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There are questions yet to be answered about western legal history. Is it anything more than the history of law that occurred somewhere west of somewhere else? If it is to establish its scholarly credentials, western legal history may have to do so by pursuing research in two areas in which it is unique. One of these consists of those fields of legal-history investigation for which western evidence is richer and more extensive than the evidence for similar events that occurred in places to the east. The other consists of those topics found only in the western states, provinces, and territories, such as the law of the open range, the law of the Spanish borderlands, law on the overland trail, and law in the mining folkmoots of the Sierras and the Rockies. A relatively overlooked subdivision of both of these categories, but especially of the second, is transboundary legal history.

When we think of the legal history of those regions shared by the British and the Russians, the British and the Americans, the
Americans and the Spaniards, and the Americans and the Mexicans, at least two potential topics come readily to mind. One is a law that lies forever just beyond our grasp: the law of the Blackfoot and the Apache, of the Assiniboine and the Papago, of the Kalispel and the Yuma. The second—much more within reach—is the transboundary law of the men of the western mountains: the beaver hunters of the Hudson’s Bay Company who crossed the continental divide from Rupert’s Land, and the trappers and traders from Saint Louis who discovered the South Pass to the west, and who met and interacted on the headwaters of the Missouri River, in the Snake Country, and along the streams that fall into the Great Salt Lake.

It does not do to use legal terms loosely, but if we wish to uncover the legal history of the old Snake Country, “law” as it was during the transboundary years of the Columbia River basin, we cannot allow familiar legal definitions to obstruct our way. Precise law may help us to frame our questions, but it should not dictate our evidence. When we seek the legal history of the early North American West, we must investigate legal behaviorism as much as rules of law. We will find probate practice but not the law of probate, creditors’ liens claimed by the fur companies unbalanced by workers’ liens owed to employees, and implied contracts enforced without thoughts of mutuality, detriments suffered, or benefits conferred. It is lawmindedness that we must seek as much as legal understanding, the lawmindedness of some of the leading figures in the westward movement across the North American continent: the lawmindedness of William H. Ashley and Sir George Simpson, William L. Sublette and Alexander Ross, and the greatest of the beaver trappers who explored the Far West, Jedediah Strong Smith and Peter Skene Ogden. The stories of their courage, adventures, sufferings, and discoveries have been told and retold in countless forms and innumerable ways. What we have not been told are tales of their legal behavior: of how they perceived property rights and enforced legal responsibilities, of how much they respected the rights of others, and of how they held others to mutually understood duties.

The first major interaction between American and British fur men in the Far West occurred at Astoria, where the Pacific Fur Company had established the initial outpost on the Columbia. When Great Britain sent a naval vessel to the Columbia during the War of 1812, the Americans were driven from the river, leaving the future Oregon Territory and the Snake Country to the exclusive possession of Montreal’s North West Company and the Indians until the dawn ing of a new era in 1821 and 1822.

3 For a survey of what can be found in Snake Country legal history, see ibid.

4 Some of the legal [and international legal] doings of this enterprise have recently been described. James P. Ronda, Astoria & Empire (Lincoln, Nebr., 1990).
In 1821 the North West Company and the Hudson's Bay Company merged, not only ending a period of violence rare in Canadian history, but introducing statutory monopoly to the Snake Country. The next year, in the United States, the Congress ended any semblance of monopoly by closing the old factory system of regulated Indian stores, and permitting all comers to enter the business of fur trading. That year John Jacob Astor opened a Saint Louis office and William H. Ashley placed in the Missouri Gazette the famous advertisement for one hundred men “to ascend the river Missouri to its source.” The notice was answered by Jedediah Smith and the American return to the Columbia River was under way.

The Snake Country had been trapped in the era of the North West Company by expeditions led by the remarkable Donald Mackenzie, one of the overland Astorians who went on to be a leader on the Columbia, first for the North West Company and then for Hudson’s Bay. The little we know of his exploits in the Snake Country comes from the writings of Alexander Ross, for whom Mackenzie was a hero. Ross is the historian’s hero, for he kept the first journal of a Snake Country expedition. In 1824 he led the first significant brigade sent out by the reformed Hudson’s Bay Company. It is from that journal and his memoirs written years later that we can start to reconstruct the law of personal property, debts, and restraints on private trading that British monopoly brought to the Snake Country.


6 As the joint occupancy of the Oregon Territory had commenced, the legislation provided that the monopoly was not to be “deemed or construed” as giving any trading rights “to the Prejudice or Exclusion of any Citizens of the said United States.” 1 & 2 Geo. 4, c.66.

7 Dale L. Morgan, ed., The West of William H. Ashley: The International Struggle for the Fur Trade of the Missouri, the Rocky Mountains, and the Columbia, with Explorations beyond the Continental Divide, Recorded in the Diaries and Letters of William H. Ashley and his Contemporaries 1822-1838 (Denver, 1964) 1 [hereafter cited as The West of Ashley].

8 There is a biography of sorts: Cecil W. Mackenzie, Donald Mackenzie, “King of the Northwest”: The Story of an International Hero of the Oregon Country and the Red River Settlement at the Lower Fort Garry (Winnipeg, 1937).
LAW OF THE HUDSON'S BAY COMPANY

The brigade that Ross commanded was typical of the expeditions that the Hudson's Bay Company was to send out from the Columbia over the next decade and a half. "I smiled at the medley," he recalled of the first day out from Spokane House, "the variety of accents, of dresses, habits, and ideas; but above all, at the confusion of languages in our camp: there were two Americans, seventeen Canadians, five half-breeds from the east side of the mountains, twelve Iroquois, two Abinakee Indians from Lower Canada, two natives from Lake Nipisingue, one Soulteaux from Lake Huron, two Crees from Alhabasca, one Chinook, two Spokanes, two Kouttanais, three Flat-heads, two Callispellums, one Palooche, and one Snake slave!" In addition to these fifty-five men there were eighty-two women and children, a group of nontrappers accompanying every expedition, yet so seldom mentioned in Hudson's Bay journals that legal historians may never write of Snake Country family law or Snake Country juvenile law. By contrast, the twelve Iroquois receive extensive attention from Ross, and it is from them we will learn about the law of desertion. "The Iroquois were good hunters," Ross noted, "but plotting and faithless."

"Soon after encamping," Ross recalled, "the Iroquois began to sing hymns: as soon as I heard that, I doubled the watch, and gave strict orders to observe their motions, as the singing of sacred music by these hypocritical wretches is a sure sign of disaffection."

In his journal he wrote, "Murmuring among the Iroquois, but I cannot learn the cause." The next morning he found out, when the Iroquois asked to see their accounts. "I showed them article by article and told them their amounts which seemed to surprise them not a little." After starting on the day's journey, Ross discovered that "the worthy Iroquois" had stayed behind. He went back and found that all but one was resolved to leave the expedition. Asked why, they "grumbled, saying the price allowed


10 Ibid. at 2:9.

11 Ibid. at 2:6.

12 Ibid. at 2:9-10.

for their furs was so small in proportion to the exorbitant advance on goods sold them, they were never able to pay their debts much less make money and would not risk their lives any more in the Snake Country.” 14 They wanted to hunt on their own. With hostile Indians in the mountains it was more dangerous to trap in a small party than with a large one, but the smaller the crowd, the more beaver each trapper could expect to get, and beaver was both why they were in the Snake Country and how they got out of debt. “Our debts are heavy,” one Iroquois explained, “and we are never able to reduce them in a large party; allow us to go off by ourselves, and we shall do much better.” 15 Ross refused. He was headed toward Blackfoot country, where he needed every man for defense, so he ordered the Iroquois to catch up. “They grumbled and talked, and talked and grumbled and at last consented to proceed. Thinks I to myself—this is the beginning.” 16

Ross was worried about much more than numbers and safety. The quality of his men was a concern. A class structure was inherent in the Hudson’s Bay Company, with the officers and clerks always referred to as “Gentlemen” and addressed as “Mr.” The lower ranks were the “Men,” 17 or “Canadians”—appellations some of the gentlemen, Ross among them, thought too good for the Iroquois. The gentlemen did not like the Iroquois, and made no bones about it. “[T]hey are sullen, indolent, fickle cowardly, and treacherous,” Ross explained. “And an Iroquois arrived at manhood is still as wayward and extravagant as a lad of other nations at the age of fifteen.” 18 Even worse, they were “very unfit for a Snake voyage” as they were “too fond of trafficking away their goods with the natives.” 19 They were exactly what no one needed in the Snake Country: reckless.

In 1818 some Iroquois had persuaded Mackenzie to let them hunt separately. A few months later, returning to the Columbia, he went to the promised rendezvous to pick them up. “Instead, however, of finding the Iroquois together, and employed in hunting or in pursuit of hunting” Mackenzie reported, “I found them by twos and by threes all over the country, living with the savages, without horses, without traps, without furs, and without

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15 Ross, Fur Hunters, supra note 9 at 2:10.
17 “Peter Skene Ogden’s Notes on Western Caledonia,” ed. W.N. Sage, British Columbia Historical Quarterly 1 (1937) 45, 51 n14.
18 Ross, Fur Hunters, supra note 9 at 1:295-96.
clothing, perfectly destitute of everything I had given them. I left them, therefore, as I found them. Iroquois will never do in this country.”

An Iroquois told Ross what had happened. After separating from Mackenzie, “we set to trapping and were very successful, but had not been long there, when fell in with a small band of Snakes. My comrades began to exchange their horses, their guns, their traps with these people for women, and carried on the traffic to such an extent that they had scarcely an article left; then being no longer able to hunt, they abandoned themselves with the savages, and were doing nothing.” As a result, the narrator claimed he left his companions and made his way back to the Hudson’s Bay post alone. "I had no difficulty believing the statement of the Iroquois,” Ross wrote. “It was in accordance with their general character.”

It might be asked what difference it made to the officers of Hudson’s Bay Company that the Iroquois squandered their property, and in the answer is the story of government by debt in Rupert’s Land and the Columbia River basin. The property the gentlemen worried about was not Iroquois property but Hudson’s

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20 Ross, Fur Hunters, supra note 9 at 1:201-202.

21 Ibid. at 1:187-88.
Bay property. They were concerned about the debts the men owed the company. When the Iroquois traded away their horses, traps, and beaver for local women they were unable to repay their debts.

Hudson's Bay maintained its control over its servants in the Oregon Country in three ways: by the ownership of property, by debts, and by restrictions on private trading. The role of ownership was to see that the freemen, not the company, faced the loss for property put at risk. On crossing a river in 1826, Peter Ogden found a canoe and a bridge that was "made of wood the River not being more than 20 yards wide. We commenced crossing but the Bridge being composed of such slender materials I did not think it prudent to risk the Company's Property over it, the Freemen being of a different opinion cross'd theirs, before all was safe across five Horses were lost." The freemen were the losers, just as they were when starving and, to survive, they killed a horse or they neglected to hobble their animals at night and the horses were driven off by Snakes or Blackfoot.

True, the company took better care of its property, always guarding the horses in enemy country or, at least, hobbling them. Still, the costs seemed to fall disproportionately on the freemen. Even when one of the company's horses died, Hudson's Bay did not always lose, as when two were found dead "owing either to drinking salt water or some poisonous root." Happily, "the meat has not been lost for it has been purchased by the men for food." Although the company was under no obligation to provide food for the people in the brigade, the engaged men—

22 The freemen were independent trappers who contracted with Hudson's Bay as members of particular expeditions to the Snake Country. They were distinguished from the engaged employees of the company, and their legal status is discussed in Reid, "Layers of Western Legal History," supra note 1.


24 John McLoughlin to George Simpson, March 20, 1827, in Dorothy O. Johansen, Introduction and Notes to Ogden, Second Snake Journal, supra note 23 at 3 n2.

25 When horses were stolen from Ogden's camp while he was leading a Snake Country expedition along the headwaters of the Missouri River, the clerk of the expedition noted, "The freemen are the only sufferers having last night put their horses in the hills." And two days later, "Some of the Freemen had to walk having no horses." Entries for January 31 and February 2, 1826, Journal of Occurrences in a Trapping Expedition to and from the Snake Country in the Years 1824 and (25) Kept by William Kittson, in Appendix A to Peter Skene Ogden's Snake Country Journals 1824-25 and 1825-26, ed. E.E. Rich and A.M. Johnson (London, 1950) 216 [hereafter cited as Kittson, Snake Country Journal].

26 Entry for May 25, 1827, Ogden, Second Snake Journal, supra note 23 at 120.

27 "Freeman [sic] starving and had we not Corn we would be in the same predicament," entry for October 30, 1826, ibid. at 19.
the servants under contract who were not freemen—were obliged to furnish food to the officers. 28

There were times when the leaders of Hudson’s Bay expeditions distributed provisions, as when there was general starvation, and their reasons—not always what we would expect—tell us quite a bit about company policy. 29 Once, Ogden discovered that the hunters were selling meat at the rate of one beaver skin per deer. That was against company rules, and Ogden could have ordered it stopped. Instead he decided to assist “the needy.” “[O]f two evils,” he explained, “we must choose the least for if they were prevented from purchasing meat they would from hunger be under the necessity of killing their Horses.” 30 On another occasion he sent provisions to men who had fallen behind the main party and had “been seven days without food.” The men deserved credit “for not killing one of their Horses,” he thought. “I am of opinion they would not have starved so long had the Horses belonged to the Co[mpan]y.” 31

Most of the freemen on a Hudson’s Bay trapping expedition had obtained much of their property from the company. At the start, either at the trading post or two or three days out on the trail, the officers parcelled out equipment to members of the brigade. Each man going with him on his first Hudson’s Bay venture to the Snake Country in 1824, Alexander Ross wrote, “had to be fitted out, according to his capacity as a hunter, with a gun, from two to four horses, and from six to ten steel traps, besides clothing and ammunition; and generally all on credit.” 32 The process might take two or more days, 33 for all transactions were entered into

28 Instructing the man who succeeded him as leader of the Snake Country expeditions, Ogden wrote, “The Engaged Men are not entitled to any Rations from their starting from this [i.e., a company post on the Columbia, generally Fort Walla Walla] to their Return and are obliged to supply you with food when in their power.” Ogden to John Work, August 21, 1830, Appendix B to The Snake Country Expedition of 1830-1831: John Work’s Field Journal, ed. Francis D. Haines [Norman, 1971] 156 [hereafter cited as Work, Field Journal].

29 There are also occasions when no explanation was stated and it is not clear from the journal who was given food—the entire camp or only the engaged men. E.g., entry for September 24, 1826, Ogden, Second Snake Journal, supra note 23 at 7.

30 Entry for January 29, 1827, ibid. at 61.

31 Entry for November 20, 1826, ibid. at 29.

32 Ross, Fur Hunters, supra note 9 at 2:5-6. On the next expedition, the first led by Ogden, “the men were supplied with Horses, Traps and other necessary required for trapping beaver and feeding themselves in [the] course of the voyage.” Entry for December 20, 1824, Kittson, Snake Country Journal, supra note 25 at 209. See also entries for December 5, 20, 1824, Ross, Snake Country Journal, supra note 13 at 387-88.

33 E.g., entry for September 18, 1826, Ogden, Second Snake Journal, supra note 23 at 3.
accounts books, one set of which accompanied the expedition—the books that Ross produced to show the Iroquois what they owed—and another of which remained at one of the company's headquarters on the Columbia River, either Fort Nez Perces or Fort Vancouver. The freemen were to pay for the goods with the beaver pelts they captured in the traps they were buying. It was a system leading generally to one end—debt, and debt was how Hudson's Bay controlled men within Rupert's Land and the Oregon Country.

There was a professional expression to describe the condition of the freemen. They were said to have "taken debts." It was a phrase that described a status of semiperpetual servitude as much as an economic relationship. The freemen who went out to trap the Snake Country in the Hudson's Bay brigades not only bought their essentials from the company, but they did so at what one officer called "exorbitantly high prices," and sold the beaver that they harvested at well below the market value, even below

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34 It was for this purpose that some expeditions had clerks, for example William Kittson, clerk to Ogden's first Snake Country brigade. "He had to keep the accounts of individual trappers, and, since trappers obtained equipment from the company in the form of loans to be repaid in beaver pelts taken during the season, his job was very important. His account shows intimacy with the men that Ogden's record lacks." David E. Miller, Introduction to "William Kittson's Journal Covering Peter Skene Ogden's 1824-1825 Snake Country Expedition," ed. David E. Miller, Utah Historical Quarterly 22 (1954) 125, 126 [hereafter cited as Kittson, "Utah Journal"].


36 "Every article of extra clothing or finery which they want must be obtained from the Company's stores; and as there is no second shop at which to apply, prices immeasurably beyond the value are charged for the various articles they purchase," Ross Cox, The Columbia River: Or Scenes and Adventures During a Residence of Six Years on the Western Side of the Rocky Mountains among various Tribes of Indians hitherto Unknown; together with "A Journey Across the American Continent," ed. Edgar I. Stewart and Jane R. Stewart (Norman, 1957) 355 [Ross was with the North West Company on the Columbia, but what he says was also the rule for Hudson's Bay.]

the Fort Vancouver equivalent of the London market value. As a result, the average freeman could return from an expedition unable to pay the company all that he owed, and could remain in debt for years—as did, apparently, at least five of those who went with Ross on his first expedition to the Snake Country. “Five of the Canadians were above sixty years of age,” he wrote, “and two were on the wrong side of seventy.”

Ross does not say so, but he leaves the impression that for the first time many of the Iroquois were comprehending the implications of their indebtedness to the company. He blamed dissension on ringleaders, especially a man called Old Pierre. Confronting Ross, Old Pierre claimed that Peter Ogden had promised the men that “there would be no more N[orth] W[est Company] currency; this they construed to be but paying half for their goods.” They meant that Hudson’s Bay, by continuing the circulation of

38 Barker, Introduction to Ogden, supra note 5 at xli-xlii.


40 “Their improvidence compelled them to purchase their trapping outfits and horses from the Hudson’s Bay Company on credit. They were obliged to pay prices under these conditions that were exceedingly high. As an assurance that their accounts would be cleared they were obliged at the end of each hunt to dispose of their furs to the company at a prearranged schedule of rates. The rates were exceeding low. The profits of trapping under these conditions were slight. Most of the Snake freemen, indeed, in spite of the hazard and hardships of their work, remained year after year indebted to the company.” Frederick Merk, “Snake Country Expedition, 1824-25: An Episode of Fur Trade and Empire,” Oregon Historical Quarterly 35 [1934] 93, 98 [hereafter cited as Merk, “Snake Country Expedition”]. There seems to have been a long tradition of perpetual indebtedness in the Canadian fur trade. See, e.g., Report from Charles Grant to Gen. Haldimand, April 24, 1780, Documents Relating to the North West Company, ed. W. Stewart Wallace [Toronto, 1934] 63 [hereafter cited as Wallace, Documents].

41 Ross, Fur Hunters, supra note 9 at 2:6. Thomas James, providing an abundance of facts, claimed that in 1810 Manuel Lisa attempted to impose the British system of high prices on goods sold by the company and low prices on fur onto the American fur trade. It is evident that the effort was resisted sooner on the Missouri than it was on the Columbia. Thomas James, Three Years Among the Indians and Mexicans, ed. Milo Milton Quaife [New York, 1966] 9, 97-99. In the American trade, however, debt kept men in the mountains year after year or caused them to take certain assignments. See, e.g., entry for August 12, 1835, Samuel Parker, Journal of an Exploring Tour Beyond the Rocky Mountains, Under the Direction of the A.B.C.F.M. Performed in the Years 1835, ’36, and ’37 [1838; reprint, Ithaca, 1967] 75; entry for 5 December, 1833, “The Private Journal of Robert Campbell,” ed. George R. Brooks, Bulletin of the Missouri Historical Society 20 [1964] 107, 109

currency issued by the Old North West Company, was purchasing their furs at half the promised price. They seem to have been correct. One of the methods of keeping the company's "servants in debt and subjection," a Hudson's Bay officer who had served on the Columbia explained, "was the circulation of a depreciated currency, called North-west Currency, in the interior, in which money was reckoned only at one half the value it bore in Canada. The men who were engaged at Montreal had their wages calculated according to the established legal currency, but every article which they received in the interior was charged according to the North-west Currency."\footnote{Dunn, Oregon Territory, supra note 37 at 25.}

Ross told Old Pierre that if they had a promise it would be kept, but it had to be kept at headquarters where all accounts were settled. He could do nothing out in the wilderness.\footnote{Entry for February 13, 1824, Ross, "Snake Country Journal," supra note 13 at 371.} It was the first recorded labor negotiation in the history of Montana, and, surprisingly, Hudson's Bay gave in. Ross apparently sensed that he was in a weak bargaining position. The next morning he saw "the Iroquois apart from the whites" and "suspected plotting." Sending for two of the leaders, he "gave them a memo importing that N.W. currency was done away with and their accounts would be settled with Quebec currency or sterling. This pleased."\footnote{Entry for February 14, 1824, ibid. at 371-72.} Ross's concession cost the company money, but did not undermine the basic policy of keeping both the engaged servants and the freemen in economic subjection, serving at the discretion—even the whim—of the officers.

The senior officer for Hudson's Bay in Rupert's Land, Gov. George Simpson, was quite frank about both the advantages and necessity of having residents of the territory under the company's will. Once, on an inspection trip, he was at one of the company's posts when he apparently discovered "a petty theft of Tea & Flour." He "examined our Trader Mr. Chastellain, & Glasgow the Cook ... they pleaded Guilty which gives me a firm hold of both; if the services of the former are required for another year, he must either remain on my terms or submit to a heavy fine; the latter will be a most useful Man to Mr. Brown in the Mountains, as he speaks English, French & Iroquois fluently, he did intend going to Canada this season having a considerable Balance in the Compys. hands but he must now prepare for another campaign."\footnote{Entry for March 3, 1821, Journal of Occurrences in the Athabasca Department by George Simpson, 1820 and 1821, and Report, ed. E.E. Rich (Toronto, 1938) 290.} Three years later, Simpson was between the Beaver and Athabasca
rivers when he learned that some freemen were about "to go on a War Expedition against a poor helpless inoffensive tribe of Indians." For reasons of humanity as well as company policy (he planned to close the local fort and feared that warfare would discourage these Indians from doing business at a post farther away), he threatened the freemen. If they went to war, he warned, he would immediately cut off their supply of ammunition and "next Season they should be bundled down to Canada where starvation & misery would follow them." Simpson was confident his words would be enough. All he had to do was threaten and the men would obey. They knew he could enforce whatever he said. "Those freemen are fully in our power," he wrote, "and if they break their promise I shall keep my word in regard to them."*4

Hudson's Bay also maintained its hold over the men by making the best of its legislative privileges. It guarded its monopoly over all sales of goods to the men and insisted on its exclusive right to purchase every fur they sold. Only the company could buy pelts and skins. The engaged servants and freemen were not permitted to trade among themselves or with Indians. It was a rule the officers enforced, even on expedition. Ogden was in the Snake Country when he discovered "that one of the Freemen had traded two Beaver Skins from an Indian[.] I lost no time in depriving him of them and forbid any from trading with the natives and if discovered they shall forf[e]it their hunts, they promise fair but I shall require to watch them narrowly—if the Freemen were allowed to trade with the natives they would soon place such value on their Furs we would never be enabled to trade with them so far they lay sufficient value on them."48

Hudson's Bay employed its monopoly of sales to the freemen to enforce the monopoly over purchases from the Indians. Once in the vicinity of the Continental Divide, Gov. Simpson was told of freemen who "were here watching the Shewhoppes in order that they might trade their Furs before they got to the Establishment [Hudson's Bay's Fort Thompson] and thereby make a profit on the hunts of these poor Indians, but I gave them notice that that practise must be discontinued." He also wrote a circular letter to the local factors, instructing that if these freemen "continue this nefarious Traffick" the factors should sell them no supplies. He knew, he wrote, that if these freemen were sold "no supplies of any description," they would "soon be quite at our disposal as their very existence depends on us."49

47 Entry for September 21, 1824, Simpson, Journal, supra note 5 at 21-22.
48 Entry for December 6, 1826, Ogden, Second Snake Journal, supra note 23 at 37.
49 Entry for October 11, 1824, Simpson, Journal, supra note 5 at 31. For American fur men, restriction on sales was a matter of contract, not of legislative monopoly. Thus, when they did not receive furs to which they felt themselves
Alexander Ross could not handle the Snake Country freemen with the same assurance as George Simpson handled renegades in Rupert’s Land. By mid-February his expedition was trapped in the snows of western Montana. Unable to move forward on horseback, he “sent off forty men with shovels and fifty horses to beat the road.” The effort failed. The next day, with the entire brigade snowbound,

John Grey, a turbulent leader among the Iroquois, came to my lodge as spokesman to inform me he and ten others had resolve to abandon the party and turn back. I asked him why? He said they would lose the spring hunt by remaining here, were tired of so large a band, and did not engage to dig snow and make roads. I told him I was surprised to hear a good quiet honest fellow utter such language, God forgive me for saying so. I said by going back they would lose the whole year’s hunt, and here a sudden change in weather would allow us to begin hunting. Danger required us to keep together for safety. John answered he was neither a soldier nor a slave; he was under the control of no man. I told him he was a freeman of good character and to be careful not to stain it. In my heart I thought otherwise. I saw John in his true colors, a turbulent blackguard, a damned rascal. He said fair words were very good but back he would go. “You are no stronger than other men,” said I, “stopped you will be! I will stop you,” and he said he would like to see the man who could stop him. I said I would stop him. If his party walked off the expedition would fail.... John went off cursing the large band, the Snake country, and the day he came to it! So another day ends.

Clearly relieved the following day when “John as he swore, did not turn back nor [did] any of his gang,” Ross was still worried. “I suspect he is plotting to raise a rebellion. If he succeeds, it will

entitled, they thought of fraud, not of crime. One American trapper wrote to his partner from the mountains that of eight or ten packs of fur “we have lost by the rascality of a few men, who were largely indebted to us and who traded their fall’s hunt with other companies during the winter as it happened they did not winter near any of our parties. I am in hopes that it will not so happen in the future as I have so arranged that it will be hard for any of them to defraud us hereafter.” Lucien Fontenelle to Pierre Chouteau, September 17, 1834, Chittenden, Fur Trade, supra note 37 at 308-309.


51 Entry for February 19, 1824, ibid. at 375.
injure our prospect if not stop us altogether." He needed the Iroquois. They were good hunters, and if game were not tracked soon the men would be killing their horses. More seriously, the expedition was between the Blackfoot and the Crow, and every man was important. Realizing that under the circumstances he could not longer rely on debt to keep Grey obedient, Ross turned to contract. "I sent for the intriguing scamp and agreed with him to hunt me animals, whenever I should want any, from which source his debt of 4,000 livres is to be reduced 400 livres or about twenty beaver." Grey agreed. "All quiet once more."

From these figures we can learn something of the freemen's debts. Ross says that Grey owed the company two hundred beavers. Later, after the expedition ended, he estimated that each trap had caught an average of twenty-six beaver. Each hunter usually had six to eight traps, but some could handle ten. If Grey had ten—a most unlikely number—and took the average catch in each, he would have taken two hundred and sixty pelts. That would have netted him sixty beaver—twelve hundred livres more than the debt he owed Hudson's Bay.

Grey was the leader of about ten Iroquois who wanted to leave the main party and hunt separately. Had he been without followers, Ross would not have contracted with him. He would have treated him like any other Iroquois and kept him in line by force. After the expedition had tramped a path over the snow-covered mountain and came to the Bitter Root River near the Missouri, two other Iroquois deserted. Without hesitating, Ross

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52 Entry for February 20, 1824, ibid. at 375. In his later memoirs, Ross told a quite different story, which is of particular interest because he attributes to himself an action that an American fur man might not have felt authorized to take. According to the memoirs, Ross got up that morning to discover that Grey had "collected, saddled, and loaded his horses ready for a start, and every eye in the camp was directed to witness his departure. Affairs had now come to a crisis; the success or failure of the expedition depended on the issue. I was determined now to act, and resolutely went up to him with a cocked pistol in my hand, ordering him either to pay his debt, or unsaddle his horses and turn them off with the others, or he was a dead man. John, seeing no person interfere, unsaddled his horses, and I returned to my tent. Not another word was spoken, and here the affair ended." Ross, Fur Hunters, supra note 9 at 2:38-40. It is evident that Ross premised his authority to use deadly force on debt. As Grey owed the company a large debt, Ross felt he had the right to keep him from leaving with property. If he left, he had to do so without the horses and traps he had "purchased" from the company.


54 Entry for December 20, 1824, ibid. at 388

55 Ross, Fur Hunters, supra note 9 at 2:5.

56 But not in every case. "On leaving our encampment at Hell's Gates, I discovered that one of my Iroquois, named Jacob, had deserted. To have gone in pursuit of him would have been vain, if he wished to keep out of our way; so we continued our journey." Ibid. at 2:14.
went after them. "Assembling a small party, I went in pursuit of
the villains. After sixteen miles we came up with them, [and]
partly by persuasion, partly by force, brought them along after
dark."57

Ross was defending property. The right of the company to
prevent desertion, to end desertion, and to return deserters by
force, was a right of property, not a right sounding in contract.
At least that was true for the British companies. For American
mountain men, it should be noted in passing (for the point cannot
be developed here), the right assumed by leaders to act against
deserters sounded more in contract, a claim of reliance upon the
promise of labor, and the foreknowledge of the deserting employee
that he had voluntarily placed himself in an employment where
the success—and, more importantly, the safety—of the enterprise
depended on his remaining in service.

