshal, by proclamation in front of the courthouse in Monterey, on June 2, and the clerk, Samuel Flower, recorded the fact in his minutes with the additional information that the adjournment was on account of the illness of the judge. On the date set for the Los Angeles session, December 1, 1851, the court was adjourned by the clerk "on written order of the Judge" to December 22, 1851; on the 22nd and it was adjourned to the 23rd, then to the 24th, and on the latter date the clerk recorded the "adjournment of court in absence of Judge...Sine Die." Los Angeles did not know that the earthly activities of James McHall Jones had terminated a full week before; he died on December 15, 1851.

Long since forgotten in the legal annals of California, Jones was one of the most interesting and attractive characters that the 1849 immigration developed. A reference to the proceedings of the constitutional convention shows him to have been a man of culture, comprehensive mind, extensive knowledge, and with a gift of apt and engaging expression. His addresses were always pertinent, informative, free from personal element, and showed not only his diligent research during the sessions of the convention, but the possession of a mind equipped by an extensive study of all literature available at that time. He was one of the most remarkable men in that remarkable body. He possessed an unflagging and all-consuming industry that probably shortened his brief and sad career, a surpassing determination, as witnessed by his single-handed campaign through the diggings for election to the convention. Serious, sober-minded, cultured, beloved, with profound knowledge, with untiring energy — who can measure the height in state and nation to which his star might have risen? California's share in legal history might have been a Jones instead of a Field [California Supreme Court and U.S. Supreme Court Justice Stephen J. Field].

ISAAC STOCKTON KEITH OGIER

Isaac Stockton Keith Ogier was from an extensive family of Huguenot descent, members of which are to be found in many parts of the United States at the present day. He was born July 27, 1819, in Charleston, South Carolina, the son of Abraham Thomas and Sarah Henlan Ogier, one of eight children. Two older brothers became prominent physicians in Charleston, but he appears to be the only one of the family who ever came west.

When the members of the first legislature of California were

asked to furnish their personal sketches, he gave as his life's history: "I.S.K. Ogier, born in Charleston, South Carolina; emigrated to New Orleans in 1845 and from New Orleans to California, December 18, 1848."

He took up his residence in New Orleans and was admitted to practice in Louisiana. No other information is at hand as to his existence in New Orleans before the Mexican War, but records of the War Department show that he enlisted in the United States forces in Louisiana, serving as captain in Company H of the Fourth Louisiana Militia Infantry. He was mustered in on May 14, 1846, in New Orleans, to serve for six months and was honorably discharged on August 14 of the same year. He reenlisted, however on December 18, 1846, and served as First Lieutenant of Company F, First Regiment, Louisiana Infantry, and was discharged on July 12, 1848. He practiced law in New Orleans for a time.

The steamer *Falcon*, carrying the first passengers from the eastern seaboard bound for California, left New York on December 1, 1848, and touched at New Orleans, sailing from the latter port for the Isthmus on December 18, 1848.[22] Aboard from New Orleans among the passengers, were the Reverend S.H. Willey, who had sailed from New York, General Persifor F. Smith, and Pacificus Ord, all later to be prominent in California affairs. Possessing through tickets they were able to board the steamer *California* at Panama and reach San Francisco on the first voyage of that vessel on February 28, 1849.

Isaac Stockton Keith Ogier was one of the passengers to board the *Falcon* at New Orleans. The glut of California-bound passengers had already begun on the Panama side of the Isthmus, and Ogier, together with a number of other adventurers, all doubtless without through tickets and discouraged at the sailing prospects, decided to expedite their voyage. They accordingly purchased the schooner *Dolphin*, repaired and provisioned her on the island of Tobago and set sail for the golden shore on January 10, 1849.[23]

None of these thirty or more purchasers had ever had any nautical experience; but Ogier was chosen captain, which position he seems to have accepted unhesitatingly. Possibly his Mexican War title was the determining factor. The *Dolphin* proved unseaworthy, but she finally got as far as Mazatlan at the end of eighty-four days from Panama. Here they sold the vessel and a number of the original *Dolphin* party took passage to San Francisco in the *Matilda*.[24] I conclude that Ogier was with this number but have been unable to verify it.

If, as seems probable, Ogier took the *Matilda*, he must have

[22] Berthold, *The Pioneer Steamer California* [n.p., n.d.] 10, 90, 91, 92.

[23] Eldridge, *History of California* [n.p., n.d.], iii:211.

[24] Jacob D. S. Stillman, *Seeking the Golden Fleece* (San Francisco, 1877) 329.

arrived in San Francisco on the 6th day of May, 1849. He went into the mining district in the neighborhood of Sonora and is listed as one of the early inhabitants of that district.[25] A resident of Sonora, Ogier was elected a member of the first legislation from the San Joaquin district at the election on November 13, 1849.

The constitution adopted, the legislature met in San Jose, the first state capital, on December 15, 1849. For some unaccountable reason, this legislature has always been referred to as the "Legislature of a thousand drinks,"[26] in disparagement of the character of the body. But it is quite obvious that if the body satisfied its legislative thirst with that number of drinks over a period of some five months, it goes down to all future generations as the greatest example of sobriety in the history [of] legislatures.

Singularly enough during all this period, California had not been admitted into the Union as a state and it was not impossible that the entire civil structure under which the state was organized, the work of the legislature and of all officers might come to nothing. The legislature adjourned in April but it was not until the 9th of September following that the state was admitted.

Ogier seems to have removed to Los Angeles soon after the adjournment of the legislature. On June 4, 1850, before his departure, he was admitted to practice before the supreme court of the state on motion of John B. Weller. Weller succeeded General Fremont as United States senator in 1851 — an important friend to have in Washington when appointments to the bench came up. Ogier opened an office in Los Angeles in partnership with Don Manuel Clemente Rojo, Los Angeles' first *abogado*, a cultured Peruvian, prominent in the public affairs of that day.

An advertisement in the California *Star* of July 12, 1851, announced the formation of the partnership, which assured special attention in cases involving Spanish and Mexican law and land grants. The same issue of the *Star* published what appeared to be the complete oration which Ogier delivered on the Fourth of July of that year. It had at least the merit of brevity; he held up Jefferson as the ideal statesman.

The settlement of titles under the land grants engrossed the public attention at this time. Early in the year 1852, as noted in the California *Star* of February 28, thirty-two owners of land grant titles, learning that the land commission proposed to hold hearings in San Francisco only, held a meeting in Los Angeles to protest against such action. "Don I.S.K. Ogier" was made "Secretario" of the meeting and he and his partner Rojo were made a committee to prepare a suitable protest to President Fillmore. The rancheros

[25] [Various authors,] *History of Tuolumne County* (San Francisco, 1882) 8; Hittell, *History of California* (San Francisco, 1895-98) iii:126.

[26] Hall, *History of San Jose*, supra note 12 at 219.

Judge Isaac S. K. Ogier, ca. 1858. (Bancroft Library)

sent a special messenger to Washington[,D.C.] to present their protest to the president. Whether as the result of this protest or not, the commission held a meeting in Los Angeles in August of that year.

A Democratic administration had displaced the Whig regime of Millard Fillmore, and Franklin Pierce was inaugurated president on March 5, 1853. California had two Democratic senators, Gwin and Weller, and things looked rosy for Democratic aspirants.

The National Archives reveal that Ogier was confirmed by Congress as United States district attorney for the Southern District of California on April 6, 1853, with commission issued on the same day. He appeared at the session of court in Monterey presided over by Judge [Ogden] Hoffman of the Northern District

on June 9, 1853. This was the only appearance of Ogier as United States attorney.

Although the act requiring the appointment of a judge in the Southern District was not passed until January 18, 1854, its passage was anticipated and there was at least one other candidate for the position — Judge Benjamin Hays, of the state district court and long-prominent in Southern California. Judge Hays writes in his diary as of March, 1854: "Tomorrow the Southerner (steamboat) ought to (be here) with definite news of the appointment... My friends seem confident to express (the opinion) that I will get it." He had been recommended by the comptroller, governor, treasurer and secretary of state of California (as he says) and his friends had spoken to Senators Gwin and Weller. The worthy judge was probably not versed in the ways and wiles of United States senators.

But the United States attorney, alive to the necessities of the situation, had proceeded from Los Angeles to Washington, D.C. where the business was to be done, and where he could best fend against his enemies. On January 17, 1854, he presented to President Franklin Pierce a short recommendation for the position, written by Senator John B. Weller, and signed by the latter and William M. Gwin, the other senator, and also by Milton S. Latham and J.A. McDougall, the two congressmen — the entire California delegation. This potent instrument appears endorsed. "Referred to the Attorney General, let a commission be sent up unless objections occur to the Attorney General — F.P." No objections occurring to the attorney general, a commission as judge of the United States District Court for the Southern District of California was issued to Isaac Stockton Keith Ogier on January 23, 1854.

Judge Ogier held his first session at the stated term in Monterey on June 5, 1854. No United States attorney having been appointed, he himself having but recently resigned the office, and no cases appearing except where the United States was a party, meaning land commission cases, adjournment was taken to the next regular session a year later. On July 1, 1854, Pacificus Ord was commissioned United States attorney for the Southern District.

Something more in the way of ceremony attended the first session at Los Angeles. On July 23 a special term was held, and on the next day Judge Ogier's commission was spread upon the minutes. The session continued to August 2. The judge, however, was far from idle. He began a session not without interest or importance in the Northern District in San Francisco on September 13, 1854, sitting in place of Judge Hoffman, who was ill.

After the session in San Francisco in 1855, the activities of the judge would seem to have been confined exclusively to the Southern District. During this year he married Anna Kiger, thirty-five years old, a native of Virginia and one of the first American women residents of Los Angeles, a woman of exceptional character

and high attainments. As recounted by the Los Angeles correspondent of the San Francisco *Alta* of November 26, 1857, they built the first cottage in the town, being the first to vary the uniform construction of flat-roofed adobe dwellings.

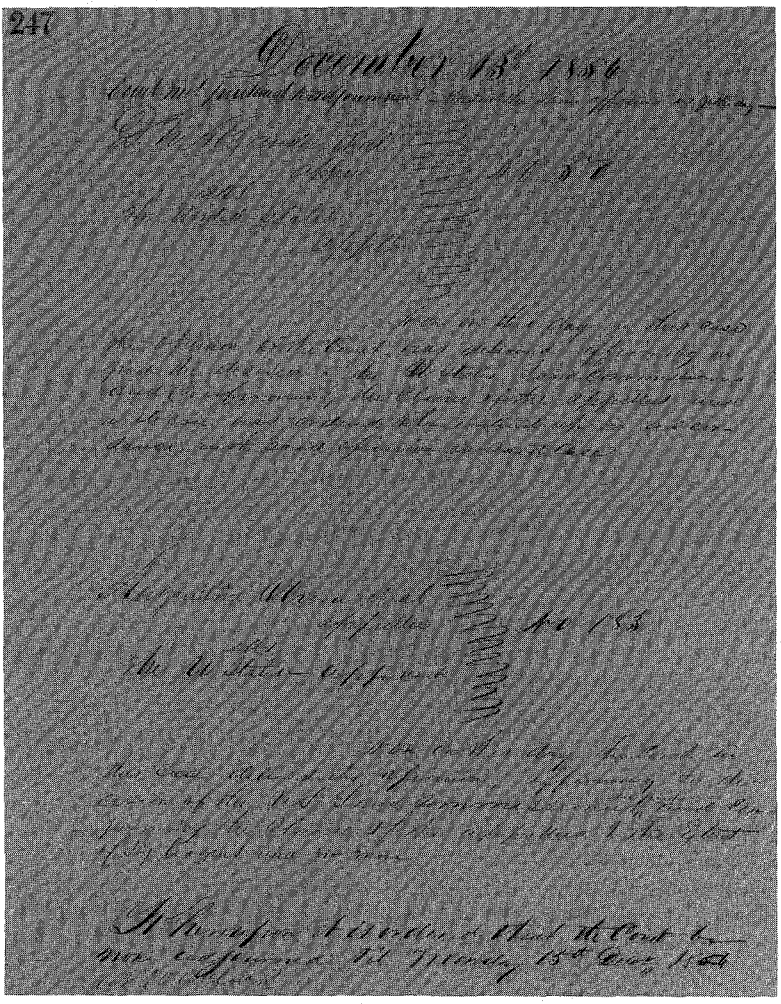
The first decision of Judge Ogier in land cases was given on September 24, 1854, in a case number 3, *Heirs of Felipe Gomez v. the United States.* The monotony of the land grant hearings in the Southern District was varied for the first time on March 6, the first indictment in the Southern District, charging some half-dozen defendants with "sweating" ten dollar gold pieces. In the trial, the prosecution netted only one victim, Quirina Lieva, who was sentenced to pay a fine of one dollar and to be confined at hard labor for two years.

There is in existence no printed opinion of Judge Ogier so far as I have been able to find. In fact there are few opinions printed or written. His brother on the northern bench, Judge Ogden Hoffman, Jr., on the other hand, has supplied legal literature with his highly interesting volume of opinions given in the determination of the land grant cases.[27] Few California lawyers of the present day have ever heard of Ogier, this interesting character of the early days, while thousands are familiar with the name Hoffman. Such is the potency of the written word. Ogier usually contented himself with a formal order in his own handwriting far from easily read, to the effect that the title of the claimant was thereby confirmed to a certain tract, the particular description of which may be had by reference to the maps filed in the case. In the rare instances when the opinion was written, however, it appears to cover the ground completely. A brief statement covering the disputed facts is made and the reasons for the court's opinion given. Such opinions, rare though they are, will suggest to the student that they more correctly follow the injunctions of the Land Commission Act than do many of those of the higher court. He invariably gave full indulgence to the presumption of regularity and authority attached to official acts where no fraud was charged to the officers of the Mexican government, and particularly where they the parties had taken possession of and improved the land in good faith.

A typical opinion is that in Case No. 172 where the United States appealed from the decision of the Board of Land Commissioners, which confirmed a grant of Rafael Castro:

> [The] Claim in this case is founded upon a grant from Governor Figueroa 16 Nov. 1833 to the appellee and approved

[27] *Hoffman's Land Cases* [compilation, n.d.]. [Many of his decisions were published in the *Law Journal and Literary Review* during its short existence in the early 1860s.]



June 5, 1854 order establishing court at Monterey and rules of the court presided over by Judge Isaac Ogier. (National Archives, Pacific Southwest Region)

on the 14 May 1834. The original grant and testimonial of Juridical possession are offered in evidence duly proven and authenticated. The grant was one square league within certain exterior Boundaries. Possession was given of the league granted by the Alcalde, and there remained a surplus over. The appellee made application to the Government to extend his grant to the surplus which was a small tract between his boundary line and that of his brother, Joaquin Castro, of seven *sobrantes* in width. On the 8 of Nov. Jimeno,

> the Acting Governor conceded the surplus to him and juridical possession of it was given in the [blanks unfilled] day of [blanks unfilled]. The parole evidence shows a substantial compliance with the conditions of the grant, occupancy of the land by the claimant and cultivation thereof. The appellee is therefore entitled to a confirmation of his grant. A decree will be entered affirming the decision of the Commissioners.

It might be well, were anyone in a position to do so, to call the attention of the occupants of the federal bench of a later age to the brevity and clarity that mark the pages of this pioneer character, whose work contributed so materially to the progress of the state. There is no citation of authority. Not a brief was filed. Argument was always oral. [Perhaps] the first authoritative decision of the Supreme Court in the land grant cases was handed down on March 10, 1855, in the case of the Mariposa grant. The Peralta and Arguello cases were decided by Ogier on January 26 preceding.

A striking instance of his sense of duty and jealous regard for the integrity of the court, as well as his prompt and decisive action, involved Pacificus Ord, the United States attorney. Ord and Ogier had embarked at New Orleans on December 18, 1848, on the same vessel and were doubtless on terms of intimacy. Vincente Gomez had petitioned for confirmation of the grant of a large tract of land. The land commission denied the validity of the claim and Gomez appealed to the district court. When the matter came up on June 5, 1857, counsel for the claimant, in presence of the United States attorney, stated to the court that there was no objection to the confirmation of the claim on the part of the United States. Ord remained silent and a decree was entered without an examination by the court into the merits of the claim. Later, information came to the judge that the United States attorney was interested in the land. At a hearing had on the court's own motion, after reciting that the district attorney had acted as described, "thus deceiving the court and obtaining a decree in his own favor under the false pretense of representing the interest of the United States," the proceedings were set aside and the case was set down for trial. The grant was never confirmed. This probably led to the resignation of Pacificus Ord.

Ord himself has a somewhat reasonable explanation of his action in the case which the United States Supreme Court in *United States v. Gomez* sets forth as an appendix on pages 587 of that volume.[28]

Isaac S.K. Ogier held the United States district court sacred. Its integrity was maintained, its reputation jealously regarded, its processes respected, even to an extreme degree.

[28] *United States v. Gomez*, 64 U.S. [23 Howard 326] 552 [1859].

Columbus Sims was clerk of the court on June 29, 1858, and James H. Coleman was his deputy. One Mr. Helms was charged with having stolen four government mules "all branded U.S., one slightly sprung in the knees" and a warrant was issued for his arrest. It happened that the clerk was at home sick and had taken the court seal with him so that it was not at the time obtainable. Deputy Coleman explained the dilemma to E.J.C. Kewen, who was acting United States attorney at the time. The two counseled together and Kewen advised Coleman to use a four-bit piece instead of the official seal. This was done and the warrant issued. Helms was arrested and gave bail for his appearance. The issue of title to the mules was settled in some way not revealed by the record, the charge against Helms was never pressed, and the matter forgotten.

A year and a half later, however, in an evil hour, Judge Ogier learned of this profanation of the seal. He forthwith [called] the astonished Coleman, who had in the meantime resigned his position in the clerk's office, before him to answer for contempt. Kewen, who had gotten him into the situation, naturally was "severely ill," as shown by a doctor's certificate, and unable to attend the hearing. Poor Coleman explained that he thought Kewen had authority to justify his own action — that the clerk, his principal, had consented to it. [Coleman] was held in contempt, fined $500, and ordered to do penance in jail for five days in addition.

Considerable public indignation followed. The Los Angeles *Star* braved the judicial wrath to the extent of declaring that "a feeling of the strongest indignation for the harsh, unjust and oppressive ruling of the court" prevailed. Coleman was actually taken to jail, but, applying for a writ of *habeas corpus* in the district court of the state, was released on bail by Judge Benjamin Hays, pending the hearing of his application. This added further fuel to the flame of the judge's anger, and the sheriff to whose custody the unfortunate Coleman had been committed was himself included in the contempt net because of his release of the prisoner on the order of Judge Hays. On the hearing before the state court, Judge Hays dismissed the *habeas corpus* petition, but by this time Judge Ogier, having had time to reflect, dismissed Coleman and remitted his fine.

Judge Ogier was civic-minded — early a member of the Voluntary Police and Ranger force in Los Angeles,[29] and on May 4, 1859, was one of the organizers of the first Protestant society in the pueblo, being elected president of the board of trustees of the society. The religious services of the society were held frequently in the courtroom until the erection of a place of worship.

Shortly after adjournment of the session ending April 16, 1861, Judge Ogier visited his gold mine in Holcombe Valley in the

[29] Newmark, [no title, n.p., n.d.] 35.

mountains of San Bernardino. The Los Angeles *Southern News*, November 28, 1860, noted that he was running three *arrastres* and had taken out at the end of ten days and nights, $289. He entertained golden dreams, and when his back salary was paid in June, 1860, I suspect he devoted it not to the payment of the mortgage on his Los Angeles home, but to improvements on the mine. He died suddenly of apoplexy, on May 21, 1861, at the age of forty-two years, just after the outbreak of the Civil War. Anna Ogier, his widow, survived him more than thirty years.

Probate showed Judge Ogier's mine was fairly well equipped — a supply of quicksilver, various mining tools usually required in that day, a number of mules and horses, a riding saddle, pack saddle, rifle, and bridle. He left no money; his library consisted of Patent Office reports, volumes of the *Congressional Globe*, forty-two volumes of Senate and executive documents, thirty-one volumes of law books not described, forty volumes of miscellaneous books, and three volumes of United States *Digest*. His seven-acre home, inventoried at the value of $5,000, was subject to a mortgage made three years earlier to Don Abel Stearns for $4,250 with interest payable at one and one-half percent per month compounding quarterly. Later, when a sale of property was petitioned for, the mortgage amounted to $9,389.52, and the property was bought in for $3,704, less than the mortgage claim. Don Abel, it is to be noted, allowed someone else to do the mining. It seems that he was delicate about insisting on the payment of the judge's interest.

To the lot of Judge Ogier there fell one of the most important and difficult tasks with which the federal court was ever presented — the adjudication of the land grants in California. This task he met in full and complete measure, fully justifying the statement of the Los Angeles *Star* on the occasion of his death, that,

> In this responsible position, the greatest responsibility devolved upon him. The whole landed interest of California was required to be submitted to judicial scrutiny, and he was given decrees in relation to lands involving an area as extensive as nearly one-half of the New England States.

The land grant questions were decided in conformity with the treaty with Mexico and the laws of nations, with industry, expedition, common sense, and above all, with a high sense of justice.

FLETCHER M. HAIGHT

Fletcher Haight was born in Newton, New York, November 28, 1799, the son of Samuel H. Haight. He graduated from Hamilton College, entered the practice of law, and in 1824 took up his

residence at Rochester. In 1844 he moved to St. Louis and practiced there until 1854, when he went into law partnership with his son, Henry H. Haight, later governor of California, who had preceded him to the golden shore in 1849.

He seems not have have become particularly active in the practice in San Francisco. The first note of his presence there that I have been able to find is an entry in the minutes of the Unites States District Court for the Northern District, Judge Ogier presiding, on September 20, 1854, when Fletcher H. Haight was appointed a special master in the case of Gordon against the South Fork Canal Company.

It is highly probable tht the possession of Union sentiment was an important factor in the qualifications of United States district judge, especially in remote California in the summer of 1861. The Civil War had hardly commenced. Fletcher M. Haight, prominent in legal circles in the West, was probably personally acquainted with Abraham Lincoln. There were numerous applicants for the position made vacant by the death of Judge Ogier. In the schedule of applicants with their recommendations prepared by the appointment clerk of the Department of Justice, it appears that there were eleven applicants — seven of whom were from San Francisco. Kimball H. Dimmick was the only one from Los Angeles. After the schedule was made up, five more, including Cornelius Cole, were listed as additional applicants. Senator Latham, however, recommended Fletcher M. Haight, as did Lorenzo Sawyer, Hall McAllister, and O.L. Shafter of San Francisco. M. Blair, Postmaster General, under date of July 26, 1861, in a letter to the president, assured him that Fletcher M. Haight was of the Free Soil school and had been for Van Buren and Adams in 1848. The prominent citizens of Monterey joined in a letter requesting his appointment. David Spence and several others, in a personal letter to General McDougall, asserted that Mr. Haight was even then "partly" a resident of Monterey County, and in case of his appointment, would make his ranch in that county his permanent residence. Haight was the owner of a large ranch in the Carmel Valley at that time.

No time was lost in filling the vacancy [created by the death of Judge Ogier]. Haight was nominated by President Lincoln on August 5, 1861, and on the same day confirmed by the Senate. He seems to have taken up his residence in Monterey, and there continued to reside until his death some five years later.

The business of the district court of the Southern District gradually dwindled. The appeals from the decision of the Board of Land Commissioners had all been filed and disposed of, so far as review by the district court was concerned. The population of Los Angeles, the principal pueblo, did not grow. The population itself, largely of native Californians, was not disposed to litigation in any

event. On June 25, 1863, an order was entered by Judge Haight that the records, furniture, etc., be moved from Los Angeles to Monterey. It was humorously said that he had moved the court to his ranch. Finally, the sessions of the district court at Los Angeles, together with those of the circuit court, were abolished by the act of February 19, 1864.[30] Sessions of both courts in the Southern District were thereafter held at Monterey only.

Judge Haight's last service was not upon the bench of the district court but on that of the circuit court. In San Francisco on February 13, 1866, he presided at the trial of the mutineers on the *White Swallow*. The case filled much newspaper space, both editorial and otherwise. On February 8, 1866, the court opened at Monterey for what proved to be its last session. No judge was present. The clerk noted adjournment from day to day, like the failing pulse of dying, until April 11, when the activities of the court ceased. In the meantime, death had overtaken Judge Haight on February 23 in San Francisco. He was then sixty-seven years of age.

THE INTERIM

At the time of the death of Judge Ogier, the appeals from the decisions of the land commissioners had been fairly well finished, and the business began to diminish in the Southern District, since the entire attention of the court had been taken up with land grant litigation. Agitation for the elimination of a second judicial district in California was carried on through 1864, 1865, and 1866.