It is true that property was sometimes a factor in American
desertions, as when the departing men took company horses. But
even then we find the Americans talking differently from the
officers of Hudson's Bay. An example is Zenas Leonard, who was
going from Saint Louis to the mountains to trap for the firm of
Gantt and Blackwell. When two men deserted from the expedi-
tion with two horses, he did not mention property except to note
that they were "two of the best horses." He wrote, instead, of the
"bad effect"; the desertion, he lamented, "impaired that full
confidence which had heretofore existed between the members
of the company."58

The records of British fur companies are rich both in evidence
of desertions and in theory as to why the firms had rights against
deserters. They tell us not only what the officers did, but why
they thought they were privileged to do it. An analysis of their
reasoning will have to be put off until another occasion. For
purposes of this article, it is best to limit our questions and permit
Ogden to explain how he handled one situation, for his response

57 Entry for February 25, 1824, Ross, "Snake Country Journal," supra note 13 at 373. "Laurent and Lizard, deserted the party.... Now that they had begun, there
will be no end to desertation thought I, if a stop is not speedily put to it....
Losing no time, I took four men with me, and hurried after the fugitives. It was a
leap in the dark, for they might have hid themselves so well in a few minutes
time that we could never have found them out, but we came upon the fellows as
they were making a fire at the distance of sixteen miles off, and so surprised were
they that they took no steps to get out of the way. We at once laid hold of them,
but could not by fair means prevail upon them to return; we, therefore, had
recourse to threats, being determined, since they gave us so hard a ride, not to
deal too softly with them. Lizard, in particular would neither lead nor drive, and
we threatened to drag him back at one of the horse-tails before he consented to
go. Back, however, we brought them." Ross, Fur Hunters, supra note 9 at 2:16-17.

58 June 1831. Adventures of Zenas Leonard Fur Trader (Clearfield, Penn., 1839),
microprint reprint.
was typical of other Hudson's Bay officers and is a practical
application of what they considered to be their authority and
how they exercised it.

Last night the Guard informed me that three half Breeds
of our Camp were on the eve of deserting, measures
were soon taken to prevent them by securing their
Horses and Arms. ... this morning they again made an
effort to start ... finding they were bent on going I
deprived them of their Horses, Traps, Arms and Blank-
ets, this however at the time appeared to have no effect
on them, I left two men to watch their motions, and
then raised Camp, we advanced six miles, and my men
not overtaking us I suspected those rascals might
attempt pillaging them, I returned with two men and
soon overtook them[. It appears they did not relish the
Idea of performing the Journey on foot and had resolved
to follow us and the three Snakes have continued their
Journey without them[. W]e will however require to
watch these Scamps for some time[. O]ne of them for his
impudence received a drubbing from me. 59

This incident occurred in what is now Idaho, somewhere
around the vicinity of the American Falls. The men could think
of leaving only because three Snakes traveling with the expedition
were going to visit a camp of Flatheads hunting buffalo. The idea
probably was that the Flatheads, when they went back to their
nation, would escort the deserters around the Blackfoot, to the
relative safety of the Oregon Country.

Ogden's legal theory is unclear. He claimed for Hudson's Bay
a property interest over the horses, traps, and arms, and used
property to force obedience. What we do not know, and what he
most likely did not ask, is why he had a claim on these goods.

59 Entry for April 22, 1826, Peter Skene Ogden's Snake Country Journals 1824-25
cited as Ogden, First Snake Journals]. Researchers of western legal behaviorism
should be warned of the reliability of some Hudson's Bay published material. An
earlier published version of the entry just quoted said: "Guard informs us that
three halfbreeds are bent on desertion. I secured their horses, arms and blankets.
They do not relish the idea of a journey on foot and followed us; one of them, for
his impudence, received a drubbing from me. We camped within two miles of
the American Falls." Entry for April 22, 1826, "The Peter Skene Ogden Journals,"
ed. T.C. Elliott, Quarterly of the Oregon Historical Society 10 (1909) 331, 360
[hereafter cited as Ogden, "Snake Journal, 1825"]. The purpose of the briefer
version is to serve historians of exploration and help them determine who saw
what first.

60 As, for example, Alexander Ross, when he ordered John Grey "either to pay his
debts, or unsaddle his horses and turn them off with the others," supra note 52.
Was it as property belonging to the company? That is, that title had not passed on physical transfer from the company to the men and would not vest until the purchase price was paid? Or was he asserting a wilderness version of a creditor's lien, seizing the property of the men to secure payment of the debts? From all the other evidence available, it seems that the Hudson's Bay officers were claiming a right to protect the company's debt, not exercising ownership. Such was what other brigade leaders indicated on similar occasions. Whenever a freeman in debt to the company suffered the death of a horse, broke his traps, or killed a horse for food, the loss was his, not the company's.

**Anglo-American Law in Snake Country**

Before returning to the Columbia River, Alexander Ross had one last event to record. On October 14, while trapping in what would become known as Lemhi Valley, Idaho, he encountered a party of American mountain men. No other occurrence had been so much apprehended by the officers of the Honorable Company. Ross had been warned to avoid Americans. If he met them, he was told, he should have nothing to do with them. Above all else, as Gov. George Simpson reminded the chief factors of the Columbia, Ross had been "cautioned against opening a road for the Americans."

A series of events, some of which we can only guess at, led to the meeting between Ross and Jedediah Smith. After passing the Blackfoot Nation and arriving at the relative safety of the main branch of the Snake River, Ross had given in to the demands of the Iroquois, and permitted them to trap separately. He knew it

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61 A revealing incident occurred at a time when Ross was trapping in the midst of a summer fishing camp of, he estimates, forty-five hundred Snakes. The Snakes were stealing the expedition's traps and, to continue trapping, Ross had to get them back. He proposed to his forty or so men that they seize some Snake horses and tell the Snakes they could recover the horses only after the traps were returned. Some of Ross's men "said the Indians were too numerous; others, that we should all get killed." But "those who had lost their traps, were, like myself, anxious to get them back, and to show that we were not to be trifled with." If we can read between the lines, it seems that property ownership contributed to fortitude and that, despite the debts, the men, not the company, "owned" the traps to the extent that they would have suffered the loss. Ross, *Fur Hunters*, supra note 9 at 2:106.

62 Barker, Introduction to *Ogden*, supra note 5 at xlviii, n 1.

63 "I weighed the matter in my own mind, and at last consented, thinking it better to let them go and to supply their wants cheerfully, then to be dragging a disaffected party along with us, so I fitted them out, and we parted friends." Ross, *Fur Hunters*, supra note 9 at 2:74.
would be a mistake, and it was. Somewhere near the Green River the detached party ran into a band of Snakes—probably a war party—who took from the Iroquois most of their possessions—nine-hundred beaver (or so they told Ross), fifty-four traps, twenty-seven horses, five guns, and even some of their clothing. All they had left, they later reported, was one hundred five beaver conveniently hidden in a cache. They were in desperate circumstances when they chanced on a party of seven Americans led by Smith, perhaps in the vicinity of today’s Blackfoot, Idaho. It is at this point that some of the arrangements became ambiguous. The generally accepted story is that the Iroquois offered the one hundred five pelts they still possessed to Smith, in exchange for his taking them back to wherever they were to meet Ross. The Iroquois, some of whom were familiar with the Snake River, did not need the Americans, who were new to the country, as guides. If they did make an agreement of this sort, they were after American protection from Snakes and Blackfoot.

Ross was unhappy when the combined Iroquois-American party appeared at his camp. He was displeased the Iroquois had no beaver, and shocked that Americans had penetrated so far into the Snake Country. There may have been only seven of them, but that was more than enough to do mischief. They were men, he decided, “whom I rather take to be spies than trappers.” He knew the Iroquois too well not to be suspicious of their story. When aspects of the tale Old Pierre told differed slightly from Smith’s account, Ross guessed that the Iroquois had not lost pelts to the Snakes, but had sold everything to the Americans for the higher prices paid by Saint Louis dealers. Then, too, Smith may have offered to return with them to Ross’s camp in hopes of obtaining more beaver by dealing behind his back with the other freemen. “I suspect these Americans have been on the lookout to decoy more” of the freemen, Ross wrote. When he learned that the seven had caught more than nine hundred beaver between them, Ross tried to buy their pelts—the very thing for which he criticized Smith. “I made them several propositions but they would

64 As Ross learned when he encountered some natives fishing at the Snake Falls. “[T]he Indians told me that they had seen the Iroquois about a month before, and gave us to understand that they had got into difficulties with the Snakes, and were spending more time in hunting after women, than beaver.” Ibid. at 2:111.


66 The Iroquois “arrived pillaged and destitute. This conduct has been blamable since they left us. They passed the time with the Indians and neglected their hunts, quarrelled with the Indians at last, were then robbed and left naked on the plains. The loss of twelve out of twenty trappers is no small consideration.” Entry for October 14, 1824, Ross, “Snake Country Journal,” supra note 13 at 385.
not accept lower than $3 a pound. I did not consider myself authorized to arrange at such prices.” The real damage, he knew, would be when American prices became common knowledge on the Columbia. “The report of these men on the price of beaver,” he noted in his journal, already “has a very great influence on our trapp[e]rs.” Then, in a matter-of-fact manner, he recorded what headquarters would think the most ominous fact of all. The Americans, he wrote, “accompanied us to the Flatheads. . . . They intend following us to the fort.”

Why did Smith want to go with Ross to Fort Nez Perces and then to Fort Vancouver, and why did Ross permit him to do so? Possibly he was only looking for somewhere to spend the winter. Most historians have concluded he went to the Columbia to spy on Hudson’s Bay,68 a supposition that may or may not be supported by the fact he gave an extensive report to William H. Ashley at the American rendezvous the next summer.69

One last incident occurring on Ross’s Snake Country expedition must be noted. On the return trip he permitted some of his mixed-blood freemen to go off on a horse-stealing raid against the Snakes. This affair is not mentioned by Ross, but by other Hudson’s Bay officers who had to deal with its repercussions. As Ogden observed when he exerted “considerable pe[r]sussion” to prevent a similar raid the next year, “the murder of 7 Americans & Patrick O’Conor [sic] was owing to that unfortunate thieving expedition.” A Hudson’s Bay deserter, O’Connor and the American trapping party he had joined had been killed by Snakes. Mountain men on both sides of the border attributed the American deaths to the raid by Ross’s men. The cause-and-effect element in these matters was well understood in the fur trade. The Hudson’s Bay people had violated the Snakes, and when the Americans became the first fur men to appear in the area, vengeance fell on them. Some Americans blamed the officers of the Honorable Company and the officers, as usual, blamed the freemen. “I am confident Mr. Ross did all in his power to prevent their going,” Ogden wrote of the mixed-blood freemen, “but with villains in this cursed & ill fated Country no man Can inforce

67Ibid., Harrison Clifford Dale, The Ashley-Smith Explorations and the Discovery of a Central Route to the Pacific 1822-1829 (Cleveland, 1918) 96-97; Paul Chrisler Phillips, The Fur Trade (Norman, 1961) 2:446; The West of Ashley, supra note 7 at 244, n167.


obedience to his Commands & how truly galling it is we must Submit."

Ross never led another Hudson's Bay expedition. The next trapping brigade sent to the Snake Country, in December 1824, was under Ogden's command. "This is the most formidable party that has ever set out for the Snakes," Ross observed. "It is expected this hunt will net 14,100 beaver." The American party under Smith went with Ogden. After coming to Fort Nez Perces with Ross they were returning to the Snake Country. The plan was to stay with the British expedition until safely by the Blackfoot Nation, and then trap until it was time to join the annual rendezvous. Ogden was so slow that Smith left him on the Missouri side of the mountains, crossing over to the Snake River with only his six men. "The Americans traded some ammunition and Tobacco from us for Beaver at the same price as our freemen," William Kittson, clerk of the expedition, recorded in one of the two official journals kept by the officers. "About noon they left us well satisfied I hope with the care and Attention we paid them. For since we had them with us no one in our party ever took any advantage of or ill treated them. One Jedidiah S. Smith is at the head of them, a sly cunning Yankey."

We could wish we knew what Kittson meant by "cunning." His leader, Ogden, thought Smith a man he could outfox. When they met again on the Snake River, Ogden thought one reason he was having a disappointing trapping season was that Smith kept just ahead of him. When Ogden's men told him that Smith and the six other Americans had taken fifty beaver—more than his party of

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70 Entry for June 8, 1825, Ogden, First Snake Journals, supra note 59 at 58.
71 Entry for December 20, 1824, Ross, "Snake Country Journal," supra note 13 at 388. He also recorded that this, the most famous expedition in Snake Country history, included "2 gentlemen, 2 interpreters, 71 men and lads, 80 guns, 364 beaver traps, 372 horses." As usual, no mention was made of women and children. Ibid.
72 "Seven Americans who followed Mr. Ross to the Flat Heads joined us this evening and intend to keep with us until out of danger." Entry for December 29, 1824, Kittson, Snake Country Journal, supra note 25 at 211.
73 The Snake Country expeditions went to the headwaters of the Missouri to hunt buffalo and then would cross back over the Continental Divide.
74 Entry for March 19, 1825, Kittson, Snake Country Journal, supra note 25 at 221. Ogden was selling at the freemen rates—high prices that would contribute to the troubles he was about to have with his own men. Later, when he met Smith again on the Snake River, Smith had to buy more, and apparently protested costs. "[T]he seven Americans . . . requested to trade & tho' they found the prices high . . . being in Want they were obliged to Comply & traded 100 Large & Sm[all] Beaver this is Some remompence for the Beaver they traded with our party last Summer." Entry for April 8, 1825, Ogden, First Snake Journals, supra note 59 at 33.
seventy-one trappers had taken—he was alarmed. "[T]hese fellows," he worried, "by going a head will Secure the Beaver." So "I assembled the Freemen & Selected 15 with orders to proceed to the Sources of this River & Secure all they Could this may be means of Sending them [the Americans] off Sooner than they probably intend at all events we must endeavour to annoy them as much as we possibly Can."\textsuperscript{75}

"The Americans followed us this day," Ogden noted the next evening, "& have encamped three Miles a head but this will avail them naught... we have traps 12 Miles a head."\textsuperscript{76} Despite a poor harvest, he maintained the strategy of harassing Smith.\textsuperscript{77} The objective, he explained, was for his trappers to "keep in Company with them so as to annoy them & with the hopes they will Steer another Course."\textsuperscript{78} Although these maneuvers were successful, they did Ogden little good. Smith departed a few days before the British crossed today's Idaho-Utah line, but, once on the Bear River, inside territory claimed by Mexico, Ogden discovered that other parties of Americans had been trapping the area all spring. "[T]he Americans have taken nearly all the Beaver," he com-

\textsuperscript{75} Entry for April 16, 1825, Ogden, \textit{First Snake Journals}, supra note 59 at 37.

\textsuperscript{76} Entry for April 17, 1825, ibid.

\textsuperscript{77} "Trappers Started with their traps to overtake the Americans who are not far a head." Entry for April 19, 1825, ibid. at 38.

\textsuperscript{78} Entry for April 20, 1825, ibid. at 39.
plained. "[T]hey are a Selfish Set they leave nothing for their Friends we act differently."\(^{79}\)

Arriving at the river that is now named for him, Ogden at last found what he sought. The Americans had bypassed the Ogden and the stream had never been trapped. "I presume the Americans intended returning this way," he noted happily, "but they will be as we were on Bear River taken in."\(^{80}\) What he wrote next helps explain the legal stand he would adopt in a few days when his presence on the waters running into the Great Salt Lake would be questioned. The Americans, he complained, "ought to keep at home [and] not infringe on their neighbours territories."\(^{81}\) He seems to have been saying two things. First, that he believed he was either in British territory or in an area that was contested between Great Britain and Spain or Great Britain and Mexico. Second, that the United States had no claim to the place. This last point is puzzling. Unless he was joking (as he had been when complaining that, unlike the British, American trappers left no beaver for their friends), he must have meant either that he was not in the Oregon Territory, or that he was somewhere the United States did not claim. He must have thought he was in Oregon, for the only British rights to lands south of the Columbia were based on its claim to Oregon.

Ogden could have been saying that he was in a part of Oregon that the United States had renounced and Great Britain still claimed. If so, he was correct, for under the Adams-Onis Treaty of 1819, the United States had surrendered all claim to lands south of the forty-second parallel or the northern lines of Utah, Nevada, and California. It is possible, but very doubtful, that Ogden was aware of the treaty. He did not mention it a week later, when American trappers accused him of being the trespasser, nor did he refer to it in his correspondence with his superiors in the Hudson's Bay Company. One reason the British government did not protest the treatment he was about to receive from the American mountain men was that London suspected him of being on the other side of the mountains, in U.S. territory. Ogden knew he had left the Bear River and guessed that he was near the headwaters of the Sacramento. Otherwise the geography was quite vague, and he was not sure where he was.

On May 23, 1825, Ogden learned how international the Snake Country had become and how little the Hudson's Bay monopoly

\(^{79}\)Entry for May 8, 1825, ibid. at 45.

\(^{80}\)Entry for May 18, 1825, "Peter Skene Ogden's Journal of his Expedition to Utah, 1825," ed. David E. Miller, *Utah Historical Quarterly* 20 [1952] 159, 178 [hereafter cited as Ogden, "Utah Journal"]. "[I]t is to be regretted that this Spot is not ten times as large." Ibid. "I only wish we could find a dozen Spots equal to it." Entry for May 21, 1825, ibid. at 179.

\(^{81}\)Entry for May 1825, ibid. at 178.
counted south of the Columbia. He was encamped on the Weber River, just west of today's Mountain Green, waiting for several men who, a few days before, had fallen behind and about whom he was worried. Early that day two of the missing men came in with a party of fifteen led by Etienne Provost. Besides some Canadians, a Russian and at least one Spaniard were in the group. "Soon after this," fourteen more absent men appeared with perhaps twenty-five Americans who were, as Kittson put it, "under different heads." By that he meant the majority were free trappers, not company men. They had a leader, however, at least to the extent that he did most of the talking. He was a little-known mountain man named Johnson Gardner. He announced to Ogden's men that they were now in a free country, where they were entitled to freedom no matter what their economic status, "engaged or indebted," and that if they did business with Americans rather than with Hudson's Bay they would be paid $3.50 per pound for beaver and would be able to purchase their goods "cheap in proportion." Ogden understood why some of his men had been absent. They had "been with the Americans no doubt plotting." The next day brought Ogden's moment of crisis. Gardner started the morning by asking him, "do you know in whose Country you are? to this I replied I did not as it was not settled between Great Britain and America to whom it belonged." At this point, Gardner may have tried to bluff, for he announced that the question of sovereignty had been settled and Great Britain had ceded Oregon to the United States. "[A]s I had no license to trade or trapp," Ogden was told, he should "return from whence I came without loss of time." Ogden knew better. "I replied when we receive orders from the British Government" he would leave. "[T]hen he [Gardner] said remain at your peril."
Even if we are surprised by the substance of the debate, we should not hesitate to recognize how much it turned on legal questions. There in the western mountains, beyond the reach of any jurisdiction, in an area not yet known in Washington, London, or Mexico City, the men who hunted beaver argued aspects not only of territorial jurisdiction and private law, but also of international and even transnational law. Seeking to take advantage of their extreme isolation, Gardner tried to bluff Ogden in one, perhaps two, instances. The first instance was the claim that joint occupation of Oregon had ended and Great Britain had ceded the territory to the United States. The cession could easily have happened with neither Gardner’s nor Ogden’s hearing of it, but Ogden could not be sure whether Gardner had more recent information. Gardner was in touch with other mountain men who wintered in the Rockies, as well as with the contractees of William H. Ashley who were in communication with Saint Louis. Even if Gardner knew that nothing had happened, it did not hurt his case to bluff the British and make Ogden wonder.

It is not likely that Gardner was saying that they were on the east side of the Continental Divide. That was U.S. territory, and Ogden had strict orders from London not to go over the mountains. He always did, however, as he had when he went from the Flathead Nation to hunt buffalo on the headwaters of the Missouri before crossing back to the Snake (or the waters of the Columbia), and as he would on his return trip when he trapped beaver on the Madison. He knew he was west of the Divide, and it must be assumed that Gardner did also. It was then a common mountain assumption that the Bear and the Green were Pacific waters. The Great Salt Lake was just about to become known to westerners, but it would be a year or two more before the fur men learned that all rivers flowed into the lake while none flowed out. There was as yet no notion of a Great Basin, and both Ogden and Jedediah Smith were searching for the one or two great rivers that, like the Colorado, emptied into the Pacific. It is very unlikely that Gardner was bluffing on this point. He not only knew he was west of the mountains, he knew that Ogden and all his men knew they were not on land indisputably belonging to the United States. He would not have tried a bluff on that score.

87 As Hudson’s Bay’s chief factor on the Columbia, John McLoughlin, made clear when he explained to his superiors in London why Ogden, even though no longer “on the waters of the Columbia,” was not east of the continental divide. “I think he was either on the head waters of a River that falls at St. Francisco or on those of a River said to fall into the Ocean a little South of the Um[p]qua.” Letter of October 6, 1825, The Letters of John McLoughlin From Fort Vancouver to the Governor and Committee: First Series, 1825-38, ed. E.E. Rich (Toronto, 1941) 141 [hereafter cited as Letters of McLoughlin].
At least one historian has said that Gardner was bluffing because he knew he was south of the forty-second parallel. That meant he had crossed into what is today the state of Utah and, more importantly, territory that the United States had ceded to Spain. In the Adams-Onis Treaty of 1819, Secretary of State John Quincy Adams reinforced America’s claim to the Oregon Country, which had come under joint occupancy only the year before. As part of the treaty for the purchase of Florida, Spain ceded to the United States all its rights to Oregon north of the forty-second parallel, and the United States ceded to Spain everything to the south. The United States had no claim to the area where Gardner met Ogden—a fact, it is said, that Gardner probably knew.88

It is more likely irrelevant whether Gardner was aware of the Adams-Onis Treaty. Even if he knew of it, there was little chance he had any idea where the forty-second parallel ran. Ogden, with the network of geographical information that Hudson’s Bay furnished its officers, should have been better informed than Gardner. Yet we may doubt if he gave any thought to latitudes. His right to be where he was, trapping on the Weber River, was not affected by the treaty, which was between the United States and Spain only, and had, therefore, left unresolved the boundary between British Oregon and the new Republic of Mexico. He does, however, seem to have been far south of any place that either Great Britain or Hudson’s Bay Company intended to claim. When company headquarters in London decided not to ask the government to protest to the United States about Gardner’s interference with Ogden’s expedition, it noted “that Mr. Ogden must have been to the southward of the 49 degree of latitude,” implying that that was so far south it put him beyond the pale.89

The best conclusion is that neither Ogden nor Gardner knew where Spanish or Mexican sovereignty began, and neither cared. We have to guess about Gardner, for he was an American and we cannot be certain what he thought. But Ogden was a Hudson’s Bay man, and for Hudson’s Bay Spain was irrelevant. The law controlling Ogden’s conduct when meeting Americans such as Gardner had been outlined by John McLoughlin, the company’s chief officer on the Columbia, who got the law from the head committee in London. That body had instructed the company’s people in North America “That by the treaty of 1818 the Lands on the west side of the Rocky Mountains are free to ourselves and

88“Gardner probably knew this, but was merely using this bluff as an attempt to justify his actions at the time.” David E. Miller, Notes to Ogden, “Utah Journal,” supra note 80 at 182 n90.
89Quoted in Barker, Introduction to Ogden, supra note 5 at lii.
the subjects of the United States for ten years from the date of it which will expire in 1828." From this rule McLoughlin drew the conclusion that "the Americans have no right to assume any authority or claim this Country as part of their Territory." For McLoughlin, this meant not only that Hudson's Bay could trap waters well south of the Snake River, but that it could use force if push came to shove: "[B]y this you see we are justified in resisting to the Utmost of our power any attack on our persons and property or any assumption of authority over us by the Americans—Indeed so confident am I of our being justified in this that had we a party sufficiently strong to defend itself from the natives and that could be depended on, I would have no hesitation to make another attempt in that quarter if it was merely for one year to defy them to put their threats in Execution and to counteract the evil impression the vaunting assertions of Gardner ... will have on the Indians and remaining freemen."90

These were fighting words. McLoughlin admitted that Gardner had put no threats "in Execution" and surely knew that Gardner did not speak for the United States, yet he would have used force to test the right. There was no need. The Americans would never use force against Hudson's Bay in the Snake Country. This was something that McLoughlin would one day acknowledge, but it took him some time to realize it.

McLoughlin, after all, was a Hudson's Bay officer, and everyone at Hudson's Bay thought that Gardner had threatened Ogden with violence. Ogden created this impression, as his account of the incident stressed Gardner's boastfulness and did not dwell on the readiness of the freemen to leave the expedition and join the Americans. After Gardner had tried without success to bluff him, Gardner left Ogden's tent and went to the tent of John Grey, the Iroquois who had given Alexander Ross so much trouble the year before.

I followed him, on entering this villain Gray said, I must now tell you, that all the Iroquois as well as myself have long wished for an opportunity to join the Americans, and if we did not the last three Years, it was owing to our bad luck in not meeting them, but now we go, and all you can say or do cannot prevent us. During this conversation Gardner was silent, but on going out he said you

90 McLoughlin to John Work, August 10, 1825, Letters of McLoughlin, supra note 87 at 301.

91 John McLoughlin to the Chief Factors and Chief Traders, August 10, 1825, ibid. at 302.
have had these Men too long in your Service and have most shamefully imposed on them, treating them as Slaves selling them Goods at high prices and giving them nothing for their Furs, Gray then said that is all true and alluding to the Gentlemen [i.e., Hudson's Bay officers] he had been with in the Columbia, they are says he the greatest villains in the World, and if they were here I would shoot them, but as for you Sir you have dealt fair with us all. We have now been five Years in your Service, the longer we remain the more indebted we become altho' we give 150 Beaver a year, we are now in a free Country and have friends to support us, and go we will, and if every Man in the Camp does not leave you they do not seek their own interest.92

Grey's boast that he was "now in a free Country" has generally been interpreted as a claim that Ogden was in the United States and that Hudson's Bay was an interloper.93 As Grey was an American and apparently thought of himself as an American,94 that meaning is quite possible. In light of the general context of what he said and the specific arguments that Ogden was careful to quote him as making, it seems much more possible that Grey was claiming economic rather than political freedom. He was asserting his right not to be bound by any agreement or understanding he had with Hudson's Bay as the terms of the contract had been dictated by the company's monopolistic powers granted by parliamentary legislation. His conclusion of law was that that monopoly was illegal in the country south of the Columbia.

Not only were the words attributed to Grey directed against Hudson's Bay's superior bargaining position, but all of the discontent expressed by the Iroquois the year before to Ross had contained the same complaint. The Iroquois were not the only people opposed to Hudson's Bay privileges, a fact of which the company was aware, as it took pains to defend its monopoly on nationalis-

92Ogden to the Governor, et al., July 10, 1825, Merk, "Snake Country Expedition," supra note 40 at 110. Ogden wrote at least three accounts of these events. For the incident described here, see also Letter from Ogden, supra note 85 at 297-98; entry for May 24, 1825, Ogden, First Snake Journals, supra note 59 at 51-52.


tic, economic, humane, and natural-law grounds. Monopolies in general, and Hudson’s Bay in particular, were coming under increasing attack in Great Britain. There had always been an antimonopoly streak in American politics. Dislike of economic privilege and uncontrolled private power was an established given in American constitutional law, and was currently a prominent aspect of the then-dominant Jacksonian political theory. A related populist culture had worked itself into the mentality of the fur trade, as when a Saint Louis merchant was warned that public opinion would not tolerate one company’s dominating the business, or when American officials compared their free-market economy to the trade restraint of British North America.

It preserved for Great Britain an important area of trade that otherwise might be dominated by Russians and Americans, and thus helped preserve Rupert’s Land for the mother country. Gov. J.H. Pelly to the Lords of the Committee of the Privy Council for Trade, February 7, 1838, Simpson, Journal, supra note 5 at 341-42.

It asserted that monopoly was economically necessary to compete with Russians and Americans on the London market. James Edward Fitzgerald, An Examination of the Charter and Proceedings of the Hudson’s Bay Company, with Reference to the Grant of Vancouver’s Island (London, 1849) 62 [hereafter cited as Fitzgerald, Hudson’s Bay]. It had been said that the North West Company sought monopoly status “to guard against any encroachments of the United States on the line of Boundary, as ceded to them by treaty.” Benjamin and Joseph Frobisher to Gen. Haldimand, October 4, 1784, in Wallace, Documents, supra note 40 at 71.

As the argument was stated by a historian who believed it: “Monopoly in itself was a support to humane councils, providing a permanent stake in the Indian country as compared with the transitory interest of American trappers, and justifying as a matter of enlightened self-interest a policy of conserving and strengthening Indian life.” Frederick Merk, Introduction to the Revised Edition: “The Strategy of Monopoly” and Introduction to the First Edition, to Simpson, Journal, supra note 5 at lviii-lix [hereafter cited as Merk, Introductions].

Traffic to the Canadian Indian country advanced through two constricted thoroughfares, both of which were closed much of each year by winter—Hudson Bay and the St. Lawrence River. Traffic thus was easy to control, and this in turn encouraged combinations and eventual monopoly.” David Lavender, “Some American Characteristics of the American Fur Company,” Minnesota History 40 (1966) 178, 183 [hereafter cited as Lavender, “American Characteristics”].

Fitzgerald, Hudson’s Bay, supra note 96 at xiii, 64-65; Merk, Introductions, supra note 97 at lix; Merk, “Snake Country Expedition,” supra note 40 at 104-105.

After the Western Department split away from the original American Fur Company in 1834, Ramsay Crooks warned Pierre Chouteau that “there will always be strong jealousies against you.” Lavender, “American Characteristics,” supra note 98 at 184.

Lewis and Clark, for example, told British traders that American ownership of the Louisiana Territory would mean that “[e]very one shall be free to trade after his own manner.” Entry for November 29, 1804, Francois-Antoine Larocque, “Missouri Journal,” in Wood, Early Fur Trade, supra note 35 at 140.
A reasonable reading of Grey is that he knew this antimonopoly sentiment helped make his case against Hudson’s Bay. We should not be surprised. He had received what has been called “a white man’s education”\textsuperscript{102}—one reason, it may be assumed, why Hudson’s Bay officers found him so difficult to handle.