The bill to abolish the Southern District had been introduced by Senator Conness. It was reported for adoption by Representative James F. Wilson of Iowa, chairman of the House Judiciary Committee, who stated that the committee had investigated and had come to the conclusion that there was not enough business in that district to occupy the attention of a judge for one month of the entire year. The bill made California one district with the judge of the Northern District its judge. It was approved on July 27, 1866, and the United States District Court for the Southern District of California went out of existence.[31]

A total of 405 cases are entered upon the records in the Southern District. Of these, 395 involved land grants, seven involved counterfeiting in Los Angeles, and three were ejectment suits growing out of the land grant hearings. No diversity of citizenship appearing in these three, the question of jurisdiction was raised but never decided. On October 24, 1864, a venire of grand jurors was

[30] Act of February 19, 1864, 13 Stat. 4 (1864).

[31] Act of July 27, 1866, 14 Stat. 300 (1866).

issued at Monterey. It had been charged that the postmaster at Los Angeles had failed to distinguish between his own money and that of the United States, but he was able to justify himself before the United States commissioner and the grand jury was never organized.

As early as 1870 a bill was before Congress to re-establish the Southern District. On December 7 of that year, Cornelius Cole, a senator from California, introduced a bill in the Senate to create a Southern District. In 1866 he had visited Los Angeles, where he was hospitably received by the inhabitants. He was somewhat impressed with its possibilities. "It may be worth while to state that southern California, as late as 1866, was counted of little value. Its agricultural products were exceedingly limited in variety and quantity. It was a common belief that only a very small portion of the land could be made at all useful except for pasturage."[32] While the region was unsettled, irrigation was developing and a future was possible. The San Francisco Chamber of Commerce, however, discouraged the idea; it memorialized Congress on the subject, pointing out that of the 694 bankruptcy cases coming before the district court since the abolition of the Southern District, only twelve were from the territory included in that district.[33]

Senator Cole's bill died due to an adverse report of the judiciary committee, and at least four similar bills, in the years, 1871, 1879, 1883, and 1884, met a similar fate.

At the first session of the 49th Congress, December 7, 1885, only Senator Stanford was present from California. H.H. Markham, later governor of the state, however, was a congressman from the Los Angeles district, and he promptly introduced a bill in the House, which was referred to the judiciary committee. The latter soon reported a substitute. A petition from the board of trade of Los Angeles, praying for the establishment of the court was presented on February 8, 1886,[34] Senator Stanford cooperating.

The House Judiciary Committee, having reported a substitute for Markham's bill, the latter was then laid on the table by unanimous consent. The substitute passed the House only after a change was made which reduced the annual salary of the judge from $5,000 to $4,000. It was then passed by the Senate and the president approved it on August 5, 1886.[35] The state was divided by counties instead of parallels of latitude as originally. The act retained the counties of Madera, Merced, and Inyo in the Northern

[32] Cornelius Cole, *Memoirs of Cornelius Cole* (New York, 1908) 242.

[33] California *Star*, April 20, 1870.

[34] Cong. Globe, 49th Cong., 1230.

[35] Act of August 5, 1886, 24 Stat. 308 (1886).

District, making the new district of the counties of San Diego, San Bernardino, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Fresno, Tulare, and Kern. In 1886 there was no Madera, Kings, Orange, Riverside, or Imperial County.

SOME FEDERAL COURT HISTORY

The United States District Court for the Southern District of California was actually organized and ready for business for some months before the death of Judge Jones on December 15, 1851, for on April 30 of that year Samuel Flower had been appointed clerk at Monterey. Pablo de la Guerra had been appointed marshal and his deputy, Elam Covington, was in service there. California was not at that time in any of the existing circuits and no circuit court was provided. The district courts were vested with circuit court jurisdiction in civil cases, as had been done in the case of Kentucky under the first Judiciary Act of 1789. Appeals were allowed directly to the Supreme Court.

In the meantime, the court of the Northern District was in active operation, having held its first session on May 19, 1851, in San Francisco, Ogden Hoffman, Jr. presiding. He continued in this same position for a period of forty years until his death in 1891. No United States attorney was appointed for the Southern District until Alfred Wheeler took his oath as such on August 4, 1852. For a little more than two years, the bench of the Southern District made vacant by the death of Judge Jones remained unfilled.

Before 1850 there was no statute authorizing the designation of one district judge to hold court in another district. Then on July 29 of that year a statute was passed providing that in the case of sickness or other disability of the district judge, such fact being certified by the clerk, the circuit judge of the circuit in which the district was situated, or in certain cases, the Chief Justice, could designate a district judge of any other court in that or a neighboring circuit to sit in his place. California, however, was not in a circuit, and with no district court at that time nearer than Texas or Iowa, it would have been a highly inconvenient thing to comply with the provisions of the act. The statute was amended in the next year to provide that the designation might be made when the certificate of the clerk showed that the public interests from the accumulation or urgency of judicial business required it.

The general appropriation bill of August 31, 1852, after providing $72,000 to pay the salaries of all the district judges in the country, attempted to give some attention to the needs of the California situation. It provided that the district judge of the Northern District of California "shall be the judge of the Southern District in that state" until otherwise provided by law. His salary

was increased from the existing $3,500 to $5,000 "so long as he discharges the duties of both districts." This highly doubtful provision was counted on to meet California's needs for the time. As early as December 9, 1851, a memorial from the San Francisco Bar had been presented in the United States Senate asking that the salary of Judge Hoffman be increased.

By the act mentioned, an appeal from the district courts of California was allowed directly to the Supreme Court in cases of equity, admiralty and maritime, and of prize or no prize, when the matter in dispute amounted to $2,000, such appeals to be in the same manner as in the case of appeals from the circuit court. The vacancy in the Southern District continued unfilled.

There was in Washington, D.C. at this time virtually no understanding of conditions in California, either as affecting the courts, or, in fact, much else. The geography of the new and distant state was unknown, and Congress, then as always, slow to respond to court requirements, had little conception of the urgent problems created by the gold rush of 1849.

On June 9, 1853, Ogden Hoffman, Jr., judge of the Northern District, sat at Monterey. The business transacted was not important. A single libel suit was heard, brought against the [owner of the] steamer *McKim*. The necessary proof was made and the matter referred to a master [sic], who made his report on the day following and the vessel was ordered sold. So far as the court minutes show, this was the only session held in the Southern District by Judge Hoffman or any outside judge.

Here for the first time in the history of the federal courts of California the name of Isaac Stockton Keith Ogier appears. He is noted in attendance at this session as United States district attorney for the Southern District.

On October 15, 1853, Judge Hoffman wrote to the attorney general [of the United States] that since the passage of the act of 1852 providing that the judge of the Northern District should be the judge of the Southern District, he had endeavored to discharge the duties of both offices, but ventured a doubt as to the constitutionality of this provision. Notwithstanding the act that made him judge of the Southern District, he thought that office could be filled at once by executive appointment. He pointed out that the existing law required that sessions be held in both districts on simultaneous dates, a thing which he submitted was impossible. In his own district the admiralty cases alone were almost enough to occupy the attention of any one tribunal, and the equity and common law suits were perhaps not exceeded in number, as they certainly were not in the amounts involved, in any circuit in the country. When, in addition to this, the land cases, being the appeals from the rulings of the Board of Land Commissioners, were considered, it was apparent that the work in the Northern District was probably

more onerous than that in any other court in the country, and [Judge Hoffman] foresaw for himself an existence "of unremitting and interminable labor."

The business in the Southern District was accumulating. The Board of Land Commissioners was active, appeals were being filed and it was apparent that the functioning of the court could not long be delayed. Senator Gwin introduced a bill drawn by the attorney general along the lines of the recommendation of Judge Hoffman in October preceding, to require the appointment of a district judge for the Southern District "heretofore established." Judge Hoffman had complained in his letter that although he proceeded to Sacramento, Stockton, and San Jose and opened court there in obedience to law, he found no business whatever and concluded that such action was "a useless and almost ridiculous formality." Therefore, the bill provided for the abolition of sessions at those points. The law would allay to some extent Judge Hoffman's fears of an existence "of unremitting and interminable labor."

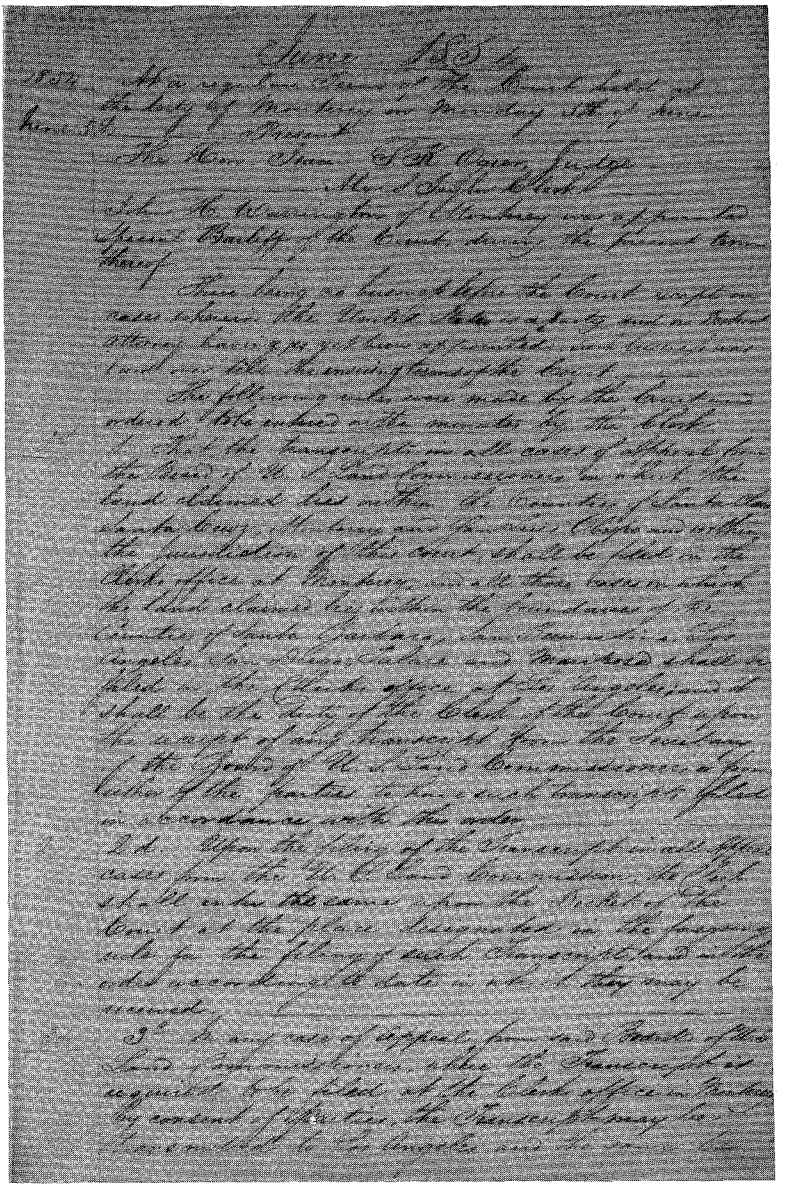
The bill became a law on January 18, 1854.[36] It also provided that in the case of sickness or other disability of the judge of either district, "it shall be lawful" for the judge of the other district to hold the sessions.

The land commission had begun its work with a considerable degree of promptness. Anxiety began to be felt over the delay in the settlement of the land grants, the great obstacle to the development of California. The commission was working diligently and its decisions came thick and fast. In the meantime, Ogier had been made the United States district attorney for the Southern District, commissioned in 1853, but had not functioned at any court session except that held at Monterey by Judge Hoffman on June 9 of that year.

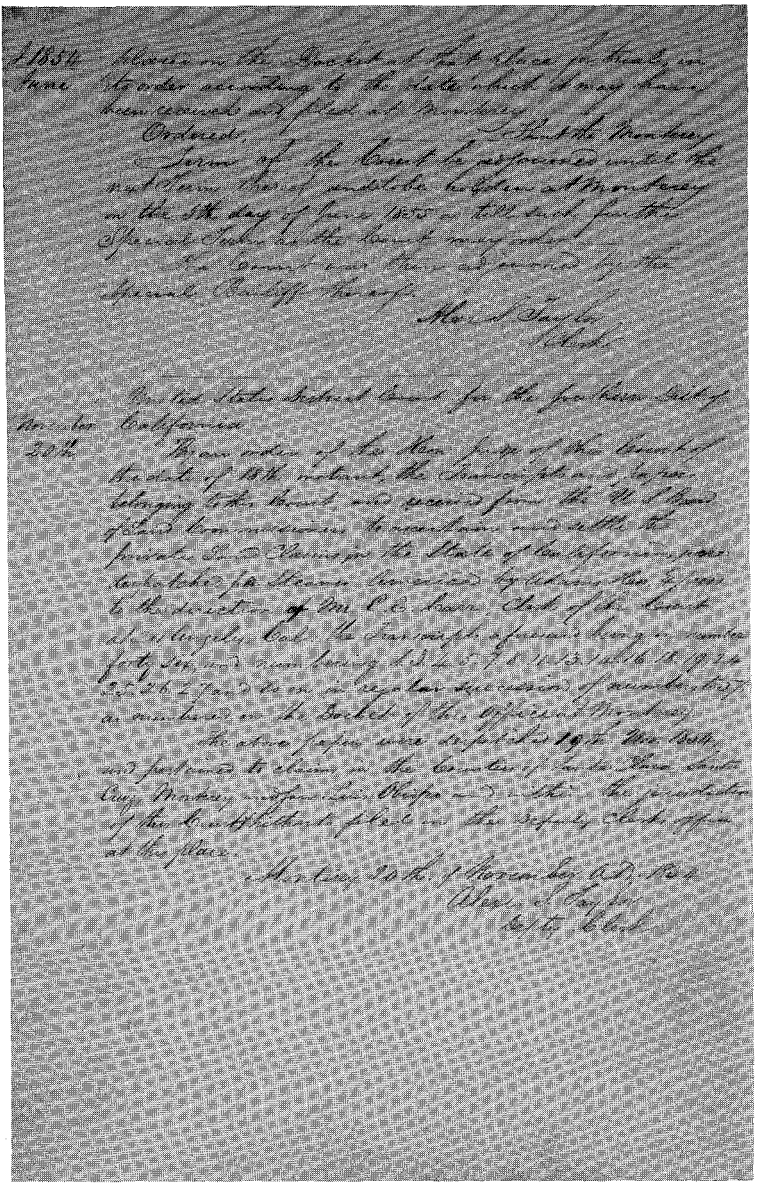
Senator Gwin and his Democratic colleague, [John B.] Weller, were influential with Franklin Pierce, the new president, with respect to appointments in California. Isaac S. K. Ogier had supported Gwin for United States senator; he already had been elevated to the position of United States district attorney, so his appointment was quite logical, and on January 23, 1854, he was elevated to the bench, five days after the passage of the new act.

Careful to be around when needed, Ogier submitted his resignation as United States district attorney to the secretary of state on February 1, and took his oath of office on the following day. His oath was taken in Washington before his friend Thomas H. Crawford, judge of the criminal court of the District of Columbia, and was transmitted to Secretary of State William L. Marcy, as was his resignation from the office of United States attorney made the day before.

[36] Act of January 18, 1854, 10 Stat. 265 (1854).



Minute Book entry for December 15, 1854 confirming the land claim of Augustine Olvera. (National Archives, Pacific Southwest Region)



Under the statute as originally passed, the existence of the land commission was for three years only. However, on January 18, 1854, the business not being finished, the life of the commission was prolonged for another year, and by another act, claimants were allowed to present claims to the commission even after the expiration of the two-year limitation period originally provided for. The life of the commission was extended for another year "and no longer" on January 10, 1855.

About the time Congress seemed in a more liberal mood, and the salary of the judge of the Southern District, then $2,800, by the act of February 17, 1855 was increased to $3,000, almost reaching that of the Southern District of New York, where the salary at that time was $3,750. The judges in California always received special consideration because of the supposedly high cost of living in the remote region.

On March 2, 1855[37] a circuit was established to include only the state of California, to be known as the Circuit Court of the United States for the Districts of California. By the provisions of the act, the jurisdiction of the district courts of California was restricted to that of the ordinary district courts, except with respect to appeals from the decisions of the Board of Land Commissioners. Sessions were held in San Francisco only. It also provided that the circuit judge could move in on the district judge "from time to time or at any time when in his opinion the business of his own court will permit and that of the Courts of the Northern and Southern Districts shall require" and preside over the district court when hearing appeals from the decision of the Board of Land Commissioners.

On September 20, 1855, Circuit Court Judge M. Hall McAllister sat on the district court bench with Judge Ogier in Los Angeles, continuing to October 5. The two judges went to work in earnest on the land grant cases. During this session, the first case was decided in the Southern District court, other than that involving the steamer *McKim* in Monterey in 1853. McAllister gave an opinion reversing the land commission's decision in the case of Luis Vignes, appellant against the United States, respondent, which sustained the grant. Other decisions followed in rapid succession and the circuit judge entered an order on October 27 designating Judge Ogier to hold the immediately ensuing session in the Northern District at San Francisco because of the illness of Judge Hoffman "according to the act of July 29, 1850." Just why he might not have acted under the act of January 18, 1854, which expressly permitted the substitution, does not appear. This Judge Ogier did, sitting in San Francisco for the last time on November 14, 1855.

[37] Act of March 2, 1855, 10 Stat. 631 (1855).

The act establishing the circuit court was amended by the Act of April 30, 1856 which directed that the circuit court hold two of its four annual sessions in Los Angeles. It was provided in this act that the circuit court shall be presided over by the circuit judge and the district judge "either of whom shall constitute a quorum," and each was vested with the jurisdiction of the circuit court or judge.

Here occurs a lull of more than four years in legislation materially affecting the federal courts in California. By 1860, the validity of nearly all of the grants had been determined so far as the district court was concerned. The highly important task of correctly surveying the boundaries of those whose validity had been confirmed had been the duty of the surveyor general. But Congress thought that the courts too had as well take a hand in this task. So on June 14 of that year,[38] additional authority was given to the district court with reference to the surveys. The court might correct and reform them, with the customary appeal to the Supreme Court. Thus after the grant owner had first faced the ordeal of the land commission, then run the gauntlet of the district court, if not the Supreme Court itself, he found himself exposed to another consuming blast of litigation initiated by any enterprising squatter who was able to employ counsel. Congress did have the grace in 1860 to limit appeals in such cases to the circuit court.

At the same time, Congress seems to have been brought to realize the labor and responsibility involved in the land grant litigation, and the national purse strings were again loosened. The salaries of the judges in California were increased. Not only were they increased, but the increase was made retroactive. There was allowed to the judge of the Northern District such sum as when added to his regular salary would make $6,000 a year, and in the Southern District, $3,500. This salary was made retroactive in the Southern District from the time of the appointment of the judge but was to continue for not more than two years after the date of the act. This windfall voted to Judge Ogier on June 14, 1860, was no doubt welcome, for he was at the time supporting a gold mine in Holcombe Valley ["Hokum" Valley, according to the wits of the day] in San Bernardino County, and was probably enabled to install the three *arrastres* on his mine.

Under the original Act to Establish the Judicial Courts of the United States, passed in 1789, it was the duty of the secretary of state to distribute the laws enacted by Congress and to issue commissions to United States officers. As time went on this seemed to draw to it other related duties, such as applications for office, pardons and reprieves, and the like, which continued to a late day. The secretary of the treasury was charged with the

[38] Act of June 14, 1860, 12 Stat. 33 [1860].

disbursement, receipt, and examination of all public accounts. As a result, the administrative affairs of the federal courts were handled by the departments of state and treasury until the Department of the Interior was established in 1849.[39] This act provided that the supervision of the accounts of marshals, clerks, and other officers of the courts, theretofore exercised by the Treasury Department, be given to the Department of the Interior.

When the secretary of the interior took over, he found that the laws regulating the fees of the court officers were "obscure, conflicting and as a whole, incomprehensible."[40] In this same document he recommended the establishment of a "Department of Justice" which would control the accounts of the judiciary.

Notwithstanding the existence of the Department of the Interior, and doubtless because of the fact that the issuance of commissions to United States officers was still the duty of the secretary of state, that department seemed recognized as the proper authority for such matters at least as late as the appointment of Judge Ogier in 1854. The Department of the Interior, however, did supervise the accounts of court officers until the Justice Department was established June 22, 1870. It was then provided that the supervisory power of such accounts by the Department of the Interior be transferred to the attorney general's office. As a matter of fact, the State Department was not relieved of the duty of issuing judicial commissions until August 8, 1888, when that duty was formally transferred to the Justice Department.

ERSKINE M. ROSS

Although the bill to restore the court of the Southern District became a law in 1886, no judge was appointed until January 15, 1887, when a commission was issued to Erskine M. Ross, recently resigned from the supreme court of California. Grover Cleveland was president and, naturally, the appointment went to a member of his political party.

Judge Erskine M. Ross looms large in the legal history of California, first as a judge of the supreme court of the state, then on the federal bench. He is remembered from his work in the old circuit court as well as in that of the district. He was born in El Pre on his father's plantation in Culpepper County, Virginia, June 30, 1845. He attended Virginia Military Institute, graduating as a cadet in the summer of 1860. When the Civil War commenced, the cadets were all called up under the command of Stonewall Jackson

[39] Act of March 3, 1849, ch. 108, 9 Stat. 395 [1849].

[40] *Report of Secretary of the Interior to the President,* November 29, 1851 [no source given].

and, later, under General Lee. He returned to the institute before the war closed, and was part of the Confederate army at the time of its surrender in 1865. Having an uncle, Cameron Erskine Thom, prominent at the bar in Los Angeles, he came to California at his suggestion, reaching San Francisco on May 16, 1868, and Los Angeles on May 19. The town then had about 5,000 people. Ross began the study of his profession in the office of his uncle, becoming a lawyer of recognized ability and standing. He married Inez Bettis in Los Angeles in 1874.

On his first essay in the political field, he was elected to a three-year term on the supreme court under the new constitution in 1879. He was re-elected in 1882 for a term of twelve years. In the spring of 1884, he concluded to resign and resume the practice of law in Los Angeles. When news of his intended resignation was given out, a protest was entered, petitioning him to retain his position on the bench. One hundred and one lawyers, all leaders of the California bar, assured him, "Your devotion to the duties of the high office; the marked ability, strict impartiality, love of justice, respect for public and private rights, and the unflagging industry which have characterized your judicial career," moved them to beg him to remain on the bench. He was so pleased that he remained for another year, when again it got out that he was intending to resign. This time the press of California without exception regretted the action. Again he reconsidered, but only until the next election, so that a successor might be elected. He persisted in his resignation, which took place October 1, 1886.

Immediately on his resignation, he formed a partnership with Stephen M. White to continue the practice of law. When the district judgeship was created, J.D. Bicknell was the most favorably mentioned for the place in Los Angeles. He was a prominent member of the Los Angeles bar, and in every way available, recommended by Ross himself. However, supposedly through the advice of Justice Field, who knew Ross' capabilities and standing as a judge, and through that of others influential in California, Cleveland appointed him. The National Archives reveal that John P. Irish of Oakland, important in Democratic affairs of that day, certified Ross as "of the highest judicial character, therein surpassed by no man on this side of the continent." He accepted the federal appointment. His commission is dated January 13, 1887, and his official oath was taken on February 5 following.

Judge Ross is remembered in connection with his trial work in both district and circuit courts. The jurisdiction of the two was so similar, little distinction can be drawn. Circuit Justice Stephen J. Field of the United States Supreme Court sat with him on the circuit court first on August 8, 1887, and frequently thereafter. The business of both the circuit and district courts, apparently not the least according to the minutes, included hearing the accounts of

the United States attorney, the clerk, and the marshal, where proof was required every six months that the services charged had been performed, etc. Judge Field sat with Ross on August 13, 1889, immediately before taking the trip to San Francisco, which resulted in the tragic death of Judge [David] Terry.

Important decisions by Judge Ross, while sitting as a circuit judge, included what were known as the "Scripper Cases." Here, with the discovery of oil on government land in Kern County, enterprising oilmen sought to acquire the land by the use of what was known as government script.

Under the act of June 4, 1897,[41] anyone holding a title in fee to land within the boundaries of a national park or forest reserve, might convey the same to the government and obtain the right to an equal area of government land wherever located. This was to be done through the agency of the land department, of course. It so happened that no one had thought the land along the Kern River worth acquiring for agricultural purposes prior to the discovery of oil in that area. All favorable locations were occupied under the placer mining law, and diligent prosecution of the work, in the hope of the discovery of oil, was commenced. The scrippers — that is, owners of the right to secure government land through the medium of the script — attempted to acquire the title to such lands by means of this script. Notwithstanding absence of diverse citizenship, the action was brought in the circuit court.

On the passage of the act of February 18, 1895, which added a third judge of the circuit court, Ross received the appointment. His last service on the bench of the district court was on February 25, 1895. This gave the Ninth Circuit three circuit judges. Ross died December 10, 1928, having retired a few years earlier. He bequeathed to the American Bar Association $100,000 to be safely invested, the annual income paid as a prize for the best discussion of some subject to be suggested by the association.

APPENDIX
THE LAND GRANTS

At this period [circa 1850], the only business in prospect before the district court for the Southern District was that in relation to the Spanish and Mexican land grants of California. Under the treaty with Mexico, February 2, 1848, generally known as that of Guadalupe Hidalgo, California was ceded to the United States. Property rights of every kind belonging to Mexicans were to be inviolably respected as if belonging to citizens of the United States. When the immigration of 1849 began, the Americans used

[41] Act of June 4, 1897, 30 Stat. 36 [1897].

to the freedom of the boundless West, looked with incredulous surprise at the great stretches of the best land in California owned by single individuals, grantees of the Mexican and imperial Spanish governments. The United States population had a poor opinion of the native Californians anyway and were not at all sure that the latter were anything but aliens with rights little better than the native Indians.

Nor was this estimate confined to the California population. The belief that the lands claimed under grants were, nevertheless, part of the public lands of the United States and should be disposed of as other portions of the public domain, except where grants could be established in rigid and literal adherence to the laws under which they were claimed, crops out in the first important dissent [on these matters] in the United States Supreme Court. Justice Daniel, dissenting in the Arguello case, condemns the confirmation of the Fremont, Reading, and Ritchie grants as,

> Subversive alike of justice and of the rights and the policy of the United States in the distribution and seating of the public lands...by inciting and pampering a corrupt and grasping spirit of speculation and monopoly.

He, too, has a poor opinion of much of the population of the late Spanish dominions in America:

> Sunk in ignorance, and marked by the traits which tyranny and degradation, political and moral, naturally and usually engender.

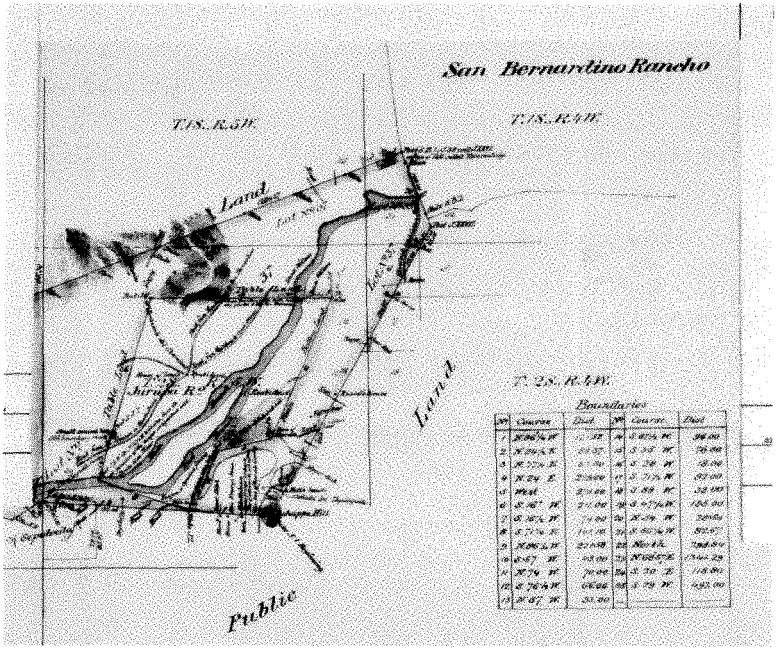
The squatters, "the honest citizens of small means" who settled on the grants in defiance of the rights of the owners, of course condemned the confirmation of the grants as inexcusable monopoly, notwithstanding the plain guarantee of the peace treaty with Mexico. Senator [William] Gwin introduced a measure which provided that where a settler in "good faith" had located on land within the boundaries of the grant, claiming it as part of the public domain, he should be protected in this claim and the grant owner compensated by an additional area of public land adjoining his grant. It is not difficult to see the effect of such an act. Whoever may have gotten up the iniquitous measure, Senator Gwin did introduce it — the only act of his long career that, justly considered, seems questionable. Congress declined to pass the bill.[42] The enterprising settlers proceeded naturally to "squat" upon these favorably situated vacant lands in complete disregard of the rights of the grant owners. Inevitably disputes arose both in and out of

[42] Cong. Globe, 24th Cong. [no page]

court, resulting in bloodshed and violent disorder.

Such was the spirit of the times even as late as 1861, that, after the title to the Chabolla grant, situated adjacent to San Jose, had been litigated through all the courts and sustained by the United States Supreme Court, the squatters still refused to move. They ignored writs of possession. A posse, formed by the county sheriff to aid him in evicting them, refused to assist that officer. "Settlers' leagues" paraded the streets of the city, nearly all armed, proclaiming defiance of the powers of the district court, even trailing a small cannon. District Judge McKee announced to the Santa Clara County Bar that he refused to preside in a community that offered armed resistance to the process of the court, and adjourned the session.[43]

The most pressing problem confronting Congress with relation to California, immediately upon its admission, was to set up some machinery that would adjudicate the validity of the land titles. Serious riots and other disturbances were even then in progress.



Court exhibit map of Rancho Jurupa, formerly owned by Don Abel Stearns in contest with the Southern Pacific Railroad Company, ca. 1870. (National Archives, Pacific Southwest Region)

[43] Hall, *History of San Jose*, supra note 12 at 285. The district court mentioned is that of the state of California under the constitution of 1849 and is not to be confused with the United States district court.

The second session of the Thirty-first Congress began on Monday, December 2, 1850. Senator Gwin immediately introduced a bill for the appointment of a commission to decide upon the validity of all grants in the state. The bill was vigorously opposed in the Senate by Thomas H. Benton of Missouri. Perhaps the force of his opposition was somewhat lessened by reasons of the fact Colonel Fremont, his son-in-law, had recently purchased the Mariposa grant from Juan B. Alvarado, the original grantee. The debate indicates, however, that the bill proposed by Gwin embodied the generally held opinion of the leading men in California at that date. Just how unselfish this opinion was is uncertain. The bill was roundly condemned by many. The Los Angeles *Star*, in its first issue of May 17, 1851, denounced it as an injury to the holders of recognized titles and contrary to the spirit of the Mexican treaty. The *Star* conceded that it might have been proper for the United States to bring an action to test the validity of any grant supposed to be spurious but to require that the owners themselves should be compelled affirmatively to establish the validity of grants that they had actually occupied for many years and whose genuineness was entirely unquestioned, was an oppressive and unwarranted burden. The act was passed, however, and became a law on March 3, 1851.[44]

For the purpose of ascertaining and settling private land claims in the state of California, it provided a board of three commissioners to continue in office for three years. By its provisions, every person claiming lands in the state under the title derived from the Spanish or Mexican governments had to present it to the commission, together with the documentary evidence and testimony of witness on which he relied in support of his claim. Fine business of lawyers!

By many writers, most in fact, this law is condemned as unjust to the grant owners, violative of the guaranties of the treaty, and measure of great oppression and injustice. It is difficult to see, however, how any other method could have been provided. The injustice did not lie in the law itself, for it was not greatly unfair to require that the owners furnish at least *prima facie* proof of their title. Had the hearings been carried on within the spirit of the treaty, and in recognition of the customs and ages of the times, no great injustice would have resulted. This was not done. The avaricious squatters in their endless harassing of grant holders, had as their chief ally none other than the government of the United States of America.

The Californians themselves had no lawyers. They needed none. That luxury had not become a necessity until the coming of the Americans. While a complete judicial system for California was

[44] Act of March 3, 1851, ch. 41, 9 Stat. 631 (1851).

set up by the Mexican government, it seems never to have been in operation beyond the alcaldes or possibly courts of first instance. Jails were practically nonexistent. The Indians were flogged, the white culprits fined. Ordinary disputes were tried before the alcalde, whose judgments were swift and sure. The alcalde's silver-headed cane, borne by authoritized messenger, answered the purpose of summons and was effective.[45]

Walter Colton, made alcalde at Monterey immediately upon the American occupation in July, 1846, in his *Three Years in California*, says of the jurisdiction of the court:

> It involves every breach of the peace; every case of crime; every business obligation and disputed land title within the space of three hundred miles. From every other alcalde court in this jurisdiction there is an appeal to this and none from this to any higher court... There is not a judge on any bench in England or the United States whose power is so absolute as that of the alcalde of Monterey.

With the American occupation came American laws. On April 13, 1850[46] the legislature of California, after an investigation of the merits of the civil law as compared with the common law, adopted the latter as the rule of procedure. The committee report on the subject is to be found as an appendix to some of the editions of the first of California *Reports*. The legislature had a few weeks previously adopted a state judicial system in most respects as it exists at the present time. When the hearings before the land commission began, it was evident that lawyers were necessary, and here appeared a feature of the land commission act that perhaps was not contemplated at the time of its adoption, at least not by the Mexican population. There was little money in circulation in the country. Those of the original grantees who held their grants, and they were very many, had only land and cattle. Lawyers' fees could be paid only in portions of these. All too often did it happen that little was left to the original owner after the long legal road was ended, first before the commission, then the district court, and often before the Supreme Court in Washington, D.C.

Take the case of Gabriel Ruiz,[47] an appeal from the decision of the board was made automatic. The appeal existed whether the parties desired it or not, and this provision continued throughout the administration of the act. The appellant, however, had six months in which to make up his mind whether or not he would

[45] Hall, *History of San Jose*, supra note 12 at 170.

[46] 1850 Cal. Stat. 219.

[47] *Gabriel Ruiz, et al. v. United States*, Southern District No. 60, Land Commission, No. 430.

prosecute the appeal. The Calleguas grant had been in existence for some twenty years. The land had been occupied peaceably and continuously; improvements had been erected and the genuineness of the grant had never been questioned.

Here appears the iniquity of the land grant administration in California, for with an obstinacy difficult at this late day to understand, unless attributable to the political influence of the squatters, the government in this case as in nearly all others, instead of accepting the decision of the commissioners, based as it was on undisputed evidence in a case entirely free from suspicion, persisted in its appeal.

The attorney general of the United States, having taken six months in which to ponder the certified copy of the record before the land commissioners, gave notice on December 5, 1854, a year and one month after the decision of the land commission, that the United States of America, notwithstanding the provision of the act that the proceedings before the commission should be governed by the Mexican treaty, "the law of nations, the laws, usages and customs of the government from which the claim was derived, the principles of equity and the decisions of the Supreme Court of the United States," would prosecute its appeal; he therefore filed his petition before the district court to reverse the action of the commission.

This petition undoubtedly made Gabriel Ruiz open his eyes in wonder, but when the grounds on which the government sought to forfeit this recognized grant were made known to him, he was, after a manner of speaking, flabbergasted. Ten separate grounds were stated, all equally fatal to the grant and all set forth in the manner of the most carefully drawn technical pleading. In the first place, Gabriel Ruiz showed no valid title to the land and the government denied that he had any; the land being within ten leagues of the sea coast, was not open to colonization anyway, and there was no evidence that the supreme government of Mexico had waived this provision; it was mission land; the conditions of the law of 1834 were not contained in the grant; the grant was not made on stamped paper and the description was void for uncertainty; the time within which the grantee could cultivate it was not stated; the signature of the members of the deputation of California were not proved to be genuine and the government denied that they were genuine; and for a seventh reason (this was in 1854), there was no evidence that Antonio Rodrigues, the justice of the peace who put Ruiz in possession in 1849, was such a justice; and so forth and so on until the ten separate grounds were stated. "Law, it is wonderful!" the astounded Gabriel thought.

A trial in the district court followed. Judge Ogier, in an order of a single page, confirmed the grant, December 3, 1855. But still Gabriel had no rest. Appeals to the Supreme Court apparently were taken

in all cases. This appeal was taken and was pending until October 31, 1856, almost another year, when the attorney general made up his mind not to prosecute the appeal and it was abandoned.

Before a patent was issued, the grant had to be surveyed. Still Gabriel's cup of bitterness might not be dry, for, before this was done, an industrious Congress gave to anyone aggrieved by a survey the right to litigate its accuracy in the United States district court. This exposed the already distracted grant owner to a fresh barrage of trials and appeals. Happily, Gabriel ran this last gauntlet unscathed and by the 17th of September, 1862, if he were still alive, he knew that his land had been correctly surveyed and his title was perfected.

The net result of the settlement of the private land grants in California was perhaps not unfair on the whole, insofar as the validity of the grants themselves was concerned. Certain specific cases such as that of General Vallejo, Captain Sutter and the famous New Almaden quicksilver mine case have aroused unending criticism. Many claims admittedly were shadowy. According to figures generously furnished [to] me by J.N. Bowman of Berkeley, from his truly exhausting studies of the California private land grants, 809 cases were actually filed before the Board of Land Commissioners. With the few additional cases that appeared for the first time in the district court and those presented before Congress itself by special act of that body, a grand total of 848 land grant cases were filed before the American tribunals. Out of this total number the decision of the Board of Land Commissioners was final in 202 cases. The decision of the district court was final in 522 cases and that of the circuit court in nine, while 113 cases went to the United States Supreme Court before final decision was reached, and two were decided in Congress itself. The atmosphere most favorable to the grant claimants was in the district court, where 553 grants were confirms and sixty-three rejected. The final result, substantially accomplished after fifteen years of litigation, was that 613 grants were confirmed and 200 rejected; failure to prosecute, mergers, and other factors accounted for the remainder of the 848.

As shown heretofore, under the original act of September 28, 1850, no circuit court was provided for California, but the district courts were given circuit court jurisdiction. This situation continued until March 2, 1855,[48] when a circuit court was created, and the district courts were by the same act deprived of their circuit court jurisdiction. Appellate jurisdiction from the district courts was given to the circuit court. The circuit was not numbered but was known as the Circuit Court of the United States for the Districts of California. Matthew Hall McAllister was

[48] Act of March 2, 1855, 10 Stat. 631 (1855).

made the circuit judge. He served until his resignation on April 2, 1862. The vacant circuit judgeship was offered to Stephen J. Field, then on the California Supreme Court. He declined it, but while the matter was pending, the position on the Supreme Court [of the United States] was offered to him, which he accepted.[49] The bench of the circuit court in California remained vacant until the position was abolished the next year by the act of March 3, 1863. By that act the Tenth Circuit was created, made up of California and Oregon. The circuit court was presided over by the associate justice of the Supreme Court and the district judge in California and Oregon — Justice Field, Judge Hoffman of California, or Judge Deady of Oregon.

California therefore was without a circuit judge so-named from 1863 to 1870. The sessions of the circuit court, eliminated in Los Angeles, February 19, 1864, were by the same statute directed to be held at Monterey and at San Francisco, three times a year. Justice Field first presided at the circuit court session in the fall of 1863, with Judge Hoffman of the district court. At this session, Asbury Harpending and his associates were tried for seditious activities around San Francisco Bay in aid of the Confederacy. Each judge separately charged the jury. Such was the practice. Outside the District of Columbia no circuit judge existed in the United States up to 1869. On July 7, 1866,[50] California was placed in the Ninth Circuit, where it remained.

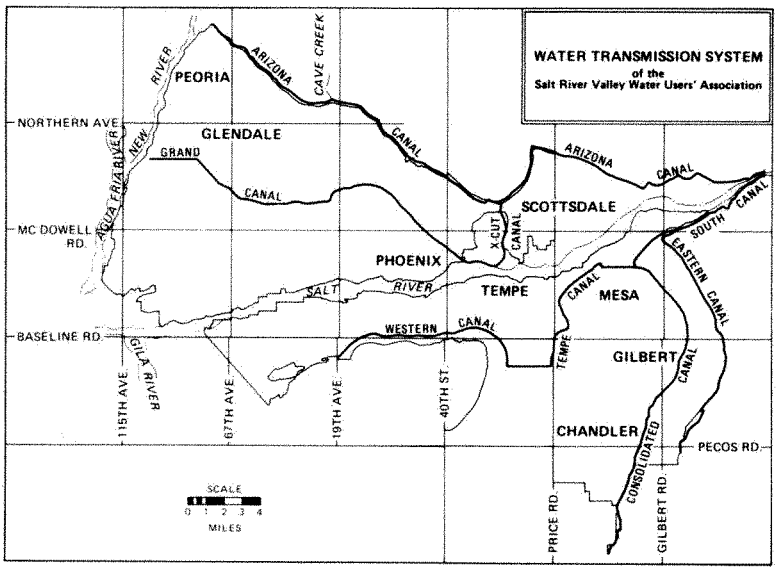
Then on April 10, 1869, it was provided that a circuit judge should be appointed for each of the nine circuits with the same powers as the Supreme Court justice of the circuit. The court could be held by any of the three, the justice, circuit judge, or district judge, or by either of the first two and the district judge. The act was an attempt to relieve the growing pressure on the Supreme Court.

Lorenzo Sawyer was the first circuit judge appointed under the new act in California. He was commissioned January 10, 1870, by President Grant, and served until September 7, 1891. Circuit court sessions were discontinued at Monterey, June 16, 1874.[51]

[49] Haskins, *The Argonauts of California*, supra note 2 at 141.

[50] Act of July 7, 1866, 14 Stat. 200 (1866).

[51] Act of June 16, 1874, 24 Stat. 308 (1874).



The boundaries of the Salt River Project, as determined by the Articles of Incorporation in 1903, were unchanged in the mid-1980s. Map showing the Phoenix-area towns served by the various canals within the project. (Salt River Project)

THE MARRIAGE OF LAW AND PUBLIC POLICY IN THE SOUTHWEST: SALT RIVER PROJECT, PHOENIX, ARIZONA

BY KAREN L. SMITH AND SHELLY C. DUDLEY

The growth of metropolitan Phoenix from a dusty village located near the Salt River to its present status as one of the United States' largest metropolitan areas has been something of an anomaly. There was no major railroad connection to Phoenix until the 1920s, no harbor or navigable river to spawn commerce, and no major trails or crossroads to lure tired travelers to stop. One could wonder easily why anyone would have stayed in the late 1860s, when the Salt River Valley was first settled by non-Indians, and California beckoned. Yet farmland was rich and would grow numerous crops if there were artificial means of putting water on the soil. The water supply in the Southwest is uncertain; desert rivers are flashy and unpredictable, sending torrents of water to flood the land one year, and the next providing insufficient amounts to grow crops. The key to sustained growth had to be insuring the water supply through water storage projects and allocation schemes derived from the law and social organizations.[1]

Although Arizona entered the United States as a territory when Mexico signed the Treaty of Guadalupe Hidalgo in 1848, it was part of the New Mexico Territory, not an independent area. As a result, it was governed in its early years by a territorial law firmly grounded in Spanish and Mexican law and custom. The public *acequia* or community ditch law of the new territory reflected two

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[1] There are numerous books and articles which detail the founding of Phoenix, Arizona. See, for example, Bradford Luckingham, *Phoenix: The History of a Southwestern Metropolis* (Tucson, 1989); Luckingham's *The Urban Southwest* (El Paso, 1982); and Marshall Trimble, *Arizona* (New York, 1977).

basic characteristics from the Spanish-Mexican period: the primary dedication of water to agricultural purposes, and the focus of water usage around the institution of the community ditch. The latter allowed owners of irrigable acreage to take water from the most convenient source and conduct it across the property of others, subject to paying just compensation for lands used. All rivers and streams were declared to be public in nature, and an elected overseer or *mayordomo* apportioned the waters with "justice and impartiality." The main canal of a community was public property, and as Ira Clark has written in his seminal book on water in New Mexico,

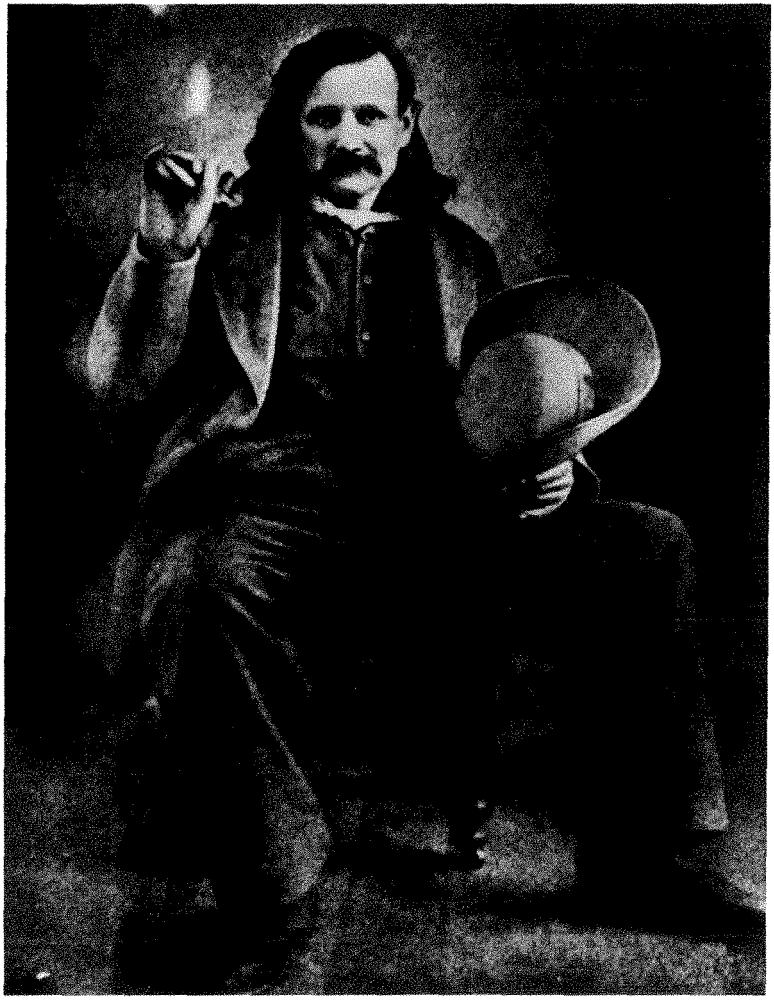
> The position of the resident was uncomplicated; his mere presence in the community assured him the right of common use and at the same time imposed upon him responsibilities for assisting in the upkeep and conforming to the rules governing water use.[2]

Arizona separated itself from New Mexico in 1863, and the Territory of Arizona adopted its own set of water laws which drew heavily on the public *acequia* laws New Mexico Territory enacted in 1851-52. Known in Arizona as the Howell Code, the first set of laws governing water provided for the following:

1. All rivers, creeks and streams of running water were public, and applicable to purposes of irrigating and mining;
2. Rights in *acequias* should not be disturbed nor their courses changed without consent of the proprietors;
3. All inhabitants owning or possessing arable and irrigable lands had the right to construct public or private *acequias*, obtain the necessary water from any convenient river, creek or stream of running water, and have the exclusive right to so much of the water as they needed;
4. In years of scarcity of water, owners of fields had preference of the water for irrigation, in order of priority of acquiring title to or occupation of the lands.[3]

[2] Ira G. Clark, *Water in New Mexico: A History of Its Management and Use* (Albuquerque, 1987) 25.

[3] Wells A. Hutchins, "Certain Features of the Water Law of Arizona," (November 1, 1936) 63-64, unpublished typescript, Salt River Project Research Archives, Tempe, Arizona.



Jack Swilling, with twelve other men, dredged a prehistoric canal to irrigate the Salt River Valley. (Salt River Project)

ARIZONA AND PRIOR APPROPRIATION

When the Arizona territorial legislature adopted the Howell Code, most of the irrigation development was in the San Pedro and Santa Cruz Valleys in southern Arizona under the ditches of Spanish-speaking people. By the late 1860s, however, the immigration of non-Spanish speaking people to Arizona altered the Spanish-Mexican public *acequia* institutions.

As the Salt River Valley experienced initial non-Indian settlement in the late 1860s, its settlers' principal pursuits were growing hay to sell to the United States Army's Camp McDowell and grain crops of wheat and barley to trade with the mining districts to the north. Jack Swilling, an ex-Confederate wagonmaster, was the first to act upon the potential which the abandoned irrigation ditches of the prehistoric Hohokam Indians held for successful farming. With twelve men and $10,000 in capital he dredged the "community ditch" from one of the prehistoric canals by 1868.[4]

Swilling's canal venture was organized as a cooperative association. The community ditch represented a community of interest, of rights and obligations among those contributing to its construction and maintenance. The basis of one's share in the irrigation community was generally the proportionate part of his land served by the ditch. The more land served water from the ditch, the more work or capital the owner of the land put into the canal's maintenance. In order to meet expenses, assessments in the form of cash or labor performed on the canal or headgates were levied against the shares each farmer held in the venture.