Having told Ogden his rights, Grey set about asserting his economic independence. “[H]e then gave orders to his Partners to raise Camp,” Odgen wrote in his journal, “& immediately all the Iroquois were in motion, & made ready to Start[. T]his example was Soon followed by others at this time the Americans headed by Gardner & accompanied by two of our Iroquois who had been with them the last two years advanced to Support & assist all who were inclined to desert.”\textsuperscript{103}

Except for the journal kept by his clerk, William Kittson, Ogden is our only eyewitness to what happened. The words were his, but he was writing to his superiors in Hudson’s Bay, justifying the loss of over seven hundred beaver skins. He was not addressing historians wanting to know why the freemen took those skins. What he chose to say and how he said it has shaped all historical accounts of what happened on the Weber River on that day in 1825. The last-quoted clause is an example. Ogden said that the Iroquois were “inclined to desert.” Whether he meant to imply they were committing a delict against either the company or British law, or that they were breaching their contract, the word “desert” put them in the wrong not only with Ogden’s fellow Hudson’s Bay officers, but with some historians. Yet it is by no means clear on what grounds Ogden could legally have held the men in the company’s service, had he been able to do so. They had agreed to go on the expedition, and surely understood that the expedition depended on their continued presence, creating an implied contract or promise to remain until the brigade was at least out of danger. Yet the company had no counter obligation. It furnished them no food, shelter, or clothing. Practice and humanity dictated that if a man were injured he was not left behind. The expedition carried him until he recovered, until they got back to the Columbia, or until he died. That protection was reassuring to the man, but hardly enough consideration to create a binding contract not to desert. After all, Ogden would have done as much for Johnson Gardner had he been found alone and wounded on the trail.

The better view was that the obligation owed to Hudson’s Bay was not service, but debt. That was how Ross had enforced it

\textsuperscript{102}Merle Wells, “Ignace Hatchiorauquasha,” in Hafen, \textit{Mountain Men and Fur Trade}, supra note 94 at 7:162.

\textsuperscript{103}Entry for May 24, 1825, Ogden, \textit{First Snake Journals}, supra note 59 at 52.
against Grey the year before.\textsuperscript{104} If Grey had paid his debts he would have been allowed to leave with his horses and traps. He could not leave owing the company debts as well as possessing property. If we were to convert Ross's actions into legal theory, it would be that the company had an implied lien on Grey's horses and traps.

The same theory apparently guided Ogden's action. He tried to hold the freemen by debt, not contract. When an Iroquois named Lazard began to take some horses (probably the ones assigned him at the commencement of the expedition), Ogden resisted: "I was determined not to allow him or others to pillage us of our Horses as they had already taken two say Old Pierres which had been lent him, they desisted & we Secured the ten Horses but not without enduring the most opprobious terms they could think of from both Americans & Iroquois."\textsuperscript{105}

Ogden did not secure every horse. Some had already been led over to the American camp. What he did, when he asserted either his claim of ownership or his claim to a creditor's lien, was to keep ten that otherwise would have been taken. His real complaint against Gardner, however, was not the horses but the desertions, and the fact that Gardner—or some other Americans whom Gardner represented—had already taken custody of many furs and was asking the Hudson's Bay freemen to bring him more. He would pay, he promised, $3.50 per pound of beaver. It was the response to this offer that led Ogden to report that he had been subdued by superior force: "Thus we were overpowered by numbers and with the exception of a part they succeeded in carrying off their Furs to the amount of 700 Beavers— in fact many of them had conveyed them in the night to the American camp. Situated and circumstanced as I then was, not knowing friend from foe, I cannot but consider it was a fortunate circumstance I did not fire; had I, I have not the least doubt all was gone, Furs and property, indeed this was their Plan [that] I should fire and assuredly they did all they could to make me, but I was fully aware of their Plan and so saved what remained, before this affair we had nearly Three thousand Beaver and were doing well."\textsuperscript{106}

Again, it must be emphasized that Ogden was writing for his Hudson's Bay superiors. His way of describing this event has been more important than the facts he chose to relate. He said he felt threatened, and historians have generally adopted his perspective. The Gardner-Ogden confrontation is the best-known incident in the western mountains proving the lawlessness of American

\textsuperscript{104} Ross, \textit{Fur Hunters}, supra note 9 at 2:38-40.

\textsuperscript{105} Entry for May 24, 1825, Ogden, \textit{First Snake Journals}, supra note 59 at 52.

\textsuperscript{106} Letter from Ogden, supra note 85 at 298. See also Ogden to the Governor, et al., July 10, 1826, Merk, "Snake Country Expedition," supra note 40 at 112.
mountain men when encountering the law-abiding agents of the Hudson's Bay Company. It has been called "the famous British-American clash of 1825—when the 'cold fur war' nearly exploded into a hot shooting war." Although it apparently came closest to degenerating into violence when Ogden drew his gun, and there is no claim by either Ogden or Kittson that they were threatened by American weapons (the threat came from an Iroquois, a Hudson's Bay freeman), the incident fits the stereotype of the American mountain men, and violence can be implied by nonviolence. More to the point, as it was so blatant, was the stealing of Ogden's furs. "[T]he transaction," Gardner's biographer charged, "was but thinly-veiled robbery, accomplished by inducing Ogden's Iroquois trappers to desert." "This was," Frederick Mark agreed, "no friendly call for the exchange of trappers amenities. A lawless spirit of trade rivalry and national resentment at the activities of the Hudson's Bay Company in Oregon county brought Johnson Gardner."

**LEGAL BEHAVIOR IN THE SNAKE COUNTRY**

Important as events at Peter Ogden's camp have been for historians of the far-western fur trade, they could prove to be even more important to scholars of transboundary western legal history. This was the only serious fracas between Hudson's Bay officers and American mountain men, and there may be no better incident for examining transboundary behavior in the Far West during the years when Great Britain and the United States jointly occupied the Oregon Country. Three elements of that behavior should be considered: the charge of violence, the crime of stealing, and the act of desertion.

107 David E. Miller, "Peter Skene Ogden Discovered Indians," in Essays on the American West, ed. Thomas G. Alexander (Provo, 1974) 137, 140. "This was the only explosive confrontation between any of Ogden's expeditions and rival American trappers, at which time the 'cold' fur war almost boiled over into a 'hot' war." Ibid at 140.

108 "[T]he 'cold' war between the Americans and British, for control of the 'Oregon Country' (under the joint occupation clause of the Convention of 1818) nearly boiled over into a 'hot' war. For it was there that Johnson Gardner, at the head of twenty-five flag-waving Americans, rode boldly into the British camp with obvious hostile intentions. Ogden's cool action prevented the fracas from developing into a shooting war." Appendix A to Peter Skene Ogden's Snake Country Journals 1827-28 and 1828-29, ed. Glyndwr Williams (London, 1971) 170.


The violence was partly in the confrontation and largely in words. Johnson Gardner went into Ogden's camp in a belligerent mood, accusing him of illegally trapping in the United States, and announcing to the freemen that he or other Americans would pay high prices for their skins. Ogden's only mention of violence is when he wrote that "the Americans with Gardner at their head accompanied by two of our Iroquois who deserted from our party in 1821 advanced to support and assist all who would join them. Lajaux an Iroquois now called out we are in numbers far greater, let us pillage, on saying this he cock'd his gun and took his aim, another then seized two of the Company's horses, but Mr. Kitson Mr. McKay and two of the engaged Men coming to our assistance we saved them."

Considering the anger the American mountain men were reported to have felt toward Hudson's Bay, after the Snakes' killing of fur trappers in revenge for a Hudson's Bay horse raid, and the pent-up animosity felt by the freemen against the company, this incident does not quite live up to the West's reputation for violence. Twenty-three freemen were to desert to Gardner. Besides those men, Gardner had the support of his original trapping party. By Ogden's own account, only four men assisted him, yet they stopped the freemen from taking the horses. Some of this behavior must be attributed to shared values concerning rights of ownership, but just what rights is not obvious.

Despite Ogden's certainty that the horses belonged to the company, the freemen had good grounds for thinking the horses belonged to them. They had been riding them, and they were responsible for them. Had a shot gone off accidentally and killed one of the horses, we can assume that Ogden would have said the horse belonged to the freeman to whom it had been assigned at the start of the expedition. The loss would have been his, not the company's. Against that sense of ownership, Ogden was asserting the claim-right or lien that the company customarily exercised to protect its debts. Both sides, therefore, could feel justified by notions of ownership to use force to retain what was theirs.

It may be that the dominant legal concept that settled the issue of right that morning on the Weber River was not ownership or lien, but possession. Although he was overwhelmingly outnumbered, Ogden kept the horses that were in his camp. The freemen

111 Letter from Ogden, supra note 85 at 298.
112 There were other men who did not come to Ogden's assistance. The next day, as they started the trip back to the Columbia, Kittson noted: "Our party is now reduced to the number of 22 Freemen, 11 Engages and 6 Boys besides Mr. Ogden and I. Total 41." Entry for May 25, 1825, Kittson, Snake Country Journal, supra note 25 at 235.
kept the horses they had placed in Gardner's camp. By Ogden's own account, they got no more.

Aside from the confrontation over the ten horses, the only other mentions of violence were when William Kittson reported that "we hear that the Americans and Iroquois are coming tomorrow to pillage" and Ogden wrote of Lajaux's cocking and aiming his gun. Frederick Merk concluded that the freemen "actually attempted in Gardner's heartening presence to pillage Ogden's camp," but Ogden's immediate superior, John McLoughlin, reached a different conclusion. "[T]he Americans appear to me," he reported to London, "to have Given no assistance to our Deserters except countenancing and receiving them in their party."115

The point on which the Hudson's Bay officers agree with the historians is that the delivery of seven hundred beaver skins to Gardner by the freemen was an unlawful conversion of property.116 From the perspective of the company, the freemen were guilty of stealing its beaver and Gardner was an accessory to the crime. All the factors and traders of the company knew what McLoughlin meant when he wrote that "the Iroquois walked off with their Furs, Horses and traps, all of which were certainly our property."117 However, the matter may not have been so, as McLoughlin himself implied when he slipped by referring to the items that were "certainly our property" as "their Furs, Horses and traps." Such expressions were common among Hudson's Bay officers, and may indicate that they were not so certain as they claimed as to who owned what. In one of his accounts, Ogden referred to the same furs as "our Furs," meaning the company's, and as "their Furs," apparently meaning the freemen's, or, at least, those in the freemen's possession.118

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113Ibid. "In the evening Alexander Carson came back and warned me to be on my guard as a plot was forming amongst the Iroquois and some of the Americans to pillage me in the night as I had refused to sell them Tobacco... we then made every preparation and kept double guard during the night." Ogden to the Governor, et al., July 10, 1826, Merk, "Snake Country Expedition," supra note 40 at 111.


115Letter of July 6, 1827, Letters of McLoughlin, supra note 87 at 40.

116Both company headquarters in London and Merk used the same word, "spoliation," to describe the act. Governor and Committee to McLoughlin, September 20, 1826, Merk, "Snake Country Expedition," supra note 40 at 119; for Merk, see ibid. at 104.

117McLoughlin to the Chief Factors and Chief Traders, August 10, 1825, Letters of McLoughlin, supra note 87 at 302.

118Ogden to the Governor, et al., July 10, 1826, Merk, "Snake Country Expedition," supra note 40 at 111. "Duford, Perrault and Kanota escaped with their Furs in fact some of them had conveyed theirs in the night to the American Camp." Entry for May 24, 1825, Ogden, First Snake Journals, supra note 59 at 53.
It is not at all clear why we should consider Hudson's Bay the owner of the furs, horses, and traps that the freemen took with them. By the custom of the trade—established both by frequent practice and freeman acquiescence—the company had a proprietary right of repossession that looks like a self-help version of a common-law creditor's lien. Ogden exercised that proprietary interest when he stopped the freemen from taking with them those ten or so horses. It is also possible that a custom of the trade restricted freemen from taking property of this category from Ogden's camp to Gardner's camp without Ogden's permission. If so, it was accurate for the company to say that the freemen converted property belonging to it.

Against the likelihood of such custom is the certainty that the company considered the freemen the owners of the horses and traps purchased by them for all purposes involving risks and loss, such as the horses' being drowned, 119 being needed as food,120 or being stolen.121 It is difficult to see why, except for trade custom, the freemen could not take the horses wherever they pleased as long as the debt was not due and as long as they intended to pay the debt. An obvious answer could be that the debt was due on demand. However, the evidence so far uncovered of Hudson's Bay practices indicates that the debt was due when the expedition returned to its base on the Columbia.

The best guess is that little thought was given to when debts were due. Debts were carried for so long by so many freemen that, as far as the meager historical records indicate, payments were determined by opportunity. If any custom existed, it was probably that they were due when the debtor returned to the base post with made beaver. After all, as the trapper could not lawfully sell to anyone else in most regions where Hudson's Bay operated, the company knew it would get whatever skins were trapped.

Despite Ogden's words, we cannot be certain that he understood that the departing freemen were repudiating their debts. Subsequent historians have assumed that that was what they were doing. "Most of them," a historian has written of the freemen of the Columbia

were under obligation to the Company for equipment and supplies, but they were not a class to feel a strong moral tie and there was no tribunal in which a legal obligation could be enforced. The only obligation which they felt was to repay the advances, and they carried

119 See entry for September 21, 1826, Ogden, Second Snake Journal, supra note 23 at 5-6.
120 See McLoughlin to Simpson, March 20, 1827, ibid. at 3 n2.
121 See note 25 supra.
these obligations lightly. The fact that the advances by
the Company had made possible the trip and the resul-
tant catches, was a mere incident. Accordingly they felt
no overpowering obligation to repay the debt by selling
the furs taken on that expedition to the Company.122

There is reason to think that not all things in the Snake Coun-
try were as obvious as they appear. It is true that many of the
freemen felt no obligation to sell to the company when they
could obtain higher prices, but, except to the officers of Hudson’s
Bay, that was not the same as saying there was no moral or legal
duty to repay, whether or not the debt was enforceable. In fact,
evidence indicates that the freemen felt a duty to repay.

Two days before meeting Gardner, Ogden’s expedition encoun-
tered two men who had deserted from Donald Mackenzie’s
brigade of 1821. “One of them promised to keep with us,” Kittson
noted, “but the other, refused, yet said he would pay his debt.”123
Both of these freemen were Iroquois, and on the morning before
the mass desertion, when Ogden was having his first conversation
with Gardner, they met with Kittson to discuss what they
owed.124 This conduct must have meant something, for had they
intended to repudiate their debts, they could have told Kittson
they were not paying, and there was little Kittson or Ogden could
have done. The same could be true for some or all of the men who
later that day deserted the expedition and joined Gardner’s camp.
It is sensible to assume that they equated desertion with debt
avoidance, but that conclusion could be mistaken. In fact, before
leaving Ogden and joining Gardner, three of the twelve deserters
paid their debts.125

Although McLoughlin and Gov. George Simpson both com-
plained of the loss to the company of the seven hundred pelts sold
to Gardner or some other Americans, the company’s loss was
smaller. To lose the market for the furs did not also mean losing
the debts those furs were supposed to secure. Over the next few
years, various of the deserters repaid the company what they
owed. The following year, for example, Ogden, on his second
Snake Country expedition, was near the American Falls when he

122 Barker, Introduction to Ogden, supra note 5 at xli.
124 “Old Pierre Tevanitagon entered with two iroquois both Deserters of the year
21 he first began to state that the debts of these two villains were settled and paid
to the Company by the remaining 11 Iroquois who kept true to the Concern. On
his presenting notes made by himself, I interfered pointed out the errors in the
notes and they left us fully aware [sic] of Pierre’s mistake.” Entry for May 24,
1825, ibid. at 234.
125 Ibid. Also, when Ogden prevented Old Pierre from taking two horses, he paid
for one of them.
was “surprised by the arrival of a Party of Americans and some of our deserters from last Year.” He not only had the “satisfaction” of purchasing ninety-three beaver and seventy-two otter skins from the Americans at favorable rates, but also settled accounts with at least three of the deserters. “[W]e received 81 1/2 Beavers in part payment of their debts due to the Company also two notes of hand from Mr. Montour for his Balance [and from] Gabriel Prudhommes and Pierre Tevanitogans also we secured all the Skins they had.” There may have been external pressure, such as hopes by these men to return to the Columbia or to visit their families, but from the location, the surrounding circumstances, and what Ogden says, the payments appear to have been voluntary. That Ogden bothered to negotiate notes indicated his expectation.

One of Ogden’s freemen was the son of Thiery Goddin, who had deserted the year before. The son had refused to desert, and now wanted to rejoin his father. Ogden “gave him his liberty the Americans having advanced three Beaver Skins to make up the number.” The father apparently paid nothing, but all was not lost. Over a year later, on his fourth Snake Country expedition, Ogden met a large party of American mountain men, with whom he traded supplies for skins. “I also received from Thiery Goddin thirty-five large beaver in payment of his debt with the Company. . . . [T]his is so much secured and more than I ever expected to have received from him.”

126 Entry for April 9, 1826, Ogden, First Snake Journals, supra note 59 at 154.
127 Entry for April 10, 1826, ibid. It should be pointed out that Montour, who deserted the day after the confrontation with Gardner, had tried to settle his debts before leaving. The reasons he gave to Ogden “for his villany were the Company turned me out of doors they have L260 of my money in their hands which they intend to defraud me of as they have refused to give me interest for but they may keep it now for my debt & Prudhoms. [Prudhomme, another man deserting that day] which we have Contracted in the Columbia [A]s for Clement [a third deserter] he has a Balce. in the Compons. Book. . . . They were immediately Surrounded by the Americans who assisted them in loading & like all Villains appeared to exult in their Villany.” Entry for May 25, 1825, ibid. at 53-54.

“Montour asked me for his account. I showed him the ammount of Debt due by him to the Company, he then said to Mr. Ogden, I have about L289 in the Companys hands for which they seem not to give me Interest, let them now keep it altogether for my Debt and that of Prudhomme’s. It was of no use in us to argue or point out their foolishness, go they must.” Entry for May 25, 1825, Kittson, Snake Country Journal, supra note 25 at 235.

128 However, one historian has concluded: “[B]y some advantage held over them [the full nature of which is not yet understood] the deserters of the previous year were compelled to pay their debts to the H. B. Co. by turning over four hundred dollars’ worth of beaver.” T.C. Elliott, Editorial Notes to Ogden, “Snake Journal, 1825,” supra note 59 at 335.
129 Entry for April 11, 1826, Ogden, First Snake Journals, supra note 59 at 155.
130 Entry for October 25, 1827, Ogden, Third Snake Journal, supra note 39 at 19.
The company may not have lost everything even when the deserters did not repay. On that fourth expedition, Ogden also ran into Robert Campbell, who told him that Old Pierre, who had been one of the leaders of the Iroquois deserters, had been killed by Blackfoot, his body hacked to pieces. Old Pierre owed "a considerable debt to the concern," Ogden noted, "but as we have a mortgage on his property in Canada I am in hopes we shall recover it."\(^131\)

The question remains as to whether it is correct for historians to say that the beaver the deserters took to Gardner had been company property. It was, after all, in a different category from the horses and traps the deserters also tried to take with them. The beaver, remember, had not been sold on credit. Still, the company's officers wrote of its being stolen much as if it were the company's property. They may have mistakenly been drawing an analogy to Rupert's Land, where the company's legislative monopoly gave it the exclusive right to purchase beaver. That legislation did not give the company a property interest in the skins, for there was no requirement that trappers sell their pelts to anyone. Moreover, the monopoly was limited to Rupert's land, and if it applied at all in the Columbia country, it specifically did not restrict Americans from buying and selling with whom they wished.

It is not clear on what grounds the company said it was the primary owner. It did not claim title when the beaver was first trapped. If a freeman caught three beaver downstream from the camp and, as he was taking them to his tent for his wife to skin, he was attacked by Snakes and the pelts were taken, he suffered the loss. He could not claim that his debt had been reduced by the value of three beaver at the moment he had found them in his traps. The company still considered them his beaver, to skin, or to eat, or to lose.

The company may have been asserting that it had the same claim in the nature of a creditor's lien that it had on the horses and traps. But, considering that the act of Parliament granting Hudson's Bay the privilege of operating on the western side of the mountains from Rupert's Land had provided that American rights were not to be affected, it is possible that the company was not authorized to prohibit private trading with Gardner. The company could have had an understanding with the freemen that if they joined an expedition they had to sell it their pelts, but if the pelts belonged to the freemen the legislation preserving American rights might preclude an implied contract not to sell to Americans, as it would have interfered with the American right to purchase.

\(^{131}\) Entry for February 17, 1828, ibid. at 63.
As with the lien on the horses and traps, the company's lien on the beaver might have had a bearing if the deserters were absconding, intending never to pay their debts. If, however, they were thinking of paying, the sale to Gardner would put them in a much stronger financial position. Gardner, after all, offered the freemen more than eight times what Hudson's Bay would give.\textsuperscript{132}

The freemen of the Columbia had found in Gardner more than the competitive market for which they had been searching ever since they first began trapping the Snake Country. Through him, they obtained even more than the freedom of trade that John Grey said the Iroquois had been after for five years. The prices paid were so much higher than they had been receiving, and costs of goods were so much lower than they had been paying, that they must have felt the difference gave them every right to leave the expedition. The prices demonstrated what Gardner and Grey meant when they told Ogden that the company treated the men as slaves,\textsuperscript{133} and what a later historian meant when he said they had been in "a virtual state of servitude."\textsuperscript{134} As Ogden was told by one of the deserters—a freeman who had been a clerk for the North West Company and was still a gentleman, called "Mister" by Ogden, Kittson, and McLoughlin\textsuperscript{135}—"go we will where we shall be paid for our Furs & not be imposed & cheated as we are in the Columbia."\textsuperscript{136}

We should consider the drastic difference in prices and costs when deciding how to describe what happened at Ogden's camp on the Weber River, for it adds a serious dimension to the question of whether to call it violence. It may have occurred to these freemen that Ogden was seizing horses that, but for company exploitation, by right of labor would have belonged to them.

Ogden realized that the economics of the Hudson's Bay Company were changed forever by the laws of competition. Back in American territory, on the headwaters of the Missouri, and on his way to the Hudson's Bay post in the Flathead Nation, he had a chance to send a letter to Simpson and the gentleman officers of

\textsuperscript{132}"I represented to them [the freemen] all the offers were held out as so many Baits, still without effect, indeed they were too well convinced of the contrary, as for a Beaver skin they could procure more for than they could with eight from us." Ogden to the Governor, et al., July 10, 1826, Merk, "Snake Country Expedition," supra note 40 at 112.

\textsuperscript{133}See text to note 92 supra.

\textsuperscript{134}W. Stewart Wallace, Introduction to Part of Dispatch from George Simpson Esq Governor of Ruperts Land to the Governor &dollar; Committee of the Hudson's Bay Company London: March 1, 1829. Continued and Completed March 24 and June 5, 1829, ed. E.E. Rich (Toronto, 1947) xlii [hereafter cited as Part of Dispatch].

\textsuperscript{135}Letter of October 6, 1825, Letters of McLoughlin, supra note 87 at 8.

\textsuperscript{136}Entry for May 25, 1825, Ogden, First Snake Journals, supra note 59 at 54.
the Honorable Company. "You need not anticipate another expedition [the] ensuing Year to this Country," he warned, "for not a freeman will return, and should they, it would be to join the Americans, there is Gentlemen a wide difference with their prices and ours, they have opened a communication with wagons over land from St. Louis to the first Spanish Settlement call'd Taa's [Taos] where they fit out their Trappers and receive their Furs in return and they say they intend reaching the Columbia also with Wagons, not impossible so far as I have seen."\(^{137}\)

Ogden had been talking with Jedediah Smith. He realized what beaver trails the Americans were following, he knew of the plans of William H. Ashley, and he could see the future. The monopoly Parliament had granted the Hudson's Bay Company had not lasted half a decade.

Still Hudson's Bay thought it could not only win but drive out the competition. Even Ogden increased his opposition to the Americans. One reason he had been on the Weber was to explore, to blaze a new route back to the Columbia, and find, he expected, a westward-flowing river that emptied into the Pacific somewhere in the area of the Umpqua. Ogden believed he was within ten days' march of the Umpqua, but now an exploration trip was out of the question. "I am not of opinion it would have been good policy in me to have open'd a short cut for the Americans to Fort George," he explained, referring to the post near the mouth of the Columbia, "we have done enough and suffered also without increasing the load."\(^{138}\)

Ogden was both following and setting company policy. Soon the Snake Country expeditions starting from the Columbia would not only be harvesting the rich preserve of beaver, but destroying it. "The greatest and best protection we can have from opposition," Simpson wrote McLoughlin (who also used the word "opposition" to mean "competition"), "is keeping the country closely hunted as the first step the American Government will

\(^{137}\)Letter from Ogden, supra note 85 at 299.

\(^{138}\)Ibid. at 298. Ogden did not succeed in shaking off the Americans. He ran into other parties as he made his way back up the Bear River, and the men continued to want to desert. When traveling, Kittson had to take up the rear, to prevent the freemen leaving with their fur. Again, on deserting, some paid their debts. "This morning Two of the Canadian Freemen gave up their furs, Traps and a couple horses and said to Mr. Ogden they would go back to join the rest of the villains that left us.... One of them... is Theery Goddin and the other J. Bte. Gervais. the latter paid up his debt and the former has still a balance against him.... Another scamp left us on the road, it is not surprising he being an Iroquois.... He took nothing with him but his riding horse. Left wife and furs behind." Entry for May 29, 1825, Kittson, Snake Country Journal, supra note 25 at 236. Ogden noted: "[O]ur Numbers are now So few that if any war party Comes across us we shall Stand a poor chance of escaping." Entry for May 29, 1825, Ogden, "Utah Journal," supra note 80 at 186.
take toward Colonization, is through their Indian Traders and if the country becomes exhausted in Fur bearing animals they can have no inducement to proceed thither.\(^1\)

Simpson’s new policy was to “denude” the Snake Country, which he expected would be both good business and smart international politics. “If properly managed,” he wrote, “no question exists that it would yield handsome profits as we have convincing proof that the county is a rich preserve of Beaver and which for political reasons we should endeavour to destroy as fast as possible.”\(^2\)

\(^1\)Simpson to McLoughlin, July 9, 1827, *Part of Dispatch*, supra note 134 at 156.

Denuding was approved at the highest level of the Hudson's Bay Company. "It will be useful," London headquarters told the officers at York Factory, "to give the Americans full occupation by active and well regulated opposition on the South of the river to prevent them from advancing towards the North." The officers knew that "the Tenure which the Company have of the South side of the Columbia is of that precarious nature, that we are certain of being deprived of it when a Boundary line is run . . . and that it is the interest of the Company to make all they can out of it while it is in our power." Hudson's Bay expeditions went into the Snake Country throughout the 1830s, more because of the American competition than despite it. McLoughlin was instructed to keep his trapping brigades "in constant and active employment, should they even do no more than clear expences, as the impoverishment of the Country situated to the Southward of the Columbia, we consider the most effectual protection against opposition from the Americans." The policy was directed not just against American advances but against the particular American mountain men whom the officers of Hudson's Bay perceived to be both their business competition and their international rivals. If they persisted in this policy, it was hoped, "we shall soon be left Masters of the Field, as those people we know to be needy adventure[r]'s existing on a bad credit who cannot afford to follow up a losing business." The Americans would be kept out because they could not compete. To denude the land was one part of Hudson's Bay policy against the American threat. The other part was changing the prices. When Simpson visited the Columbia in 1826, he had asked the cause of the freemen's "misconduct." "[T]he once famed Snake Country for beaver is a ruined one now, and granting it were allowed repose, which few on either side concerned are willing to give, it would at least require four years to recruit." Entry for October 20, 1827, Ogden, Third Snake Journal, supra note 39 at 17. "Did not we hold this country by so slight a tenure it would be most to our interest to trap only in the fall, and by this mode it would take many years to ruin it." Entry for April 29, 1829, Ogden, ibid. at 145. "Snake Country is Ruined and there are at present 400 Americans in it and I see nothing that they can do to live but go in a body to the Pie-gan Lands which will be a Death blow to the Saskatchewan." Letter from McLoughlin at Fort Vancouver, March 1, 1833, in Washington Historical Quarterly 2 (1908) 167, 168.
Iroquois, mixed-bloods, and Canadians, the very groups that gentlemen traders knew were unmanageable.\textsuperscript{145} Even after hearing of the unprecedented desertions from Ogden's brigade, McLoughlin did not think that prices were the problem. Again, it was the fickle character of the freemen. "There is not a man of the party," he complained, "who does not well know that none of them were ever induced to Buy a single Article and that they are in Debt much against our will, and these advances had been made to oblige and accomodate them when at the time we ran the risk of loseing our property by their death."\textsuperscript{146}

At first McLoughlin thought the difficulties could be solved by tossing a small sop to the men. He would let the freemen purchase supplies at Fort Nez Perces, the starting place of expeditions, for the prices charged at Fort Vancouver. That might keep them from deserting to the Americans.\textsuperscript{147} He simply did not understand the situation, as he later admitted after discovering "that the High price charged for the Supplies was the cause of the difficulties." Although "we heard that they were complaining, still we never had information before us to Enable us to Judge of the Costs of the Snake furs till I made out the Accounts."\textsuperscript{148}

The accounts were a revelation. Examining the figures for Ogden's expedition, McLoughlin found that the cost of a made beaver had been ten shillings and twopence halfpenny. More surprising, only two shillings of that amount represented the value of the goods received by the freemen. The balance of the cost, McLoughlin concluded, had been "caused by losses incurred by desertion and by expences in sending clerks and servants to watch over" the freemen, which seems to have been the chief duty of William Kittson.\textsuperscript{149} There was no escaping the conclusion that the freemen's discontent was costly for Hudson's Bay. As long as they remained dissatisfied, it would be expensive to denude the Snake Country. "[T]o charge such High prices was certainly most mistaken policy," McLoughlin concluded, "as we had only a precarious tenure of the Country and we ought therefore to have allowed the trappers [to] have their supplies at as low

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\textsuperscript{145} McLoughlin to Simpson, March 20, 1846, Merk, "Snake Country Expedition," supra note 40 at 121.