While cooperative in its construction and in some ways similar to the Spanish institution of the public *acequia*, the Swilling Ditch Association was unlike many other cooperative irrigation ventures in that it was not communal. Decisions about the amount of water to be used to irrigate crops, defined as the duty of water, were made individually, determined by a settler's claim to the river.

By the time Swilling cut his ditch in 1868, the "Colorado Doctrine" regarding ownership in running water was the practice in much of the Anglo-Saxon West.[5] The Colorado Doctrine fully repudiated the riparian doctrine, which allowed the owners of land adjacent to running water to have the right to use the water;[6] rather, it set forth unequivocally the concept that first in time of

[4] Karen L. Smith, "From Town to City: A History of Phoenix, Arizona, 1870-1912," (M.A. thesis, University of California, Santa Barbara, 1978); Earl Zarbin, "Salt River Valley Canals:1867-1875," unpublished typescript, 1980, Salt River Project Research Archives, Tempe, Arizona.

[5] *Yonker v. Nichols*, 1 Colo. 551; 8 Morr. Min. Rep. 64.

[6] The English colonists who emigrated to the eastern United States brought English common law with them. The law regarding water use is based upon riparian rights: the right to use the water belongs to the owner of land on the banks of the natural watercourse or stream. A riparian owner has the benefit of the stream as it passes through his land for all reasonable and useful purposes on an equal basis with other riparian landowners. This theory of law worked well in England because the region is humid and rainfall provides the necessary water for agricultural production. It works well in the humid regions of the United States for the same reasons. It does not work well in the arid West because without rules for dealing with water scarcity, inadequate precipitation constrains agriculture.

use is first in right.[7] The Colorado Doctrine has become known popularly as the doctrine of prior appropriation.

The doctrine of prior appropriation promotes the goals of settlement and development of the West because it allows for a water right to be treated as a property right. While the actual ownership of the water resides in the public, an appropriator of water is a usufructuary, enjoying the right to use the water and draw from it all profit, utility, and advantage. The water right then becomes security for the heavy capital investment necessary to develop mineral resources or build irrigation projects. The priority feature of first in time, first in right, acts to limit growth to the capability of the existing water supply.[8]

Communal associations usually determined beneficial uses and made provisions for sharing a water shortage, but the Swilling group in Phoenix did not, relying instead on individual exploitation of the environment. Similarly, communal associations usually developed a wide variety of administrative, economic, and social organizations centered upon irrigation; the Mormons of Utah provide a useful example. Early settlers in the Salt River Valley, however, seemed more concerned with personal rights and economic success than with group obligations and community benefits.[9] The Swilling Ditch served as a model for several new canals dug during the 1870s, and these were also primarily cooperative ventures. The population of the Salt River Valley was about 11,000 in 1890, a considerable rise from the 235 people noted in the 1870 census. As more land was brought into cultivation during the 1880s, most of the canal companies in the valley became corporate associations issuing capital stock. The casual operation and maintenance procedures and the informal management of water shortage and distribution of the early ditch days were no longer enough for the increasing numbers of people using the canals. More business propositions than agricultural tools, these corporate canal companies leased and assigned water

[7] *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113 (1855) provided the initial framework for the use of water during California's gold rush, establishing the principle of first in time, first in right. California law included, however, a mixture of riparian and prior appropriation principles based upon what was then California custom and public policy. This was established further in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674 (1886).

[8] Karen L. Smith, "Water, Water Everywhere, Not...," in Beth Lucy and Noel J. Stowe, eds., *Arizona at Seventy-Five: The Next Twenty-Five Years* (Tucson, 1987) 151; Lenni Beth Benson, "Desert Survival: The Evolving Western Irrigation District," 2 *Arizona State Law Journal* (1982) 378-79.

[9] George Strebel, "Irrigation as a Factor in Western History, 1847-1890," (Ph.D. dissertation, University of California, Berkeley, 1965); Karen L. Smith, *The Magnificent Experiment: Building the Salt River Reclamation Project, 1890-1917* (Tucson, 1986) 4-5.

rights within the service limits of an irrigation ditch with little regard for the primacy of prior appropriation. Water certificates gradually became common currency, as more and more of them found their way into the hands of persons who were not landowners, but were instead money lenders collecting on defaulted loans. The significance of the shift from cooperative to corporate irrigation can be seen largely in the changing purposes of the canal companies; making a profit from land sales, not controlling the water supply or farming, became the motive force.[10]

While building on both the Colorado Doctrine and the New Mexico public *acequia* laws, the Arizona territorial legislature nevertheless created broad statutes regarding water which left many details open to interpretation; the specifics of water law were left to the courts. As long as the population remained sufficiently small so that all water users could take advantage of the natural supply available in the desert rivers and streams, the vaguely-worded Howell Code was adequate. When the population grew to a point where it pressured the ability of the running water to supply all users, lawsuits began to occur and the territorial judiciary began to apply specificity to the statutes. In the 1888 case of *Clough v. Wing*, the Arizona high court defined the measure and limit of the appropriative right to be beneficial use; an appropriator of water for irrigation is entitled to so much water as is necessary to irrigate his land and is bound to make a reasonable use of it.[11] Earlier, in 1874, the court had ruled in *Campbell v. Shivers* that a water right could be forfeited if it was not used within a five-year period.[12] Additionally, the court took on the task in *Dyke v. Caldwell* of answering the question of reasonable diligence involved in appropriating water, between the time an appropriator initiated the right and actual diversion and beneficial use.[13]

The concept that water was appurtenant to the land was not part of local custom regarding water use. There were eight major canal companies within the Salt River Valley and the majority of them held to the practice that water rights were corporate and "floating" or not attached to any land. In 1887, Michael Wormser, a large landowner and capitalist living within the valley, brought suit against the Salt River Valley Canal Company, one of the corporate irrigating companies which ascribed to floating rights. Wormser owned the San Francisco Ditch, and was a principal in

[10] E. F. Young, "Early History of the Salt River Project," unpublished typescript, 1917, Salt River Project Research Archives; Strebel, "Irrigation as a Factor," supra note 9; Smith, *The Magnificent Experiment*, supra note 9 at 5.

[11] *Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453 (1888).

[12] *Campbell v. Shivers*, 1 Ariz. 161, 25 Pac. 540 (1874).

[13] *Dyke v. Caldwell*, 2 Ariz. 394, 18 Pac. 276 (1888).

the Tempe Irrigating Company. Essentially, the suit asked the court to determine the rights of the eight canal companies then operating and taking water from the Salt River.

Joseph H. Kibbey was the judge in the *Wormser* case for the Second Judicial District of the Territory of Arizona. In reviewing federal statutes and case law, as well as decisions from other western states and territories, Kibbey determined that a canal company did not hold a right to appropriate water. As Kibbey wrote in this important decision for Arizona, popularly known as the Kibbey Decree,

> ...a canal company whether it be a mere association of persons who may or may not be land owners, or may consist indifferently of both, whether it be a corporation or whether it be an individual, cannot become the owner of water. The total amount of water that a canal company, as well as either an individual or an association of landowners may divert from a stream in this territory, is the amount they devote immediately to a beneficial purpose. In other words, the amount of water that a canal company may divert from a river is the amount of water needed by those to whom water can be supplied through such canal and to whom such water is actually supplied and no more.[14]

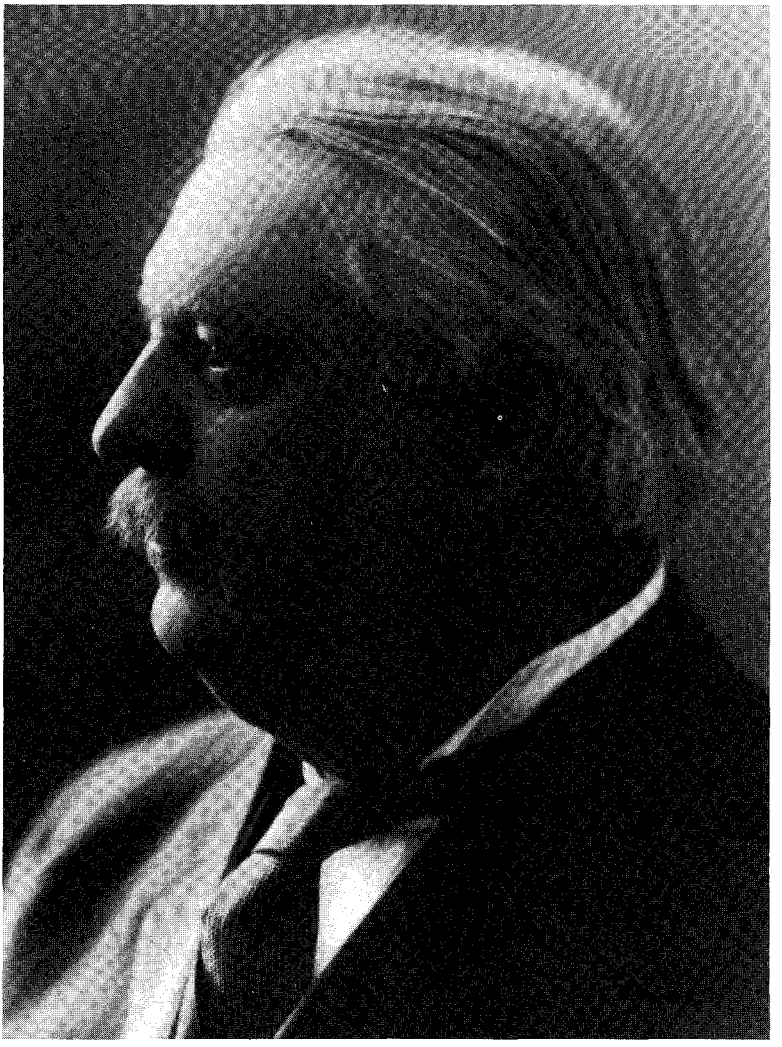
Perhaps more important for the Salt River Valley and Arizona Territory was Kibbey's ruling on the appurtenancy question. If, as Kibbey reasoned, a man could not be an appropriator of water unless he had a beneficial use for it, it followed that land ownership was necessary for the best development of the land and use of the water.[15] His evidence for this lay primarily in the Desert Land Act of 1877, wherein Congress authorized individuals to acquire 640 acres of public land at twenty-five cents per acre provided the land was irrigated within three years.[16] Kibbey wrote:

> ...when one under the Desert Land Act has appropriated water for the reclamation and cultivation of desert land, he cannot segregate it, as it is appurtenant to the land. And what is said here of lands acquired under the Desert Land Act applies equally to lands acquired under any of the provisions for the sale of public lands...I have come to the conclusion, then, that

[14] *M. Wormser, et al., v. Salt River Valley Canal Company, et al.*, Number 708 in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Maricopa (March 31, 1892) 34, Salt River Project Research Archives, Tempe, Arizona.

[15] *Wormser v. Salt River Valley Canal Company*, supra note 14 at 43.

[16] Act of March 3, 1877, ch. 107, 19 Stat. 377 (1877).



Judge Joseph Kibbey not only settled the landmark water case of *Wormser v. Salt River Valley Canal Company,* but helped write the Articles of Incorporation for the Salt River Valley Water Users' Association. (Salt River Project)

> the right of appropriation of water for the cultivation of land becomes permanently appurtenant to that land, for without it the land is worthless; without the land the appropriation could not have been made.[17]

[17] *Wormser v. Salt River Valley Canal Company,* supra note 14, at 46.

Judge Kibbey's decision suggested a radical change in the methods of acquiring and maintaining a water right in Arizona Territory. Trading in water rights as if they were certificates of stock was invalid under the Kibbey Decree. Yet the canal companies largely ignored his ruling as they continued to barter water certificates in their efforts to realize sizeable profits from the undeveloped arid lands of the valley. The early concentration on barley and wheat crops gave way in the 1880s to diversification: peach, apricot, fig, and citrus trees stood next to fields of alfalfa, clover, and grain. As community and corporate boosters publicized nationally the quality of Salt River Valley citrus and other crops, and with the completion of the railroad spur from Maricopa to Phoenix in 1887, which enabled the Salt River Valley to market its products via the mainline Southern Pacific railroad, more settlers came to build homes and farm. The canal companies were interested more in land speculation than water distribution, however, and additional legal challenges to their methods of taking water dominated court agendas throughout the 1890s.[18]

PLANNING FOR WATER STORAGE

More water was claimed from the Salt River and its tributaries than flowed normally, and it was clear that the inadequate supply hindered the canal companies' plans. Exaggerated estimates of the amount of acreage which could be cultivated potentially ranged as high as 500,000 acres. Speculators, boosters of the valley's major town, Phoenix, and businessmen were "too ambitious to be satisfied with conditions that [fell] short of the best possibilities."[19] Instead of focusing on the law, which prescribed how water rights were limited, all were agreed that some project to increase the available water supply for the valley was necessary; if there was enough water for everyone, there would be no need to be concerned about shortages. There was little consonance among the various canal companies, citizen groups, and landowners, however, as to how this should be accomplished. The major problem in the valley, in addition to a penchant for individual rather than communal action, was a lack of investment capital.[20]

Just as in the early part of the nineteenth century, when there

[18] Smith, *Magnificent Experiment*, supra note 9 at 5-6. Other significant court cases heard throughout this period included *Biggs v. Utah Canal Company*, 7 Ariz. 331, 64 Pac. 494 (1901); *Slosser v. Salt River Valley Canal Company*, 7 Ariz. 376, 65 Pac. 332 (1901); and *Gould v. Maricopa Canal Company*, 8 Ariz. 429, 76 Pac. 598 (1904).

[19] S. M. McCowan, Chairman, Phoenix and Maricopa County Board of Trade, April 10, 1900, Salt River Project Research Archives, Tempe, Arizona.

[20] Smith, *Magnificent Experiment*, supra note 9 at 6.

were no large pools of venture capital in the eastern United States, so there was relatively little in the West in the latter part of the nineteenth century. Arizona and the Salt River Valley, like much of the West, found itself "under the sentence of economic colonialism," dependent on the East to finance its large and significant improvements.[21] Private efforts to construct the large water storage project thought necessary for the Salt River Valley failed, primarily because of the economic depression of the 1890s and the project's estimated cost of $3,000,000.

Even if the money had been available, consolidation of all the lands in the valley under a private reservoir company was unrealistic. Those with old water rights were entitled to the present supply of water, and although water storage would insure that amount, these landowners were reluctant to be treated on the same terms as new settlers in the valley; as junior appropriators, new settlers benefited the most from an increased water supply.

Believing that the valley had reached the limits of its agricultural development without an increased water supply, many valley farmers used the opportunity of the Fifth National Irrigation Congress meeting in Phoenix in December 1896 to call for government reclamation. There was no clear vision, however, of what sort of aid valley landowners favored. Some landowners wanted a modification of California's Wright Act (1887), which allowed for the formation of tax-levying irrigation districts. Under this scheme, the national government would advance money to state-recognized irrigation districts to reclaim desert lands. Others wanted a variation of the Carey Act (1894), which authorized presidential allocation of one million acres within each state's public lands for irrigation, reclamation, settlement, and cultivation; surplus funds were to be used to reclaim other lands within the state.[22] The federal government was ambivalent about a national reclamation program. Despite the enthusiasm John Wesley Powell of the United States Geological Survey generated in 1878 when he published his report on the arid lands and stated that a great number of farms could be carved out of the desert if water were made available, Congress was divided regarding its role. Various subcommittees travelled throughout the West, hearing testimony on the practicability of constructing water storage reservoirs in the arid region. Complaints that the federal government was disrupting private efforts to build profitable irrigation works persuaded some congressmen that federal reclamation was a state's

[21] John W. Caughey, "The Insignificance of Frontier in American History," *Western Historical Quarterly* 5 (1974) 13-14.

[22] The Wright Act, ch. 34, 1887 Cal. Stat. 29; Smith, *Magnificent Experiment*, supra note 9 at 9-10, 14; the Carey Act, Act of August 18, 1894, ch. 301, 28 Stat. 372 (1894).

activity. Others recognized that the government had always granted aid to special interests, from financing eastern turnpikes and canals in the early nineteenth century to the granting of vast tracts of the public domain both to canal projects and to the transcontinental railroads. The concept of social overhead — that some improvements are worthwhile to society despite their failure to return an investment — underlay much of the government's previous efforts in financing internal improvement projects; a canal was usually more useful to the public than to the owners. Finally, the issue of national reclamation was a "turf" problem within the federal bureaucracy. The U.S. Army Corps of Engineers challenged the primacy of the Geological Survey in the reclamation cause when it declared that the problem of constructing works for water storage was one with which only the federal government could cope, and most particularly, one which belonged to the Corps of Engineers.[23]

Within this public policy vacuum, landowners within the Salt River Valley determined that the only way they could provide for water storage was "to build the dam ourselves and own it and control it."[24] Their leaders were men well-versed in the law and public policy: Joseph Kibbey, Benjamin Fowler, and George Maxwell.

Kibbey's reputation as a water lawyer and jurist had grown large since his arrival in Arizona Territory in 1888. The son of an Indiana attorney general and judge, Kibbey practiced law in the Midwest until poor health forced him to move West. He came to Arizona as the attorney for the Florence Canal Company, one of the oldest canal companies in the territory. Family connections persuaded President Harrison to appoint Kibbey to the territorial supreme court in 1889. He handled several water cases in that capacity, most related to mining, until he decided the *Wormser* case in 1892, which propelled him to the forefront of the debate regarding water law, irrigation, and water storage.[25]

Benjamin Fowler was not a lawyer, but a former book publisher who had received a classical education at Andover and Yale University. Like Kibbey, Fowler came west in 1889 for his health. He quickly was regarded as a leader within the burgeoning community of Phoenix and the Salt River Valley, and was sought after to participate in committees and clubs, being elected

[23] Institute for Government Research, *The United States Reclamation Service* (D. Appleton & Co.) 9-10; Stanley R. Davison, "The Leadership of the Reclamation Movement, 1875-1902," (Ph.D. dissertation, University of California, Berkeley, 1951); Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (New York, 1975).

[24] Phoenix, *Arizona Republican*, March 20, 1901.

[25] John S. Goff, *Arizona Territorial Officials: The Supreme Court Justices, 1863-1912* (Black Mountain Press, 1975) 120-23.

president of the Arizona Agricultural Association, the Phoenix Board of Trade, the Associated Charities of Phoenix, and the Phoenix Chamber of Commerce. Fowler was a skillful negotiator, and valley residents found him persuasive enough to smooth over the rough feelings which existed between many of the political factions. They turned to him naturally to help solve the water storage problem. The Salt River Valley Water Storage Committee, formed in 1900 with the goal of securing a storage dam by persuading Congress to authorize local bonding, elected Fowler its president.[26]

Unlike Kibbey and Fowler, who moved to Arizona for health reasons and had personal motivation to work on the Salt River Valley's water supply problem, George Maxwell was a leader on the national stage. The foremost irrigation propagandist, Maxwell was director of the National Irrigation Association, a lobbying organization financed largely by railroad and mining interests. A former California water lawyer, Maxwell approached reclamation of the arid lands with a crusader's zeal. He had attended the Fifth National Irrigation Congress in Phoenix in 1896, and was eager to help the Salt River Valley acquire storage facilities to make certain the water supply.[27]

The Water Storage Committee of the Salt River Valley proposed to purchase the Tonto Basin reservoir site, located approximately forty miles northeast of the valley between the Sierra Ancha and Mazatzal mountains at the confluence of Tonto Creek and the Salt River, and all the canal systems of the valley, for approximately $6,000,000. The committee authorized Benjamin Fowler to travel to Washington, D.C. to lobby Congress to enable Maricopa County, of which Phoenix is the center, to bond itself for $10,000,000.[28]

While in Washington, Fowler met frequently with Maxwell and solicited his advice on how the Water Storage Committee should proceed. Maxwell told Fowler that valley landowners needed to organize themselves into a landowners' cooperative water company which would take control of water rights and the land under the canals. This would eliminate the continuing problem of floating water rights and the questionable role of the canal companies in distributing water. Perhaps more important, Maxwell introduced Fowler to Frederick Newell, the chief hydrographer for the Geological Survey. Both Newell and Maxwell were supporters of a federal reclamation program where the national government would build water storage facilities to irrigate the arid lands west of the

[26] Smith, *Magnificent Experiment*, supra note 9 at 16.

[27] *The Taming of the Salt* [Salt River Project] 62-65.

[28] Smith, *Magnificent Experiment*, supra note 9 at 14-18.

Construction work on the Arizona Canal, 1908. (Salt River Project)

100th meridian and landowners would repay the government at no interest. Fowler became persuaded that a federal reclamation project was the answer to the valley's water storage problems.[29]

FEDERAL RECLAMATION

The Reclamation Act, or Newlands Bill, which Senator Francis Newlands of Nevada first introduced in 1901, was designed to overcome the limits of private enterprise by creating an arid land reclamation fund, consisting of receipts from the sale and disposal of the public lands in the sixteen states and territories of the arid West.[30] Narrowly defeated in 1901, Senator Newlands reintroduced the measure in the next Congress. A significant change occurred, however, when Leon Czolgosz, an anarchist, assassinated President William McKinley in September 1901; Vice-President Theodore Roosevelt assumed the office. Roosevelt was a friend of George

[29] Ibid. at 17-18.

[30] Texas was included as one of the reclamation states in 1905-1906, making seventeen states eligible.

Maxwell and other proponents of federal reclamation, and in his first message to Congress, indicated his support for a national program as outlined in the Newlands Bill.

On June 17, 1902, Congress passed Senator Francis Newlands' National Reclamation Act. The bill provided for the creation of a reclamation revolving fund to finance irrigation projects; for the withdrawal of public lands for irrigation works and any land susceptible to irrigation, except as provided under the homestead laws; the limitation of water developed through federal reclamation to resident landowners of 160 acres or less; and importantly, that the right to use water acquired under the terms of the National Reclamation Act is appurtenant to the land irrigated, with beneficial use the basis, measure, and limit of the right. Just as Judge Kibbey had looked to the Homestead and Desert Land acts as authority for his decision in the *Wormser* case, so, too, did Congress see the basis for a federal reclamation water right in those two pieces of legislation.[31] Earlier attempts to limit federal reclamation to homesteaders and applicants for ownership of public lands failed due to George Maxwell's persuasive argument that federal reclamation should be for homebuilding, public or private. Maxwell convinced President Roosevelt to allow owners of private land to participate in the government's program, and the president instructed Secretary of Interior Hitchcock to modify the provision on public lands. The Salt River Valley, where land ownership was essentially private with few public lands remaining for settlement, would be eligible for a federal project, however, due to the lobbying efforts of George Maxwell.

While the criteria for determining reclamation project eligibility was yet to be formulated, Frederick Newell, now chief engineer of the Department of Interior's new Reclamation Service, thought it important that a project fulfill the financial provisions of the Reclamation Act, that the technical engineering and hydrologic aspects be good, and that the water rights in the area under consideration be adjudicated. The Salt River Valley's project, or the Salt River Project as it was coming to be known, fit the technical profile perfectly, but the other two criteria appeared elusive. The long-held traditions of prior appropriation, individual determination of beneficial use and the duty of water, and the reluctance of old settlers with vested rights to share with the newer residents of the valley were part of its irrigation heritage. To be successful in securing a federal reclamation project, landowners in the Salt River Valley would have to overcome petty differences and unite in creating both a common water rights policy and an equitable means of financing the project.[32]

[31] National Reclamation Act, Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1902).

[32] Smith, *Magnificent Experiment*, supra note 9 at 24.