\textsuperscript{146} McLoughlin to the Chief Factors and Chief Traders, August 10, 1825, \textit{Letters of McLoughlin}, supra note 87 at 303.

\textsuperscript{147} He planned "to offer them their Supplies at Walla Walla at the same price as if they took them here to induce them to remain on this side of the Mountains to hunt on the South side of the Columbia." Letter of October 6, 1825, ibid. at 10. Fort Vancouver, on the Columbia, received goods directly from London ships. They had to be transported by canoe to Fort Nez Perces on the Walla Walla River.

\textsuperscript{148} Letter of July 6, 1827, ibid. at 48.

\textsuperscript{149} Lamb, Introduction to \textit{McLoughlin}, supra note 93 at lxv.
a price as possible so as to get while in our power all the furs we could out of it."\cite{150}

McLoughlin thought the difficulty easily solved. Of course the company had to raise a bit the price paid for beaver, but, more importantly, it should lower the cost of goods sold the men. The Americans might continue to pay more for pelts, but they had to charge higher for supplies, as Hudson’s Bay could always undersell them. Its products came to Fort Vancouver by sea—relatively cheap transportation compared with horse caravans out of Saint Louis that had to pass through Pawnee country to get to the American trappers on the eastern side of the mountains. The matter appeared so sensible and so urgent that McLoughlin acted on his own authority, telling his superiors that the reforms would be implemented before they got his report. “As it is certain if Americans fall in with our party,” he wrote, “Unless we give more for Beaver than we have hitherto our people will desert us. We therefore have agreed to give them 10/- for Every full Grown Beaver . . . and to allow them [to] purchase personal necessaries according to their abilities and means.” He was convinced, he assured the leadership, that “the measure adopted will be beneficial to the Concern, as the High prices charged the Freemen and trappers for their supplies . . . drove our people to desert from us and to work for others whom they are now Guiding to Countries Rich in Beaver and in opposition to us.”\cite{151} As he told Simpson, it was “certainly much better much more effectual to allow the expences we are obliged to incur at once to the Hunter, it secures their fidelity equips them more completely and stimulates them to exert themselves.”\cite{152}

Simpson agreed. “We now when too late perceive that our former system of trade with those people [freemen] was bad,” he wrote.\cite{153} Happily, to correct it would not be costly.\cite{154} Although he might not have admitted it, he was inaugurating a radically different labor policy for the Snake Country expeditions. “We therefore entreat,” he instructed McLoughlin, “that no exertions be spared to explore and Trap every part of the country and as the

\cite{150}Letter of July 6, 1827, Letters of McLoughlin, supra note 87 at 40.
\cite{151}Letter of September 1, 1826, ibid. at 34.
\cite{152}Lamb, Introduction to McLoughlin, supra note 93 at lxv.
\cite{153}Barker, Introduction to Ogden, supra note 5 at lvi.
\cite{154}As he explained when writing about another matter. “The Expence will be a mere trifle as the Men are on the spot, they will have no Wages or if any merely nominal, . . . and their pay will be the price we shall give for their Skins which must be liberal or nominally high in order to sound as well as that offered by the Americans, but their supplies will of course be charged at prices to be regulated by the prices given for their Skins.” Simpson to the Governor and Committee, August 20, 1826, Part of Dispatch, supra note 134 at 153.
service is both dangerous and laborious we wish our people to be treated with kindness and liberality, and such prices given for hunts as will afford them a fair remuneration for their services and their supplies sold on such terms as would convince them that by desertion they would seriously injure their own interests."

London headquarters endorsed both policies. "We can afford to pay as good a price as the Americans," the governor and committee assured Simpson, "and where there is risk of meeting their parties it is necessary to pay as much or something more to avoid the risk of a result similar to that of Mr. Ogden. By attempting to make such expeditions too profitable the whole may be lost and it is extremely desirable to hunt as bare as possible all the Country South of the Columbia and West of the Mountains."156

Simpson was also told that his expedition leaders should behave differently from the way Ogden had behaved toward Jedediah Smith on the Snake River. They should find some better means of competing than sending men out ahead of the Americans. London even wondered whether rules of conduct could be negotiated, perhaps by treaty. "In the event of our trapping party falling in with any Americans in the Country common to both," Simpson was urged, "the leader ought to have instructions to endeavor to make an amicable arrangement as to the parts of the Country which each will take, to avoid interference, and to be careful to avoid giving just cause for accusing our people of any aggressions against the Americans or violence except in a clear case of self defense."157

We might guess that this was foolish thinking. With the expeditions laying waste just to keep the Americans out, and with prices being set to destroy them as competition, one might expect that Hudson's Bay was asking for trouble, that there was bound to be unpleasantness when the British and the Americans met in the Snake Country. We would be wrong. There was trouble—serious trouble—when one or the other met the Blackfoot, but not when they met one another. Ogden was thinking of economic, not physical, trouble when, less than a year after his encounter with Gardner, he wrote that "with my discontented party I dread meeting with the Americans." The expedition had just spent a horrible winter in the wilderness, cold, starving, and watching horses die. Now, in late March, just as the men were beginning to trap beaver, Indians told Ogden that one of the fur brigades working for William Ashley was only three days ahead.

155 Simpson to McLoughlin, July 9, 1827, ibid. at 156.
156 Governor and Committee to Simpson, March 12, 1827, ibid. at 154-55.
157 Ibid. at 155.
Ogden knew what to expect. It would be as it had been the year before, on the Weber River. "[T]hat some will attempt desertion I have not the least doubt," he reasoned. And why not? he wondered, "after the sufferings they have endured can it be otherwise."\(^{158}\)

Ogden was wrong. When the rival brigades met they did some trading and passed on in peace. There were no hard words, no threats, no national jingoism. There were desertions, but with a difference. Men now deserted in both directions. Ogden lost one "worthless useless scamp," the young man whom he released to join his father and who "paid his Debt in full." The surprise was that two joined him. One was "not worth more" than the useless scamp who was gone, but the other, a Canadian, "joined us with his Traps and Horses [and was] in appearance a decent looking Man." More important was the contrast to the year before. "[N]ot one of our Party appeared the least inclined to leave us not even a hint was given, so much to their Credit[. I]f our last years Party had comported themselves equally well we should not have been under the necessity of returning to the Columbia with such miserable returns."\(^{159}\)

Ogden implied that he still thought desertion a result of Iroquois behavior, of the unpredictable, fickle freemen following the childish whims and fancies of the wilderness, but he may have been displaying the usual bias of a Hudson’s Bay gentleman. He told McLoughlin that the better behavior was due to economics. The new prices had made a difference,\(^ {160}\) especially the lower costs of goods sold by the company to the men. American trappers began searching out Hudson’s Bay brigades, hoping to purchase supplies and sometimes going all the way to the Walla Walla River to buy the things they needed to stay out for another season.\(^ {161}\)

\(^{158}\)Entry for March 20, 1826, Ogden, *First Snake Journals*, supra note 59 at 144.

\(^{159}\)Entry for April 11, 1826, ibid. at 154-55.

\(^{160}\)Letter of July 6, 1827, *Letters of McLoughlin*, supra note 87 at 41. Historians have come up with some strange ways of interpreting the event: "It was part of the ebb and flow of the American fortunes in the far west. The victory of Astor in landing at Astoria ahead of the North West Company in 1811 was neutralized by the victory of the North West Company’s questionable purchase of the Pacific Fur Company in 1813. Now again the victory of the Americans in causing the trappers to desert Ogden and the Hudson’s Bay Company in 1825 is offset by their failure to repeat in 1826." Barker, Introduction to *Ogden*, supra note 5 at lix.

\(^{161}\)"The American party in company with us ... informed me it was their intentions to follow me and accompany me to the Columbia. I informed them if so I could not hold out better terms to them than my own men had. With this they are satisfied, and replied had they not seen me, it was their intention that when their hunts were made to have gone to Nez Percy [Fort Nez Perces] and delivered their furs there, consequently they take their chance." Entry for September 29, 1827, Ogden, *Third Snake Journal*, supra note 39 at 11-12.
During the remaining years of the Snake Country era, when the two nations jointly shared the beaver streams among the mountains drained by the Columbia River, the fur brigades of Hudson’s Bay and of the Saint Louis companies were constantly meeting in the woods. A good deal of predictable social and even legal behavior developed, regulating transboundary peace. There were common rules, values, and attitudes toward property, individual rights, and especially toward the various Indian nations that will require at least a book-length monograph if they are to be told. In this article there is room left to consider only the law of desertion. The Gardner-Ogden affair was never repeated. It remained the practice on all sides to receive any men who wished to change their employment. They had to come without debts, however, or to make arrangements to pay what they owed to the company they were leaving. Problems about ownership of horses and traps became easier to deal with as Hudson’s Bay adopted the practice of lending equipment to the freemen.

A pattern of conduct emerged that both sides would soon learn to depend and act on. Ogden was at winter quarters on the Snake River in December 1827 when two Americans came to his camp to tell him where they had met a detached party he had sent out under the leadership of Thomas McKay. They said their own group had consisted of seven men but was “now reduced to six, one having remained with Mr. McKay.” Ogden thought McKay’s behavior important enough to note in the expedition’s journal. “I was glad to learn from the Americans,” he wrote, “that Mr McKay held out no encouragement for him to leave his employers.”

American leaders sometimes did more than act passively. They took positive steps to be certain they were not the accomplices of men running away from debts. In 1831, also on the Snake River, John Work of Hudson’s Bay met an American expedition led by one of the foremost mountain entrepreneurs from Saint Louis, Lucien B. Fontanelle. “Two of our men Bt Tyaquariche and A. Dumais wish to desert from us and accompany the Americans [to] whom they have applied to be received in their employ,” Work noted in his journal. “Mr. Fontanelle came over and ap-

162 For example, in 1828, while on the Columbia River, John Turner left the employ of Jedediah Smith and took employment with the Hudson’s Bay Company. In 1833 he was on an expedition under Michel Laframboise in California when they met an American party and he decided to join his countrymen. “[B]ut he paid his debt & delivered up his traps and horses before he went off.” Entry for January 16, 1833, Fur Brigade to the Bonaventura: John Work’s California Expedition 1832-1833 for the Hudson’s Bay Company, ed. Alice Bay Maloney [San Francisco, 1945] 27.

163 Entry for December 20, 1827, Ogden, Third Snake Journal, supra note 39 at 38.
praised me of the circumstances and stated that he had refused to have anything to do with them, or to receive some furs which they offered him until they had settled their accounts with me and paid up the debt which they owed the Honbl Hudson's Bay Company.” Fontanelle had with him some of Tyaquariche's relatives, Iroquois who had deserted from Ogden to Gardner in 1825. Tyaquariche apparently told Fontanelle that he was going to join them despite his debts. “[T]his Mr. Fontanelle said he could not prevent as they were freemen, but he could expect no supplies of any kind from him.” Work implies that Fontanelle's threat forced Tyaquariche to come to terms. “Were people who have to deal with these scoundrels in this country,” Work wrote, “to act mutually in a similar manner to Mr. Fontanelle there would be much less difficulty with roguish men and they would have less opportunity of putting their roguish knavery in practice.”

Ogden even thought there was a chance that some understanding could be reach about deserters. In 1827 he was ascending the Snake River on Christmas Eve when a party of six Americans joined his camp. It was led by Samuel Tulloch, who at the time probably worked for the concern of Smith, Jackson, and Sublette, then the leading Saint Louis company in the mountains. “This is a decent kind of fellow,” Ogden wrote of Tulloch, “and [he] informed me that the Company he belongs to would willingly enter into an agreement in regard to deserters, on both sides. They appear alarmed and may be not without cause.” They stayed together for about two weeks until Tulloch left, hoping to reach the American winter quarters somewhere around the Bear River. If he did, Ogden wrote, “we may expect to see them here again in fifteen days hence and from the information I received prior to their departure, it is more than probable one of the leaders of the company will return with them to make an arrangement with me relative to their deserters, also in regard to any other that may desert from either company. This would be most desirable for our side.”

The American leader who came to see Ogden was Robert Campbell. It is not clear whether they discussed an intercompany agreement, but what Campbell said shows the similarity between practices on both sides of the boundary. Three years earlier, when Ogden had had his trouble with Gardner, Hudson's Bay had relied on debt to keep its men in line, while the Americans had relied on

164 Entry for April 16, 1831, Work, Field Journal, supra note 28 at 95.
165 Entry for December 24, 1827, Ogden, Third Snake Journal, supra note 39 at 39.
166 Entry for January 5, 1828, ibid. at 45.
contract. Now it was Ogden who said he had "a written contract" with the freemen, although he did not much rely on it, and Campbell who depended on debt.

Mr. Campble [sic] informed me that two of their trappers Goodrich and Johnson, who joined my camp last fall, with the intention of going to the Columbia, are heavily indebted to the Concern. To this I made reply that I had no knowledge of the same, and as he was now here it was his duty to secure his debts and his men also, that so far they had deserved no encouragement from me, nor would they, and I took the liberty of observing, that my conduct towards their party was far different from what I had received four years since. He said it was, and regretted that at that time there was no regular Company in the country, otherwise I should have received far different treatment. This may be so, at all events—situated as they are dependent on me—it is not their interest to say to the contrary. I have acted so far, honourable towards them, and shall continue so, and probably situated as we are, it is the best policy we can adopt.

The next day Campbell had "a long conference" with the two men, "and both have consented to return, but in my opinion one never will. It was however well understood before they separated from me, that the debts they contracted in my camp should be discharged, to this all agreed. My share of debts are trifling and [I] shall take good care to secure them."

CONCLUSION

Ogden continued to worry about desertions, but it was the economies of the trade, not American labor practice, that caused him most concern. The lure of American dollars seemed too

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167 "Considerable credit is due to my party for their behaviour, so far it is to be observed they are under a written contract, but if inclined to go, would lay little stress on it and still less in regard to their debts." Entry for February 18, 1828, ibid. at 64.

168 Entry for February 19, 1828, ibid. at 64-65. Campbell's comment on Gardner's conduct was not unique. Tulloch, for example, had told Ogden "That the conduct of Gardner at our meeting four years since has not been approved of." Entry for December 24, 1827, ibid. at 39. It is not clear if they expressed disapproval because they thought Gardner acted illegally or because his conduct was too confrontational and, therefore, bad for the fur business.

169 Entry for February 20, 1828, ibid. at 65.
attractive to be resisted, he noted, on learning that one of the men who had deserted from him to Gardner

is now in a fair way of going to St. Louis, having sold his eight horses and ten traps for fifteen hundred dollars. Independent of this he has his fall and spring hunt equal to six hundred more, which makes him an independent man. In the Hudson's Bay Company service with the strictest economy almost depriving himself of common necessaries, barring accidents, in the course of ten years he might collect that sum. Is it then surprising that men who consult their own interests, should give preference to the American service[?]170

Ogden even worried that Hudson's Bay's natural advantage of cheap ocean transportation was neutralized by the masterly American organization of the summer rendezvous supplied by wagons.171 In this, he was incorrect. The mountain men and their Saint Louis financiers could not compete against the combination of George Simpson's program of laying barren the Snake Country and the power of a protected monopoly to plan for, and control, the future.172 By 1837 Hudson's Bay had pushed its string of trading posts as far from the Columbia as Fort Hall in southeastern Idaho, where its factors and clerks were able to "sell their goods at one half of what the Americans charge; and pay much higher for the goods received than the Americans."173

But times were changing. The law of the elephant was about to begin, with Fort Hall an early way station on the overland trail,
while the law of the beaver was coming to an end in the country of the Snake Indians. Europeans were no longer buying hats made from beaver. In 1835, for the first time, buffalo robes sold better than beaver on the Saint Louis market. Five years later, hard times had come to the mountains, and many men could no longer make a living trapping streams that had once teemed with beaver. In February 1840 Francis Ermatinger, who had been in charge of Fort Hall for the Hudson’s Bay Company, was back on the Columbia River. “The Snake country is not as when you were here, a snug little party to conduct to their trapping ground,” he lamented in a letter to his brother. “We have to deal with as lawless a rabble, the scum of all nations, as can possibly be gathered together. I left Fort Hall upon the 26th November and soon afterwards received an express informing me that a party of the scoundrels had been at the Fort and run off all the horses, at the same left a note threatening my life and declaring that ‘their fathers fought for the country and the Company shall not possess it.”’

Those “scoundrels” were from Fort Davy Crockett, in Brown’s Hole on the Yampo River, near the entrance to Ladore Gorge. The place was also called Fort Misery, “because of its mean establishment and depressed inhabitants.” There they lived a precarious hand-to-mouth existence, trying to survive by trading and trapping an area that had long since been stripped clean of their livelihood.

On November 1, 1839, there occurred the event that historians of the mountains have marked as leading “to a schism in the ranks of the mountain men and to the scattering of the inhabitants of Brown’s Hole.” That evening a raiding party of ten Sioux swept up one hundred fifty horses. “This was very unexpected,” an eyewitness wrote, “as the trappers & Snake Indians had been in the habit of letting their horses run loose in the valley, unattended by a guard, as this place was unknown to any of the hostile Indians. This event caused considerable commotion at the Fort, and they were determined to fit out a war party to go in search of the stolen horses, but the next morning this project

175 Letter of February 6, 1840, Lois Halliday McDonald, *Fur Trade Letters of Francis Ermatinger Written to His brother Edward during his service with the Hudson’s Bay Company 1818-1853* (Glendale, 1980) 225 [hereafter cited as McDonald, *Letters of Ermatinger*].
177 Ibid.
was abandoned, and a party of twelve men went over to Fort Hall, belonging to the Hudson’s Bay Company, and stole several horses from that company.”

This was the raid that led to Ermatinger’s lament of change for the worse in the Snake Country. What he did not know was that the men stole more than Hudson’s Bay horses. “On their return,” a visitor to the mountains reported, “they stopped at a small encampment of Snake Indians, consisting of three lodges, one of them belonging to a very old man, who invited them to eat with him, and treated them with great hospitality. At evening the whites proceeded on their journey, taking with them all the old Indian’s horses.”

When the horse thieves arrived back at Fort Davy Crockett, “the trappers remaining at the Fort expressed their displeasure at this act of unparalleled meanness so strongly, that they were obliged to leave the party, and go to a trading post of the Eutaw Indians.” That is, the “scoundrels” were forced out of Fort Misery and retreated to a post at the mouth of the Uinta River, in eastern Utah. Perhaps the matter would have been forgotten by everyone except the Hudson’s Bay accountant at Fort Hall, had not the Snakes gone to Fort Davy Crockett to protest. Knowing that by the clearest rules of “Indian law ... if whites stole their horses they might take vengeance on any whites they met, unless the property was restored,” a party of mountain men set out to recover the horses. Led by Joseph Reddeford Walker, who had conducted the first American expedition through the Yosemite Valley and among the giant redwoods, the party included Joseph L. (Joe) Meek, William Craig, Kit Carson, Robert Newell, and twenty-five other traders and trappers. They were successful. The horses were restored to Hudson’s Bay and the old Snake.

“The horse-stealing episode was the low water mark of deterioration in the mountain men’s relation with one another,” Dorothy O. Johansen has observed, and so it was. Writing of the raid on

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179 Ibid.

180 Ibid. at 176-77.

181 These are the words of Joe Meek, one of the mountain men about to enforce Indian law. Frances Fuller Victor, The River of the West (Hartford and Toledo, 1870) 259.


184 Johansen, Introduction and Notes, supra note 176 at 48 n52.
Fort Hall, the Hudson’s Bay officer Francis Ermatinger had recalled the past as he lamented the present. “The Snake country is not as when you were here,” he told his brother. Writing of the same incident, Robert Newell, an American mountain man and one of those who rode with Walker to recover the horses, also thought of the past as he despaired of the future. “Shuch thing never has been Known till late,” he wrote of white men’s stealing horses from other white men and from friendly Indians.185

For Newell, law had departed from the western mountains and the time had come for the mountain men to leave as well. That summer he attended the last rendezvous,186 and then, “convinc[ed] that the trapping era was over,”187 on September 27, 1840, “with two waggons and my family I left fort hall for the Columbia and with some little Difficulty I arived at Walla Walla[. T]hare I left one waggon and the other I had took down in a boat to vancouver and have it at this time on my farm about 25 miles from van-couver west.”188

It has been said that Simpson’s program of making barren the Snake Country was a success, that it “resulted also in postponing for over twenty years the cession of the Oregon Country to the United States; and when this cession took place, it was largely caused by the influx of American settlers, and was in no way caused by American fur-traders.”189 Maybe—and then again, maybe not. Hudson’s Bay’s program of denuding the beaver streams succeeded in that it helped to bring an economic depression to the valleys of the Bear, the Green, the Boise, and the Snake rivers, and contributed to driving mountain men such as Newell from the trade. But Newell had not retreated to the beaver streams of the Missouri, as Simpson had expected. He went instead to the Columbia. The party he led amounted to much more than the sum of its numbers—three women and nine men,


186The year 1841 also marked changing times on both sides of the boundary. There was no rendezvous on the American side in 1841 and the British side was shaken as it had never been before by the killing of Samuel Black, chief factor of New Caledonia District. “In brief, the natural death of a Shuswap chief with whom Black had had a recent disagreement was attributed to Black’s bad medicine by the widow. She harangued her nephew until he felt it was a point of honor to revenge the believed murder.” McDonald, Letters of Ermatinger, supra note 175 at 231 n 78. It is more likely that the avenger was the nephew of the man, not of the widow.

187Dictionary of American Biography, s.v. “Meek, Joseph L.”


189W. Stewart Wallace, Introduction to Part of Dispatch, supra note 134 at xlv.
including the fur trappers Joe Meek, Caleb Wilkins, and, ironical-
ly, Francis Ermatinger, “the ranking trader of the Hudson’s Bay
Company in the Snake River Country." They were the people
who brought the first wagons to Oregon—“the first wagons to
break the sage of the plains of Idaho and be dragged over the steep
slopes of the Blue Mountains”—proving correct Ogden’s guess
that wagons could travel all the way from Saint Louis to the
Columbia River.

Almost as important, Newell and Meek did the very thing that
the Hudson’s Bay Company most wanted to prevent. They
settled in the Willamette Valley. Newell helped draft the organic
law for Oregon, and served two terms as speaker of the House of
Representatives. Meek became the territory’s sheriff, was a
member of the legislature, and, in one of the more famous events
in the state’s history, rode horseback across the continent to help
persuade Congress that it was time to enact the Oregon bill giving
the country once ruled by Hudson’s Bay an American govern-
ment.

Simpson had been both right and wrong. He was right that
Hudson’s Bay could strip the Snake Country and hold the Ameri-
can fur trappers at bay; wrong in thinking that the mountain men
were the vanguard of settlement and that if they were stopped the
settlers would have no one to follow. The mountain men, driven
from their mountains, frequently became the original settlers;
when they did not, they were often the ones who guided the
settlers. The year after Newell’s settling, the first wagon train
from the Missouri frontier made it into Oregon, led part of the
way by Thomas “Broken Hand” Fitzpatrick, one of those young
men who two decades earlier had answered the advertisement by
William H. Ashley and who went on to become a legend in the
mountains. Behind them—behind those first wagons brought
into Oregon by Newell and Fitzpatrick—stretched the thousands
of overland migrants, the men and women who would soon be
passing through the old Snake Country, and who would force the
Hudson’s Bay Company to retreat far beyond the Columbia River
Valley, which it had so long coveted, to the relative isolation of
New Caledonia.

190 T.C. Elliott, “‘Doctor’ Robert Newell, Mountain Man,” Washington
Historical Quarterly 18 (1927) 181, 184.
191 Ibid.
192 To keep retired trappers away from the posts “where their interference with
the Trade is always more or less felt,” James Douglas actually planned
establishing a settlement “in the You’ta Country, south of Great Salt Lake, on the
Mexican frontier.” Douglas to the Governor and Committee, October 18, 1838,
Letters of McLoughlin, supra note 87 at 255.
Monterey Street, San Louis Obispo, ca. 1885 [San Luis Obispo County Historical Museum]
THE POLICE AND CRIME IN LATE-NINETEENTH- AND EARLY-Twentieth-Century SAN LUIS OBISPO, CALIFORNIA

BY LYLE A. DALE

Since the mid-1970s a growing number of scholars have researched and written on the history of crime, disorder, and criminal justice in the United States, especially in the nineteenth and early-twentieth centuries. Of particular interest has been an exploration of the role of the police in response to crime, and the development of order in American urban life. Generally, the research has shown a rise in order in American cities throughout the late-nineteenth century and into the early-twentieth, with a corresponding decline in lawlessness and public disorder. The cause for this apparent decline has been debated rather vigorously.

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Of the several theories explaining this observed rise in order, one (most strongly articulated by Roger Lane) argues that the social effects of urban industrial growth, far from creating a chaotic breeding ground for crime, instead produced increasing regimentation and regulation.² Life became more sober and predictable; people became less reckless and shed their impulsive and violent ways.

A second approach, expounded by John Schneider, is concerned with where crime occurred in the city, and how spatial arrangements structured criminal action.³ In his study, the differentiation of residences by ethnicity and class, the creation of a commercial downtown, and the development of a vice area freed the city from the collective disorder and conflict it had known earlier.

Eric Monkkonen argues, however, that the decline in lawlessness and disorder derived from a rising public demand for order: "actual increases in public decorum followed increased demands for more public decorum."⁴ He further maintains that "police enforce the laws that loosely reflect the dominant society's consensus."⁵

A fourth argument, proposed by Eugene Watts, accounts for the apparent decline in public-order arrests as a function of police priorities, not as a reflection of an actual decline in public disorder.⁶ Simply put, police can make only a finite number of arrests; therefore, police must set priorities in their operations. The police "reaction to one problem, such as public disorder, must be matched against their activity toward other illegal activity."⁷ Watts sees a gradual shift from "social control" (public-disorder arrests) to a "crime-fighting model of policing" as the best explanation for interpreting public-disorder arrests.⁸

These theories all share one similarity: they are based on the study of eastern or midwestern cities of some size, a bias in focus that has been only briefly noted.⁹ To date, little attempt has been made to undertake a systematic study of public disorder, the police, and criminal justice in general in rural towns, especially in western rural towns.

² Lane, Violent Death in the City, supra note 1.
³ Schneider, Detroit and the Problem of Order, supra note 1.
⁴ Monkkonen, "Organized Response to Crime," supra note 1 at 117.
⁵ Monkkonen, "A Disorderly People?" supra note 1 at 544.
⁷ Ibid. at 341.
⁸ Ibid. at 342.
⁹ Watts, for instance, notes that "All the world is not St. Louis," but still expects basic similarities across the nation for big-city police; ibid. at 357. Monkkonen observes that San Francisco did not conform to the national decline in public disorder, and suggests further city-level research; "A Disorderly People?" supra note 1 at 559.
One study that did break from the eastern-midwestern bias was *The Roots of Justice*, by Lawrence M. Friedman and Robert V. Percival, which explores criminal justice in Alameda County, California, from 1870 to 1910.\(^\text{10}\) Still, Alameda County, although a western community, was, even then, a rather large and urban one. Furthermore, the book remains essentially a case study. Friedman and Percival acknowledge that any claims they make may be attributed only to Alameda County in the period under consideration. They also admit that the larger question looms of how far their data can be pushed: "What more can we claim? How many of our findings stop right there? How much is true of California, as a whole, at that time? of the United States in general?"\(^\text{11}\) When the authors do expand on their findings, it is only to make "a few wild stabs at further meaning."\(^\text{12}\)

The question then arises as to what a detailed study of a rural community in the West, in roughly the same time period as other studies, would show. Would it reach essentially the same conclusions regarding disorder and police work? Or would it demonstrate that criminal patterns were more localized, indicating that criminal justice was more parochial in nature, with little relationship to different, and larger, areas? This article attempts to explore these questions by examining the work of the police and crime in San Luis Obispo, California, in the general period of 1880-1910.

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**The Town and the County**

San Luis Obispo was (and to some extent still is) a rural county. While much of California experienced enormous population and economic growth during the period, San Luis Obispo was in large part isolated from the growth in northern and southern California. It lies midway between San Francisco and Los Angeles, along the central coast of the state, and is bordered to much of the north, east, and south by the Santa Lucia Mountains, with the Pacific Ocean to the west. Until the arrival of the railroad at the end of the nineteenth century, travel to the north or south was difficult.

Much of the railroad's delay was caused by the great expense of construction over the coastal mountains. The Southern Pacific had made steady progress south from the San Francisco Bay area until it arrived and stopped at Santa Margarita in 1889, ten miles north of San Luis Obispo. To the south the Southern Pacific had

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\(^{11}\) Ibid. at 311.

\(^{12}\) Ibid.
stopped at Goleta, just north of Santa Barbara, a gap of 120 miles. Although San Luis Obispo received publicity in the Los Angeles papers and local land values were rising, residents could only watch as other areas grew faster. In October 1892 the Southern Pacific started construction south from its terminus north of the town, and on May 5, 1894, the first passenger train ran into San Luis Obispo. The gap between northern and southern California was finally closed in 1901.

While San Luis Obispo County remained relatively small and rural compared with the large growth centers to the north and south, it did grow in its own fashion. [See Table 1; all tables are in the Appendix.]

Certain trends emerge from the raw numbers. For instance, San Luis Obispo County not only mirrored the growth of the state as a whole during the boom of the 1880s, but its percentage rate of increase almost doubled that of the state: 75.8% to 39.7%. However, without the railroad or an industrial base, the county enjoyed almost no population growth in the 1890s, while the state continued to grow at a rate of 22.7%. After the turn of the century and with the railroad arriving in town, growth again picked up in the county, although at a far slower rate than that of the state: 16.5% versus 60.1%.

Additionally, the figures show that the county's growth in the 1880s was not within the town of San Luis Obispo, but was scattered throughout the county, where raising cattle and dairy farming were the major sources of business. [A pamphlet issued by the San Luis Obispo Board of Trade in 1887 declared the county the "banner cow county" of the state, and a Los Angeles newspaper described it as "the great butter and cheese belt of Southern California." With the coming of the railroad, the city of San Luis Obispo began to grow once more, reaching 18.1% of the county's population by 1900 [as opposed to 14.2% in 1890], and 26.6% by 1910. Still, the county's rural nature is underscored by a comparison of the population density between county and state [see Table 2].

14 Glen S. Dumke, Boom of Eighties in Southern California (San Marino, 1966) 172 [hereafter cited as Dumke, Boom of Eighties].
15 Annie L. Morrison, History of San Luis Obispo County (Los Angeles, 1917) 108.
16 C.N. Jespersen, History of San Luis Obispo (San Luis Obispo, 1939) 93; Dumke, Boom of Eighties, supra note 14 at 172.
17 Compare this with the percentage of the U.S. urban population, which in 1910 was 46%, according to Monkkonen in "Organized Response to Crime," supra note 1 at 119.
The Town and its Police

The police force in the small, rural town of San Luis Obispo consisted of a city marshal and some two to four officers. The former are listed in Table 3, together with their terms of office.18

The list of arresting officers in the arrest records indicates the approximate size of the force at a given time.19 For example, in the period of late 1886 to early 1888, with Marshal Dunbar in command, the arresting officers were listed as Frank Grady, David Thayer, and H. Jewitt, for a total force of four. Two of the officers were former marshals; apparently the marshal's post was on a rotating basis. However, in April 1888, with the arrival of Madison Graves as marshal, a clean sweep of the police force took place; evidently the force operated on some form of patronage system.20 Thereafter the force changed with each successive marshal, and by 1897 numbered five in all.21

The police force of San Luis Obispo may have been small, but the town was small, too. Was the force sufficient for the town's needs? For the number of police per thousand people in San Luis Obispo in selected years, see Table 4.

The police force remained at a rather constant size of approximately 1.7 officers per thousand people. However, since Friedman and Percival have observed a ratio of 0.78 and 0.91 per thousand in Oakland for the years 1890 and 1900 respectively,22 San Luis Obispo seems to have had a rather large police force for its population. Friedman and Percival also noted the police ratio per thousand population for the largest cities in the United States during the same period.23 Cities with a population of more than three hundred thousand averaged 1.9 police per thousand; those under fifty thousand averaged 1.1.24 Little San Luis Obispo thus

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18From Marshal's Accounts, San Luis Obispo.
19Arrest records referred to are taken from the Register of Arrests, Town of San Luis Obispo. October 1, 1886, to October, 1898 [hereafter referred to as Register of Arrests].
20The Register of Arrests, supra note 19, contains the following note, heartfelt if ungrammatical: "J.H. Dunbar's Term of Office expired April 16, 1888, never to command again!"
21A listing of candidates' cards in the San Luis Obispo Tribune of March 30, 1890, indicates that the marshal's office in San Luis Obispo was elective at the time. Unfortunately, the local newspaper seldom reported on such elections.
22Friedman and Percival, Roots of Justice, supra note 10 at 77.
23Ibid.
24Ibid. See also Monkkonen, "Organized Response to Crime," supra note 1 at 119-21, in which he asserts that small towns had fewer police per capita and, therefore, rural populations were subject to less possibility of arrest.
had a police force, per capita, that matched those of the largest metropolitan areas in the country.

Although the force was large for a town of its size, another question worth exploring is whether it was particularly busy. One way to determine this is to look at the arrest rates. Since the arrest data for San Luis Obispo are incomplete, we can examine only a couple of periods for which accurate population data are also available (see Table 5).

The rates correspond closely to those of Oakland, as observed by Friedman and Percival. In 1890 they observed an arrest rate of 85.5, and in 1900 a rate of 38.8. Clearly, arrest rates for San Luis Obispo were on a par with the more urban Oakland to the north.

25 Friedman and Percival, Roots of Justice, supra note 10 at 29.
However, comparative arrests per officer indicate a somewhat different picture (see Table 6).

Over the period, except for variations when arrests for drunkenness increased enormously, the arrests per officer tended to decline. This was also observed in Oakland by Friedman and Percival. However, the arrests per officer that they observed tend to be significantly higher—often the rate is approximately double. For example, the rate of arrests per officer in Oakland in 1890 was 109.9, while in San Luis Obispo it was 43.5. In 1897 Oakland's rate was 41.8 arrests per officer; San Luis Obispo's was 24.2. The San Luis Obispo police force was slightly more than double the size of the Oakland force on a per-capita basis: 1.7 officers per thousand people compared with approximately 0.7 for Oakland. Thus, roughly twice as many officers per capita made fewer than half as many arrests. The overall arrest rates were approximately equal.

San Luis Obispo's force may have been rather large, relatively speaking, but the question of its professionalism is another matter. Whether it was a well paid, well maintained unit of municipal government is questionable. For one thing, apparently the force had no uniforms until the mid-1890s. The San Luis Obispo Tribune reports that Marshal Cook appealed to the town's trustees in April 1895 to provide his force with "full uniform suits for each member of the city police force." The newspaper commented that, "As a matter of public pride, if nothing else, the police officers and the city marshal should be provided with full dress uniforms, and caps and clubs additionally," and that "police-men Cox, Pruitt, Cushing, Fox and City Marshal Cook should be walking our streets with flashing uniform and glittering buttons." Clearly, the town was not disposed to spend much money on its police, for the Tribune assured the taxpayers that "It is understood that the members of the police force will pay two-thirds of the money required . . . the city to advance the other third."

Payment of the force was another issue of frequent concern. As late as 1907 the mayor said that "good policemen are worth more money than we are paying at the present time and should receive $75 per month each for their services." If this was considered sufficient in 1907, we can only speculate what the salary was, say, twenty years earlier.

26 Ibid. at 34.
27 Ibid.
28 San Luis Obispo Tribune, April 6, 1895.
29 Ibid.
30 Ibid.
31 Tribune, January 21, 1907.
Apparently it was not enough. In a newspaper account of the beating of a customer who was "creating a disturbance," we learn, for example, that Officer Grady moonlighted as the night watchman of a "disreputable house."32 The Tribune did not comment on whether there might be a conflict of interest in the two roles.

By far the greatest problem with police remuneration concerned expense accounts—specifically, reimbursement for travel to apprehend accused parties for which warrants had been issued. Local officials in San Luis Obispo seemed to believe they were being overcharged for such travel and, from time to time, felt obliged "as agents of the people . . . to prevent actual and barefaced robbery of the treasury."33 There was concern that a police officer, "panting for a job, induces some scalawag to swear out a warrant for the arrest of some guiltless, and preferably, distant individual." The officer was then able "to run up a long bill in utter and brazen fraud of the people."34 However, without a promise of reimburse-

32 Tribune, July 24, 1880.
33 Tribune, December 31, 1889.
34 Ibid.
ment, the police would refuse to serve the process of the court; local officials were reduced to a "piteous request" that the police "kindly refrain from serving legal papers out of the county." 35

The matter of reimbursement for travel was finally brought before the courts. Officer Dunbar brought suit in court to recover fees due him, under state statute, for traveling to Los Angeles in order to bring an accused person back for trial under a warrant issued by the justice court. The matter was heard before the San Luis Obispo Superior Court, which issued its decision in favor of the plaintiff. 36 However, the mileage charge was dismissed. The court held that, while an officer who pursued a criminal and arrested him was entitled to mileage from the court, in this case the suspect was already in custody in Los Angeles. Consequently the officer was "relieved of the difficulty and expense of a precarious pursuit," and was not entitled to his mileage. 37

The matter of expense-account reimbursement for the police continued. In 1899, the San Luis Obispo Grand Jury issued a report citing "errors and irregularities found in the accounts" of the police officers. 38 Among these were: "Marshal Cook, illegal charge for livery hire and mileage twice charged; Officer Knapp, illegal expense of conveyance on search warrant, overcharge on mileage, illegal charge of car fare and overcharge on warrants." The total amount of illegal fees charged came to $167.10. 39

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Keeping the Peace

The arrest records of the San Luis Obispo police in the period 1880-1910 show that their primary function was to maintain order—in other words, the police were disciplinarians. Most arrests were for drunkenness, fighting, and other related disputes that encroached upon, and threatened, the civil decorum of the community. In this, the police almost certainly represented public sentiment—at least the sentiment of the respectable population of the town, for whom order and discipline had to be maintained, if only in public. Those who stepped out of line had to be controlled and, perhaps, mildly punished. 40

35 Ibid.
36 Tribune, January 3, 1890.
37 Ibid.
38 Tribune, January 6, 1899.
39 Ibid.
40 Friedman and Percival also commented that the point of police work was to show that order and discipline were alive to those who broke the rules, as well as to those who made them and wanted them enforced. Roots of Justice, supra note 10 at 313.
The arrests in San Luis Obispo from 1887 to 1898, using Friedman and Percival’s general categories of crimes, are listed in Table 7.41 The first category consists of felonies or serious crimes. Those listed in the San Luis Obispo Arrest Register were murder, rape, robbery, assault, burglary, grand larceny, arson, and carrying a concealed weapon. The second category is of order maintenance—the main problem being drunkenness. Under “other public order” are all the other “crimes” that the citizens of San Luis Obispo did not wish to intrude on the general calm: disturbing the peace, fighting, disorderly conduct, vagrancy, using vulgar language, shooting in the city limits, indecent exposure, sleeping on the street or sidewalk, urinating on the street, begging, insulting ladies, having minors in saloons or dance halls, giving liquor to minors, and littering. “Minor crimes versus persons” include minor assault, battery, and resisting an officer. The third category is of law enforcement, and includes the “morals” arrests: gambling, prostitution, seduction, drug offenses, adultery, and violating Sunday laws. It also includes “regulatory” arrests for doing business without a license, maintaining a nuisance, and violating fire ordinances. Traffic violations also fall in this category: fast riding and riding on the sidewalk, allowing loose stock on the street, and obstructing the sidewalk. Finally, there are such minor property crimes as petit larceny, obtaining goods under false pretenses, malicious mischief, embezzlement, fraud, and defrauding an innkeeper or livery owner.42

A study of the table’s figures certainly indicates a number of things about police work in San Luis Obispo. Order maintenance (specifically drunkenness) clearly accounted for almost all the arrests. The police force seems to have been concerned with arresting drunks to the exclusion of almost all other activity. In 1888, except for two arrests for the use of vulgar language and one for doing business without a license, the entire work of the police force, at least as reflected in the arrests made, was to apprehend drunks. This is rather startling, to say the least. Did no other criminal activity occur in San Luis Obispo? This seems unlikely, yet how can this focus be explained?

41 Friedman and Percival, Roots of Justice, supra note 10 at 179. The figures in Table 7 are taken from the Register of Arrests, supra note 19. Unfortunately, this is the only arrest register that could be found and the information it contains is not extensive. Typically, it lists the name of the person arrested and the offense charged. Also listed, but only sporadically, are entries for the names of the arresting officer and the complaining witness, and property in possession at the time of arrest.

42 Friedman and Percival’s fourth, “service,” category, which includes arrests when no crime is committed, such as of runaway children, is omitted here, as no such arrests were identified in the San Luis Obispo Register of Arrests, supra note 19.
The absolute numbers of arrests varied significantly from year to year, in a fluctuation that was due almost entirely to the number of arrests made for drunkenness. Friedman and Percival also observed drunkenness to be by far the most common grounds for arrest, but their figures were typically around 40% of total arrests. Monkkonen also found that drunkenness and disorderly offenses accounted for over half the urban arrests in the period to 1920; however, he showed a steady decline per capita throughout the period from the Civil War to the present.

Drinking does seem to have been a favorite way to pass the time in San Luis Obispo. Going to the saloon was probably one of the few things for ranch hands, laborers, and other local workers to do in their free time. The local populace seems to have been rather tolerant about drinking and the associated rabble rousing, at least as reflected in the reports of the Tribune. We are told of Michael Heath, "who averages at least one drunk and arrest every month," and who, back in town on an idle Sunday, was arrested and charged with being drunk and sleeping on the sidewalk. "Michael is a harmless fellow, but can't resist the temptation to drink lots of whiskey whenever he comes to town," commented the newspaper. Another report tells of an "individual in a comatose position from a thorough soaking in bug juice, who had stretched himself across the sidewalk, forcing passersby to jump over him." When an officer arrived to place the fellow under arrest, "He offered no resistance except his dead weight." One story concerns three members of the Hughes family, who "were having a high old time when the officer appeared on the scene to gather them in. They had partaken too freely of 'roof paint' or some other liquid equally as strong and indulged in a free for all scrap." The Tribune's headline told readers that the Hugheses "Were Having a Jollification."

After 1890 the arrest rate for drunkenness began to decline, falling to 69% of all arrests by 1898. (This was still high compared with Oakland's rate, however.) As this occurred, the arrests shifted almost entirely to other public-order offenses. Were police becoming more tolerant of drinking, and therefore focusing on other activities, or was drinking declining while people sought release in other forms of behavior?

The arrest records indicate that drinking was probably not declining. The only likely changes were in the situations to which the police responded or the charges that were filed. From

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43 Friedman and Percival, Roots of Justice, supra note 10 at 80-81.
44 Monkkonen, "A Disorderly People?" supra note 1 at 542-43.
45 Tribune, December 21, 1883.
46 Tribune, October 3, 1890.
47 Tribune, April 11, 1899.
1894, the numbers changed substantially. The arrest record shows more arrests for fighting, sleeping in the street, insulting ladies, indecent exposure, and the like—crimes that could easily be the result of continued drinking. However, nothing in the records indicates why this change took place.

A striking peculiarity in the San Luis Obispo arrest figures is the almost total lack of arrests for morals charges. In most years there was not even one arrest for any sort of morals crime. Friedman and Percival found that, of all arrest rates, those for morals charges in Alameda County averaged about 7%, 48 while Watts found that morals arrests ran as high as 22% of arrests in St. Louis in 1900-1906. 49 According to Friedman and Percival, the justice system in Alameda County devoted much effort to the control of gambling and vice; 50 in discussing such crusades they suggest that society earnestly believed that vice had to be eliminated entirely, not merely tolerated or winked at. 51 It seems highly unlikely, if not impossible, that there were no gambling or prostitution or drug problems in San Luis Obispo; more likely, morals offenses were tolerated by the police as long as they did not become too overt.

The best example of this tolerance can be found in the treatment of prostitution—a common problem in nineteenth-century America, to which San Luis Obispo was no exception. 52 While everyone knew of its existence, "Victorian manners excluded it from polite conversation," as one historian has put it. 53 The institution was generally accepted as inevitable, and every sizable city had a red-light district. 54

48 Friedman and Percival, Roots of Justice, supra note 10 at 80-81.
50 Friedman and Percival, Roots of Justice, supra note 10 at 317. Watts also found public-morals crimes a concern of the St. Louis police, approximately 22% of all arrests in the period 1900-1906 being for such crimes. See "Public Response to Crime and Disorder," supra note 10 at 350.
51 Ibid. at 321. For more on the late-nineteenth-century increase in morals regulation, see David J. Pivar, Purity Crusade: Sexual Morality and Social Control, 1868-1900 [Westport, Conn., 1973].
Newspaper reports indicate that San Luis Obispo had its own such district, apparently centered in an area of Palm Street just to the west of the main business district of Monterey and Higuera streets. The reports repeatedly refer to a "disreputable house on Palm Street," the "hell-holes of Palm Street," "a house of ill fame on Palm Street," or "the Palm Street precincts." Only once, though, was the area actually referred to as "the Red-Light District."

Missing from any of the articles that refer to prostitution in San Luis Obispo (and there are surprisingly few over the thirty-year period) was any call for the elimination of such vice. The local press was not alone in this: typically, newspapers elsewhere failed to be concerned with prostitution as a problem. Instead, they expressed either amusement or horror at conditions in and around the brothels.

When the subject was mentioned in the San Luis Obispo newspapers at all, it was because behavior in the district was out of control or, worse yet, had spilled over into other areas of the town. For example, the *Tribune* reported about a "party of four or five young men [who] emerged from one of the hell holes on Palm Street" and "became engaged in a dispute" that resulted in a knife fight to which the police had to be summoned. On another occasion, the newspaper reported that "The citizens of this town, who chanced to be on Monterey Street, were treated to the disgusting spectacle of two drunken women of the town reeling along the sidewalk. One was nearly paralyzed and was leaning heavily on her companion, who reproached her sister with the vilest and most obscene language for her inability to 'brace up.'" The article went on to state that the good citizens would not tolerate "some brazen-faced strumpet on the principal streets, blind with drink, cursing and making use of the foulest language that a depraved nature can invent. This, too, in broad daylight in front of respectable women and children."

Such behavior seems to be the only thing that roused the police to act in response to prostitution. For example, of the seven arrests made on morals charges in 1887, two were of the same person, charged each time with visiting a house of ill fame—probably because he had created a disturbance in the house. A second case that year involved a charge of "living in a house of ill-fame"; however, only one arrest was made. In December 1886,

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55 *Tribune*, December 31, 1881; December 10, 1895; November 30, 1890.
56 *Tribune*, January 24, 1898.
57 Butler, *Daughters of Joy*, supra note 52 at 81.
58 *Tribune*, December 3, 1881.
59 Ibid.
four men were arrested for "visiting a house of ill-fame." Again, they had probably caused a stir, to which the police felt obliged to respond. However, no arrests of the house "residents" were made; only the likely trouble makers were taken in to be charged.

After his or her arrest, the prisoner was generally brought to court for a determination of the case. At the lowest level was the police or justice court, which heard petty crime cases and dealt with the endless parade of drunks and others who found themselves in minor trouble with the law. Surviving records of the San Luis Obispo police and justice courts are few, but we have a complete police court docket for 1881-1883, portions of 1885, and all of 1886. Two justice court dockets exist, one for August 1905 through January 1907, and one for May 1908 through March 1910. This allows us to make a rather complete analysis of court activity for 1881, 1882, 1883, 1886, 1906, and 1909. Unfortunately, because none of these years matches the years for which arrest records exist, we cannot follow a case through from arrest to court proceedings. Still, between the arrest records of the late 1880s and much of the 1890s, together with court records of the early 1880s and 1906 and 1909, we can have some idea of the lower end of the justice system.

As we have seen, most arrests by the police were for minor offenses, and most people who appeared in police court had been arrested for minor offenses. The distribution of cases heard by the San Luis Obispo Police Court for selected years is listed in Table 8, according to the functional categories used in Table 7.

Table 8 shows that drunkenness dominated the work of the police court, just as it did the arrest work of the police. Over 50% of the cases heard, and up to 60% in 1886, were on drunk-related charges. This compares closely with the results Friedman and Percival noted in Oakland. Other public-order cases accounted for between 12 and 21% of cases heard in San Luis Obispo, versus about 15% in Oakland. Minor offenses against the person accounted for roughly 10 to 14% of cases in San Luis Obispo.

*60* The arrest records contain no data on the status of the prisoner after arrest, and we therefore have no way of knowing, for instance, how many drunks were kept in jail overnight, and then simply released the next day.

*61* The basic criminal court in California, from 1880, was the superior court, which heard all felony cases. Above this was the supreme court, which acted as the only true appellate court in the state until 1905. See Friedman and Percival, *Roots of Justice*, supra note 10 at 39; and see 116 for discussion of the evolution and relationship of the police and the justice courts.

*62* Often several charges were cited with drunkenness: drunk and nuisance, drunk and sleeping on street or sidewalk, drunk and using vulgar language. Since drunkenness instigated the other behavior, that is the charge listed in the table.

*63* Friedman and Percival, *Roots of Justice*, supra note 10 at 116, and for percentages cited in this paragraph.
against 7.5% in Oakland. Morals cases were heard less often in San Luis Obispo, representing 3 to 5% of cases, versus 7.5% in Oakland. Minor offenses against property accounted for 5 to 7% of cases heard in San Luis Obispo, compared with 6% in Oakland. The distribution rate of cases heard was roughly similar between the two jurisdictions of San Luis Obispo and Oakland, although the San Luis Obispo court heard a higher percentage of cases of offenses against the person, while Oakland heard slightly more morals cases.

For the distribution of cases heard in the San Luis Obispo Justice Court in selected years, with the functional categories slightly modified to reflect the type of cases heard, see Table 9.

The docket for the San Luis Obispo Justice Court shows that no drunkenness cases were heard there. Perhaps they were heard under different charges, or the drunks simply paid a fine in lieu of standing trial, or the district attorney decided not to bring the charges to court. Vagrancy and disturbing the peace account for the great majority of cases heard—44 to 48 percent of the cases between them. By 1906 and 1909 these may have been the preferred charges to deal with drunkenness. Certainly the San Luis Obispo Police Court had dealt little with vagrancy; no such cases were heard in 1881 and 1882, only two in 1883, and six in 1886. Then, too, vagrancy had become more of a problem by the
early 1900s. The railroad had come to town, making it easier for transients to pass through.

The movement of tramps across the country in the latter part of the nineteenth century created heated demands for action. In San Luis Obispo, the Tribune reported, "Tramps are numerous and something must be done."64 Later, it claimed that "the hobo element is getting altogether too large for the city."65 The newspaper also informed its readers that "The city has a large band of the members of the hobo fraternity just at the present time, and the officers are having a lively time."66 On one occasion, "news was received from that portion of the city where the brewery is situated" concerning a large band of hobos.67 When the police arrived, they found that "the gang of hobos constituted no less than eight." The Tribune went on to describe the arrest: "A fight of over fifteen minutes was required to load up the crew, and then officer Fox had to use his lariat to bring one of them along. Arriving at the city jail, the fun commenced. The hobos had just sufficient bug juice instilled into their lazy carcasses to make them extremely belligerent and, before they were jailed, every policeman on the force and several private citizens had received numerous kicks and cuffs, some of which were of sufficient force to remind their recipients that they had met a very warlike enemy. The affray furnished great sport for a large crowd which speedily gathered to take in the fun."68

Another difference between the records of the San Luis Obispo justice and police courts was the increase in cases involving minor offenses against property. The police court in the 1880s heard only a small percentage of cases involving property, usually some 5 to 7 percent. By the early 1900s the justice court docket shows that nearly one-fifth of all cases heard involved offenses against property. This also seems to suggest a rise in vagrancy and a problem with transients. Reports in the Tribune tend to confirm this. For example, the paper wrote in April 1895 that "complaints are quite numerous ... of poultry houses robbed. The midnight marauders should be taught a lesson."69 Another article observed that the "number of strangers in the city has not diminished in the least. . . . Several petty thefts have been reported and chicken roosts are by no means safe."70

64 Tribune, January 6, 1895.
65 Tribune, October 26, 1895.
66 Tribune, December 1, 1895.
67 Tribune, March 1, 1895.
68 Ibid.
69 Tribune, April 30, 1895.
70 Tribune, December 3, 1895.
In 1906 and 1909 fully one-third of the property offenses involved defrauding an innkeeper; in the majority of the cases, the only action the court took was to issue a warrant, indicating that the offender had departed. We may assume that the person in question was a transient of some sort who, passing through, availed himself of an innkeeper’s hospitality and quickly left town.

The question arises as to whether the decline in arrests for drunkenness toward the end of our period represents a decline in public disorder, as Monkkonen suggests, or whether, as Watts believes, it represents a shift in police priorities. To some extent, this shift is reflected in the arrest statistics from San Luis Obispo. As arrests for drunkenness declined, they were matched by an increase in vagrancy arrests. As we have seen from the justice court records, after 1900 disturbing the peace and other public-disorder crimes became less numerous than vagrancy charges. Vagrancy nevertheless represents a public-disorder offense, and, together with drunkenness and disturbing the peace, remained the almost exclusive concern of the San Luis Obispo police with public order. This confirms the observations of Friedman and Percival in Oakland. As they noted, while the police were patrolling the streets looking for drunks, they were “also patrolling the moral and social edges of society . . . enforcing standard norms of good . . . conduct.” 71 The police were a civil-discipline force, attempting to maintain order for the citizens of San Luis Obispo.

The present study does not appear to confirm the work of either Monkkonen or Watts. In the rural community of San Luis Obispo, no increase in orderliness is apparent. Arrests for drunkenness seem to have decreased, only to be replaced by police work against vagrants—hardly a sign that disorder was declining. Though this change in police priorities might suggest a comparison with Watts’s study of the St. Louis police, the San Luis force did not shift from social control to the crime-fighting role that Watts proposes. 72 The San Luis Obispo police continued to enforce civil discipline throughout the period under consideration.

This study of the rural community of San Luis Obispo suggests that researchers in the field could well focus less exclusively on midwestern and eastern cities than has been the general rule to date. More case studies of small, rural communities, particularly in the West, need to be included in any overall discussion of the apparent rise in urban order in the latter part of the nineteenth and early-twentieth centuries.

71 Friedman and Percival, Roots of Justice, supra note 10 at 85.
72 Watts, “Police Response to Crime and Disorder,” supra note 1 at 351.
### APPENDIX—Tables

**Table 1**
**Population of San Luis Obispo County, 1880-1910, Compared with State of California**

<table>
<thead>
<tr>
<th>Year</th>
<th>San Luis Obispo County</th>
<th>San Luis Obispo City</th>
<th>State of California</th>
</tr>
</thead>
<tbody>
<tr>
<td>1880</td>
<td>9,142</td>
<td>2,432</td>
<td>864,694</td>
</tr>
<tr>
<td>1890</td>
<td>16,072</td>
<td>2,295</td>
<td>1,208,130</td>
</tr>
<tr>
<td>1900</td>
<td>16,637</td>
<td>3,021</td>
<td>1,585,053</td>
</tr>
<tr>
<td>1910</td>
<td>19,383</td>
<td>5,157</td>
<td>2,377,549</td>
</tr>
</tbody>
</table>

*Population figures cited are taken from U.S. Bureau of the Census reports as published after each decennial census.*

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**Table 2**
**Population Density of San Luis Obispo County and State of California, in Persons per Square Mile**

<table>
<thead>
<tr>
<th>Year</th>
<th>San Luis Obispo County</th>
<th>State of California</th>
</tr>
</thead>
<tbody>
<tr>
<td>1880</td>
<td>2.74</td>
<td>5.54</td>
</tr>
<tr>
<td>1890</td>
<td>4.82</td>
<td>7.75</td>
</tr>
<tr>
<td>1900</td>
<td>4.99</td>
<td>9.52</td>
</tr>
<tr>
<td>1910</td>
<td>5.87</td>
<td>15.30</td>
</tr>
</tbody>
</table>

*Based on 155,980 square miles for California and 3,334 square miles for San Luis Obispo County.*

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**Table 3**
**City Marshals and Terms of Office, 1881-1910**

<table>
<thead>
<tr>
<th>Term</th>
<th>Marshal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1881-1882</td>
<td>C.W. Robinson</td>
</tr>
<tr>
<td>1882-1885</td>
<td>(?) Tanner</td>
</tr>
<tr>
<td>1884-1885</td>
<td>Frank Grady</td>
</tr>
<tr>
<td>1885-1886</td>
<td>Henry Jewitt</td>
</tr>
<tr>
<td>1886-1888</td>
<td>John H. Dunbar</td>
</tr>
<tr>
<td>1888-1894</td>
<td>Madison Graves</td>
</tr>
<tr>
<td>1894-1900</td>
<td>James W. Cook</td>
</tr>
<tr>
<td>1900-1910</td>
<td>W.G. Robinson</td>
</tr>
</tbody>
</table>

* * *
**Table 4**

**Number of Police per Thousand People in San Luis Obispo in Selected Years**

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Police</th>
<th>No. Population</th>
<th>Police/1000 Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890</td>
<td>4</td>
<td>2,295</td>
<td>1.74</td>
</tr>
<tr>
<td>1900</td>
<td>5</td>
<td>3,021</td>
<td>1.66</td>
</tr>
</tbody>
</table>

**Table 5**

**Arrest Rates in San Luis Obispo in Selected Years**

<table>
<thead>
<tr>
<th>Year</th>
<th>Population</th>
<th>No. Arrests</th>
<th>Arrests/1000 Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1890</td>
<td>2,295</td>
<td>174</td>
<td>75.8</td>
</tr>
<tr>
<td>1898</td>
<td>3,020</td>
<td>120*</td>
<td>39.7</td>
</tr>
</tbody>
</table>

*Figures for 1898 are used, extrapolated for the full year as a portion of the arrest record is missing. Population is estimated based on the 1900 census.*

**Table 6**

**Number of Arrests, Number of Police, and Arrests per Officer in San Luis Obispo, 1887-1898**

<table>
<thead>
<tr>
<th>Year</th>
<th>No. Arrests</th>
<th>No. Police¹</th>
<th>Arrests/Officer</th>
</tr>
</thead>
<tbody>
<tr>
<td>1887²</td>
<td>250</td>
<td>3</td>
<td>90.6⁶</td>
</tr>
<tr>
<td>1888</td>
<td>224</td>
<td>4</td>
<td>56.0</td>
</tr>
<tr>
<td>1889</td>
<td>371</td>
<td>4</td>
<td>92.75</td>
</tr>
<tr>
<td>1890</td>
<td>174</td>
<td>4</td>
<td>43.5</td>
</tr>
<tr>
<td>1891</td>
<td>219</td>
<td>4</td>
<td>54.75</td>
</tr>
<tr>
<td>1894³</td>
<td>350</td>
<td>5</td>
<td>93.6⁶</td>
</tr>
<tr>
<td>1895</td>
<td>351</td>
<td>5</td>
<td>70.2</td>
</tr>
<tr>
<td>1896⁴</td>
<td>103</td>
<td>5</td>
<td>49.4⁶</td>
</tr>
<tr>
<td>1897</td>
<td>121</td>
<td>5</td>
<td>24.2</td>
</tr>
<tr>
<td>1898⁵</td>
<td>90</td>
<td>5</td>
<td>24.0⁶</td>
</tr>
</tbody>
</table>

¹Includes marshal and officers
²November missing from Register
³Register book skips 1892 and 1893. Records for 1894 begin with April
⁴Pages for May-November have been removed. No. of arrests extrapolated from 103 is 247 for 12 mos.
⁵Through September only
⁶Extrapolating arrests recorded for full year
<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Year</th>
<th>Entire Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Felonies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Order Maintenance</td>
<td>93</td>
<td>7</td>
</tr>
<tr>
<td>Drunkenness</td>
<td>88</td>
<td>6</td>
</tr>
<tr>
<td>Other Public Order</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Minor v. Persons</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Morals</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Regulatory</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Traffic</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Minor v. Property</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Total N</td>
<td>250</td>
<td>121</td>
</tr>
</tbody>
</table>

* Only one arrest recorded during year

1 November missing from Register
2 Register skips 1892 and 1893; records for 1894 start with April
3 Pages for May-November have been removed
4 Through September; October-December not available
### Table 8
**Distribution of Cases Heard in San Luis Obispo Police Court by Functional Categories for Selected Years**

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>1881 No. of Cases</th>
<th>1882 No. of Cases</th>
<th>1883 No. of Cases</th>
<th>1886 No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Felonies</strong></td>
<td>1 &gt;1</td>
<td>10 4</td>
<td>4 2</td>
<td>1 &gt;1</td>
</tr>
<tr>
<td><strong>Order Maintenance</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drunkenness</td>
<td>106 57</td>
<td>118 55</td>
<td>75 50</td>
<td>130 60</td>
</tr>
<tr>
<td>Other Public Order</td>
<td>22 12</td>
<td>36 17</td>
<td>23 15</td>
<td>46 21</td>
</tr>
<tr>
<td>Minor v. Persons</td>
<td>16 9</td>
<td>22 10</td>
<td>22 14</td>
<td>3 1</td>
</tr>
<tr>
<td><strong>Law Enforcement</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Morals</td>
<td>8 4</td>
<td>7 3</td>
<td>5 3</td>
<td>11 5</td>
</tr>
<tr>
<td>Regulatory Traffic</td>
<td>1 &gt;1</td>
<td>2 1</td>
<td>5 3</td>
<td>15 7</td>
</tr>
<tr>
<td>Traffic</td>
<td>19 11</td>
<td>7 3</td>
<td>6 4</td>
<td>9 4</td>
</tr>
<tr>
<td>Minor v. Property</td>
<td>12 6</td>
<td>12 5</td>
<td>10 7</td>
<td>1 &gt;1</td>
</tr>
<tr>
<td>Total N</td>
<td>185</td>
<td>214</td>
<td>150</td>
<td>216</td>
</tr>
</tbody>
</table>

### Table 9
**Distribution of Cases Heard in San Luis Obispo Justice Court by Functional Categories for Selected Years**

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>1906 No. of Cases</th>
<th>1909 No. of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Felonies</strong></td>
<td>35 19</td>
<td>30 15</td>
</tr>
<tr>
<td><strong>Order Maintenance</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vagrancy</td>
<td>40 22</td>
<td>54 26</td>
</tr>
<tr>
<td>Disturbing the Peace</td>
<td>40 22</td>
<td>46 22</td>
</tr>
<tr>
<td>Other Public Order</td>
<td>2 1</td>
<td>2 1</td>
</tr>
<tr>
<td>Minor v. Persons</td>
<td>24 13</td>
<td>24 12</td>
</tr>
<tr>
<td><strong>Law Enforcement</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Morals</td>
<td>7 4</td>
<td>5 2</td>
</tr>
<tr>
<td>Regulatory</td>
<td>3 2</td>
<td>2 1</td>
</tr>
<tr>
<td>Minor v. Property</td>
<td>31 17</td>
<td>38 19</td>
</tr>
<tr>
<td>Total N</td>
<td>185</td>
<td>201</td>
</tr>
</tbody>
</table>
Jane Stanford [Stanford University Archives]
RAILROADS, ROBBER BARONS, AND THE SAVING OF STANFORD UNIVERSITY

By David C. Frederick

In the mid-1890s, two fledgling institutions participated—one directly, the other indirectly—in one of the greatest lawsuits of the late nineteenth century. For Leland Stanford Junior University, founded in 1886 but struggling financially after the death of Leland Stanford in 1893, the suit filed by the U.S. government against Stanford’s estate threatened its very existence. For the U.S. Circuit Court of Appeals for the Ninth Circuit, formed in 1891, the case was the earliest in a long line of significant decisions by the court that would shape the development of the West.