In August 1902, leaders of the Salt River Valley Water Storage Committee called a mass meeting of all the valley's citizens to discuss an action plan for securing a federal reclamation project. They had as an adviser George Maxwell, who understood well what Washington, D.C. would require. To get started, they formed a Water Storage Conference Committee of twenty-six members representing all the canals in the valley and the major cities and towns. Their task was to create an organization of water users based upon the reconciliation of local irrigation principles and practices with the federal law. While Maxwell knew the federal requirements, no one knew the local situation as well as Judge Joseph Kibbey, and he was solicited to write the draft articles of incorporation for this new water users' organization.[33]

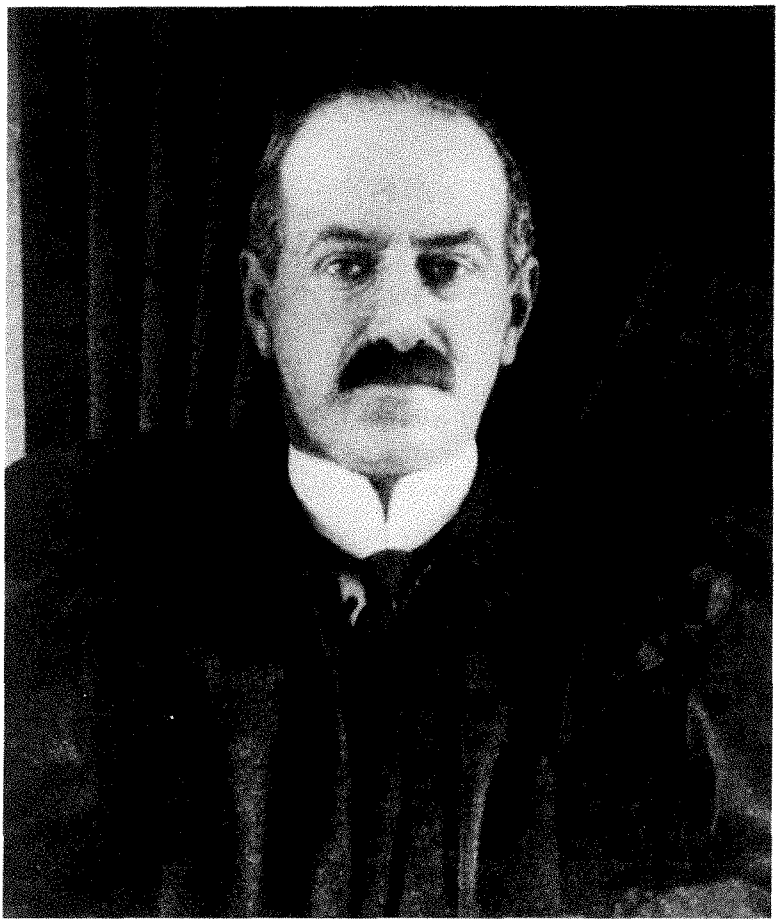
Kibbey and the Water Storage Committee's executive committee identified several key principles to be "those on which the people could unite and at the same time accord with the spirit of the National Irrigation Act."[34] They were as follows:

1. The association of water users should include all water users with vested rights;
2. Those vested rights include the following conditions:
   a. the basis of an appropriation from public sources is land ownership and residency;
   b. beneficial use of the water shall be the measure and limit of the appropriation;
   c. the right to the appropriation is appurtenant to the land;
   d. the rights to appropriation are severally prior — first in time is first in right.
3. The natural flow of the Salt and Verde Rivers which supplied the Salt River Valley should be under the same rules of use and distribution as stored water, uniform and subject to priority;
4. The proportionate costs of the government works, and the cost of operations and maintenance should be equal to all;
5. The powers of administration should be centralized within the association;
6. The powers of the association should be distributed so that there is a maximum of responsibility and a minimum of personal benefit;
7. Ample security should be provided the government by making the assessment charge a lien against the land.[35]

[33] Ibid. at 29-30.

[34] Joseph H. Kibbey, "Brief on the Articles of Incorporation of the Salt River Valley Water Users' Association," [May 25, 1903] 39, unpublished typescript in Salt River Project Research Archives, Tempe, Arizona.

[35] Ibid. at 39-42.



U.S. District Court Judge Edward Kent presided over the case of *Hurley v. Abbott* which established the water rights for the Salt River Project. (Salt River Project)

The articles of incorporation for the Salt River Valley Water Users' Association anticipated problems between local custom and federal reclamation law where there was no precedent. By using beneficial use as the measure and limit of the water right, Kibbey attempted to limit the possibility that a landowner with prior rights to the natural flow would waste water by taking both that water and project-developed water. For example, a farmer with prior rights to five acre-feet of natural flow water would not be able to take an extra foot of project-developed water to irrigate his alfalfa crop if the amount of water required for proper irrigation was five acre-feet. Similarly, priority of right lost its singular

importance in determining water rights as the Salt River Valley Water Users' Association attempted to create the conditions for equality among its members.[36] Kibbey explained how this would come about:

> If the amount of water available from all sources shall be sufficient to properly irrigate the number of acres of land which the Secretary of Interior shall estimate can be irrigated therefrom, then all distinctions between the rights of shareholders cease and become of no importance.[37]

Without a guarantee that the available water supply would be adequate, however, Kibbey ensured that the articles provided that the doctrine of prior appropriation would govern if there was nothing but natural flow.

Frederick Newell and the Reclamation Service were impressed with the final articles of the Salt River Valley Water Users' Association and recommended them as models to others throughout the West contemplating forming organizations to contract with the federal government for a reclamation project.[38] On the strength of the articles and the great success the valley people had in organizing themselves, the secretary of interior on March 11, 1903 accepted the recommendations of Newell and other federal officials and selected the Salt River project as one of the first five federal reclamation projects.[39]

Although selecting Salt River as a federal project, the secretary of interior still expected water users in the Salt River Valley to settle the water rights issue. In 1905, in parallel with the government beginning construction of the Roosevelt Dam, Patrick T. Hurley initiated a friendly suit for the Salt River Valley Water Users' Association to determine the rights to use the water of the Salt River and its major tributary, the Verde River *(Hurley v. Abbott).* Presiding over the case was Edward Kent, chief justice of the Arizona territorial supreme court. Many attorneys in the Salt River Valley thought that Hurley's lawsuit would resolve only his claim, not the 4,800 others listed as defendants. They advised their clients accordingly not to file answers, as a final adjudication of

[36] Smith, *Magnificent Experiment*, supra note 9 at 35.

[37] Kibbey, "Brief," supra note 34 at 51.

[38] F. H. Newell to Secretary of Interior Hitchcock, February 20, 1904, Records of the Bureau of Reclamation, Record Group 115, Salt River 1902-1919, series 261, National Archives, Washington, D.C.

[39] Charles D. Walcott to Secretary Hitchcock, March 7, 1903, Records of the Secretary of Interior, Record Group 48, Lands and Railroads Division: Reclamation, National Archives, Washington, D.C. Secretary Hitchcock penned his approval on Walcott's letter to him.

the rights to the Salt River and its tributaries could not be had. Judge Kent suggested the United States intervene in the case as that would technically compel all the parties involved to assert their rights; since the United States had purchased the northside canal system on behalf of the Salt River Valley Water Users' Association, it was an interested party. Additionally, the United States claimed certain amounts of water for two Indian reservations, the Salt River Pima-Maricopa and the Fort McDowell Yavapai. The United States did intervene in June 1907, and the case went to trial in 1907-1908.

Judge Kent decided the case March 1, 1910. In the first major adjudication of water in the Salt River Valley since the *Wormser* case, Kent used the principles of prior right, beneficial use, and appurtenancy of water to the land to govern his determination of rights. He divided the lands of the valley into three classes, based upon the number of years they had been irrigated. The United States used Judge Kent's land classification scheme as the basis for its determination of which lands within the valley were eligible for federal reclamation benefits. Since 1910, the Kent Decree has governed water use within the valley.[40]

Coincidentally, the United States Reclamation Service completed construction of Roosevelt Dam, the keystone of the Salt River Project, in the same year that Judge Kent ruled in *Hurley v. Abbott*. With the dam in place, the water storage project that Salt River Valley residents had sought since the end of the nineteenth century was a reality. The federal government had used the Salt River Project as a model for other reclamation projects throughout the West, not only for its articles of incorporation, but for its engineering design and construction techniques as well. When the United States Reclamation Service engineers saw the potential for the development of hydroelectricity at the Roosevelt Dam, engineers on other reclamation projects also began to seek out those possibilities on their own projects. The situation at the Salt River Project, where a great potential existed to generate hydroelectricity to sell to neighboring towns and mines and aid in the repayment of the project, helped persuade Congress that a general policy regarding the sale of hydroelectricity from federal projects

[40] *Patrick T. Hurley v. Charles F. Abbott, et al.*, No. 4564 in the District Court, Maricopa County, Arizona (1910), Salt River Project Research Archives, Tempe, Arizona. In 1976, the Salt River Project petitioned the Maricopa County Superior Court to begin adjudication proceedings for all claimants to water from the Salt and Verde Rivers and their tributaries to settle Indian claims to water based upon the reserved rights doctrine. This was expanded to include the Gila River Basin system, of which the Salt River is a tributary. Proceedings continue slowly and the court is preparing in 1989-90 to select a master to hear testimony.

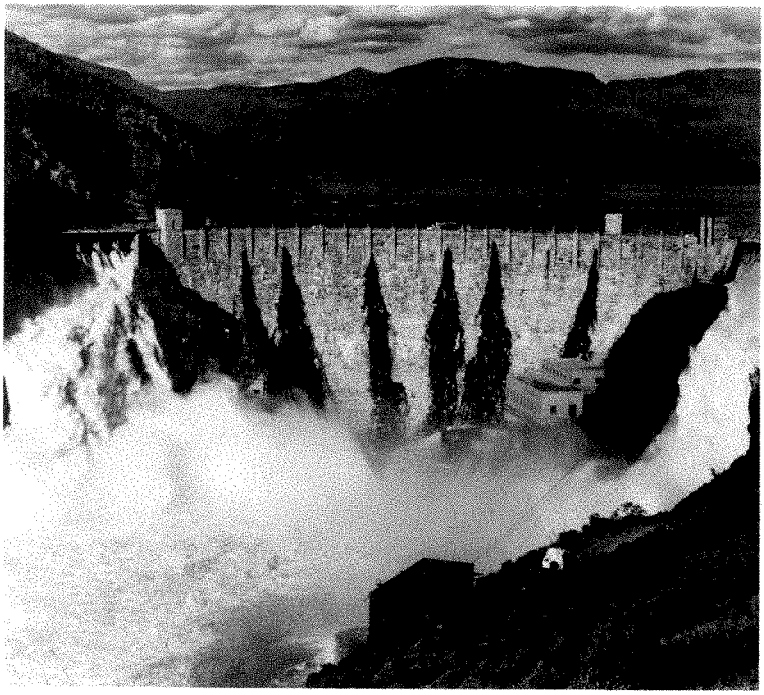
was warranted.[41] The Salt River Valley Water Users' Association helped to shape subsequent federal reclamation legislation primarily because it made federal reclamation work on the Salt River Project while other water users' organizations were less successful. Extension of the time for repayment of the federal loan, modification of the final amounts due the government, and disposition of the proceeds from the sale of hydroelectricity are just a few of the areas where the Salt River Project provided the operative example. Finally, in September 1917, the secretary of interior turned over the operation and maintenance of the Salt River Project to the Salt River Valley Water Users' Association. The government retained title to the dam and the other facilities it built or purchased for the Salt River Project, and the secretary of the interior also retained the right to review and approve any changes the Association might make in the project. Essentially, however, the Salt River Project belonged to the water users.[42]

Shortly after the Association took control of the Salt River Project, the state of Arizona completed in 1919 a major modification of the water code. The legislation created the office of the State Water Commissioner whose mission was to have general control and supervision of the waters of Arizona. The commissioner oversaw all new applications to appropriate water and the construction of non-federal reservoirs, and was vested with the authority to reject any application if it conflicted with existing water rights. Until 1919, a water user was forced into court to protect his prior rights from subsequent diversions of water.

The 1919 Water Code authorized the water commissioner, upon receiving a petition from a water user, to determine the relative rights of various claimants to the waters of a stream. After investigating the facts of the case, the commissioner submitted his determination of rights to the Superior Court of Maricopa County in which a majority of the water users resided.

[41] The Town Sites and Power Development Act, Act of April 16, 1906, ch. 1631, 34 Stat. 116 (1906), provided for the sale of surplus power generated on federal reclamation projects.

[42] Agreement between the Salt River Valley Water Users' Association and the United States of America, September 6, 1917, Salt River Project Research Archives, Tempe, Arizona. Other projects which fared less well than Salt River were the Truckee-Carson in Nevada; the North Platte in Nebraska; and the Milk River in Montana. See Smith, *Magnificent Experiment*, supra note 9 at 147-55 for a brief discussion of these projects. Federal reclamation legislation supplementing the original National Reclamation Act (1902) included the Reclamation Extension Act, Act of August 13, 1914, ch. 247, 38 Stat. 686 (1914); Sale of Electric Power on Salt River Project, Act of September 18, 1922, ch. 323, 42 Stat. 847 (1922); the Omnibus Adjustment Act, Act of May 25, 1926, ch. 383, 44 Stat. 636 (1926); and the Reclamation Project Act of 1939, Act of August 4, 1939, ch. 418, 53 Stat. 1187 (1939).



1911 photo of Theodore Roosevelt Dam which serves as the major reservoir for the Salt River Project. (Salt River Project)

CONCLUSION

More than two million people live in the Salt River Valley in 1989, and the region has become one of the largest in the Southwest. It supports a wide variety of economic activities, from the manufacture of electronics to professional football and basketball teams. Irrigated agriculture is now a small part of the valley's economy. Yet more than one hundred years ago, a small, dedicated group of farmers dug a ditch, put in a headgate, and irrigated fields of grain, citrus, and cotton to provide the foundation for the metropolitan Phoenix area's phenomenal growth. As long as there was water for everyone, problems related to shortages were academic. The law in Arizona Territory was liberally worded, providing more opportunities in its vagueness than structure and constraints. When more and more people came to farm and pressured the carrying capacity of the rivers, however, so that there were insufficient amounts of water for everyone to farm, people turned to the courts for redress. In California, farmer challenged

miner and the first American law of the West was an odd mixture of English common law and the Spanish-Mexican tradition of the public *acequia*. Soon thereafter, other courts in the West began to describe a law unique to the region and its aridity, and the doctrine of prior appropriation replaced English common law nearly everywhere west of the 100th meridian. Throughout the nineteenth century, the courts in the states and territories of the West provided the detail about who could take water, at what time, and how it was to be used; elected representatives to state and territorial legislatures took note when revising water legislation.

The most significant marriage of public policy and water law came when the federal government decided to enter the reclamation business, and to connect local irrigation and water use practices with broader federal principles regarding the sanctity of small land ownership and beneficial use. Nowhere was this more apparent than on the Salt River Project. The local water users in the Salt River Valley were the architects of the federal reclamation era with their model articles of incorporation, which provided a merger of local and federal interests, their initiative in developing hydroelectricity as a significant by-product of reclamation, and their ability to negotiate with federal officials. The Project helped to create new law, in the Kent Decree, and in several pieces of supplementary legislation to the National Reclamation Act of 1902.

The key to sustained growth in the Salt River Valley and the metropolitan Phoenix area was the Salt River Project. It was the product of technological achievements in water storage and success in the legal-public policy nexus.

THE NORTHERN DISTRICT OF CALIFORNIA AND THE VIETNAM DRAFT

BY JOHN T. MCGREEVY

Anyone driving across the Bay Bridge from San Francisco to Oakland in the late 1960s could easily see evidence of the American involvement in Vietnam. On the left, a ship might be departing from the naval base at Treasure Island, while overhead a plane might pass by carrying troops away from their last American stop. Glimpses of the University of California at Berkeley campus to the north would hint at the campus protests troubling the area, and a quick trip into Oakland could include a drive past the pickets and draft counselors clustered outside the enormous U. S. Army induction center.

The relationship between the Bay Area and the Vietnam War, however, can be explored in other, less predictable places. In particular, a peek into courtrooms and law offices scattered throughout the area would have made a visitor aware of the Selective Service cases then swamping the United States District Court for the Northern District of California. Recent studies of the Vietnam War draft have generally ignored these local courtrooms and lawyers. Instead, historians and policymakers have emphasized how, in various degrees, the Selective Service agency, the Johnson and Nixon administrations, and Congress cautiously attempted to reform the draft in response to the political turmoil of the 1960s.[1]

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[1] The most comprehensive recent study of the draft is George Q. Flynn, *Lewis B. Hershey: Mr. Selective Service* (Chapel Hill, 1985). Also helpful are John Whiteclay Chambers, II, *To Raise An Army: The Draft Comes to Modern America* (New York, 1987); Lawrence M. Baskir and William A. Strauss, *Chance and Circumstance: The Draft, the War, and the Vietnam Generation* (New York, 1978) [hereinafter cited as Baskir and Strauss, *Chance and Circumstance*]; and Gus C. Lee and Geoffrey Parker, *Ending the Draft: The Story of the All Volunteer Force*

Unfortunately, an emphasis on national events conceals dramatic changes at the local level. This study examines the Northern District of California, the district viewed by both resistance activists and government attorneys as the national focal point for legal issues concerning the draft. By the end of the 1960s, a staggering volume of cases, a sympathetic bench, and a well-organized bar combined to challenge the implementation of the draft and, by implication, the American involvement in Vietnam.

This legal activity, however, was not without its ambiguities. On the one hand, attorneys and judges in the Northern District did hamper the operation of the draft structure through sophisticated arguments and minimal sentences. Even as student demonstrations briefly stopped the induction process in Oakland, Bay Area attorneys and judges were chopping at the legal roots of the entire selective service system.[2] On the other hand, both radicals and conservatives pointed out that expert legal assistance to any particular group of defendants might simply shift the burden of service to more disadvantaged groups. More important, attorneys unable to win arguments on the war itself focused their energy on loopholes in the archaic draft law. While often successful in the narrow sense of freeing defendants, arguments revolving around the draft law rarely addressed larger issues about the conduct of the war. President Nixon's decision in 1969 to sharply reduce draft calls resulted in the weakening of the already tenuous link between the legal activism surrounding the draft and the larger anti-war movement.[3]

THE BAR AND THE DRAFT LAW

Two articles in the *San Francisco Chronicle* suggest how quickly the Northern District became a national center for resistance to the draft. In a December 1965 feature piece on local draft boards, all of

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(Alexandria, VA, 1977); on protest, see, for example, Michael Useem, *Conscription, Protest and Social Conflict* (New York, 1973), and Nancy Zaroulis and Gerald Sullivan, *Who Spoke Up? American Protest Against the War in Vietnam, 1963-1975* (Garden City, NY, 1984).

[2] For a discussion of the Oakland draft protests see, Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (New York, 1987) 247-55.

[3] Todd Gitlin explains the decline of the anti-war movement by emphasizing President Nixon's decision to scale back the draft, governmental repression, and crucially, the collapse of the student Left. Gitlin, *The Sixties: Years of Hope, Days of Rage*, supra note 2 at 411-19. Godfrey Hodgson argues that the vast majority of Americans were "realists" who opposed the war for what they saw it doing to American society, not because the war itself was immoral. Hodgson also notes that public opinion polls showed that most Americans disliked peace activists more than they opposed the war. Godfrey Hodgson, *America in Our Time: From World War II to Nixon, What Happened and Why* (New York, 1976) 384-98.

the draft board members interviewed promised to give any conscientious objectors (COs) who came before them a scrupulously fair hearing, although one anonymous member added that he had "no stomach for an American who isn't willing to fight — and die if necessary — for his nation." Fairmont hotel owner Benjamin Swig, in his seventeenth year of service on Local Board 36, observed that he could "usually tell" the difference between the true CO and the "fraud who objects only to serving his country." Of course, as the article also noted, Swig rarely engaged in this type of philosophical discernment. Almost all of the COs to appear before San Francisco boards were Jehovah's Witnesses, and they rarely added up to more than thirty per year. "I can't remember the last one we had," said restaurant owner Tom Dimaggio, "It's been a year at least...maybe two. We [local board 45] get a lot of volunteers in our area. I'm proud of that."[4] Dimaggio's confidence only reflected the court figures. In fiscal year 1966, one assistant U. S. attorney, Paul Sloan, handled all of the selective service matters for the government — this included thirty-nine formal criminal cases, but only one actual trial.[5]

Half a decade later, the *Chronicle* reported that men refusing induction in Oakland made up a staggering 38.4% of the nation's total refusals. New Selective Service chief Curtis W. Tarr, in town to meet with the state director and the U.S. Attorney's Office, commented at a press conference that for someone planning to "prepare a primer" on draft resistance in America, "there is no place in the country to come better than Northern California."[6] In testimony before a closed hearing on the draft law before the House Armed Services Special Subcommittee on the draft, Tarr was even more blunt, stating, "Abuse of the law is more common in a few areas of the nation than we can tolerate, and the most crucial region is Northern California. We believe that this is true because violators there have not been convicted in sufficient numbers."

He continued, "...blame rests also with the courts. They have imposed upon [the] Selective Service unrealistic requirements for processing costs. Some judges seem to reflect a definite bias against selective service that is expressed in their action toward dismissal of cases, terms of probation, and sentences to the guilty."

[4] Paul Avery, "Prospects for a Draft Objector," *San Francisco Chronicle*, December 5, 1965, 4.

[5] Paul Sloan, interview with the author, April 13, 1988; U.S. Congress, Senate, Committee on the Judiciary, *The Selective Service System: Its Operation, Practices, and Procedures: Hearings Before the Subcommittee on Administrative Practice and Procedures* (1969) 340 [hereinafter cited as *Selective Service Hearings*].

[6] William Cooney, "Draft Chief's Heat on Reluctant Bay Area," *San Francisco Chronicle*, July 11, 1970, 1, 14.

William Sessions of the Justice Department was equally grim. "We have continually been involved in trying to solve those massive problems out there [San Francisco], and they are massive."[7]

A small group of radical attorneys, many of whom were affiliated with the National Lawyers Guild played a crucial role in creating these "massive problems." Scornful of the traditional San Francisco firms scattered around the financial district, these lawyers' ideology had been shaped by past political and legal battles. Ann Fagan Ginger, the president of the Meikeljohn Civil Liberties Institute in Berkeley, was the daughter of socialist parents from a Midwest college town. During the 1950s, her first husband had been interrogated by members of the House Unamerican Activities Committee; several years later Ginger moved west to Berkeley where she became involved in a number of attempts to link what she viewed as the closely connected struggles for civil rights and civil liberties.[8] Aubery Grossman traced his radicalism back to the labor cases of the 1930s, as well as to the Bay Area HUAC hearings in the 1950s.[9] Along with representing a number of Communist Party members during the McCarthy era, Norman Leonard had also counseled Bay Area labor activists.[10]

To these attorneys, the draft cases provided an opportunity to bring questions of the war's morality and legality before both judges and the general public. To add to the appeal, the young defendants who were the focus of the cases could generate public sympathy through their moral arguments. Even before the caseloads began to skyrocket, these attorneys were clearly working to bring new issues into the courtroom. By 1967, virtually unnoticed by the rest of the legal community, they had developed an imposing array of legal arguments in opposition to the draft. Less than one year after the 1965 *Chronicle* article on local boards, Ann Fagan Ginger authored an article in the *National Lawyers Guild Practitioner* outlining the proper procedures used in an application for CO status. Following a Bay Area workshop on draft law, the same journal published a 1967 special issue dedicated to "the legal problems of human beings trying to free themselves of the war machine" that contained essays on topics ranging from standards of medical and psychological fitness to practical guides

[7] Tarr in *Hearings on the Administration and Operation of the Draft*, before the Special Subcommittee on the Draft, House Armed Services Committee, 91st Congress, 2d Sess. (Washington, D.C., 1970) 12481 [July 23, 1970]; Current FBI director William Sessions in the same document, November 18, 1970, 12847.

[8] Philip Carrizosa, "Profile," *Los Angeles Daily Journal*, June 4, 1984, 1.

[9] Francis J. McNamara, "The Communist Assault on the Draft," *Human Events* 31 (March 1971) 9-12; Aubery Grossman, interview with the author, April 20, 1988.

[10] Norman Leonard, interview with the author, May 11, 1988.

for trying cases under the current Selective Service law.[11] In the same year, Ginger published the first of what would eventually be several editions of her comprehensive guide to the new draft law.[12]

Fortunately for those opposed to the draft, the target of these legal assaults was a uniquely vulnerable American institution. Gallup and Harris polls consistently showed strong support for the draft in the abstract, but an increasing percentage of Americans questioned the operation of the selective service system.[13] Aware of the growing criticism, President Johnson had appointed a federal commission to study draft procedures. The commission, headed by former Kennedy Justice Department official Burke Marshall, issued a report in February of 1967 calling for a draft lottery, an end to student deferments, and greater uniformity in draft procedure. Congressional conservatives were not persuaded, however, and they quickly created their own commission, which not suprisingly recommended only minor tinkering with the selective service system. Thus, when the new draft law of 1967 was passed that summer, the system was left basically unchanged and the decentralized structure remained intact. A frustrated Marshall finally concluded that "the new bill makes the system worse than before."[14]

In fact, despite the power the system held over millions of lives, it remained beyond almost all types of legal remedy. Although the Warren Court had enlarged the rights of immigrants and even juveniles, the draftee still lived in the procedural world of 1940.[15]

[11] Ann Fagan Ginger, "Application for Conscientious Objector Status," *National Lawyers Guild Practitioner* 25:1 (1966) 7-25. The special issue was contained in the *National Lawyers Guild Practitioner* 26:3 (1967).

[12] Ann Fagan Ginger, ed. *The New Draft Law: A Manual for Lawyers and Counselors* (Berkeley, 1967). Significant law review articles also appeared during these early stages, including Ann Fagan Ginger, "Minimum Due Process in Selective Service Cases — Part I," 19 *Hastings Law Journal* (1968) 1313-48, a detailed analysis of draft law procedures; and Charles H. Wilson, Jr., "The Selective Service System: An Administrative Obstacle Course," 54 *California Law Review* (1966) 2123-79. Wilson's article was edited in part by Michael E. Tigar, who later went on to help found the *Selective Service Law Reporter (SSLR)* in Washington. The *SSLR* eventually published 6,000 pages of legal analysis, opinions, and regulations.

[13] As late as January of 1969, sixty-two percent of all Americans in a Gallup poll favored dependence on the draft after Vietnam, but forty-two percent in a Lou Harris survey of March 1969 did think the draft was "unfair." See, Lee and Parker, *Ending the Draft: The Story of the All Volunteer Force*, supra note 1 at 496-99.

[14] Marshall's comments in Richard Gillam, "The Peacetime Draft: Voluntarism to Coercion," in Martin Anderson, ed., and Barbara Honegger, *The Military Draft: Selected Readings on Conscription* (Stanford, 1982) 116; Marshall's report was entitled *In Pursuit of Equity: Who Serves When Not All Serve* (Washington, D.C., 1967).

[15] An extended discussion of the draft law can be found in Ginger, "Minimum Due Process Standards in Selective Service Cases — Part I," supra note 12 at 1313-48.

What had changed was the enormous number of men who were allowed to avoid service by attending college, fathering children, or working in a protected occupation. This elaborate bureaucratic system with its myriad classifications was necessary, in the language of the Selective Service, to "channel" the vast numbers of young men for whom the U. S. Army had no use during the 1950s and early 1960s.[16]

The system's most important feature was its decentralized structure. A central headquarters in Washington, D.C. maintained only a tenuous control over 4,000 local boards staffed by generally white, middle-class volunteers without legal training. These "little boards of neighbors" made classification decisions with the actual force of law, but without any of the procedures generally associated with an administrative or judicial hearing. [The system was one of the few government agencies not clearly judicial or legislative in character that remained outside the provisions of the Administrative Procedures Act.[17]] Courts were prohibited from reviewing local board decisions as long as the decision had "a basis in fact." At no time did registrants have the right to counsel or to a transcript of their hearing, even though, as San Francisco lawyer Malcolm Burnstein argued, "when you take away a man's liberty for two years, you [should] provide him with counsel if he wants it."[18] Men appealing the status granted to them by the local board were not granted a personal hearing by the state appeal board, and only a split decision ensured a petition to the presidential appeal board. Registrants could not transfer their appeal to the federal courts until *after* a refusal of induction, which also meant taking on the risk of a five year sentence along with a $10,000 fine. Alternatively, the registrant could appeal his status after induction into the military, but failure to win the case in court meant a full tour.

The virtue of this system to its defenders was that it protected communities from inflexible federal standards. Early in his administration, President Johnson had used draft apparatus to provide statistical information and support for his War on Poverty, but he soon saw more pragmatic benefits as protests against the war mounted. Using the draft could help ameliorate criticism of the expanded American commitment in Southeast Asia since a reserve call-up would touch more members of the politically powerful middle class. More important, according to General

[16] Only twelve percent of college graduates and twenty-one percent of high school graduates saw service in Vietnam; Baskir and Strauss, *Chance and Circumstance*, supra note 1 at 5, 9; Robert K. Griffith, Jr., "About Face: The U.S. Army and the Draft," *Armed Forces and Society* 12 (1985) 114-15.

[17] Ginger, "Minimum Due Process in Selective Service Cases — Part I," supra note 12 at 1318.

[18] "The Law," *Time*, June 14, 1968, 76.

Hershey, President Johnson viewed the local draft boards as a lightning rod to attract and dissipate protests aimed at national policies.[19]

As lawyers in the Bay Area and across the country began to investigate these previously obscure procedures, they struggled fruitlessly to come up with an administrative parallel. It was as if legal archaeologists had discovered an artifact in the middle of a busy street, but one completely unconnected to the world surrounding it. Other agencies also possessed complex regulations, but the failure to obey them rarely meant a prison term. San Francisco attorney Fay Stender's reaction was typical: "The draft system is a unique phenomenon in American law — absolutely unbelievable."[20] Until late in 1967, however, few arguments concerning the draft could be tested in Northern District courts because the number of cases remained relatively low. In fiscal year 1967, according to Justice Department statistics, only sixty-four criminal cases were commenced in the Northern District. By the end of the year, however, 400,000 American troops had landed in Vietnam, and the Bay Area had already grabbed the national spotlight with the violent Stop the Draft Protests at the Oakland induction center. The next few months saw an acceleration in the number of draft law violations, with the number of criminal cases commencing in fiscal year 1968 reaching 140, and the number of complaints climbing to 1,696.[21]

A significant institutional change, along with the surge in draft cases, helped distinguish the Northern District from others across the nation. In December 1967, attorney Aubery Grossman entered Chief Judge Oliver Carter's chambers with an unusual proposal to provide representation for selective service defendants. Surprisingly, Judge Carter immediately accepted Grossman's offer to form a Selective Service Lawyers Panel (SSLP) made up of attorneys willing to provide counsel for defendants in selective service cases. Even though Grossman "never thought he'd go so far," Carter also instructed the Public Defender's Office to appoint attorneys

[19] Flynn, *Lewis B. Hershey: Mr. Selective Service*, supra note 1 at 229-31. For Hershey's recollection of his conversation with Johnson see Ibid. at 248.

[20] Fay Stender also gained notoriety through her work for Black Panther leader Huey Newton; Peter Collier and David Horowitz, *Destructive Generation: Second Thoughts About the Sixties* (New York, 1989) 21-66; Fay Stender in "The Movement and the Lawyer — Part I," *National Lawyers Guild Practitioner* 28 (1968) 7; Robert E. Carey (former U.S. assistant attorney), interview with the author, May 10, 1988.

[21] The only other judicial districts with that kind of volume were the Eastern and Southern Districts of New York (New York City), and the Central District of California (Los Angeles). By contrast, only 146 complaints were registered in the state of Massachusetts with seventeen prosecutions instituted; in South Dakota, thirty complaints were issued with four prosecutions instituted. *Selective Service Hearings*, supra note 5 at 336-48.

from the lists supplied by Grossman.[22] In so doing, Carter dramatically improved the quality of legal representation available to draft clients. Under the direction of Aubery Grossman and Norman Leonard, the over 200 lawyers who ultimately became affiliated with the SSLP began to accumulate stacks of briefs and rulings on selective service through conferences held in the Bay Area and through national publications. [At Boalt Hall in Berkeley, student activists managed to install a two-unit seminar on draft law as an elective.[23]] This extraordinary compiling of information on the highly technical draft law quickly began to produce results; harried local prosecutors faced a remarkably organized bar. "The government didn't know [much]," recalled one attorney, "[they were] far less prepared for technicalities and [the] sheer number."[24]

Beyond the competence of the defense attorneys lay commitment. While some attorneys saw the cases as simply a new source of income, others clearly viewed the cases as a way to make a personal statement about the Vietnam War. Michael Weiss, fresh out of Michigan law school and himself a member of the Reserves in order to escape the draft, counseled potential draft resisters and spoke at area high schools. Attorney Allan Brotsky argued that since "the finest, most idealistic, most high minded young men [are] charged with serious crimes,"[25] the cases were inherently political. Grossman proudly boasted to a newspaper reporter that no other era had produced "so many young people ready to go to jail for their beliefs."[26]

[22] Aubery Grossman, interview with the author, April 15, 1988; Leonard Anderson, "The Draft Crime Trials," *San Francisco* 11:5 [1969] 30.

[23] Paul Harris, "Writing Worth Reading," *National Lawyers Guild Practitioner* 27:1 [1968] 37; Paul Harris, interview with the author, March 10, 1989.

[24] Michael Weiss, interview with the author, April 5, 1988.

[25] Weiss interview, supra note 24; Allan Brotsky, "The Trial of a Conscientious Objector," in Ann Fagan Ginger, ed. *The Relevant Lawyers: Conversations Out of Court on Their Clients, Their Practice, Their Politics, Their Lifestyle* [New York, 1972] 102 [hereinafter cited as Ginger, *Relevant Lawyers*]. Aubery Grossman in William Cooney, "Draft System on Trial in Mass Court Case Here," *San Francisco Chronicle*, March 28, 1968, 16. Estimating on the number of COs who were "sincere" versus those who used the legal system to escape the draft is tricky. In 1969, Assistant U.S. Attorney Paul Sloan argued that eighty to ninety percent of the defendants were legitimate objectors who simply did not present their claims properly; on the other hand, a more cynical assistant U.S. attorney claimed that he had listened to thirty defendants describe their change of philosophy after they had run over a cat. Jeffrey A. Shafer, "Prosecutions for Selective Service Offenses: A Field Study," 22 *Stanford Law Review* [1969-70] 369.

[26] Leonard Anderson, "The Draft Crime Trials," supra note 22 at 30.

THE DRAFT BEFORE THE COURTS

Law review articles and dedicated attorneys, however, did not decide cases. Better legal arguments were offered in San Francisco, but they also played to a receptive audience. To begin with, the judges of the Northern District were clearly more sympathetic to young men opposed to the draft than were their counterparts across the nation. Why this was so is a difficult question to answer, but sympathy for the draft violators was most prevalent among a group of younger judges — Robert Peckham, Alfonso Zirpoli, and Stanley Weigel — all appointed by Presidents Kennedy and Johnson.[27] While emphasizing that the war did not "control" his opinions, Judge Zirpoli later recalled that he felt "we should never have gone to Vietnam" since it was not "in the interests of our national defense."[28] Zirpoli, in particular, became a favorite of local attorneys. Closely tied to the local Democratic party and the North Beach Italian community, Zirpoli had received his appointment in the first days of the Kennedy administration and quickly earned a reputation as an extraordinarily sympathetic judge. He once noted that "I am not a stickler for strict adherence to the rules. If I can dispose of the matter and the lawyers are all there, I am not going to worry about whether they complied with the rules or not."[29]

This attitude, what one observer called a "harsh, practical realism," meshed nicely with the issues presented in selective service cases.[30] Potential COs who violated the draft laws were a unique brand of defendant. In the words of one local attorney, the judges intuitively viewed them as "good, white, middle-class kids,"

[27] Defense attorneys allegedly vied to stay on the good side of court administrator Maggie Blair for the simple reason that Blair was known to grant the "magic letters — Z, P, or W" [Judges Zirpoli, Peckham, or Weigel] if you happened to be in her favor. Loren Basham, interview with the author, April 2, 1988; Weiss interview, supra note 24; Joel Shawn, interview with the author, April 11, 1988.

[28] The Honorable Alfonso J. Zirpoli, "Faith in Justice: Alfonso J. Zirpoli and the United States District Court for the Northern District of California," an oral history conducted in 1982-83 by Sarah L. Sharp of the Regional Oral History Office, The Bancroft Library, University of California (Berkeley, 1984) 195.

[29] Ibid. at 174.

[30] Stanford N. Sesser, "Forging New Law," *Wall Street Journal*, February 14, 1970, 14. Also see, Shafer, "Prosecutions for Selective Service Offenses: A Field Study," supra note 25 at 374. Shafer found that seventy-two percent of the cases in his sample received probationary sentences. Shafer's statistics are even more impressive when one adds acquittals to the total number of cases. The available literature on federal courts generally is inconclusive. Beverly Cook argues that judges were influenced by public opinion and began to hand out lower sentences; she uses the Northern District as an example of a district with a high probation rate. Herbert Kritzer, by contrast, claims that judges responded to "local environment" more than "public opinion." The debate can be found in Herbert M. Kritzer, "Political Correlates of the Behaviour of Federal District Judges: A 'Best Case' Analysis,"

similar to their own children.[31] Since the judges faced defendants with, generally, no previous convictions, an all-American demeanor, and with no regret concerning their violation, sentencing became a difficult issue. Nationally, the average prison term in fiscal year 1968 of 33.7 months stayed within range of the maximum sentence of five years. The pattern was different in the Northern District. When Assistant U.S. Attorney Paul Sloan suggested to Judge Zirpoli during the 1967 William Ehlert trial that the defendant be given a sentence of two years probation with alternative service, Zirpoli leaped at the chance. "Zirpoli thought that was great stuff," recalled Sloan. Surprised to hear a prosecutor arguing for a lower sentence, Zirpoli told Sloan that "This is your finest hour."[32]

Judge Zirpoli's views on probation and alternative service swiftly became the court standard instead of the exception. All of the nine judges, most of whom would have been termed as moderates, began issuing milder sentences. As early as 1968, two-thirds of the defendants in the Northern District received probationary sentences, while 73.9% of convicted draft defendants nationwide received prison sentences.[33] While not all of the judges would have agreed with Zirpoli's argument that jail sentences should not be handed out unless "you had truly aggravating circumstances or a crime of violence," even the more conservative judges began to conform to the pattern. Paul Harris, the chief clerk for Judge Zirpoli, confidently told a George Washington High School audience in 1970 that "If you file the CO form and the court feels you are sincere, in this district, San Francisco...you will not go to jail." One Oregon judge later opined that "they [the Northern District judges] didn't send anybody to jail."[34] Of the ninety-four

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Journal of Politics 40 (1987) 25-28; Beverly Cook, "Public Opinion and Foreign Policy," *American Journal of Political Science* 21:3 (1977) 567-600; Herbert M. Kritzer, "Federal Judges and Their Political Environments: The Influence of Public Opinion," *American Journal of Political Science* 23:1 (1979) 194-207; Beverly Cook, "Judicial Policy: Change Over Time," *American Journal of Political Science* 23:1 (1979) 208-14.

[31] Harris interview, supra note 23.

[32] Statistics from *Selective Service Hearings*, supra note 5 at 348; Sloan interview, supra note 5.

[33] Statistics in Lawrence M. Baskir and William A. Strauss, *Reconciliation After the Draft: A Program of Relief for Vietnam Era Draft and Military Offenders* (Notre Dame, IN, 1977) 132-33 [hereinafter cited as Baskir and Strauss, *Reconciliation After Vietnam*]; *Selective Service Hearings*, supra note 5 at 347.

[34] Zirpoli, "Faith in Justice," supra note 28 at 192. Paul Harris, "Individual Rights Under the Law and the Legal Position of the Draft Evader or Resistor," a lecture at George Washington High School, May 27, 1970, cited in *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12506; Harris interview, supra note 23; "Bay Draft Cases Transfer Problem," *San Francisco Chronicle*, August 8, 1970, 11; "Judge Gus J. Solomon on the Vietnam War-Era Draft," *Western Legal History* 1 (1988) 280.

draft cases tried between December of 1967 and May of 1969, seventeen men were dismissed and fifty others received no prison sentences.[35] During the summer of 1968, forty-two men were convicted of draft crimes, but only ten of these men served prison terms.[36] Such figures were far enough below the national average to provoke rumblings in Congress about possible restrictions on a minimum length of sentence for selective service violations. Representative F. Edward Hebert of Louisiana commented that "the subcommittee believes it is unconscionable for a court to find a defendant guilty of a violation of the draft law...while at the same time failing to assess a penalty consistent with the violation."[37]

Such figures provoked more favorable reactions elsewhere. By late 1968, draft counselors and attorneys across the nation were advising their clients that California was the promised land. Since a loophole in the Selective Service law allowed men to transfer their registration, it was relatively easy to switch to a draft board in Northern California, refuse induction at Oakland, and have your case heard in the Northern District. The evidence on the number of transfers is sketchy, but most anecdotal accounts suggest that the numbers were substantial. By 1970, in fact, discouraged Selective Service officials were starting to use the term "flooding" in their descriptions of the phenomenon.[38] Gordon Lobodinsky fled Conyers, Georgia, on a motorcycle and arrived in San Francisco because he had heard of the sympathetic judges.[39] One man flew into the San Francisco area from Washington, D.C., spent a week in the area to establish a mailing address, and then returned to the Bay Area for his trial after he refused induction. "The judge gave him probation," remarked Paul Sloan, "just what he wanted."[40] Charles Wingfield, a Georgia black affiliated with the Student Nonviolent Coordinating Committee, came to the Northern District where Judge Wollenberg invalidated the actions of his

[35] Leonard Anderson, "The Draft Crime Trials," supra note 22.

[36] William Cooney, "San Francisco — An Anti-Draft Mecca," *San Francisco Chronicle*, November 6, 1969, 43.

[37] *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12466 (November 10, 1970).

[38] Sloan interview, supra note 5; Larry J. Hatfield, "Oakland Still Tops in Draft Refusals," *San Francisco Chronicle*, March 21, 1971, 7; "Bay Draft Cases Transfer Problem," supra note 34; "Prosecutions Up 10-Fold on Draft," *New York Times*, August 30, 1970, 24.

[39] Bob Baker, "Hell No, They Didn't Go," *San Jose Mercury News*, March 4, 1988, C-2.

[40] John Peterson, "Escape in Oakland —Draft Evaders Go West, Where Judges are Easy Lawyers Sharp," *National Observer*, June 1, 1970, quoted in *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12507.

Leesburg, Georgia, draft board because of racial discrimination.[41] A Los Angeles publication, *Counterdraft*, admonished evaders not to "disclose to the clerk that [the draft objector] has switched his residency to the Bay Area merely to take advantage of the San Francisco situation."[42]

Again, attitudes about the Vietnam War played an important, if difficult to define, role. Along with the rest of the American public, the judges had begun to question America's involvement in Vietnam — less, perhaps, because of moral qualms than out of frustration at how the conflict was tearing at American society. As Zirpoli law clerk Paul Harris noted, "Some of the judges' children now have friends who have refused induction."[43] Judge Zirpoli's own daughter had been involved in the Free Speech movement at Berkeley and opposed the war.[44] Judge Lloyd Burke's son returned home from a tour of duty in Vietnam unenthusiastic about the American involvement.[45]

The special position of Northern District judges, compelled to watch an endless stream of defendants, may have shaped positions on the draft cases. Judge Stanley Weigel halted the trial of Roger T. Alvarado, a campus activist at San Francisco State University, and discussed the issues involved in conscientious objection with Alvarado for forty-five minutes. Convinced that Alvarado was sincere, he then gave him a probationary sentence.[46] Judge Albert Wollenberg, while disavowing any claims to being an "activist" judge, argued that the draft cases "were all part of the terrible mess we were in. I don't think you'd say they affected your ideas about the Vietnam war — except insofar as what they were doing to the people."[47] The unique perspective of the San Francisco judges, forced to observe an endless stream of conscientious objectors and military deserters, also helped the defendants' cause. Judge William Sweigert contrasted the relish he took in sentencing

[41] "Federal Court Finds Evidence of Racial Bias," *American Civil Liberties Union News* (Northern California) 35:2 (1970) 1; *United States v. Wingfield*, No. 43066-ACW (N.D. Cal. 1970).

[42] Los Angeles *Counterdraft* 1 (1968) 13.

[43] Paul Harris, "From Judges Clerk to Community Lawyer," in Ginger, *Relevant Lawyers*, supra note 25 at 318.

[44] Donald Dale Jackson, "Judge Sympatico: Aggressive Compassion in a San Francisco Court," in *Judges* (New York, 1974) 295; Zirpoli, "Faith in Justice," supra note 28 at 188.

[45] Shawn interview, supra note 27; Harris interview, supra note 23.

[46] Leonard interview, supra note 10; *United States v. Alvarado*, Crim. No. 41656 (N.D. Cal. 1970), 2 *Selective Service Law Reporter* 348 (1970).

[47] Albert C. Wollenberg, Jr., "To Do the Job Well: A Life in Legislative, Judicial, and Community Service," an oral history conducted in 1970-73 by Amelia R. Fry and James R. Leiby, and in 1980 by Sarah L. Sharp, Regional Oral History Office, The Bancroft Library, University of California (Berkeley, 1981) 296-97.

income tax violators with the "heart-rending duty of committing young idealists to jail for refusal to perform duties under the controversial selective service act."[48]

As well as handing out lighter sentences, Northern District judges began to author a striking number of opinions altering the operation of the draft. The implications of these decisions were even more disturbing to Selective Service agency officials than the lenient sentences, since the decisions threatened to make the current draft system, at least in the Northern District, unworkable. In *Petersen v. Clark*, Judge Zirpoli decided that the statute prohibiting judicial review of selective service rulings to be unconstitutional. The court, Zirpoli argued, could not condone the denial of due process even when weighed against the importance of the selective service system. In other words, Zirpoli specifically rejected arguments made by congressmen fearful that judicial review might cause "litigious interruptions of procedures to provide necessary military manpower."[49]

Judges Harris and Peckham soon came to Zirpoli's defense with rulings using the same reasoning soon after the *Peterson* case. (Judge Carter, on the other hand, rejected the argument.) The U.S. Attorney's Office for the Northern District immediately requested that one of Harris's cases, involving the refusal of a local draft board to grant Charles Gabriel CO status, be pulled up to the Supreme Court on appeal.[50] Although one member of Gabriel's draft board had asked if he was a "subversive" while another asked him to "eradicate" any thoughts that he had received unfair treatment, the Supreme Court declined to view this as evidence of an unfair hearing and voted 9-0 to refuse Gabriel's request for a change in draft status.

A second successful challenge, at least at the district court level, occurred in the summer of 1969. In *United States v. Weller*,[51] Judge Robert Peckham essentially ruled that the Selective Service regulation which prohibited counsel for men appealing their draft status before local boards was invalid. Peckham was careful to avoid the more important constitutional issue — whether such a regulation violated Fifth Amendment rights of due process — but he still threatened one of the most sensitive areas of Selective Service procedure. Traditionally, local boards had hired appeals agents to assist the board and the registrant with legal questions,

[48] Harris, "Writing Worth Reading," supra note 23.

[49] *Peterson v. Clark*, 285 F. Supp. 698 (1968).

[50] *Gabriel v. Clark*, 287 F. Supp. 369 (1968); *Rheingans v. Clark*, Crim. No. 56181 (N.D. Cal. 1968); Carter ruled in *Hodges v. Clark*, 291 F. Supp. 177 (1968).

[51] *Weller v. United States*, 309 F. Supp. 52 (1969). Weller was an artist affiliated with the rock group Country Joe and the Fish.

but these hired legal guns obviously had divided loyalties. The United States Senate, in May of 1969, had roundly defeated a measure to provide draft registrants with independent counsel because of fears that the system might choke on the legal paperwork. With lawyers at the sides of COs during every step of the hearing process, the already overburdened local boards might quickly grind to a halt. While Judge Peckham referred in his opinion to a "slight delay," Selective Service Director Tarr argued in a later hearing that, "If we become involved in a local board in adversary proceedings, we will get entwined in a kind of legal framework with which our local board cannot cope."[52] Again, as with judicial review, the Supreme Court refused to uphold the district court ruling. In this instance, the Supreme Court refused to address the substantive issues and remanded the case to the Court of Appeals for the Ninth Circuit, which eventually ruled that the Ninth Circuit was an improper venue for this type of issue.[53]

That same summer, Peckham and Zirpoli became the first judges in the nation to challenge the composition of local draft boards. Since Selective Service regulations required board members to represent their own districts "if at all practicable," Peckham faulted the government for not making an effort to follow through on the rule. Judge Peckham emphasized the reliance the selective service system placed on an "in depth knowledge of social and economic conditions" of local board members and concluded that the defendant's rights were violated by the improperly constituted board. Outsiders, not neighbors, controlled the local boards. (In Hunter's Point, with a forty-three percent black population, only one board member was black, and he did not live in the district.) Judge Zirpoli used the same basic argument nineteen days later on behalf of Frederick Demarco, an unemployed sandalmaker.[54]

Since neither case was appealed, and since other judges in the Northern District rejected the reasoning of Peckham and Zirpoli,

[52] Tarr in *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12577 (July 7, 1970).