The holding of United States v. Stanford established the liability of the railroad magnates, or “robber barons,” who had reaped enormous profits from government subsidies for the unpaid loans of the railroad they owned, the Central Pacific Railroad Company. At a deeper level, the case illuminated the interplay between key government actors and railroad interests in influencing the course of litigation. It also provided a first comprehensive look at the court’s internal procedures and the jurisprudence of two Ninth Circuit judges whose views would clash for

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three decades—William B. Gilbert and Erskine M. Ross. At the trial and appellate stages, these two jurists decided the case in favor of Jane Stanford on grounds her attorneys did not argue. In the process, her victory saved Leland Stanford Junior University, which would not have survived if the government had prevailed.

BUILDING THE TRANSCONTINENTAL RAILROAD

The Civil War provided the crucial impetus for breaking a decision-making logjam over the construction of a transcontinental railroad. Congress had recognized the necessity for such a connection for more than a decade, but squabbling between northerners and southerners over the preferred route had impeded the national legislation necessary to assist private construction efforts. After the southern states seceded, the urgency of a transcontinental transportation and communication link jolted Congress into legislating for development of the northern route. In 1862 it passed a detailed statute creating the Union Pacific Railroad Company and conferring subsidies in the form of land grants and bonds to the Union Pacific and other railroad companies participating in the construction of the route.\(^1\) The statute named the incorporators of the Union Pacific, spelled out its powers and functions, charted its organizational structure, and directed the time and place of its meetings.\(^2\) Congress then specified detailed operating procedures for the other participating railroads. The list covered rights of way, materials for construction, collection of subsidy bonds and patenting of land grants, and repayment of debts incurred by the railroads on the bonds.\(^3\)

For the eastern portion of the transcontinental route, stretching from the Nebraska Territory to an unspecified point near the western boundary of Nevada, Congress entrusted construction to the Union Pacific.\(^4\) The legislature authorized the building of the western segment—from San Francisco to the California-Nevada boundary and beyond until the railroads met—to the Central Pacific, a corporation formed under California law.\(^5\) The 1862 statute recognized that the Central Pacific was "a corporation existing under the laws of the State of California," but it nonetheless provided that the California railroad should receive the same

\(^1\) Act of July 1, 1862, ch. 120, 12 Stat. 489 [hereafter cited as Act of July 1, 1862].
\(^2\) Ibid. at 489-91.
\(^3\) Ibid. at 491-94.
\(^4\) Congress also provided that the Leavenworth, Pawnee, and Western Railroad of Kansas should construct a rail and telegraph line from the Kansas River to link up with the Union Pacific’s line. See ibid. at 493-94.
\(^5\) Ibid. at 494.
subsidy bonds and land grants "upon the same terms and conditions, in all respects, as are contained in this act for the construction of [the Union Pacific] line."\(^6\)

Under these terms, the participating railroads received loans in the form of subsidy bonds for each mile of track completed: $16,000 for the line west of the Sierra Nevada, $48,000 per mile for 150 miles through the Sierra Nevada, and $32,000 per mile for the sector east of the mountainous part.\(^7\) To induce speedy construction, Congress authorized payment of the loans upon the completion of forty-mile segments of track. The principal of these bonds, payable in thirty years, bore interest at an annual rate of 6 percent.\(^8\) Over the course of its construction effort, the Central Pacific received vast land grants and loan subsidies totaling $27,855,680. With interest at maturity, the Central Pacific's total indebtedness reached $60 million.\(^9\) Although historians have made much of the economic benefit conferred on the railroads by the land-grant policy, at least one economic historian has calculated that the loan subsidies brought twice as much aid in real terms to the Central Pacific as the land grant.\(^10\)

The 1862 statute also established the corporate bases of liability for repayment of the loans. Section 5 provided that "the Secretary of the Treasury shall ... secure the repayment to the United States ... of the amount of said bonds so issued ... together with all interest thereon which shall have been paid by the United States."\(^11\) It authorized the government to secure repayment by holding a "first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued."\(^12\) In the event the railroads defaulted on the bonds, Congress empowered the secretary of the treasury to take possession of the railroad.\(^13\)

\(^6\) Ibid.
\(^8\) Act of July 1, 1862, supra note 1 at 492.
\(^10\) Mercer, *Railroads and Land Grant Policy*, supra note 7 at 78. For the Southern Pacific Railroad Company, the discovery of oil on granted lands would dramatically increase the value of the land grant. Litigation involving these lands occupied much of the court's attention in the early twentieth century.
\(^11\) Act of July 1, 1862, supra note 1 at 492.
\(^12\) Ibid. at 493. Two years later, Congress amended this provision to authorize the security interest to be a second mortgage, thus enabling the companies to sell their own first mortgage bonds to raise much-needed capital. See Act of July 2, 1864, ch. 216, 10, 13 Stat. 356, 360 [hereafter cited as Act of July 2, 1864].
\(^13\) See Act of July 1, 1862, supra note 1 at 493.
Questions of repayment and liability received little attention in the early days of construction. The four key shareholders of the Central Pacific—Leland Stanford, Collis Huntington, Mark Hopkins, and Charles Crocker—who became known as the "Associates" in some circles, the "Big Four" in others, struggled to keep their investment viable while their designated foreman, Crocker, scouted for adequate crews to lay the track. After months of negligible progress, Crocker began putting Chinese laborers to work. Their efforts transformed the project from a losing proposition into a profitable one. All told, thousands of Chinese laborers toiled long hours to build the road. By late 1867, the Central Pacific's segment approached the California state line, some 278 miles east of Sacramento. The Central Pacific added 362 miles of track in 1868 and pushed into Utah early the following year. The Central Pacific and Union Pacific celebrated their linkup by driving a golden spike at Promontory Point, Utah, on May 10, 1869.

Almost from the beginning, legal controversies plagued the two railroads. Because the subsidies and land grants vested upon completion of track, the railroads received public funds before finishing the entire line. At an early stage, the government and the railroads clashed over payment of the interest due semi-annually on the subsidy bonds. The Treasury Department contended that the railroads owed the interest when it came due; the railroads interpreted the statute to require repayment of principal and interest when the thirty-year loan period expired. Congress rebuffed an official opinion from the attorney general validating the treasury secretary's view by passing an appropriations bill that required the secretary to pay out money withheld from the railroads for nonpayment of the interest. For their part, the railroads questioned not their underlying liability but the timing of repayment.

Throughout the 1870s and 1880s, scandals involving the Union Pacific and Central Pacific inspired concern in Congress over repayment of the subsidy bonds. As a government-created corporation, the Union Pacific received the most attention, but

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14 On their nicknames, see George T. Clark, Leland Stanford (Stanford, 1931) 188-89.


the Central Pacific was also under close scrutiny. In 1887 Congress established the Pacific Railway Commission to investigate wrongdoing by the railroads. The commission found plenty. It reported that the Central Pacific had defrauded the U.S. government, violated "[n]early every obligation which these corporations assumed under the laws of the United States," and "impelled the people of [California] to adopt amendments to the State constitution regulating railroads and creating a State commission to protect shippers against the discriminations of the Central Pacific Company." When the commission sought to compel Leland Stanford to answer questions or submit data, his close friend Justice Stephen Field in the circuit court held that such an investigation unconstitutionally invaded the power of the judiciary, states' rights, and Stanford's personal rights.

By the 1890s, as the first of the subsidy bonds was about to mature, attention focused anew on the railroads' liability for these loans. The Cleveland administration expressed little interest in pursuing repayment from the two great railroads. In any event, by the middle of the decade both of them were either in receivership or on the verge of bankruptcy. The shareholders of these behemoths, however, enjoyed great wealth after stripping the companies of assets through payments of large dividends. For those seeking prompt payment from the Union Pacific, this fact brought little solace. The 1862 statute incorporating the railroad contained no provision holding shareholders liable for the corporation's unpaid debts in the proportion in which they held shares. The Central Pacific, on the other hand, seemingly stood in a different position. It was a creature of California law, which appeared to contemplate the liability of stockholders for the


20 *In Re Pacific Railway Commission*, 32 F. 241, 249-59 [C.C.N.D. Cal. 1887].

21 Cummings and McFarland, *Federal Justice*, supra note 16 at 290-91. An enterprising lawyer from St. Louis, Daniel H. Solomon, wrote to the Justice Department with relentless regularity to press a theory of recovery: that the government could sue the Central Pacific stockholders for the underlying debt of the corporation. Solomon dropped tidbits of his theory at regular intervals in a bid to represent the United States in a suit against the Stanford estate for a ten percent contingency fee. When the Justice Department had extracted enough information about Solomon's theory, it eventually declined his requests and hired another special counsel instead, Lewis D. McKisick. Solomon to Department of Justice, Department of Justice Central Files, Year Files 1892, File 7622: Assorted Letters, boxes 631 and 632, Record Group 60, National Archives [hereafter cited as Justice Department Records].
corporation's unpaid debts. From its original constitution of 1849, California law provided that "[e]ach stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities." To the modern lawyer, schooled in the general principle that shareholders have limited liability for a corporation's debts, this rule may appear to have been self-defeating to the concept of incorporation. In the late-nineteenth century, however, limited shareholder liability did not apply everywhere and California was an important exception. For the government to succeed in the Stanford suit, it would have to convince the courts that the Central Pacific's shareholders were liable for the company's debts.

By the mid-1880s published reports of the Big Four's ostentatious lifestyle increased the attractiveness of pursuing the shareholder-liability theory. Former governor and at that time U.S. Senator Leland Stanford lived particularly well, much to the chagrin of his partner Collis Huntington, who sought to shield the Big Four's personal wealth from Congress and the public. Stanford shattered the myth of the robber barons' poverty in 1886, when he announced the founding of Leland Stanford Junior University. This large endowment suggested that the Central Pacific's stockholders had the financial means to repay the loans. Huntington viewed the gift with contempt, referring to it as "Stanford's circus" on a regular basis. The benefactor's unexpected death on June 20, 1893, and reports that he left an estate estimated at between $35 million and $75 million, fueled sentiments to press the government's claims, especially as the country was facing a severe economic downturn.

The issue divided Congress. Sen. George F. Hoar of Massachusetts introduced a resolution on June 8, 1894, directing the Judiciary Committee to inquire whether the government's claim against the Stanford estate "should be forthwith relinquished and put at rest." Hoar, whose feelings on the matter were surely

22 Cal. Const. of 1864, Art. 4, §36.
24 Lewis, The Big Four, supra note 15 at 191.
25 Ibid. at 184-85.
26 Ibid. at 191.
27 Ibid. at 188; 26 Cong. Rec. 5950 (1894).
28 26 Cong. Rec. 5949 (1894).
"California's Representative Man, Hon. Leland Stanford" [Stanford University Archives]
influenced by his own service as an overseer of Harvard, believed that a government suit would threaten the very existence of the young university, "one of the illustrious examples of munificence and public benefaction.""29 Remarking that Hoar's resolution was "premature," Sen. William A. Peffer of Kansas raised the salient political fact that "with millions of our people out of employment and with hundreds and hundreds of thousands of business men upon the verge of bankruptcy, we here in the Senate of the United States should not be talking about releasing a claim against a multi-millionaire's estate."30 Even with the possible adverse political consequences of Hoar's proposal, Attorney General Richard Olney endorsed it. In a letter to Hoar, he wrote: "Whatever money may be due the Government, or might be collected by it at the end of a litigation, will probably be of more use to humanity at large, if applied to the charitable purposes for which Mr. Stanford designed it than if administered by the United States." He added, "I was so strongly impressed with this aspect of the matter that, though my attention was called to the claim immediately after Mr. Stanford's death, I delayed taking any steps in regard to it until the last moment. I was greatly in hope that some action of Congress would relieve me from the necessity of moving in the matter."31

Olney made no effort to hide such sentiments from the public,32 which mirrored the divisions in Congress over the propriety of bringing suit. When one member of Congress from New England observed that Californians were so angry at the Central Pacific syndicate that they might be willing to dismantle Stanford University to enforce the government's claim, the San Francisco Call hotly retorted: "If the law makes the property of the four members of the syndicate responsible for its obligations, it will be no answer to the Government's suit to plead that part of that property has been put to beneficial uses."33 The Call editorialized that "this claim should be made, and its rightfulness determined."34 The newspaper advanced the "moral rather than [the] pecuniary grounds" of this position:

[I]t is of less importance to the people of the United States that this debt should be collected than it is that

29 26 Cong. Rec. 5896 (1894).
30 26 Cong. Rec. 5950 (1894).
32 According to one reporter, Olney did not believe that bringing a suit would be successful. San Francisco Call, June 10, 1894.
33 Call, June 6, 1894.
34 Call, June 9, 1894.
notice should be served that men shall not make free with public money and escape with the plunder. The people of the United States cannot afford to let a record be made that if a man gets hold of enough he may hold it in spite of court and Congress. . . . It is not well to establish loose precedents. The case of four rich but insolvent men has attracted the attention of the civilized world. People abroad do not understand how such things can be. 35

While the public continued to debate the merits of bringing a suit, a group of senators during the summer of 1894 prepared legislation to compel the attorney general to institute an action. Sen. David B. Hill of New York introduced a bill to require Olney to prosecute a suit "as rapidly as the interests of justice will permit." 36 The momentum to file suit built up even though Congress never passed the bill, but the Justice Department's lawyers could not initiate an action until the first of the bonds matured and became due, which occurred in January 1895. 37

THE GOVERNMENT'S SUIT

By early 1895, Justice Department lawyers had analyzed the government's options. They ruled out a suit against the railroad itself in the belief that the Central Pacific lacked sufficient resources to repay the estimated $60 million it owed the government. 38 Of the Big Four, Crocker and Hopkins were dead, their estates distributed; Stanford's estate was still intact, and Huntington was still alive. Why the Justice Department elected to pursue the Stanford estate rather than the last living Central Pacific magnate is a mystery, although Huntington's presence must have played a role. The most cunning of the four, Huntington had long been the leader of the Central Pacific. He reportedly had invested over one million dollars to ensure the support of Congress for his various schemes. 39 Regardless of whether he influenced Olney and the members of Congress who pressured the attorney general or simply intimidated them, the government's decision to sue Jane Stanford freed Huntington of the expense of defending the

35 Ibid.
36 26 Cong. Rec. 8620 (1894); see also Call, August 14, 1894.
38 See ibid. at 34.
39 Call, June 8, 1894.
Government special counsel Lewis D. Mc Kisick and Jane Stanford's counsel, F.E. Spenser, Russell J. Wilson, and Mountford S. Wilson [San Francisco Examiner, June 7, 1895]

suit and may also have made the task more difficult. By going after a sympathetic widow who was struggling to keep a university afloat, the government mooted any advantage it might have gained by pursuing a robber baron.

Olney anticipated accurately that the Stanford estate would refuse to pay on the claim and appointed a special counsel to prosecute the suit for the United States, Judge Lewis D. McKis-
McKisick earned his honorific as a member of the Tennessee Commission of Appeals and later as a special judge of that state's Supreme Court. He moved to California in 1879 and soon earned a reputation as one of the best lawyers in the state. Attorney Henry S. Foote, whose later correspondence would cast serious doubt on his enthusiasm for the task, joined McKisick in preparing the government's case. If the Justice Department had been halfhearted in its effort to pursue litigation against the Stanford estate thus far, the appointment of McKisick represented a clear change in zeal. The former judge filed the government's claim for $15,237,000 on March 15, 1895, in the federal circuit court for the northern district of California.

Jane Stanford well understood the threat presented by the complaint. An adverse decision by the courts would render her unable to sustain support payments for Stanford University and "the college will be very much curtailed in its usefulness if not closed altogether." She put together a first-class legal team to defend the suit. Her lead counsel was a former justice on the Nevada Supreme Court, John Garber, of Garber, Boalt & Bishop. Her regular counsel, Russell J. Wilson and Mountford S. Wilson, also represented her, as did F.E. Spenser, who, according to the Call, bore "a most striking resemblance to Justice Field, taking a side view of it." Russell J. Wilson filed one general and five special demurrers to the complaint on May 6, 1895, to block the suit. The common-law demurrer pleading had the practical effect of denying the legal sufficiency of the complaint. Jane Stanford's lawyers based the demurrer on two theories: first, that neither Stanford nor his wife ever owed the amount demanded by the United States; and second, that the suit failed because the government had never redeemed the bonds.

A large crowd gathered at the Appraisers' Building on June 3, 1895, "in anticipation of oratorical efforts to be made" in the

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40 See Call, March 6 and 16, 1895.
41 See Oscar T. Shuck, Bench and Bar in California: History, Anecdotes, Reminiscences (San Francisco, 1889) 482-83.
42 See note 134 infra and accompanying text.
43 The circuit and district courts retained their confusing bifurcated original jurisdiction at the time. Circuit courts had jurisdiction when the United States was a plaintiff or petitioner. See Benjamin R. Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States, 2d. ed. (Boston, 1896) 116-21.
44 See Call, March 16, 1895.
45 For more on Garber, see C.W. Taylor, Bench and Bar of California, 1937-38 (Chicago, 1938) 353.
46 See Call, June 6, 1895.
47 United States v. Stanford, supra note 37 at 34.
48 Ibid. at 34-35; see also Call, May 7, 1895.
Stanford case. Judge Joseph McKenna disappointed the assemblage. He took the bench only to declare that he would not be hearing the case and to postpone it for "some judge" to hear. He did not explain that he had recused himself, but the onlookers learned through the court grapevine that McKenna and Stanford were close friends and that the senator had named the judge as a trustee of the Stanford estate. Although McKenna had resigned as trustee, "he felt a natural and commendable delicacy about sitting in a case where a decision in favor of the government would undoubtedly destroy the institution." His service in the circuit court as trial judge was not unusual. Until 1911, when Congress abolished the circuit courts and merged their original jurisdiction with that of district courts, the circuit judges appointed to the circuit courts of appeals routinely tried cases in the circuit courts.

Judge Erskine Ross took McKenna's place when the hearing on the demurrer commenced on June 5, 1895. He had been elevated to the appellate bench from the district court in southern California only two weeks before the government filed suit. Junior to William B. Gilbert, the third circuit judge in the Ninth Circuit, Ross had a wealth of trial experience and his assignment to the circuit court for the case represented a sensible division of judicial labor even if it foreclosed him from sitting on the panel for the

49 Call, June 4, 1895.

50 Ibid.


52 According to the Minutes of the U.S. Circuit Court for the Northern District of California, McKenna was slated to hear matters in the circuit court throughout May and June, 1895. See Minutes of the U.S. Circuit Court for the Northern District of California, May 6, 1895—February 17, 1897, available on microfilm at the U.S. District Court for the Northern District of California, San Francisco. McKenna's "recusal" announcement consisted solely of a statement that the case would be continued two days later. That day and the next, he apparently sat both in the circuit court and the circuit court of appeals. See ibid. at 27:29-37. These minutes do not reveal why or how the decision was made to assign Ross to hear the Stanford matter.

Unfortunately, the minutes of the circuit court of appeals shed little additional light on the question. On the day he recused himself in the Stanford case, McKenna sat with Erskine Ross and District Judge Thomas P. Hawley in the circuit court of appeals. The same panel also sat the next day. On June 5, 1891, when the Stanford case resumed with Ross on the bench, Gilbert had taken Ross's place on the circuit court of appeals panel with McKenna and Hawley. See Minutes of the U.S. Circuit Court of Appeals for the Ninth Circuit at 1: 451-54 [hereafter cited as Ninth Circuit Minutes]. Gilbert apparently was not present in San Francisco for the June sitting, and McKenna may have summoned him from Oregon to substitute for Ross so that the latter could hear the demurrer motion in the circuit court. Ibid. at 451.
almost-certain appeal in the case.\textsuperscript{53} If the expected appeal occurred, Gilbert would preside over a panel with two district judges sitting by designation. These designations, which date from the first session of the court in 1891, formed an important staffing component of the circuit court of appeals during its first half-century. Panels composed of circuit judges were the most common, but district judges sat by designation much of the time.\textsuperscript{54} This use of judicial personnel in the \textit{Stanford} case theoretically meant that two district judges could reverse, over the dissent of one circuit judge, the trial decision of another circuit judge.

Such hypothetical possibilities seemed far distant at the hearing in the circuit court. As counsel for the moving party on the demurrer, Garber spoke first. He spent the entire day developing his argument that Congress had not intended to create a personal agreement or liability on the part of the railroads' shareholders to pay the bonds under the 1862 statute.\textsuperscript{55} He also maintained that Stanford was liable under California law only for that proportion of the Central Pacific's debts incurred in California, because action by the California corporation outside the state would be \textit{ultra vires} and not within the power authorized by law.\textsuperscript{56} After making this point, which rested on state law, however, Garber confusingly referred back to the 1862 congressional statute. A legal commentator berated the argument as "weak, rambling and inconclusive—the work of an evidently overrated lawyer."\textsuperscript{57} This observer found much to applaud in Lewis McKisick's oral presentation, but the local press found it heavy going, complaining that "Judge McKisick open[ed] with an assortment of hard dry statement[s], utterly unpalatable to the few laymen present and not particularly refreshing to the assembled bar."\textsuperscript{58} "Long passages from longer acts were read and deftly dovetailed with the theories of attorneys and the opinions of courts until

\textsuperscript{53}The Evarts Act prohibited a judge or justice from sitting on the appeal of a case heard by that jurist in the district or circuit court. Act of March 3, 1891, ch. 517, §3, 26 Stat. 816, 827.

\textsuperscript{54}Indeed, during the first two sessions of the court after its formation in June 1891, district judges conducted the court's business. In October 1891, District Judge Erskine Ross made his way to San Francisco from Los Angeles and District Judge Thomas Hawley of Nevada heard the first oral arguments in the court's history. See Ninth Circuit Minutes, supra note 52 at 1:28, 41-44. Justice Stephen J. Field apparently served as presiding judge of the court pending appointment of the judge to fill the vacancy created by Lorenzo Sawyer's death and the new seat authorized under the Evarts Act. See ibid. at 1:26, 41-42.

\textsuperscript{55}See \textit{Call}, June 6, 1895.

\textsuperscript{56}Ibid.

\textsuperscript{57}"Stanford Decision," supra note 51 at 617.

\textsuperscript{58}\textit{Call}, June 7, 1895.
everybody but the attorneys actually engaged were in more or less of a muddle on the entire proposition."\(^{59}\) Despite the Call's criticism, the lawyers in the audience evidently appreciated McKisick's effort. The government's counsel based his theory of the case on state law. Because California law imposed liability on shareholders for a corporation's debts in the proportion in which they held stock ownership, the Stanford estate purportedly owed one-quarter of the debt issued to the Central Pacific.\(^{60}\)

Word quickly spread that "McKisick is making a strong argument." The courthouse soon filled with attentive listeners; for lawyers like to hear a good argument in a great case." The gathered assemblage rewarded McKisick with an ovation at the close of his argument.\(^{61}\)

Throughout these two days of argument, "Judge Ross sat unmoved as granite. Not a word dropped from his lips, nor an expression of his face, could be read as indicating what impressions the argument was making upon his mind."\(^{62}\) This stoic countenance reflected no lack of comprehension on Ross's part. Blessed with a razor-sharp intellect, he handed down a detailed decision a mere three weeks later. "[O]ne of the most capable and upright jurists who has ever adorned the woolsock of the State or Federal courts,"\(^{63}\) Ross delivered his opinion sustaining the defendant's demurrer from the bench.\(^{64}\) It ran to some thirteen thousand words and paid Garber's argument "the left-handed compliment of deciding in favor of the demurrant on a ground neither raised by the demurrer nor discussed by Judge Garber in argument."\(^{65}\) The judge focused almost entirely on the relevant provisions of California state corporation law, rejecting arguments that the issue required close analysis of the 1862 congressional statute.

His opinion rested on four propositions. First, Ross wrote that statutory, and not common, law created individual liability of stockholders for corporate debts. He analyzed California state law to determine whether stockholders were individually liable.

\(^{59}\) Ibid.

\(^{60}\) The government asserted, without proving, that Leland Stanford held one-quarter of the Central Pacific's stock. Jane Stanford's lawyers neither rebutted nor agreed with this contention. See United States v. Stanford, supra note 37 at 34-35.

\(^{61}\) "Stanford Decision," supra note 51 at 618.

\(^{62}\) Ibid.

\(^{63}\) Call, June 30, 1895.

\(^{64}\) For its part, the lay press was not particularly surprised by Ross's decision. "No one was very much astonished yesterday when it was announced that the demurrer to the Government's complaint against the Stanford estate had been sustained by the United States Circuit Court." Ibid.

\(^{65}\) "Stanford Decision," supra note 51 at 617.
Second, he interpreted a California Supreme Court decision to render nugatory a provision of the California constitution that assessed individual liability for corporate debt in the proportion of stock ownership. With respect to California's general corporate statute, Ross deemed it invalid for vagueness because it did not definitely assess liability on individual stockholders: "It is manifest that the declaration that the stockholder is liable for all the debts and liabilities of the corporation 'in proportion to the amount of stock by him held' does not establish any rule by which any definite liability can be fixed." Finally, Ross opined that the contract between the U.S. government and the railroad companies excluded the possibility that the government would seek indemnity from stockholders for the railroad companies' debts. Of this last proposition, he observed that the congressional

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66 United States v. Stanford, supra note 37 at 44.
statute "embodying the contract" should speak to the question, yet he determined that the statute, though "drawn with great care, . . . is not as explicit as it should have been." Ross concluded that the statute contained no "absolute, unqualified promise to repay the bonds," and that Stanford thus assumed "no personal obligation . . . to repay them."68

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**THE NINTH CIRCUIT DECISION**

Ross's decision elicited a thankful letter from Jane Stanford, who conveyed her gratitude with these words: "God in His mercy ruled that a just and righteous judge should pronounce judgment and you have gr aciously done more for me than save millions; you have by this decision vindicated the honor of my husband, the father of my sainted son—which is more precious to me than untold gold."69 Predictably, the ruling produced a different response from the government's counsel. Lewis McKisick fired off a spirited letter to Olney's replacement as attorney general, Judson Harmon, in which he attacked the "lame and impotent conclusion that under the Constitution and laws of the State, the complainants have no remedy against the stockholders."70 With great care, he laid out precisely why he believed that Ross had wrongly interpreted California law. "By a bald assumption the Judge confounded" the appropriate California law principle. "I say to you that the counsel for Mrs. Stanford were as much surprised at the result as I was, for Judge Garber did not argue that if there were a debt owing by the corporation, the stockholder was not liable for his proportion; on the contrary he admitted that he was, but did argue that he was only liable under" California law "for the reason no doubt that he wanted to avail himself of the increase of the capital stock to 1,000,000 shares."71 Accordingly, McKisick recommended that the Justice Department permit the bill to be dismissed, even though Ross had given leave to amend, and appeal the decision. The judge's "error is so manifest that I doubt if the Circuit Court of Appeals will affirm the judgment, even without argument."72

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67Ibid. at 39.