[53] Intriguingly, the U.S. attorney first appealed directly to the Supreme Court, and then requested that the Court *not* hear the case, because, on second thought, the U.S. attorney argued that the Court had no jurisdiction. So, as Justice Stewart noted, "Somewhat ironically, the argument that we have no jurisdiction over this appeal is made by the appellant [the Northern District], the United States. The Appellee, on the other hand, insists the case is properly here." If the strategy of the U.S. attorney was to avoid a discussion of the substantive issues, it succeeded. Justice Douglas was the only dissenter, arguing that the issue should be decided "here and now." *Weller v. United States*, 28 L.Ed.2d 26, 34; 466 F.2d 1279 (1972).

[54] Eugene S. Hunn, "Draft Boards," *San Francisco Bay Guardian*, December 12, 1967, 1-3; *United States v. Beltran*, 306 F. Supp. 385 (1969); *United States v. Demarco*, Crim. No. 42377 (N.D. Cal. 1969).

the rulings did not immediately threaten the draft process, but they did set a number of local defendants free and receive national attention.[55] One Justice Department official accused the judges of misinterpreting congressional intentions. "It is again this approach, putting the onus on the [selective service] system to demonstrate something that was never intended in the law."[56]

Possibly the most significant in this string of rulings by the Northern District occurred in two cases, one in December of 1969, and one two months later in February of 1970. By this time, the scope of the draft problem in San Francisco was extraordinary. Over 1,300 men were listed in the U. S. Attorney's Office as draft law violators, and officials in Washington, D.C. and Sacramento had begun to register their displeasure with events in the Bay Area.[57] Given this climate, the decisions by Stanley Weigel in *United States v. Bowen* and Alfonso Zirpoli in *McFadden v. Selective Service System-Local Board No. 40* were remarkable.[58] In the most sweeping defense yet offered of the idea of selective conscientious objection, Weigel and Zirpoli sided with two Catholic registrants whose applications for CO status had been denied, and argued that the current law violated the registrants' constitutional rights. Since the law required that registrants oppose all wars to receive a CO classification, the argument went, it discriminated against Catholics by not allowing them to follow the just war doctrine of the Church. Catholics, in other words, should be allowed to follow the dictates of both their own consciences and the doctrines of their church in selecting whether or not a particular war was just. A refusal to allow Catholics to practice their religion in this manner violated the establishment clause of the First Amendment. Unfortunately, Judge Weigel argued, "members of traditionally pacifist religions such as Quakers and Jehovah's Witnesses are generally exempted from military service while members of other religions — such as Bowen's Roman Catholic faith — are not so exempted." Fifth Amendment due process rights were also violated, Weigel concluded, because Catholics did not receive equal protection under the law.

[55] Judges Harris and Sweigart rejected this reasoning in *United States v. Karl*, 309 F. Supp. 829 (1969); *United States v. Nussbaum*, 306 F. Supp. 66 (1969); *Nussbaum* was upheld on appeal in 441 F.2d 273. Also see *The Nation*, September 8, 1969, 195-96; *New York Times* reprint, "S.F. Draft Cases Set Precedent," in the *San Francisco Chronicle*, September 9, 1969, 11.

[56] *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12550 (July 24, 1970).

[57] Sloan interview, supra note 5; Anderson, "Draft Crime Trials," supra note 22 at 30.

[58] *United States v. Bowen*, Crim. No. 42499 (N.D. Cal. 1969). For a discussion of the *McFadden* case, see, John A. Rohr, *Prophets Without Honor: Public Policy and the Selective Conscientious Objector* (Nashville, 1971) 95-103.

Both cases were orchestrated by local attorney Richard Harrington and filled with testimony by local Catholic theologians on the importance of the just war doctrine. *Amicus curiae* briefs were also submitted by representatives of other religions, and both judges hinted in footnotes that other faiths with similar ideas about just and unjust wars would benefit from the rulings. Judge Zirpoli delved even more deeply into the religious questions in the *McFadden* case, but his conclusion echoed Judge Weigel's. He recognized that violations of civil liberties could, at times, be "supported by a compelling interest." Significantly, he concluded that the procurement of manpower for an armed conflict was not compelling enough. He later argued that, "If you are going across the Pacific to engage in a war of that nature, there is every justification for a personal conclusion that this is not a morally just war."[59] Moreover, he added, "If you [disagree with] the seizure of the steel strike [Truman's 1952 attempt to seize the steel mills]...there is every reason for concluding that this [the draft] was unconstitutional."[60]

Government officials quickly registered their dismay. U.S. Attorney James Browning accused Weigel of "fly[ing] in the face of other court rulings across the country." Curtis Tarr was blunt in his testimony before the House subcommittee on the draft: "I do not believe that [the] Selective Service in its present organization could continue to operate."[61]

A few months later Tarr outlined another implication, stating, "It [selective CO] would tend seriously to undermine the considered judgment of the country to engage in any given war."[62]

The Supreme Court also rejected Judge Zirpoli's analysis. Although the Court declined to rule on the *McFadden* case, it did examine another case brought by attorney Richard Harrington, *Negre v. Larson*. Justice Marshall concluded for the Court that requiring opposition to all wars did not discriminate against particular religious faiths with a just war tradition. An "obvious difference" between objection to one war and objection to all wars existed, Marshall argued, and the law simply recognized one valid type of CO, not one valid type of religion. Justice Douglas dissented. Clearly, Douglas maintained, Negre's religious training led him to determine that the war in Vietnam was unjust. Justice Douglas

[59] Zirpoli, "Faith in Justice," supra note 28 at 180.

[60] Ibid. at 183.

[61] William Cooney, "Draft Refusals Jamming Court," *San Francisco Chronicle*, February 27, 1970, 28; *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12480 (July 23, 1970).

[62] *Selective Service and Military Compensation: Hearings Before the Committee on Armed Services*, 92nd Congress, 1st Sess. (Washington, D.C., 1971) 76.

chided his brethren for pretending that religious issues were not involved.[63]

Prosecutors in the Northern District also felt the same pressures confronting many of the attorneys and judges. In San Francisco, Cecil Poole, the nation's first black U.S. attorney, faced not only hundreds of draft cases, but unrest in Oakland and a district already wracked by antiwar protests in San Francisco and at area college campuses. Like the judges, Poole took a more lenient view of draft law violators than thought proper by Selective Service officials; his view of the Vietnam war in 1967 was that lawyers were ignorant of the "struggles...of [American blacks and] other non-white peoples in Vietnam or Cambodia or even Mexico."[64] To be sure, Poole continued to prosecute violators; he simply chose his cases more selectively and attempted to avoid confrontations with draft resisters. [One young man watching his brother's trial ran up to Poole and attempted to hand him his draft card; Poole refused to accept it, whereupon the young man placed the card in Poole's shirt. An exasperated Poole then ordered the man's arrest.][65] Following one draft protest at the Oakland induction center, Senator George Murphy attacked Poole for not arresting men without draft cards. "My own opinion," Senator Murphy announced, "and that of most other people is that prompt enforcement of the law is the surest way to preserve the law and order of this country."[66] Assistant U.S. Attorney Paul Sloan, whose own draft file was allegedly called up by General Hershey in a fit of pique over the problems in the Northern District, termed the resisters "high-minded [and] high principled." Sloan neatly demonstrated how the changing political climate was shaping the treatment of draft cases. In 1970, he left his position at the U.S. Attorney's Office and began to represent draft defendants.[67]

PHILOSOPHY VERSUS THE DRAFT

It is difficult to assess the impact of this legal activity on the draft and, ultimately, the war. Despite Allan Brotsky's admonition

[63] The Supreme Court ruled on two similar cases in one opinion, *Negre v. Larson* and *Gillette v. United States*, 28 L.Ed.2d 168, 179, 193-95; Richard Harrington, interview with the author, April 11, 1989.

[64] Cecil F. Poole, "Lawyers and the Urban Crisis," 42 *Journal of the State Bar of California* (1967) 832.

[65] Bashem interview, supra note 27; "Surprise Sequel to Flag Burning," *San Francisco Chronicle*, December 12, 1967, 15.

[66] William Cooney, "Marshall Won't Back Down," *San Francisco Chronicle*, December 12, 1967.

[67] Sloan interview, supra note 5; Steven E. Clark, interview with the author, April 21, 1988; Anderson, "The Draft Crime Trials," supra note 22 at 31.

that "it is the job of the lawyer to uncover and deal with the real issue, the nature of this war, in every Selective Service case," the results were rarely that dramatic.[68] Broader issues about the war's constitutionality and the nature of America's involvement rarely emerged from beneath the intricate legal issues that the obsolete selective service law presented.

The draft, and not the war, became the issue. Attempts to bring the war into the courtroom by focusing on constitutional principles generally failed to persuade the judges, especially in the first wave of cases. Instead, attorneys began winning cases with due process arguments that struck at the arcane draft structure while ignoring larger issues. This pattern was set in the early days of the Selective Service Lawyers Panel (SSLP). In March 1968, the most concerted attack on the selective service system was launched by a team of attorneys under Aubery Grossman's leadership. In a series of motions to prevent the trial of over one hundred men charged with draft crimes, Grossman clearly attempted to push the discussion toward the legality and morality of the both the draft and the Vietnam War. While many of the arguments raised were attacks on specific procedures used by the Selective Service, other motions included attacks on the draft because of "involuntary service contrary to the Constitution," comparisons to issues raised in the German war crime trials, and an accusation that "drafting young people exclusively violates the First Amendment because young people most frequently oppose the Vietnam war." Grossman concluded his oral arguments with a plea to examine this "mass phenomenon...This war [that] so violates the conscience and moral scruples of these men that they just can't serve." Even liberal Judge Zirpoli rejected the attack. While leaving the door open for lawyers to raise some of the more technical issues in individual trials, he ultimately rejected all of the motions.[69]

Those cases that Grossman and others hoped to use as rallying points against the war also failed to set off the necessary sparks. Former Stanford University student body president and draft resistance activist David Harris refused to allow attorneys to raise technical arguments on his behalf; when Judge Carter ruled that no testimony about the Vietnam War or American foreign policy

[68] Brotsky, in Ginger, *Relevant Lawyers*, supra note 25 at 101.

[69] Harris interview, supra note 23. For information on the *Tucker* case see, Shafer, "Prosecutions for Selective Service Offenses: A Field Study," supra note 25 at 379-80, 382-83, 399, 408-44; Charles Howe, "Broad Legal Attack on Draft, War," *San Francisco Chronicle*, March 16, 1968; Cooney, "Draft System on Trial in Mass Court Case Here," supra note 25 at 16. For a list of the motions filed in *United States v. Tucker*, Crim. No. 41675, see *National Lawyers Guild Practitioner* 21 (1968)3-14.

was admissable, Harris's trial essentially ended.[70] In the summer of 1968, Grossman attempted to organize a publicity campaign around Eric Whitehorn, a seventeen-year-old Palo Alto high school student who claimed that since society prevented him from exercising a number of rights he should listen to his mother's advice and stay home. The *San Francisco Chronicle* as well as the conservative journal *Human Events*, gleefully chronicled Grossman's embarassment when Whitehorn, after being sentenced by a visiting judge, recanted in prison claiming that Grossman had "victimized" both him and his mother by promising them that they would be part of a "famous test case."[71]

More typically, courtroom arguments revolved around extraordinarily technical issues. Cases on any one Northern District docket might include a dispute involving a reluctant inductee who received his VISTA [Volunteers in Service to America] appointment and draft notice on the same day, a battle over whether a draft defendant with a step-brother could claim an exemption as the sole surviving son, or an argument over whether a soldier attempting to avoid the plane to Vietnam could be prohibited from doing so by telegram and not an official order.[72]

This inability to directly challenge the Vietnam War raised troubling questions for contemporaries. Already, lawyers in the major urban areas were following the Bay Area's lead in preventing scores of draft defendants from serving in the army. [One Los Angeles lawyer, William Smith, who handled hundreds of cases, claimed in 1970 that he could guarantee avoidance of the draft for $250.][73] To individuals with access to these services, this assistance was heaven-sent, but the effect on the overall induction process was less ethically clear. Who filled the spots left vacant by those men able to avoid military service? That radical attorneys had

[70] Because of his activism, and because he happened to come before the relatively more conservative Judge Carter, Harris received a stiff three-year sentence. David Harris, *Dreams Die Hard* (New York, 1982).

[71] Grossman interview, supra note 22; McNamara, "The Communist Assault on the Draft," supra note 7; William Cooney, "The Mother Hoax in Draft Fight," *San Francisco Chronicle*, August 20, 1969, 1,28; "Reluctant Draft Foe Freed From Prison," *San Francisco Chronicle*, August 26, 1969,8; "Judge Gus J. Solomon on the Vietnam War-Era Draft," supra note 34.

[72] *United States v. Noonan*, No. 69 (N.D. Cal. 1970), 3 *Selective Service Law Reporter* 3511 (November 1970); Lang v. Mitchell, No. 69425 (N.D. Cal. 1970), 3 *Selective Service Law Reporter* 3484 (October 1970); *Pifer v. Laird*, No. 70-608 (N.D. Cal. 1971), 4 *Selective Service Law Reporter* 3468 (August 1971).

[73] Smith was instrumental in developing many of the early arguments against the draft, as evidenced by his article in the *National Lawyers Guild Practitioner* issue on the draft, supra note 11 at 80-85; Harris interview, supra note 23; John Wheeler, "It's Getting Tougher to Avoid the Draft," *San Jose Mercury News*, May 31, 1970, cited in *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12504.

begun to consider these questions by the end of the decade suggests how rarely issues concerning the war's morality had entered the courtroom. In a 1969 article, Paul Harris had argued, "As long as this society maintains its capitalist-democratic approach the lawyer has the power to free people and further the revolution." One year later Harris noted the flip side of this power: "[W]hen you help a guy stay out of the Army, somebody goes in his place...mostly black, brown, or poor white people...I feel I can't counsel someone without putting that problem to him. And I won't counsel anyone anymore without a political discussion of some length." In fact, at a stormy 1968 session of the National Lawyers Guild in Santa Monica, one activist challenged attorneys to abandon selective service counseling and enter the army in order to assist working class draftees. Gradually, attorneys opposed to the war did begin to set up counseling centers near induction centers instead of, in Paul Harris's words, "dissect[ing] the selective service law." Nevertheless, the emphasis always remained on men attempting to avoid service, rather than men deciding whether to leave the army.[74] The leaders of the attack on the selective service laws recognized these painful ambiguities. While arguing that "[clients] are entitled to our judgment that the war in Vietnam...violates norms of written and customary international law," *Selective Service Law Reporter* editor Michael E. Tigar also concluded that "litigation...cannot be permitted to take precedence over the task of organizing for direct action."[75]

It would be a mistake, however, to dismiss the events in the Northern District as merely the story of a few thousand lucky draft defendants who avoided both a trip to Southeast Asia and a long prison sentence. Attempts to make the Vietnam War an issue in the cases failed, but efforts to topple the shaky structure of the draft were more successful in the Northern District than in any other place. The more pragmatic attorneys emphasized a different tack, probing the draft law like wildcatters searching for the gusher that could blow the top off. A 1969 comment by Joel Shawn in the *San Francisco Chronicle* provides a summary of this viewpoint: "We're saying, many of us: okay we have to accept the law and we have to accept the war. But now, let's look at the

[74] Dan Lund, "NLG: The Way We Were 1968," *The Conspiracy* 15 (1968) 5, cited in Ann Fagan Ginger and Eugene M. Tobin, eds. *The National Lawyers Guild: From Roosevelt Through the Reagan Years* (Philadelphia, 1988) 262; Paul Harris, "You Don't Have to Love the Law to Be a Lawyer," *National Lawyers Guild Practitioner* 28:4 (1969) 100; Paul Harris, "State of the Guild Speech," *Guild Notes* 9:2 (1980) 15. Many of the attorneys did assist soldiers A.W.O.L. from bases in the Bay Area or attempting to avoid transfers to Vietnam. Weiss interview, supra note 24.

[75] Michael E. Tigar, "Lawyer's Role in Resistance," *National Lawyers Guild Practitioner* 27:4 (1968) 197.

contract and see how you've drawn it up."[76] This train of thought had been present from the beginning, but it now took on a greater significance as the real issue became how many jabs the draft structure could fend off. The decentralized draft structure did inhibit attempts to challenge the system, but the expertise developed through the SSLP and the tremendous volume of cases provided new legal opportunities. While Aubery Grossman abandoned draft cases in order to work for the Indians occupying Alcatraz in late 1969, noting that "I wasn't at all sure that any of these [later defendants] that came along now were highly conscientious," other attorneys continued to handle the waves of clients.[77] General Hershey's reaction is a barometer of the importance placed on their activities by the selective service system. At one congressional hearing, he publicly grumbled about San Francisco lawyers "who promised to work for anything they can...to obstruct the Selective Service system."[78]

"THE HONEYMOON IS OVER"

General Hershey and Selective Service officials were not alone in their concern about the operation of the draft system. During the 1968 presidential campaign Richard Nixon remained purposefully vague about his plans for ending the Vietnam War, but he did forcefully advocate the end of the draft as soon as the policy was deemed feasible.[79] Neither the president nor Henry Kissinger, his National Security Advisor, believed that an effective foreign policy could be implemented with antiwar protests at their current level. "Both Kissinger and Nixon," according to William Shawcross, "were convinced that it was the draft, not the long bleeding of Indochina, that was arousing most of the domestic opposition."[80] The obvious solution was to end the American involvement in Southeast Asia, but the White House feared the perceived loss of credibility that would result from the hasty pullout created by an immediate termination of the draft. Within

[76] Charles Howe, "Draft Resisters Multiply — So Do 'New Lawyers'," *San Francisco Chronicle*, August 18, 1969, 16.

[77] Grossman interview, supra note 9.

[78] Hershey in *Selective Service Hearings*, supra note 5 at 96.

[79] Nixon's views were apparent as early as November 1967 when he urged the government to move toward an all-volunteer force. Griffith, "About Face: The U.S. Army and the Draft," supra note 16 at 120; Richard M. Nixon, "The All-Volunteer Force," October 18, 1968 national radio address printed in *Selective Service Hearings*, supra note 5 at 683-90.

[80] Although attacks on the media by Vice-President Agnew helped limit television coverage, the largest demonstrations against the war up until that point occurred in the fall of 1969, see Hodgson, *America in Our Time: From World*

the year, however, Nixon's actions began to change the legal and political context in which the draft functioned. First, President Nixon appointed yet another commission to study the draft. This time, however, the key recommendation was for a draft lottery, finally authorized in December of 1969. The lottery made the draft less arbitrary since it limited the time of draft vulnerability to one year instead of the previous seven. Second, Nixon began to reduce the size of the draft calls, which steadily decreased from 343,300 in 1969 until the "zero draft" of January 1973.[81]

In the meantime, the Nixon administration hoped to create a different image of military service. "Young MetroAmerica won't listen to [Secretary of Defense] Mel Laird," wrote Jeb Magruder in a memo to H.R. Haldeman, "but they will listen to Marty Anderson [White House expert on draft reform]...not because Marty's any more liberal (he's probably *less* liberal than Laird) but because he's got more *hair*, a Ph.D., a sexy wife, drives a Thunderbird and lives in a high rise apartment."[82]

Nixon's choice to replace General Hershey also met these criteria. Dr. Curtis Tarr held a Ph.D. in American history from Stanford, and as a former president of Lawrence University was accustomed to working with young people. Tarr also emphasized public perceptions. "Gradually we were able to replace these older [state] directors," he proudly noted, "with new ones who presented a much different image to the youth of America."[83] Immediately after his appointment in April of 1970, Tarr began preparing to administer the new lottery system, as well as attempting to reorganize the antiquated workings of an inefficient and chaotic Selective Service bureaucracy.[84]

Predictably, these concerns led Tarr to San Francisco. Warned by Solicitor General Ernest Griswold that the draft system was tottering, Tarr began to focus on problem spots across the country,

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War II to Nixon, What Happened and Why, supra note 3 at 377; William Shawcross, *Side Show: Kissinger, Nixon, and the Destruction of Cambodia* (New York, 1979) 89. At the same time, U.S. Army officials began reaching similar conclusions about the efficacy of the draft. One secret Army study argued that the elimination of the draft could defuse antiwar protest within the ranks as well as ameliorate racial tension and cut down on drug use. Griffith, "About Face: The U.S. Army and the Draft," supra note 16 at 126-27.

[81] Flynn, *Lewis B. Hershey: Mr. Selective Service*, supra note 1 at 240-97.

[82] Draft call statistics taken from the Administrative Office of the U.S. Courts in Baskir and Strauss, *Reconciliation After Vietnam*, supra note 33 at 130. Magruder quoted in Jonathan Schell, *The Time of Illusion: An Historical and Reflective Account of the Nixon Era* (New York, 1975) 88.

[83] Curtis W. Tarr, *By the Numbers: The Reform of the Selective Service System, 1970-1972* (Washington, D.C., 1981) 23 [hereinafter cited as Tarr, *By the Numbers*].

[84] Tarr in *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12472 (July 23, 1970); Tarr, *By the Numbers*, supra note 83 at 7-35.

most notably the Northern District where half of the criminal cases now concerned the draft.[85] Here the stick of tougher enforcement replaced the carrot of a new draft image. Since the overburdened U.S. Attorney's Office was now incapable of handling all the cases, the most pressing need was legal manpower. Immediately after his appointment as Cecil Poole's successor, U.S. Attorney James Browning promised a speed-up in draft cases — a speed-up that was made possible by additional legal assistance from Selective Service and Justice Department attorneys.[86] The statistics reflect the increased emphasis on draft cases. In fiscal year 1971, Browning's office began 511 criminal cases, almost twice as many as in the previous year. The lead in one respectful newspaper account declared that the "honeymoon is over for draft resisters." Tarr also began work to limit the ability of registrants to transfer their induction, efforts that bore fruit with an executive order in 1971.[87]

The bench also felt the winds of change. President Nixon withdrew Lyndon Johnson's nomination of Cecil Poole to the Northern District bench only three days after the inaugural. Poole's chances were apparently scuttled by Senator George Murphy — still bitter about Poole's perceived leniency in handling draft cases — and top officials in the Nixon Justice Department.[88] Tarr also met with Solicitor General Ernest Griswold and Attorney General John Mitchell in August of 1970 to "emphasize the need for appointing judges [in the Northern District] who would uphold the Selective Service Law." Mitchell, according to Tarr, "promised to do what he could in an admittedly difficult situation."[89] The results were encouraging. In the fall of 1970 two new judges were appointed to the Northern District bench. Both Samuel Conti and Robert Schnacke soon acquired reputations among local defense attorneys as hardliners on selective service cases. Conti, in particular, refused to hand out the customary probationary sentences, providing a "splash of cold water" for stunned attorneys. Conti termed draft refusal a "very, very serious crime," and argued

[85] Ibid. at 58.

[86] William Cooney, "U.S. Seeking Solution to Draft Case Logjam," *San Francisco Chronicle*, February 27, 1970, 28; "Do Draft Dodgers Find Mecca Here? Leniency Alleged," *San Jose Mercury News*, September 1, 1970, 4.

[87] *Annual Reports of the Director of the Administrative Office of the U.S. Courts, 1967-1971* (Washington, D.C., 1968-1972) 275 (1970) and 327 (1971); William Cooney, "Draft Case Prosecutions Greatly Speeded Up Here," *San Francisco Chronicle*, April 9, 1970; Baskir and Strauss, *Reconciliation After Vietnam*, supra note 31 at 76; Tarr, *By the Numbers*, supra note 83 at 59 for the induction switch.

[88] Richard Harris, *Justice: the Crisis of Law, Order, and Freedom in America* (New York, 1970) 157-60; Baskir and Strauss, *Reconciliation After Vietnam*, supra note 33 at 76; Carrizosa, "Profile," supra note 8.