68Ibid.


70McKisick to Harmon, July 1, 1895, Justice Department Records, supra note 21.

71Ibid.

72Ibid.
A careful analysis of Ross's opinion in the *American Law Review* supported McKisick's assessment. "In a square, manly way," Seymour D. Thompson picked apart the circuit court judgment. 73 "Judge Ross stands high in the professional and public estimation on the Pacific Coast. We share in that estimate of his character and talents. We have often had occasion to refer to his decisions in terms of commendation," he wrote. "But we are in this case unable to follow his reasoning to the result which he reaches. We have regarded the question as a very important public question, and one suitable to be discussed in a legal journal. We have, therefore, investigated it with some care, in the light of a collection of rules and principles applied by the courts in determining the liability of stockholders in corporations, which rules and principles are not unfamiliar to us." 74

Thompson's critique began at first principles. He disagreed with Ross's proposition that statutory law alone created stockholders' individual liability for a corporation's debts. Indeed, the original California constitution, which was in effect when the Central Pacific incurred the bond obligations, provided for unlimited shareholder liability up to the proportion of stock ownership. 75 Ross had deemed this constitutional provision unenforceable for vagueness under the California Supreme Court's ruling in *French v. Teschemaker*, which had held this section of the state constitution to be non-self-executing. 76 Thompson attacked Ross for relying on this precedent, a decision that was "so extraordinary—so utterly opposed to common sense—that it has not met with much favor in other jurisdictions." 77 Indeed, the California legislature had also evidently viewed *French* with disfavor because it had speedily enacted legislation to restore the rule of proportional shareholder liability for corporate debts. 78 The principle of federal comity to the decisions of state tribunals that interpreted state constitutional and statutory law did not, asserted Thompson, bind the federal courts "to unjust and monstrous results." 79

73 *Call*, October 8, 1985. The August issue of the *American Law Review* does not provide the author's name. See "Stanford Decision," supra note 51 at 617. Thompson was, however, one of the journal's editors.

74 Ibid. at 623.

75 See note 22 supra and accompanying text.


77 "Stanford Decision," supra note 51 at 625.

78 Ibid. at 627; see also Calif. Civil Code §322 (Deering 1915) [detailing legislative history of shareholder-liability provision].

79 "Stanford Decision," supra note 51 at 626.
Thompson’s disagreement with the opinion’s expression of federal comity in following a state court decision exposed an important facet of Ross’s jurisprudence and a curious reversal in the continuing debate in legal circles over the exercise of power by federal tribunals. From the Civil War onward, Ross fought extensions of federal power into state affairs. In the facts presented, the ex-Confederate soldier may have seen an opportunity to chip away at doctrines that supported the discretion of federal courts to ignore state court precedents or to decide questions of state law under general principles.\(^8\) Thompson’s long recitation of contrary authority suggested that, on this issue, Ross might easily have devised his own interpretation of California statutory and constitutional law without following the state supreme court.\(^8\) Ross’s decision to reject that course underscored his enduring commitment to limitations on federal incursions into the state sphere. Ironically, the employment of the comity principle to protect a corporation and its stockholders departed from the historical circumstances in which the federal courts had extended their power. As corporations became larger and more powerful after the Civil War, they generally supported efforts by federal courts to devise general principles in diversity cases because adherence to local law created more uncertainty in interstate business. Federal courts consequently developed a reputation as allies of big business.\(^2\) Ross’s support of corporate interests by resorting to local principles turned the conventional thinking on its head.

\(^8\) Under the U.S. Supreme Court’s decision in Burgess v. Seligman, 107 U.S. 20, 33-34 (1883), Ross was not obliged to follow French v. Teschemaker. Ordinarily, federal courts would hold themselves bound to follow decisions of state courts in the interpretation of their own constitutions and statutes when such rulings had fixed property rights. In this instance, however, the Central Pacific had contracted with Congress before the California Supreme Court had rendered French. The rule in this situation was different, as Justice Bradley explained in Burgess: “So when contracts and transactions have been entered into, and rights have accrued under a particular state of decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued.” 107 U.S. at 33-34.

\(^8\) See “Stanford Decision,” supra note 51 at 626-27.

On the question of federal comity in adhering to the state court precedent, therefore, the decision could have gone either way, as Thompson appeared grudgingly to concede. The commentator refused to grant as much in his third point of criticism: that Ross simply read "out of existence" the general California railroad statute, which made shareholders liable for corporate debts. Thompson chastised the judge's application of a state supreme court precedent to this provision when that decision did not even address the salient statute. Although Thompson did not say as much, Ross's reasoning on the issue fundamentally differed from the comity principle he had so carefully followed on the California constitutional question.

Thompson's last point addressed Ross's interpretation of the 1862 congressional statute that established the government's "contract" for the construction of the transcontinental road by the Union Pacific and Central Pacific. Ross had held that the congressional railroad statutes "unmistakably show that no personal liability of the individual stockholders was contemplated, either by the United States, on the one side, or the railroad companies and their stockholders, on the other side." Thompson reacted with total incredulity: "Lawyers need not be told that when a person gives credit to a corporation whose stockholders are individually liable for its debts, it is not necessary, to enable the creditor to enforce that liability, that either he, or the corporation, or its stockholders, should have contemplated such a result at the time when the credit was given." Examination of the "thousands of cases relating to the statutory liability of stockholders" revealed the novelty of Ross's approach: "not one can be found advancing such a doctrine."

Thompson's scathing critique of the circuit court decision disclosed the wide gulf in possible interpretations of the historical circumstances surrounding Congress's decision to subsidize the railroad's construction. Whereas Ross saw in the 1862 and 1864 laws an endeavor to expend public monies to private companies to advance public aims, his critic interpreted the history in a much more sinister light:

If [Judge Ross] had extended his researches downward through that public history, he would have discovered that the four co-adventurers who had received the aid from the government began by swindling the govern-
ment, through a false representation made to a commit-
tee of Congress, as to the distance at which the foot-hills
of the Rocky Mountains commenced from the City of
Sacramento, out of double the amount of aid per mile
that was really due under the terms of the statute, for a
considerable number of miles; that they immediately
organized an outside corporation composed of them-

selves, for the purpose of building the road, by contract-
ing with themselves in the form of the railroad corpora-
tion, at a price enormously in excess of its real value,
paying themselves in the bonds of the United States
issued under the statute, and issuing to themselves
stock composed of pure water and for which no value
was ever paid by them. That they paid themselves
thirty-four millions of dollars in dividends upon this
stock; that they expended nearly five millions of dollars
for purposes which their president, Leland Stanford,
refused to disclose on oath, which purposes were not
disclosed by any vouchers, and which expenditures a
congressional committee reported as having been
probably made in influencing legislation. 86

The truth arguably combined elements of both perceptions. Part
of the history that neither Ross nor Thompson mentioned, but
which nevertheless lurked, was the bequest Leland Stanford had
made to create the university named for his late son.

For Stanford University officials, the prospect of an appeal
threatened disaster despite the circuit court victory. On July 2,
1895, David Starr Jordan, the university's president, wrote to
Attorney General Judson Harmon explaining the financial effect
of continued litigation on the institution. In agonizing detail, he
explained exactly where every penny from the Stanford legacy
would go to finance the university. "Should a decision be delayed
long, the University would be obliged to live within its actual,
not its prospective means. In other words it must close its doors
and discharge most or all of its Faculty." 87 The Justice Department
recognized the university's predicament. It had no interest in
unduly delaying the speed of litigation. Indeed, the entire disposi-
tion of the case, especially in light of its great complexity, was
quick. From the initial filing in March 1895, the case proceeded
through arguments and final disposition at the circuit court,
circuit court of appeals, and Supreme Court levels in just under

86 Ibid. at 634-35. For Ross's perception, see United States v. Stanford, supra note
37 at 47.

87 Jordan to Harmon, July 2, 1895, Justice Department Records, supra note 21.
one calendar year. By contrast, the average time from docketing of appeal to final decision in the circuit court of appeals alone in this period was nine months, and the Supreme Court had not fully arrested its backlog.

The Ninth Circuit convened on September 16, 1895, to hear argument in the appeal of Ross's decision. Judge William B. Gilbert of Oregon presided, with District Judges William W. Morrow of California and Thomas Hawley of Nevada sitting by designation. A meager audience showed up for what promised to be a good argument. The court assented to McKisick's request for an unlimited time for oral presentations, and he began to read from the two-hundred-page book in which he had printed his argument. Delivered in a "quiet conversational tone," McKisick's exhaustive presentation placed heavy emphasis on Ross's alleged error in granting the demurrer for reasons emanating from California law. After dedicating well over half of his argument to an examination of the relevant California legal principles, McKisick developed an interesting argument in equity. If Ross was correct and the United States had no remedy at law, he argued, did it not have a viable remedy in equity? Surely the late

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88The Supreme Court rendered its decision on March 2, 1896. United States v. Stanford, 161 U.S. 412 (1896). Jane Stanford herself contributed to this speedy process by lobbying President Cleveland and Attorney General Olney in the spring of 1895 to advance the suit as quickly as possible to conclusion. To conserve money, she traveled for free by hooking her private railroad car to trains moving in her direction; she then used her car as a private "hotel" during her stay in Washington. From an initial budget of $500, she returned with $300. Edith Mirrielees, Stanford: The Story of a University (New York, 1959) 89-90. For the correspondence from this trip, see Nagel, Iron Will, supra note 69 at 81-83.

89Including dismissals, which typically decreased the time of decision, the appellate process between September 1891 and September 1896 took an average of 264 days. Omitting dismissals, the average was 279 days. David C. Frederick, Ninth Circuit Statistical Study, deposited with Ninth Circuit Library, San Francisco [hereafter cited as Ninth Circuit Statistical Study]. The Supreme Court still had a backlog in 1896 of 383 cases, which meant that cases filed in previous terms had not been decided. See 1897 Att'y Gen. Ann. Rep. xi.

90Hawley, a former chief justice of Nevada and federal district judge from that state between 1890 and 1907, often sat by designation in the circuit court of appeals.

91Call, September 17, 1895. This printed oral argument also served as McKisick's brief.

92See Call, September 18, 1895.

93See Argument of L.D. McKisick, United States v. Stanford, No. 246, U.S. Circuit Court of Appeals for the Ninth Circuit, Records of the Ninth Circuit, on deposit at University of California, Hastings College of the Law Library [hereafter cited as McKisick Argument].

94Ibid. at 142-65.
railroad magnate owed something to the federal government for the generous loans that facilitated his accumulation of wealth.

McKisick closed by urging the circuit court of appeals to reconsider Ross’s construction of the congressional statutes. The Union Pacific and Central Pacific were different types of entities, and Congress must have intended to treat them as such. Whereas to the Union Pacific the U.S. government was both sovereign and creditor, to the Central Pacific it was merely a creditor. The U.S. government had not created the Central Pacific, but had merely lent it money. This detailed analysis, which took McKisick just over a day to deliver, elicited no questions from the bench. The local newspaper, however, reported a feature of the oral argument that differs from modern custom: “The plain level of [McKisick’s] reading was occasionally broken into by remarks or questions equally quiet on the part of Judge Garber (representing Mrs. Stanford), which were answered or replied to by Judge McKisick with no change in the tone of voice.”

Garber himself “had his case much better in hand than on his argument before Judge Ross, and it is fair to say that he made an argument worthy of his distinguished reputation.” Despite Garber’s efforts to advance the circuit court’s analysis, McKisick’s “powerful and learned argument” forced consideration of the “only debatable ground in the case”: whether Congress, by creating a statutory scheme for the development of a transcontinental railroad, had intended to place the liability of the Central Pacific stockholders on an equal footing with the stockholders of the Union Pacific, which built the eastern link. Garber first addressed Congress’s intent in holding the Central Pacific’s stockholders personally liable. The legislature’s treatment of the Union Pacific offered the appropriate guide. The 1862 law that created the Union Pacific contained “no provision whatsoever for any individual liability on the part of the stockholders thereof.” Because Congress conferred the same rights and benefits of construction on the Central Pacific as it had on the Union Pacific, the legislature must have intended to relieve the Central Pacific’s shareholders of liability for the corporation’s debts.

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95 Ibid. at 171.
96 Call, September 18, 1895.
98 Ibid.
100 Ibid. at 17.
contract between the Central Pacific and the U.S. government, Garber asserted, was a contract in the fairest sense. The government’s interest in having the railroad completed at the earliest date possible inspired the deal.  

This argument had some persuasive appeal. If the government’s aim during the Civil War had been to bridge the gap between the West Coast and East Coast quickly, it could accomplish that goal either by building the road itself or by providing subsidies to private entrepreneurs willing to undertake the task. According to Garber, the government essentially traded an opportunity to hold the Central Pacific’s shareholders liable in order to achieve its short-term aim of improving communications and facilitating commerce with the West Coast.

Garber concluded his argument the following day, “a remarkable effort, the two days’ talk being made wholly without notes or memoranda, except the citations of law.” When McKisick launched his rebuttal, he attempted to play up the equities on the government’s side. In addition to large sums from the federal government, he noted, the railroads had received substantial subsidies from the major cities in California. San Francisco had paid $400,000, Sacramento nearly $300,000, and Santa Clara, San Joaquin, and Placer counties each had contributed hundreds of thousands of dollars more. “What has the appellee brought here? A demurrer supported by a rhetoric so brilliant and scintillating that it has illuminated the darkest continent, gone to Africa, and by a torrent of eloquence that poured out of this temple and resounded through the halls of this building as if a mountain had been lifted.” Through his own “torrent of eloquence,” McKisick undoubtedly hoped to impress the judges that they owed the railroad no favors. Despite the railroads’ receivership filings and poverty pleas, government subsidies had contributed to the shareholders’ wealth. Now was the time to repay the debt. When McKisick finally closed, Judge Gilbert in his courtly manner advised the litigants that the court would take the matter under its “immediate study” and “render a decision as early as possible.”

Armed with this array of arguments and given the complexity of the case, the Ninth Circuit easily might have reversed Ross’s decision. The trial judge had ignored the arguments raised by

101 See Call, September 19, 1895 (reporting Garber’s oral argument).
102 See Call, September 20, 1895. Garber submitted a formal brief for consideration by the court. See note 99 supra.
103 See Call, September 21, 1895.
104 Ibid.
105 Ibid.
But even Thompson claimed to think that the appellate court would affirm in spite of his arguments to the contrary. In a subsequent issue, the American Law Review reported that Ross's decision "was, as we predicted, affirmed by the United States Court of Appeals for the Ninth Circuit. "Liability of the Stockholders," supra note 97 at 926. This "prediction" is difficult to distill from its earlier analysis, although the journal did predict that even though the stockholders would be found liable, the law would not be enforced. See "Stanford Decision," supra note 51 at 624.

107 United States v. Stanford, 70 F. 346 (9th Cir. 1895); for newspaper commentary of the decision, see Call, October 13, 1895.
that the individual stockholders were free from liability. The appellate opinion instead emphasized the special stature of the Central Pacific under the laws of the United States. Whereas Ross had elaborately treated the state issues of corporation law and stockholder liability in accordance with his suspicion of national power, Gilbert took precisely the opposite tack.

The Ninth Circuit opinion did not, as it might have, devise its own interpretation of California law and thereby advance the power of the federal judiciary to decide issues involving state statutes. Rather, Gilbert looked to the congressional statutes, which embodied the "attitude of the United States." He concluded that "it was a matter of indifference to the government whether the Central Pacific Railroad Company or the Union Pacific Railroad Company built the road that was to be aided by the government bonds and subsidy."108 Premising his conclusion on this "indifference" and on the statute's omission of any imposition of shareholder liability, Gilbert contended that it was "impossible to conceive" that if Congress had "in view the ultimate liability of the stockholders of the Central Pacific Company it would not at the same time have imposed a like liability" on the Union Pacific's stockholders.109 He concluded that the government had "waived" its right to collect from the Central Pacific's shareholders the debts incurred by the company.110 Gilbert imputed the omission of shareholder liability provisions in the Union Pacific statute to the contract between the Central Pacific and the United States; he then inferred Congress's intent to waive its rights as a creditor. Gilbert's statutory analysis in the case foreshadowed a wide gulf between his approach and that of Ross, who strictly construed statutes and eschewed attempts to infer congressional intent.

In the American Law Review, Thompson commented that the "opinion of Judge Gilbert cannot be too highly commended as a good piece of literary work, if such an expression can properly be applied to a judicial opinion. It is well constructed, and is reasoned in a manner to make the conclusion very plausible, at least to one who is not well versed in the principles governing the liability of stockholders in corporations."111 Thompson explained Gilbert's seemingly radical departure from ordinary principles of corporation law. A creditor's rights did not depend on intent to hold the stockholders liable. "[O]n the contrary, the charter or statute under which the stockholders are individually liable is conclu-

109 Ibid. at 360.
110 Ibid. at 363.
111 "Liability of the Stockholders," supra note 97 at 926.
112 Ibid. at 936.
sively deemed in law to enter into and form a part of the contract between the parties.”

If Gilbert’s rendition of corporate law inspired objections so, too, did his approach to statutory construction. He went a long way toward reaching his result through negative inferences and intentions by omission. His theory had a self-contained logic to it, but so did the opposite conclusion. Under an alternate approach, these omissions and inferences might have yielded a completely different outcome. The statutory omission of shareholder liability for the Union Pacific was also explainable because Congress controlled the appointment of directors and the terms of the corporation’s existence. If the Union Pacific acted contrary to Congress’s intent, the legislature could amend the original statutes and direct appropriate action.

Congress had no such control over the Central Pacific, an entity incorporated under California law. If the terms of that railroad’s incorporation or its actions raised concern in Congress, the legislature could not redress the problem by statute. Congress reserved to itself only the right to amend the 1862 statute, which set out the terms of the land grants and subsidy bonds, “at any time, having due regard for the rights of such companies named herein.” Thus, Congress could alter the contract terms but could not change the Central Pacific as a corporate entity. Accordingly, Congress might well have intended not to hold the Union Pacific’s shareholders liable for the corporation’s debts and yet retained its option of pursuing the Central Pacific’s stockholders. Given this view of the congressional legislation, Ross’s concentration on the substantive basis for shareholder liability under California law made a great deal of sense, irrespective of whether one agreed with his interpretation of that law.

The day the Ninth Circuit rendered its decision, Lewis McKisick announced the government’s intention to appeal to the Supreme Court. Although the special counsel had ably represented the government, the Justice Department in Washington assumed control over the case. McKisick’s post-hoc analysis of

113 See Act of July 1, 1862, supra note 1 at 489-91 (naming the “corporators” and fixing the organizational details).

114 Congress did precisely that two years after it created the Union Pacific. See Act of July 2, 1864, supra note 12.

115 Act of July 1, 1862, supra note 1 at 497.

116 See Call, October 13, 1895.
the circuit and appellate court opinions to Solicitor General Holmes Conrad fully expressed his bitterness at the judicial results: "The truth is that the decision of the Circuit Court and the Appellate Court, in so far as the law of the case is concerned [sic], has met the disapproval of every intelligent lawyer of the State, and has met the approval of only those who sympathize with Mrs. Stanford and with the Stanford University." John Garber's omission of any reference to Leland Stanford's character was good strategy, McKisick continued, because "if he should have done so I should have replied that Stanford's testimony given before the Pacific Railway Commission and contained in the record, when read between the lines, convicts him of systematic corruption, and in fact convicts him of having been the most conspicuous criminal of the Century." Neither side had openly debated the suit's likely effect on the university, but McKisick believed that the "maudlin sentiment . . . manifested in its behalf" might have made a difference. The sixty-seven-year-old lawyer found this mysterious. He considered the university "the most astounding, vulgar, sepulchral monument to Egoism to be found in history, endowed with the largest race horse breeding establishment in the world, and with the largest vineyard in the world where is manufactured every year enough wine and brandy to debauch every misguided youth who attends the races to see the Stanford horses run or trot."

If these sentiments fueled his commitment to the cause, the anger in them did not cloud his ability to analyze the legal problems confronting the department in its appeal to the Court. McKisick settled into a calmer tone in offering his advice to the solicitor general on how best to prepare. The "rather anomalous condition" of the case before the Court intensified the difficulties of preparation. Both the circuit and appellate courts had decided the case on different theories and neither had relied on the arguments made by Jane Stanford's counsel. The Supreme Court itself might devise yet a third theory of the case. Having invested so much of himself in the case thus far, McKisick relinquished his role with great reluctance. "This is submitted without desiring to thrust myself into the case, but I feel deep interest in it and believe that I am and always have been right."

The Supreme Court itself heard argument in the case beginning on January 28, 1896. The litigants for both sides had changed,

117 McKisick to Conrad, December 10, 1895, Justice Department Records, supra note 21.
118 Ibid.
119 Ibid.
120 Ibid.
121 Call, January 29, 1896.
McKisick and Garber being replaced by lawyers of higher official standing. Assistant Attorney General J.M. Dickinson and Solicitor General Holmes Conrad represented the government. Jane Stanford retained Joseph H. Choate of New York. The government's attorneys followed the structure of McKisick's arguments in the courts below. They emphasized Stanford's liability under California law and the irrelevance of congressional statutes in determining the Central Pacific stockholders' liability for the debts incurred by the company. When Conrad concluded, Choate began by "saying the magnitude of the claim was wholly unparalleled." He proceeded to cover the range of possible theories for resolving the case in Jane Stanford's favor, from the intent of Congress in forming the contracts with the railroads to the absence of shareholder liability under California law.

In an opinion for a unanimous Supreme Court rendered on March 2, 1896, Justice John M. Harlan affirmed the decision of the Ninth Circuit. With only a few minor embellishments, the Court essentially adopted Gilbert's view that the 1860s statutes did not impose personal liability on the railroad stockholders. Harlan's analysis of congressional intent also mirrored Gilbert's: "But it cannot be inferred from the legislation of Congress that it intended, for the protection of the interests of the United States, to impose a heavier liability upon the stockholders of the California company than was imposed upon the stockholders of the Union Pacific Railroad Company. Why should it have so intended? Why should it be supposed that Congress would purposely make it more difficult to construct one part of the proposed national highway than another?" Harlan posed these questions without explaining how the Central Pacific's construction effort would have been more difficult if Congress had held the company's stockholders liable. He then made no effort to offer an objective answer. Instead, the Supreme Court proceeded from premises that, if believed, led inexorably to the result it reached. In this respect, Harlan's opinion was far less impressive analytically than the lower court opinions by Gilbert and Ross.

122 Choate was one of the most distinguished lawyers of the late nineteenth century. See Dictionary of American Biography, s.v. "Choate, Joseph."


124 Call, January 29, 1896.

125 See ibid.

126 United States v. Stanford, supra note 123 at 434.

127 Ibid. at 426-27.

128 Ibid. at 430.
For Stanford students, who closely followed the results if not the analysis, the Supreme Court’s decision set off a spontaneous celebration. Word of the Court’s ruling reached the campus late in the morning of March 2, 1896. Students streamed out of lecture halls at the blaring of horns and train whistles. Despite the falling rain, a thousand students marched excitedly toward the president’s residence. David Starr Jordan cautiously urged restraint until the news could be confirmed, but it was a halfhearted effort. As the throng moved on to the chapel, Jordan was overheard saying, “I may say that if it is as we hope, the students are at liberty to paint everything cardinal except the statues in the museum.” Appropriately, the sun peeked through in the early afternoon as word spread that the initial rumors were true. The Supreme Court’s ruling saved the university. After years of delay, the assets in Leland Stanford’s estate earmarked for immediate disbursement to the university—well over $3 million—would be distributed.

The effects on the university of a victory by the government hovered above the proceedings without playing any official part. Never once did any of the lawyers or judges mention Stanford’s bequest in briefs or opinions. Yet the beneficence of the gift undoubtedly affected the outcome. The day after the Supreme Court announced its decision, Justice Stephen J. Field, who sat on the case, sent a telegram to Mrs. Jane Stanford: “Heaven’s care and overflowing kindness never fail.” However much it stemmed from a longstanding friendship with the Stanfords, the justice’s telegram perhaps gave an appearance of impropriety. Field’s biographer has written that “he wrote none of the court opinions, [but he] gave every possible assistance to Mrs. Stanford in protecting her interests.” A later attorney general of the United States, Homer Cummings, added to the legend of Field’s behind-the-scenes efforts: “Although Justice Field did not sit in the case when it was argued in the circuit court in California, it was said that he consulted with the judge who heard it and that he was responsible for the selection of Joseph H. Choate to defend the Stanford interests before the Supreme Court.”

129 Call, March 3, 1896.
130 The university also eventually received a million-dollar legacy from Thomas Stanford, Leland’s brother. Call, March 3, 1896. Despite the anticipation of a speedy distribution of the estate’s assets, the probate proceedings did not wind up until December 28, 1898. Call, December 29, 1898.
132 Swisher, Stephen J. Field, supra note 20 at 245. Swisher also reported that “letters showing [Field’s] close personal relationship with Stanford, Huntington, and others, have been carefully destroyed.” Ibid. at 265.
133 Cummings and McFarland, Federal Justice, supra note 16 at 292.
Even stronger evidence of the sympathetic effect of the bequest on the litigation came from one of the government’s lawyers involved in the case. Had McKisick not completely thrown himself into prosecuting the government’s claim, a letter by U.S. Attorney Henry S. Foote to Jane Stanford written within a week of the Supreme Court’s decision would cast serious doubt on the sincerity of the government’s effort. “Circumstances of course compelled me to appear for the Govt. against you, in your noble and heroic effort to preserve for yourself, and the State of California the University that bears the name of your dear son,” Foote began. “But not for one moment... I had any other feeling than that you ought and would succeed, in preserving to the young men and women now living, and to those yet unborn the blessings entailed by the preservation of the institution so beloved in this State.”

The magnitude of the claim also possibly shaped the outcome. The Supreme Court’s decision in the Stanford case arguably departed so much from ordinary principles of law that the Court has never relied on its holding again. United States Representative James G. Maguire of San Francisco noted the anomaly in California’s corporations law created by the decision, which he summarized as, “in effect, that a stockholder in a corporation under the laws of California is not liable for his proportion of the debts of the corporation unless at the time of the contraction of the debts the creditor had in mind the stockholders’ liability and intended to hold them for the debt.” Because the Court’s judgment appeared to nullify the existing California rules, Maguire bemoaned the fact that cases such as United States v.

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134 Foote to Stanford, March 8, 1896, Stanford Papers, supra note 31. The rest of the letter was equally obsequious:

“You will stand as you deserve to be the great central heroic figure in all future time, the grief stricken widow and mother, forgetful of her own griefs, smothering her own sorrow, and laboring in season and out of season, with tear dimmed eyes and soft and tender heart, in the same spirit that our great martyrs in religion and patriotism have shed glorious light on the pages of History—

“My Dear Madam to contemplate your character, your sufferings, your noble virtue, your true bravery, and your womanly tenderness, is to bring tears to the eyes and soft feelings to the heart, of even the sternest of men....”

135 Only three times has the case been cited since, and then to support descriptive propositions. See Oregon & Cal. R. R. Co. v. United States, 238 U.S. 393, 416 [1915] [citing Stanford to support the proposition that national purposes induced the federal grants to the transcontinental railroads]; Southern Pac. R. R. Co. v. United States, 183 U.S. 519, 527 [1902] [citing Stanford to establish that Congress can confer on state-created corporations franchises of a similar nature to those for federally-created corporations]; Central Pac. R. R. Co. v. California, 162 U.S. 91, 161-62 [1896] [Harlan, J., dissenting] [citing Stanford to support argument that Congress selected Central Pacific to build the transcontinental road to accomplish national aims].

136 See Call, March 3, 1896.
Stanford "have arisen in judicial procedure to obstruct the regular current of decisions, because the failure to apply ordinary rules of construction and decision to them tends to bring our judicial system into disrepute." 137 He believed that the claim's size—$15 million—had distorted the judicial process. Maguire's solution was to divest the courts of jurisdiction to decide any claim above $5 million. 138

While the generosity of the bequest and the magnitude of the government's claim may have affected the outcome of the case, a third possible influence was the climate of railroad success in the Ninth Circuit between 1891 and 1906, when nearly one-quarter of all appeals heard by the court involved a railroad. Railroads won 82 percent of the time when they were appellees and the appellant was not a railroad. Given the fairly high tendency of appellate courts to affirm, this figure is not too surprising. The average rate of affirmance in the period was 69 percent. 139 When data for the railroads' record as appellant are included, their relative success before the Ninth Circuit was only slightly better than non-railroad litigants'. As appellant, the railroad requested the court to undo some action undertaken by the court below. In railroad versus nonrailroad cases when the railroad was the appellant, the appellant succeeded 33 percent of the time. This figure is slightly more favorable than the 31 percent rate of nonrailroad appellants. 140 Whether these figures show the legal correctness of the railroads' contentions, the skill of their lawyers, the favoritism by the court, or some subtle combination of all three, they nonetheless establish that railroads won their appeals at a higher rate than average in both capacities as appellant and appellee. Attributing the result in the Stanford case to the railroads' general success at the time is untenable, but Jane Stanford's good fortune was no surprise in the overall trend of railroad litigation victories. 141

137 Ibid.

138 See ibid. In the sense of altering California's unlimited liability for shareholders, Maguire's fears proved to be unfounded. In articles pregnant with irony, Stanford Professor Wesley Hohfeld wrote a little over a decade later that California's rule continued to be in force. In reaching this conclusion, Hohfeld never once cited the Stanford decisions. Hohfeld, "Stockholders' Liability," supra note 23.