[89] Tarr, *By the Numbers*, supra note 83 at 59.

that defendants deserved at least a two-year prison sentence because they "chose not to go, so someone else had to go and, perhaps, today that person is maimed or dead."[90]

For the individuals hoping to avoid military service, however, the changes made by the Nixon administration made little difference. By 1971, the loopholes in the law were such that thousands of cases were simply abandoned by prosecutors before indictment, a situation no different from that in 1968 or 1969. Paul Sloan's critics in the Selective Service national office and in the Justice Department ultimately realized that there was little even the most efficient prosecutor could do to stem the tide, given the procedural errors inevitable with the untrained local boards. (U.S. Attorney Browning soon termed the cases a "procedural morass.") Even the adaptations made by Browning, Tarr, and the Justice Department could not change this pattern. Robert E. Carey, hired in early 1971, recalled seeing "rooms full of files" at the U.S. Attorney's Office. One year after his vaunted speed-up, James Browning received yet another task force to help handle the 3,500 "draft matters" and 800 "potential indictments" he faced.[91]

Yet the draft survived. Legal pressure may have had some influence in President Nixon's decision to gradually phase out the draft, but the legal activism of the Northern District had not forced the draft to its knees. Two cases heard in 1970 neatly illustrate this point. In September, Judge William T. Sweigert stunned the Bay Area legal community by declaring the Vietnam war unconstitutional in *Mottola v. Nixon*.[92] "Something of a philosopher," according to Judge Zirpoli, Sweigert had been an assistant to Earl Warren during Warren's two terms as California's governor. According to Zirpoli, "If anybody did anything to convert Earl Warren to the liberal that he eventually became, I would say it was Judge Sweigert."[93] Sweigert argued that "to strike down as unconstitutional a President's wartime seizure of a few private steel mills but to shy away on 'political question' grounds from interfering with a Presidential war itself, would be to strain at a gnat and swallow a camel." Sweigert's opinion had no effect on

[90] Weiss interview, supra note 24; Harris interview, supra note 23; William Cooney, "2 Year Terms for 4 Draft Refusers," *San Francisco Chronicle*, February 25, 1971, 15.

[91] Browning, in Peterson, "Escape to Oakland," cited in *Hearings on the Administration and Operation of the Draft Law*, supra note 7 at 12506. Sloan interview, supra note 5; Baskir and Strauss, *Reconciliation After Vietnam*, supra note 33 at 76; Carey interview, supra note 20; William Cooney, "Draft Prosecution 'Task Force' Here," *San Francisco Chronicle*, March 13, 1971, 12.

[92] *Mottola v. Nixon*, 318 F. Supp. 538 (1970).

[93] Zirpoli, "Faith in Justice," supra note 28 at 172.

either the draft or the higher courts. Over a year later, he was sternly overruled by the Ninth Circuit.[94]

Also in 1970, local attorney Joel Shawn engineered a startling attack on the draft before Judge Weigel in *DeSmet v. United States*.[95] Through research and discussion with state selective service officials, Shawn discovered that the system was not taking into account the number of volunteers or career military men from each district, despite a congressional statute that specifically called for such a procedure. Congress had overlooked the policy, but Shawn pressed the inconsistency in the courts. As Shawn later recalled, the case offered a golden opportunity to stop the entire operation of the draft in the Northern District, and perhaps elsewhere as well. The Selective Service shared this prognosis. While General Counsel Walter Morse referred to the "monumental effect" the case could have, Curtis Tarr concluded that "[t]he effect of an unfavorable opinion in any one district would be to severely pinch — if not halt altogether — the flow of draftees from that district."[96] Here, then, was the ultimate prize for those attorneys opposed to the war as well as committed to representing those men who hoped to avoid it — an argument that promised to threaten the operation of the entire draft system instead of simply freeing another client. Judge Weigel, however, refused to accept Shawn's claims. Shawn then appealed to the Ninth Circuit, where he faced a special team of government attorneys from Washington, D.C. brought in specifically to contest Shawn's claims. The court sided with the government, but issued a curt opinion which failed to disclose its reasoning. The political logic, however, was clear. As one of the government attorneys, Steven E. Clark, conceded, there was no opinion because "it [the court's opinion] couldn't be supported...[because] the consequences of deciding in favor of Mr. DeSmet [were too momentous]."[97]

In other words, the opinions of the judges in the Northern District did not persuade higher courts to seriously threaten the draft structure. By the same token, the selective service system managed to survive under the more capable leadership of Curtis Tarr and continue to issue induction notices until the last days of 1972. Through the mild sentences, elaborate briefs, superb organization, and pathbreaking rulings, judges and attorneys in the Northern District made it much more difficult to raise an army. They did not make it impossible. For many, of course, this was not

[94] *Mottola v. Nixon*, 464 F.2d 178 (1972).

[95] *DeSmet v. United States*, Crim. No. 70-229 (N.D. Cal. 1970).

[96] Shawn interview, supra note 27; letter from Morse in *Selective Service and Military Compensation: Hearings Before the Committee on Armed Services*, supra note 62 at 689 (February 23, 1971); Ibid., Tarr on February 19, 1971.

[97] Shawn interview, supra note 67.

the goal, but the statement begs the question of how we evaluate the legal activism in the Northern District. Local attorneys and judges did threaten the integrity of the system through a concerted legal effort, but as draft calls decreased so did the opportunities to challenge the induction process. Moreover, the very structure that had given the selective service system such political appeal during the first World War — its reliance on local control — helped to frustrate activists dedicated to altering the system. Essentially, attacks on the draft in the Northern District remained local attacks, dependent upon either the approval of higher courts or the willingness of other districts to follow Northern California's lead. Given that such support was rarely forthcoming, a hobbled but still breathing draft system helped President Nixon defuse antiwar protest even as the war, albeit with fewer American troops, continued to rage in Southeast Asia.

In such a context, the issues of equity that concerned some of the defense attorneys and judges were never resolved. More specifically, who did serve when large groups of mostly white, generally middle-class defendants in one section of the country did not? The complexities of the issues surrounding the draft by 1970 reflect the increasing fragmentation of American politics. While Nixon appointee Judge Conti handed out stiff sentences because of the men who died in the "place" of draft defendants, radical attorneys attempted to focus on the immorality of the American involvement even as they wondered if their own legal skill might be determining the identities of those who perished. The more liberal attorneys and judges struggled, with more success in the Northern District than any other place, to attack an obsolete draft law. Their successes, however, could not mask the challenge of connecting the draft cases to a broader strategy of anti-war protest.

ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields which we believe may be of interest to readers. Although comprehensive, this is not a definitive list and the editor will appreciate receiving information about articles not listed here.

August, Jack L., Jr., "Carl Hayden, Arizona, and the Politics of Water Development in the Southwest, 1923-1928," 58 *Pacific Historical Review* 195-216 (1989).

Bookspan, Shelley, "Historians, Specialization, and the Toxic Tort," 9 *Public History News* 2 (1989).

Butler, Anne M., "Still in Chains: Black Women in Western Prisons, 1865-1910," 20 *Western Historical Quarterly* 19-35 (1989).

Clark, Homer H., Jr., "The Role of Court and Legislature in the Growth of Family Law," 22 *U.C. Davis Law Review* 699-716 (1989).

Deloria, Vine, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," 31 *Arizona Law Review* 203-24 (1989).

Drachman, Virginia G., "'My Partner' in Law and Life": Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America," 14 *Law and Social Inquiry* 221-50 (1989).

Goodwin, Hon. Alfred T., "The Commission for Constitutional Revision," 67 *Oregon Law Review* 1-10 (1988).

Harring, Sidney L., "The Incorporation of Alaskan Natives Under American Law: United States and Tlingit Sovereignty, 1867-1900," 31 *Arizona Law Review* 279-328 (1989).

Kester, Randall B., "The Montgomery Ward Case: Pre-Trial History in the Making," 5 *Oregon Benchmarks* 1-4 (1989).

Lam, Maivan Clech, "The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land," 64 *Washington Law Review* 233-88 (1989).

"Legal History and Law Librarianship," a collection of articles, 81 *Law Library Journal* 1-67 (1989).

Parker, Richard, "Water Supply for Urban Southern California: A Historical and Legal Perspective," 8 *Glendale Law Review* 2-66 (1989).

Soifer, Paul, "Historians, Lawyers, and the Smoking Gun," 9 *Public History News* 3 (1989).

Subrin, Stephen N., "Dudley David Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision," 6 *Law and History Review* 311-73 (1988).

Traub, Stuart H., "Rewards, Bounty Hunting, and Criminal Justice in the West: 1865-1900," 19 *Western Historical Quarterly* 287-301 (1988).

Wasby, Stephen L., "The Bar's Role in Governance of the Ninth Circuit," 25 *Willamette Law Review* 471-570 (1989).

Watson, Benjamin, "Origins of California's County Law Library System," 81 *Law Library Journal* 241-52 (1989).

Wilkinson, Charles F., "Land Tenure in the Pacific: The Context for Native Hawaiian Land Rights," 64 *Washington Law Review* 227-32 (1989).

Willner, Don S., "A Second Look at Constitutional Interpretation in a Pioneer and Populist State," 67 *Oregon Law Review* 93-104 (1988).

Book Reviews

Cowtown Lawyers: Dodge City and its Lawyers,1876-1886 by C. Robert Haywood. Norman, OK: University of Oklahoma Press, 1988; 289 pp. $24.95.

Robert Haywood's *Cowtown Lawyers: Dodge City and Its Lawyers, 1876-1886* is not only an enjoyable tale but also a fascinating historical perspective on the role of the lawyer in the microcosm of a frontier in transition.

The setting is Dodge City and the decade chosen by Haywood is 1876-1886. Dodge City had only just been incorporated in 1876, but already had a reputation of violence and immorality. It was the center for an industry based on the slaughter of the buffalo and the partisans of that industry were anything but civilized as one might expect. However, in 1876 a new industry — nearly as violent and uncivilized — was born with the first of the Southwestern cattle drives which established Dodge City as the end of the trail and center for railroad transportation to the East.

The period of time chosen by the author is an interesting period in the history of the West. It encompasses the incredibly rapid transition from the "lawless" society of mountainmen, explorers, and buffalo hunters to the "lawful" society of legislative enactments, judges, and lawyers. The decade of 1876-1886 covers other events of great significance to the development of the West, the destruction of the magnificent buffalo, the intense blizzard of 1886, and the end of the Indian wars. This intense period of activity and transition is unparalleled in Western history at least for its brevity. It is also a time and place of great interest because of the lawyers involved, Harry Gryden and Mike Sutton, and their followers. (These lawyers, who are competitors, reminded me of lawyers I know and I am sure will remind everyone of lawyers they know. One is more the dirty shirt, "try-everything" type of lawyer, while the other is more the "establishment," behind-the-scenes type of lawyer.)

Although legal education of the type we have become used to in most of the twentieth century was largely nonexistent, frontier lawyers had to meet certain standards of education and experience, and, as in the case of all disciplines, the good ones were quite good. Those that adapted to the "will" of the community survived and those who did not failed. Law as a career took a very different path than it does today. Of particular interest is Haywood's description of the difficulty of surviving as a frontier lawyer. The story of Mike Sutton asking his partner to handle a case in the early days of their practice because his partner had more presentable clothes, as well as the difficulty of making a career of the law without some type of political appointment, is a far cry from today. I was reminded of

what I saw in Kansas in the early years after World War II. At that time it was still necessary for a lawyer to hold a political job such as city or county attorney, to supplement income.

Although the criteria for becoming a lawyer were few, in all likelihood representation was more adequate in more cases than it is today. The practice of law was very much an individual matter in those days. One person handled the case from start to finish, and if he was a good lawyer, then the client had good representation. If he was not a good lawyer, then he did not continue in practice for very long. One acquired clients based on reputation for past achievements. Those who performed well survived.

Cowtown Lawyers portrays the lawyer not only as an advocate for the particular client, but also as the key to the evolution of the law in a particular setting — as a proponent of change in the guise of organizer, leader, and sometimes candidate for office. This evolution is most clearly personified by Mike Sutton; the earlier sublimation of his beliefs gave way to the pursuit of those beliefs, even though not yet the popular view. No effective lawyer, however, can get too far out front; as Haywood points out, the "law of any community . . . [evolves] to represent just about what society considers convenient, proper, or profitable at the moment" (p.240).

Haywood helps fill a void in legal history — the influence of the law and its functionaries at the local level. He describes his work as a "concern . . . with the professional, and, to a lesser degree, the private lives of the attorneys who actively practiced law in Dodge City between 1876 and 1886 and with drawing some general inferences about the judicial system's influence on the late frontier experience" (p.xii). One of the themes that seems to run through the early chapters is the impact of lawyers on the development not only of the law and legal structure of the community, but on the social fabric of the community as well.

The author certainly meets his goals; but he goes farther and provides a structure for the similar analyses of other locations —in time and setting — around the country. One would hope that other historians will join Robert Haywood's effort to fill the void.

The book's style is fast moving. Haywood's materials appear sound and well supported. One could only wish that he had shown more clearly how the "law" did evolve as a result of the day-to-day efforts of judges and lawyers. There is, unfortunately, little discussion of statutory law, military law, or the federal system. Nevertheless, these shortcomings, if they are such, do not in any way detract from the overall skillful and analytical discussion of the evolution and adaption of the "law" in a short period from the rough and tumble, early trail town to prohibitionist and moral standards of Dodge City at the end of the decade.

Gerald K. Smith, Esquire
Lewis & Roca
Phoenix, Arizona

The Lament of the Single Practitioner by Mordecai Rosenfeld. Athens, GA: University of Georgia Press, 1988; 233 pp. $18.95.

This volume is a collection of short articles that Mordecai Rosenfeld has written over the past ten years for the *New York Law Journal.* Not intended to offer guidelines as to the improvement of the quality of practice *in solo delicto* this would make a good gift for a practitioner whose long hours have led to sociological myopia.

Rosenfeld writes from a liberals' viewpoint about the injustices which flow from the well-reasoned opinions that waft down upon us from more rarified atmospheres. His pen takes particular delight in comparing foibles of the nine most-high to the problems and triumphs of baseball, a subject on which he apparently has extensive personal knowledge. His wit waxes philosophical as he analyses how the courts have reached a variety of conclusions that have missed the point most needed to be addressed to improve society.

Lawyers are not spared from Mordecai Rosenfeld's barbs as he gleefully attacks mega-firms, word processing, and paralegals. He poses the burning questions: Are enormous law firms a response to "pantagruelian litigations" or vice versa? Do the large firms really employ "commando phalanxes" of lawyers on constant alert, capable of airlifting to any courtroom on ten minutes notice for the sole purpose of preventing their firm from appearing with fewer lawyers than their opponent?

A large majority of the essays are very contemporary and address recent the cases of Ivan Boesky, Pennzoil-Texaco, von Bulow, Bernard Goetz, and Robert Bork. Along with the flowing style this book makes for easy reading.

The most valuable attribute of this work is that, on occasion, the author's observations promote reflection about the meaning of the practice of law, far beyond their own scope. This stimulation of creative and divergent thinking elevates this work above the ordinary.

Maurice Mandel, II, Esquire
Newport Beach, California

Federal Justice in the Second Circuit, 1787-1987 by Jeffrey B. Morris. Second Circuit Historical Committee, 1989; photographs, appendix, glossary, index; paper bound. $12.95.

Judicial history is an acquired taste. Aficionados should include legal scholars, specialized historians, and indeed, some judges and lawyers, but not likely a very broad sector of the population. Professor Jeffrey B. Morris of the University of Pennsylvania has wrought a miracle of sorts, however, in producing this bicentennial

history of the federal courts in New York, Vermont, and Connecticut. With the help of his colleagues on the Second Circuit Historical Committee he has given us an easily readable, richly illustrated, soft-cover, inviting and well-organized volume which might even be found in popular bookstores. How often can a book of legal history be so described?

Unlike our own Ninth Circuit, which was officially created in 1866 and can hardly trace its origins farther back than 1855, the Second Circuit came into existence in 1801 and has never changed its constituency. Morris was invited to recite the entire federal judicial history of the three states comprising the Second Circuit from the Constitutional Convention to its bicentennial. But Morris' work is more than just a history of federal courts in New York, Vermont, and Connecticut. It is a superb overview of the development of the federal judicial system beginning with the convening of the first session of court held under the sovereignty of the United States when Judge James Duane gaveled the United States District Court for the District of New York (the "Mother Court" of the federal judiciary) to order on November 3, 1789.

Morris' work is organized by appropriately-chosen periods of judicial development which might well have mirrored national eras. The early years, 1787-1801, give us a taste of how the Judiciary Act of 1789 was implemented, tracing the development of the federal court system through its first crisis with the early Sedition Act cases. The Age of Jefferson through the Civil War begins with the saga of the ill-fated Judiciary Act of 1801 and highlights the role of the federal courts in the Civil War. Next, Morris hints at our westward expansion when he covers fascinating cases involving admiralty, ownership of railroads, and other commercial cases in the period from 1865 to 1891, another logical dividing point and an important year in federal judicial history.

Of particular interest to those interested in judicial administration in the West is the period beginning with passage of the Evarts Act which established the Circuit Courts of Appeals in 1891, whereafter Supreme Court justices no longer were required to "ride circuit." Morris gives us a splendid exposition of the alternative themes considered for organizing the federal courts, and shares some very important lessons for current day discussion as he concludes with the passage of the Judiciary Act of 1925.

It is ironic that the chapter on "Learned Hand's Court," 1925-1960, must also deal with the bribery scandal surrounding one of its members, Judge Martin Manton, who was eventually convicted of obstruction of justice in 1939. Morris treats the episode with candor and grace and emphasizes how the giants of the Second Circuit at that time, Augustus Hand and his brother Learned ("follow Gus but quote Learned"), have truly distinguished the Second Circuit for all time.

The final chapter covers the Kennedy presidency to the present day when "exploding dockets and nationalized rights" aptly describe the fate of all federal courts including our own Ninth Circuit.

Morris pays remarkable attention to detail. Every member of the court of appeals appears to have been identified (sometimes in a string listing), as have many district judges. Detail, however, does not eclipse the whole, and both the serious student and the generalists will have much to enjoy in this superb piece of work. The driven scholar and the casual reader are both served by the appendix. There is a useful glossary of legal terms, the footnotes are carefully and unobtrusively collected, and the index is thorough. Even the picture credits reveal the breadth of the project with contributions having been received from the American Heritage Society, the Supreme Court Historical Society, the New York State and City Historical Societies, to say nothing of *Harpers Weekly.*

Federal Justice in the Second Circuit is a history of great cases ranging from the early sedition trials and the prosecution of Susan B. Anthony for trying to vote, to the attempt by the United States government to prevent publication of the "Pentagon Papers" by the *New York Times.* This volume should be a mainstay of any legal historian's library and will no doubt be an inspiration to those who await the chronicle of our own circuit. A reader sitting within the Ninth Circuit may well inquire: "When will the rich history of federal justice in the nine western states and Pacific territories be chronicled so effectively?" The Second Circuit Historical Committee has given us a superb example of how well a regional judicial history can be collected and presented.

Diarmuid F. O'Scannlain
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Ninth Circuit
Portland, Oregon

Essays in the History of Liberty. Edited by Martin Ridge. San Marino, CA: Henry Huntington Library, 1988; 128 pp. $19.95.

This volume contains six incisive essays on the changing concept of political liberty over the last two centuries. Written by six eminent American historians affiliated with some of the nation's most prestigious universities, the essays were first delivered as public lectures to patrons of the Huntington Library and were subsequently assembled for publication in this thematic volume. The six authors held research fellowships at the library at various times over the last half decade and, during their residence, all were invited to participate in the lecture series. The contributors are Michael Les Benedict (Ohio State University), Don Fehrenbacher (Stanford), Stanley Kutler (Wisconsin), James McPherson (Princeton),

John Philip Reid (NYU), and Harry Scheiber (University of California, Berkeley). Editor Martin Ridge, head of research at the Huntington Library, explains in the introduction: "The authors, distinguished scholars all, were invited to think about the history of liberty in American life and draft an essay on an aspect of it that would be of interest to an intelligent general public" (p. vii). As a result, the essays, each a self-contained unit, make for relaxed, stimulating reading; at the same time they maintain, through extensive endnotes, an admirable scholarly aura.

It will doubtless come as no surprise to readers of this journal to learn that the concept of liberty in the United States has undergone considerable expansion and alteration since the drafting of the Constitution. These historians spell out in much detail exactly when and why a number of critical changes occurred. The organizational thrust is chronological — beginning with the late-eighteenth century and ending in the 1980s. Race relations (including slavery) and religion draw the most attention, with four essays devoted to aspects of those two issues.

Reid's essay launches the volume by defining the generally accepted concept of liberty in the late eighteenth century. The author emphasizes the English heritage of unwritten, constitutional rights. Many participants in the rebellion against parliamentary authority based their actions on what they considered a series of continuing infringements upon their personal liberties in violation of their status as longstanding citizens of political units within the British Empire. Reid argues that the contemporary concept of liberty was closely linked to the concept of independence, which meant in the eighteenth century "not being beholden to any other person" (p. 5) nor subject to the exercise of "arbitrary power" (p. 9). By that standard, chattel slavery was the very opposite of liberty. Leaders of the independence movement were convinced that Parliament was determined to deprive their North American colonies of their liberties and, *ergo*, virtually enslave them through the application of arbitrary political power. Americans exaggerated, of course; still the author observes that "the coming of the American Revolution provided a great theater for the rhetoric of liberty" (p.2). Legal historian Reid lays down a base mark from which we can measure in later decades the magnitude of deviations from the original understanding of the concept of liberty, and he succeeds in large part — but not entirely, for he concedes at one point that unanimity on its precise definition never existed in the new United States.

Fehrenbacher and McPherson concentrate on the slavery issue in the antebellum period. White southerners expressed a strong attachment to the principles of political liberty for themselves, bordering on states' rights autonomy, while simultaneously defining their liberty to hold property rights in Afro-Americans.

Fehrenbacher discusses how American foreign policy was handicapped in the western hemisphere by the perpetuation of slavery in a nation which publicly proclaimed its dedication to the principles of political liberty. To cite one consequence, race-conscious southerners exercised sufficient veto power to prevent the United States from recognizing the independence of revolutionary Haiti for more than a half-century after the slave revolt that led to its separation from France. The thought of accepting a black ex-slave as a formal ambassador in Washington society was just too horrifying for southern sensibilities.

McPherson makes Abraham Lincoln the focal point of his essay. According to the author, Lincoln believed the Founding Fathers intended to include blacks in the sweeping phrase "all men are created equal," which meant that slaves were entitled to personal liberty at some future date under radically different conditions. The emancipation of slaves and the later enactment of three constitutional amendments dealing with the rights of ex-slaves marked a major shift in public perceptions of the concept of liberty. Negative liberty — the freedom "from" unfavorable outcomes — was augmented by the idea of positive liberty — the right "to" participate or benefit from certain activities. "Positive liberty is an open-ended concept," McPherson observes (p. 72), and its application to a whole host of unrelated issues has influenced a wide range of legal thinking about the status citizens in an affluent, technologically-sophisticated society. In the next essay on economic liberty and the constitution, Scheiber likewise argues that a shift in judicial focus from the rights of property to the rights and privileges of persons, starting with rulings related to ex-slaves, led in the twentieth century to a broadened concept of liberty.

Benedict and Kutler discuss liberty and religion in two distinct eras: the early-nineteenth and late-twentieth centuries. Benedict notes a sharp division between Hamiltonian Federalists and Jeffersonian Republicans over governmental support for religion, or more precisely Christian religion. Federalists believed Protestantism was a bulwark of free society, and thus promoted liberty, whereas Jeffersonians considered government sponsorship and recognition of any form of organized religion incompatible with genuine liberty. In the electoral contest, the Federalists were eventually destroyed as a viable party, and when Jeffersonians achieved power in the states, they "stripped particular religious denominations of their special privileges" (p. 35). Benedict shows that the defeat of political conservatism led to the erection of a high wall between church and state very early in the nation's history.

Kutler focuses on the revival of the religious issue by examining the school prayer controversy of the 1970s and 1980s. In the post-

World War II era, civil libertarians pressed several steps beyond the stance of their Jeffersonian forefathers. They were no longer content to tolerate a limited amount of abstract, almost secular religion in the educational process; instead they aimed at rooting out any form of generic religion altogether. The backlash from the religious Right, coincidental with the election of President Ronald Reagan in 1980, produced calls for a constitutional amendment to reinstate perfunctory prayer in the nation's public schools. Kutler believes conservative Republicans kept the school prayer issue alive for their own political purposes but with little commitment to orchestrating genuine constitutional reform. Reagan's statements supporting the preservation of an element of religiosity in state functions were symbolic in nature rather than substantive, and thus were not seriously threatening to the Jeffersonian legacy.

One of the great virtues of this anthology is its thematic unity and its coverage of events spanning three centuries. Readers seeking enlightenment on the historical evolution of the court's approach to the liberty issue will find these pages rewarding and pleasurable.

Edwin J. Perkins
University of Southern California

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In Honor of the Honorable William P. Gray for his
Service to the Bench and Bar
Steve Cochran, Esq., Los Angeles

In Honor of Julien G. Sourwine on his Presidency of
the Nevada State Bar
Earl M. Hill, Esq., Reno

In Honor of the U. S. Courts of the Ninth Circuit on
the 200th Anniversary of the Establishment of the Federal
Judiciary, September 24, 1789
Chet Orloff, Portland

OUTRIGHT CONTRIBUTIONS

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