139 This figure does not include dismissals. Ninth Circuit Statistical Study, supra note 89.

140 Ibid.

141 The Central Pacific, which had never challenged its liability for the subsidy bonds, eventually repaid all the money it owed. It made its final payment on February 1, 1909, and the government "had received every penny due." David Myrick, Refinancing and Rebuilding the Central Pacific Railroad, 1899-1910 (Provo, 1961) 37.
The Stanford case had the highest stakes of any litigation before the Ninth Circuit in its first decade of existence. The Supreme Court's decision did not dim the crucial role of the appellate court in constructing the legal framework upon which Justice Harlan's opinion chiefly relied. In their opinions, Judges Ross and Gilbert laid the seeds of their thinking on the power of the central government and the place of states in the federal system. In this case, their competing theories achieved the same outcome. In many others, it would not.

For the next thirty years, Gilbert and Ross clashed frequently on issues ranging from property disputes to search-and-seizure law. The Stanford case provided a glimpse at the foundations of their jurisprudence. It also presented complex issues upon which reasonable minds could differ. Yet the government's position secured not a single vote at all three levels of the federal judiciary. Even if Foote was something of a quisling to the government's cause, McKisick certainly dedicated great energy to winning the suit; his arguments were thorough and, to many, persuasive. Arguably, the guaranteed calamity of a government victory to Stanford University contributed to unanimity among the federal judges and justices who decided the case. The legal issues upon which they concurred originated in Congress's Civil War-era goal of building a transcontinental railroad. The means of financing that national aim inspired heated controversy in Congress and complex litigation in the federal courts during the late nineteenth century. The legal battle over the Stanford estate provided a significant moment early in the lives of two of the West's most important and enduring institutions.
HISTORICAL REFLECTIONS
ON THE U.S. COURT OF APPEALS,
NINTH CIRCUIT

BY J. CLIFFORD WALLACE

Editor's Note: The Hon. J. Clifford Wallace, Chief Judge of the Ninth Circuit, addressed the Annual Meeting of the San Francisco Chapter of the Federal Bar Association on June 12, 1991. The following is the written text of Judge Wallace's remarks.

I want to talk today about our court and its history. This year we celebrate the hundredth anniversary of the Court of Appeals. It has an interesting background. If you visit the National Archives Building in Washington, D.C., you will see a statement (do you ever look at those signs that are chiseled in marble? I always wonder what they say, especially when people go to so much trouble), which says, "History is Prologue to the Future." Sometimes we look in rearview mirrors to find out what has happened to give us some assistance on what needs to be done in the future.

The court functioned as a circuit before it became a court of appeals. In 1855 Congress established a separate, unnumbered circuit court in California. Its first judge was Matthew Hall McAllister, whose name you will find at various locations around San Francisco today. He was from Georgia, and he completed his undergraduate work at Princeton. He was the circuit judge for seven years. In 1863 the Tenth Circuit was formed, which was composed of California and Oregon, and then in 1866, three years later, the original Ninth Circuit was formed, composed of California, Oregon, and Nevada. By 1891 Washington, Montana, and Idaho had been added, and subsequently Arizona, Hawaii, Alaska, Guam, and the Northern Marianas completed our circuit.

The establishment of the Court of Appeals took place on March 3, one hundred years ago. The first session was held on June 16, 1891, with Justice Stephen J. Field presiding and Circuit Judge Lorenzo Sawyer, the first Ninth Circuit court judge, in the old Appraisers Building here in San Francisco, which was described as dismal, cheerless, and with faded drapes. As the second circuit-court judge had not yet been appointed, they
borrowed a district court judge to fill out the panel. Now, you see, nothing has really changed, has it? Earlier, Justice Field turned down the opportunity to become the first circuit judge because he preferred to stay on the California Supreme Court. But he let the appointing powers know that he would be quite willing to accept a position on the United States Supreme Court, and he was ultimately appointed to that position by President Lincoln.

We are the largest court of appeals in the country. We cover some 1,343,938 square miles, much of which is water, and hear appeals from the nine states plus Guam and the Northern Marianas.

The court started with one member and one opening on the court, plus a circuit justice of the Supreme Court. We still have one opening. There were thirteen judges when I arrived in 1972. In 1978 we increased to twenty-three. Now we have twenty-eight judges. Someone asked me, "How many judges can you have on the court?" And I said, "I don’t know; we haven’t tried yet."

Some people possess a number fixation—you know, we have numerologists. There are people who worry about cats walking across their paths or about walking under ladders, others who believe there is some magic in numbers, and there are a few of them on the Potomac who believe the number nine has some magic significance in the judiciary: no court can be greater than nine. But, as I have traveled throughout the world, I have found that twenty-eight judges is not a large court. It’s a relatively moderate-sized court. It’s just that we’ve never had an appellate court that size before, and those who are associated with mini-courts are worried about what to me seems to be quite average and quite acceptable.

Let me tell you a little bit about the chief judges of the Ninth Circuit Court of Appeals. The first was Lorenzo Sawyer. He read law in Ohio and came to California to search for gold. He set that aside for his law practice and was on the California Supreme Court when he was appointed as a circuit judge by President Grant. He spent twenty years on the court. He wrote In re Nagel, which was a case that arose out of the attempted assassination of Justice Field, and he was president of the Board of Trustees of Stanford University.

William Ball Gilbert was the first to be graduated from law school. He was the third chief judge. Since then chief judges of our circuit have been graduated from Michigan, Harvard, two from Stanford, Chicago, Montana State University (we know who that is), Oregon (we know who that is), and Boalt Hall (you now know who that is). The first native-born judge of our circuit was Francis Arthur Garrett; he was the fifth chief judge, and he was born in Washington. I am the twelfth chief judge since the formation of the court of appeals. The average tenure of a chief judge is eleven years. Of course that was bolstered somewhat by Judge Gilbert, who served thirty-five years (you see, you don’t
have it so bad having me around); Wilbur, twenty-four; and Dick Chambers, seventeen. Now we are restricted to seven years, or age seventy, whichever occurs first.

What about the future? I want to announce that our court is united and dedicated. We have differences of opinion about a wide variety of topics, but we meet together and work them out; it’s surprising how twenty-eight judges can come together and unite on a course of action. I am very pleased to preside over a court where that occurs. I have found stimulating and interesting that people of diverse backgrounds come to grips with problems of judicial administration.

And I must say that this is not a court that is going to stand still. It’s never been afraid of innovation. One of the real problems we have in the United States today is that the judiciaries and the lawyers are too conservative in the sense that they refuse to change or modify what they have grown accustomed to in order to meet the needs of society. It would be nice if we could go back to the old days. I would much prefer to be a circuit judge in the days of Learned Hand, but that will not occur. If I were to return to practice law now, I would rather do it as I did for the fifteen years that I practiced as a trial lawyer before the courts in San Diego, but time does not stand still. Time has moved on, and society has placed new demands upon us. It’s our responsibility as a court and as a bar to meet those challenges. We must be flexible. We must always understand that we are not in the business of making widgets. It’s not just production. We are in the business of dispensing justice. But with that in mind, we must be open to new ideas, to think about them, to try them, to see if there’s a better way. Our real clients are the people out there who file lawsuits. They are not my cases, they are not your cases, they are the people’s cases, and we have to devise ways in which we can do better at dispensing justice among our people.

I have found, as I have visited around the world, that our judicial system is the most respected, even though we know the challenges we have. In a larger sense, it seems to me that we have a responsibility, in the smaller and smaller world in which we interact, to set the example of providing justice to the people who need it so much.

Now, out west, being large has never scared us. There are those who have some concerns, and I read in a recent newspaper article that Senator Slade Gordon of Washington has reintroduced a bill to divide the Ninth Circuit. The bill will form Washington, Oregon, Idaho, Montana, and Alaska into a twelfth circuit. You may ask what happened to Hawaii, which was in the last bill. Well, Hawaii’s judges and lawyers, and subsequently their senators, decided they did not want to be in the mini-circuit. They wanted to stay with the mainstream of the judiciary and did not want to take the radical position of splitting the Ninth
Circuit. Now Hawaii is no longer in the proposal. I do not know what actual interest there is in the Northwest in this new circuit without the warm-water port of Honolulu, but I suppose we will find out in the near future.

We also understand from a newspaper article that Representative Sid Morrison of Washington, who submitted a bill to divide the circuit last year, has no plans to introduce a similar bill in the House. As of now, no one on our court of twenty-eight judges has voted in favor of division. The Judicial Conference of the circuit has resolved against division by an overwhelming majority on more than one occasion. Bar associations across the circuit, with very limited exceptions, have endorsed the concept that the circuit should stay together. There are valid and good reasons for this position. It is not that we want to be the biggest. It is not that we have grown used to each other and want to stay together. We sincerely believe that we can develop a better system of administration of justice in our circuit as it is than we can by dividing the circuit into two, or three, or four circuits.

If you will look carefully at the recent Federal Courts Study Committee report, it becomes clear that its authors were curious about how they should deal with the appellate problem. No circuit judge was on the particular committee that was dealing with this, except one from the First Circuit, who might not, as you know, fully understand how larger circuits work. At the beginning, there were the numerologists who wanted to divide everything over nine. But, after fifteen months of deliberations, the committee concluded that they should watch the Ninth Circuit for the next five years. Why is that? I think it’s because the committee took a step back to look at how our judiciary will be in the next twenty, thirty, forty, or fifty years, and became concerned about the appellate structure in the federal courts.

If we join with those who believe we should continue to divide any court over nine, what happens when we have twenty, thirty, or forty circuits? Is there an alternative to the balkanization of the federal judiciary? What will occur when there are so many federal appellate courts that there will be no national law (because it’s critically clear that the Supreme Court will not be able to provide national law with the number of cases that will be in the federal system)? But if the Ninth Circuit can be successful in demonstrating that we can provide a better system of justice in a large circuit, then there’s an alternative. Instead of balkanization, we could have five large circuits in the United States, which would take care of their own individual problems, and perhaps preserve a federal judiciary well into the next century.

So we have the challenge in the Ninth Circuit. They will watch us. We welcome the observation. And our court is committed to do everything we can at every level to be sure that we do not fail. With your help, I am confident we will succeed.
Matthew Hall McAllister, judge of the U.S. Circuit Court for California, 1855-1862. Judge McAllister was appointed to provide circuit court duties for the newly established districts of California, thereby relieving a U.S. Supreme Court justice of the arduous journeys west. He presided over the dramatic trial of members of the 1856 San Francisco Committee of Vigilance. [U.S. Court of Appeals, Ninth Circuit]

As associate justice of the U.S. Supreme Court, Stephen J. Field served as the circuit justice for the far-western states from 1863 until 1897. [Oregon Historical Society]
A former member of the California Supreme Court, Lorenzo Sawyer was appointed by President Grant to the U.S. Circuit Court for the Ninth Circuit in 1869. Over the next twenty-two years he presided over landmark cases involving railroads, the Chinese, and growing western corporations. (Oregon Historical Society)

The Pioneer Courthouse in Portland, completed in 1875, first housed the Oregon district and circuit courts. Considered by the Historic American Building Survey to be "undoubtedly the single most important building of the American Northwest to survive into the Twentieth Century," the neoclassical-Italianate courthouse is home to the Oregon judges of the U.S. Court of Appeals for the Ninth Circuit. (Oregon Historical Society)
The Old Appraisers' Building, at 630 Sansome Street in San Francisco, where the U.S. Court of Appeals for the Ninth Circuit held its sessions from 1891, the year the court was created by the Evarts Act, until 1905. [U.S. Court of Appeals, Ninth Circuit]

A panel of three early members of the U.S. Court of Appeals; left to right: William W. Morrow (1897-1923), William Bell Gilbert (1892-1931), and Erskine M. Ross (1895-1925). These three judges contributed greatly to the development of the Ninth Circuit. "From the 1890s into the 1920s [and in Gilbert's case, 1931]," as David C. Frederick describes in his forthcoming book on the history of the circuit, "these judges laid a solid foundation for the court's handling of disputes that arose in a rapidly changing West. During this time, the court rendered judgments on a variety of key issues, from the consolidation of the railroads and the enforcement of anti-Chinese immigration laws to the development of a stable law for mining and the use of public lands. They also decided important questions of law and order during World War I and Prohibition." [U.S. Court of Appeals, Ninth Circuit]
According to legal architectural historian Lynn C. Stutz, the U.S. Court of Appeals building at Seventh and Mission in San Francisco was called by one Sunset magazine writer "a post office that's a palace." The San Francisco Call declared that it was second only to the Library of Congress. Built between 1897 and 1905, it is one of the primary examples of Beaux-Arts classicism in the United States.

The four-story structure consists of two lower stories faced with rusticated granite ashlar, and a third story of smooth granite detailed with granite pilasters. The windows on the ground floor are arched, while those on the third story have heavy Italianate hood-moldings that alternate between pediments and low arches. The fourth story is obscured behind the heavy cornice and balustraded roof parapet. The monochrome aspect of the structure is relieved by medallions of Vermont Verde Antique marble below each ground-story window. The interior is a kaleidoscope of ceramic and marble mosaics, bronze doors and grillwork, detailed woodwork, and plaster ornamentation.

Heavily damaged following the 1906 earthquake and fire, the structure was repaired within four years and served the courts until the 1989 Loma Prieta earthquake inflicted severe internal structural damage. Plans for restoration are currently under consideration. [National Archives, Pacific Sierra Region]
A STRANGE STORY

By Stuart B. Walzer

In 1950, in my second year at Harvard Law School, I participated in Professor Mark DeWolfe Howe's seminar in American Legal History. Professor Howe, a wise and courtly man, assembled a book entitled Readings in American Legal History. To the delight of every law student, it contained a nineteenth-century account of a bigamous California marriage, with humorous and racy overtones. It was called "A Strange Story."

The case appeared in the American Law Review in 1886, prefaced by a letter from "Reporter." In the letter, Reporter wrote that the law of the case was beyond question, and that it had been published shortly after the adoption of the Field Codes in California in 1872.

The codes—and the codification movement—were inspired by the writings of the great English political philosopher Jeremy Bentham. The object was to simplify the law, so that the lowliest tradesman could interpret the law for himself without the aid of expensive lawyers. Every tradesman would carry his own pocket-sized volume of laws, which would guide him in his daily affairs. The movement, with its levelling tendencies, had a strong following in the debtor-oriented western states. One of its opponents claimed that in California "the enormous growth of the powers of the corporations under the Code, drove the people to Kearneyism and a half-communistic Constitution." The widespread criticism of the Field Codes as they were adopted in California was made much of by the New York Bar, in its successful efforts to defeat complete codification in New York.

The underlying theme of "A Strange Story" is the evil that can arise from oversimplification of the law, as a result of the codification movement. The solution proposed was for better education

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1 American Law Review 20 (1886) 764.
2 Miller, Destruction of Our Natural Law by Codification (1882) 8.
of lawyers in the basic principles of "natural law"—a raging controversy at the time, which still arises, in slightly different form.

Here, then, is the story, just as it was originally published in the American Law Review.

* * *

We surrender a large portion of our columns today to the report of a case which has attracted and absorbed the attention of the whole community, and created a greater excitement that any which has heretofore occurred in this section of the State. The indignation of the public generally at this disgraceful result of the careless manner in which new codes have been gotten up is excessive; and as there is a painful suspicion that other defects as yet undeveloped may exist, the feeling is universal that the Civil Code should be at once repealed and the other codes referred to a competent commission to revise them.

The case referred to is that of the People v. Oades, just decided in the County Court of San Bernardino. Oades is an Englishman of good education, who came to that county about two years ago, and purchased and settled upon a farm in Temescal township. In January last he married Mrs. Nancy Foreland, a young widow lady of great beauty, residing in that neighborhood as eminently respectable.

About two months ago a woman, accompanied by three children—two boys and a girl—arrived at the city of San Bernardino, and after inquiring of Oades' whereabouts proceeded to his residence, where she has since continued to reside. It afterwards transpired that this woman and Oades comported themselves towards each other as man and wife, and the neighbors, indignant at such open profligacy, laid a criminal complaint against them before Justice Billings, under the act of March 15th, 1872, for "open and notorious cohabitation and adultery." When the parties were brought up for trial, however, they produced a certificate of marriage, and proved by it and other authentic documents that the woman was Oades' wife—having been married to him in England about twenty years ago and moved with him to New Zealand, where their children had been born. The accused were therefore acquitted and returned to their home, where Oades continued to live with the two women as before.

Thereupon another complaint was laid before the same justice against Oades and Mrs. Oades No. 2, charging them with the same offense. On this trial it was proved that about eight years ago Oades was living in Wellington County, New Zealand, on the frontiers; when without warning, the Maoris—a tribe with whom the English were at peace—made an inroad into the settlements. Oades was at the time temporarily absent in Victo-
ria, and returned only to find his homestead burnt and his family disappeared. Some human remains were found in the ruins; and from this and from such information as he could gain during the ensuing two years he was gradually forced to the conviction that his wife and children were dead; and being loth to remain amid the scenes of his distress he left New Zealand and came to California. Upon this state of facts Oades claimed that his marriage with Mrs. Oades No. 2 was valid under the second subdivision of the sixty-first section of the Civil Code, which provides that the marriage of a person having a former husband or wife is void, "unless such former husband or wife was absent and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, in which case the subsequent marriage is void only from the time its nullity is adjudged by a proper tribunal." Upon an examination of the law this proposition was found to be disputed, as there was no doubt that when Oades married his second wife he had been ignorant of the existence of his first wife for more than five years. The complaint was therefore dismissed.

Oades still continuing in open cohabitation with the two women, a deputation was sent by the neighbors to lay the matter before Mr. Cokeman, the district attorney, who after examining the case, referred it to the grand jury, who found a true bill against Oades for bigamy. The trial, which took place last Monday, attracted a large crowd of eager spectators, among whom, the observed of all observers, appeared the two Mrs. Oades. The same state of facts was proven, and after the close of the evidence Mr. Cokeman, the district attorney, opened the case for the prosecution in an able and eloquent argument, of which we can only give a brief abstract:-

"The Law," he urged, "was to be construed according to its spirit and intent, and the language where contrary thereto was to be disregarded. These time-honored principles have been expressly adopted in the new code: 'Where the reason of a rule ceases, so should the rule itself. Cessante ratione legis, cessat ipsa lex.' And again, 'where the reason is the same, the rule should be the same. Ubi eadem ratio ibi eadem jus.' And again, 'he who considers merely the letter goes but skin deep into the meaning. Qui haeret in litera haeret in cortice.' Now, in this case," he continued, "the evident intention of the law was simply to provide against the illegitimacy of the children of the second marriage, and it certainly never could have been intended to make bigamy lawful. It is true, that at the date of the second marriage, Oades was ignorant of the existence of his first wife, but his voluntary cohabitation with both women, after learning the facts, was to be taken as conclusive proof of a guilty intention, ab initio. And, in support of this view, the counsel cited "The Six
Carpenters' Case.’ That case was very similar in principle to this, and it was adjudged that ‘the law judges by the subsequent act the quo animo or intent, for acta exteriora indicant interiora secreta.’

On the other hand, the counsel for the accused relied upon the provision of the Penal Code in relation to bigamy, which expressly provides that no person shall be held guilty of bigamy ‘whose husband or wife has been absent for five successive years’ [prior to the second marriage], without being known to such person within that time to be living, and in reply to the argument of the district attorney, he urged upon the court that in criminal matters it would be a dangerous precedent to adopt so liberal a principle of construction as that contended for by Mr. Cokeman; and he cited in support of his position the following maxims: ‘A verbis legis non est recedendum,’ ‘Index animi sermo,’ and ‘Maledicta est exposicio quae corrumpet textum,’ the meaning of which, as he explained for the benefit of the court, was that in the interruption of statutes ‘we must stick to the letter.’ That it is true that the intention must govern, but the ‘language is the evidence of the intention,’ and that ‘it is wrongly called interpretation when we alter the text.’

The learned judge said that however desirable it might be to convict the prisoner, the position taken by his counsel was clearly the right one, and accordingly he instructed the jury to acquit, which was done, and Oades returned home triumphantly with his two wives.

Thereupon all the most eminent counsel of San Bernardino were retained by citizens interested in the virtue of the community, with a view of ascertaining some means of removing this terrible scandal of Oades and his two wives; and after an exhaustive examination of the case they came to the conclusion that the only method of annulling the marriage was to proceed under the second subdivision of the eighty-second section of the Civil Code, which provides that a marriage may be annulled where the ‘former husband or wife is living’ at the time of the second marriage. But, as under the second subdivision of the eighty-third section of the Civil Code, an action for the annulment of such a marriage, it was evident that as neither Oades nor either of his wives were willing to bring the suit, the difficulty remained as great as ever.

What further steps will be taken is at present unsettled. But the people are very much excited and determined not to let the matter drop. Eminent counsel in San Francisco and Sacramento, including one of the Code Commissioners, have been written to, but as yet no answer had been received. We will keep the public informed of further developments.

This case still continues the all-absorbing subject of interest to the community. We give the latest, information upon the subject
as furnished by a special correspondent, dispatched by us several
days since to San Bernardino. Our correspondent interviewed Mr.
Cokeman last night, from whom he learned some details not
hitherto divulged. It seems that last Wednesday, Mr. John
Howlett, of San Bernardino, was by advice of counsel dispatched
to seek an interview with Mrs. Oades No. 1, with a view of
offering her inducements to bring a suit to annul the marriage of
Oades with Mrs. Oades No. 2. It was thought that she, being the
party principally injured by the second marriage, might easily be
persuaded to do so. After considerable difficulty and some danger
—having been run off by Oades with a shotgun—Howlett on
Thursday morning managed to secure a private interview with
Mrs. Oades No. 1, while Oades was out riding with his second
wife. She appeared to be a mild, timid woman, but it was impossi-
ble to induce her to move in the matter—although Mr. Howlett
offered her large inducements to do so. Oades, she said, had sworn
that if she attempted to annul his second marriage he would not
only beat her half to death, but also would never live with her any
more; that she wouldn't mind the beating so much, but that she
preferred to submit to the present state of circumstances rather
than lose Oades altogether, especially as being married to him she
couldn't marry anyone else. Howlett therefore returned without
affecting anything; and after consultation of counsel, was again
dispatched to make the same proposition to Mrs. Oades No. 2.
But neither would she accept the offer. "If there was any way,"
she said, "of annulling Oades' first marriage she might be induced
to move in the matter, although she really didn't mind Mrs.
Oades No. 1 much; as she was getting too old to be a very formida-
able rival; and, besides, she found her a considerable help about the
house; but as to her bringing suit to annul her own marriage there
was no use talking about it, as she was perfectly well satisfied
with Oades even with the incumbrance of his first wife and
children.

Upon the receipt of this information the Rev. Mr. Kiggett, a
minister of great and deserved influence in the community, was
dispatched to expostulate with Oades himself. Oades received
him courteously and discussed the matter with great frankness.
Theoretically, he said, he was a monogamist, and believed that
the law should not allow a man to have more than one wife. He
therefore joined with his reverend friend in saying that the action
of the Code Commission in allowing bigamy could not be too
severely condemned. "But such matters," he continued, "after all,
are to be settled in each State as the legislators in their wisdom
should deem best, it being now a settled principle in jurisprudence
that all rights and obligations have their courses solely in legisla-
tive enactment; that all the most eminent jurisprudents, includ-
ing the New York and California Code Commissioners, are
agreed that right is what the legislature wills, this being the
fundamental idea upon which the Civil Code is based. As to the
old notion of natural right, that is entirely exploded. *Nous avons
change tout cela,*" said Oades (who appears to be somewhat of a
literary turn). "If there were such a thing," he continued, "the
appointment of the code Commission to reduce all law or right
into a code would have been as absurd as to have appointed them
to codify chemistry or mathematics—it would, in short, have
been to repeal principles established by the Almighty, and to
substitute in their place the shallow notions of ignorant and
fallible men. For his part he didn't pretend to be wiser or more
virtuous than the laws; and as the laws allowed him two wives
his conscience didn't disturb him for having them; neither of his
wives were willing to give him up and to tell the truth he couldn't
get along very well without both of them. He loved them both so
well (he added facetiously) that he was like the ass between two
bundles of hay, and didn't know how to choose between them.
Beside, if either marriage was annulled it would have to be the
last one; and while he might possibly stand the loss of the old
woman (that is, his first wife), nothing on earth would induce
him to part with the last."

The reverend gentleman thereupon left in great and just
indignation; which was greatly increased on Sunday at seeing
Oades who had always been regular in his attendance at church—
seated in his pew with his two wives, listening complacently to
the sermon.

As we stated yesterday the San Bernardino lawyers had written
to one of the code commissioners. Our correspondent was shown
the answer but did not have the opportunity of taking a copy. He
was able, however, to send us a very full abstract of its contents.

The codifier—who appears from his letter to be a much more
sensible man than one would think (judging only from the codes)
wrote that it was a bad thing and that he didn't see what was to be
done about it; but that the commission was not responsible for it;
that all they had done was to copy the code of that eminent
codifier Mr. David Dudley Field; that it was evidently the inten-
tion of the legislature that the commission should pursue this
course; for if they had wanted a new code made they certainly
should have known better than to refer the matter to them; that
it couldn't be expected that a commission of three men, without
any special training or experience for the purpose, could complete
in two years a work for which Justinian had found it necessary to
employ the great Tribonian and seventeen other of the most
eminent lawyers in the Empire during many years; a work of
such transcendent difficulty that the greatest of English jurispru-
dents, Austin, had thought it necessary to recommend that a large
number of the ablest men should be especially educated for it and
should devote their whole lives to it; a work, finally, so extensive
that it had taken even Mr. David Dudley Field some time to accomplish it. As for himself, he said he never had pretended to be much of a codifier, but the position was offered to him with a good salary and he didn’t feel called upon to decline it; that he made it a rule never to decline anything that was offered on account of his own incompetency—that being a matter that concerned only those who employed him; that if any one were to offer to employ him to make a piano or a steam engine—which was as much out of his line as codifying itself, he would accept the offer provided always that it was on a salary, and that he was not to be paid by the job; that in his opinion the other commissioners were no better than himself, and finally that the whole commission reminded him very forcibly of Pantagruel’s opinion of the French lawyers, which he quoted as follows: “Seeing that the law is excerpted out of the very middle of moral and natural philosophy, how should these fools have understood it, who, par Dieu, have studied less in philosophy than my mule.”

All other means failing, yesterday a mass meeting was called to deliberate about the matter, which was largely attended by the citizens of San Bernardino, and also of Los Angeles and San Diego. After much discussion it was finally proposed, as the only remedy, to petition the legislature to pass a special act dissolving Oades’ last marriage. But Oades, who was present, immediately rose to address the meeting, and told them that that was no go; for by the twentieth section of the fourth article of the constitution of California it is expressly provided that “no divorce shall be granted by the legislature.” As Oades produced the book itself, this argument was unanswerable. It was then proposed that the legislature should be petitioned to call a constitutional convention for the purpose of annulling one or the other of Oades’ marriages; but Oades produced the constitution of the United States, and read the tenth section of the first article, which expressly provides that “no State ... shall pass any law ... impairing the obligation of contracts,” “and marriage,” he said, “was well settled to be a contract, and therefore no earthly power could deprive him of his vested right in his two wives.” This brought the assembly to a stand still; for it was very evident that nothing short of an amendment of the constitution of the United States could reach his case. At length, however, the silence was relieved by a prominent citizen of Los Angeles, who proposed—as a simple and effectual means of meeting the difficulty—to hang Oades. “This,” he said, “was a very common way of arranging such affairs in Los Angeles, and it had always met the public approbation except on one occasion; when, indeed, they had perhaps gone a little too far in hanging seventeen Chinamen.” This suggestion took so well with the meeting that Oades took the hint and left while the Los Angeles man was explaining his
views. The meeting at once broke up in pursuit, but Oades, after a close race, reached his house, where he barricaded himself and drove off the crowd with a shotgun.

After the crowd had dispersed our correspondent interviewed Oades at his house. He found him just sitting down to supper with his two wives, all in high spirits, and was cheerfully invited to join them. He had a long and interesting conversation with Oades, but this morning it had entirely escaped his memory, and our correspondent is too truthful to invent an account of what passed. He says, however, that he found Oades a very genial companion, and that they only separated at three o’clock in the morning, after the consumption of two flasks of whisky between them. The latter part of his letter is indeed a little incoherent, and were it not for the well known steadiness of his character, might give rise to a suspicion that he has himself been converted by the sight of Oades’ connubial felicity—for he says that Oades is a good fellow, and that in his opinion, the whole affair has grown out of the jealousy of the people of San Bernardino; which is an old Mormon settlement; and that they are mad with envy at seeing Oades in the enjoyment of a privilege of which the laws have deprived them.

* * *

When I read the story in Professor Howe’s collection, I thought it too good to be true. Years later, I tried to track it back, but could get no further than the American Law Review. Then, one day, I mentioned it to my friend Bernard Weissman, who for many years wrote popular legal books and articles under the name Will Bernard. He directed me to his article in Westways magazine of May 1954, under the title “The Bigamist of San Bernardino.” I will let him tell his own story:

“I was determined to follow the story back to its source. The old law book where I first saw the story had taken it from a newspaper clipping sent in by an anonymous reader. The reader, in turn, identified the clipping as coming from the Los Angeles Evening Express of December 16, 1873.

“Library records list only two known copies of this particular newspaper—one of them at the Los Angeles Public Library. I hurried to the library, exhumed a dusty volume from its vaults, and leafed to December 16.

“There, sure enough, amidst advertisements for stage coach rides, windmills and melodeons, I found the entire account.

“But the mystery still remained. What was the end of Mr. Oades’ story?

“Anxiously I turned the brittle, yellowing pages of the old Evening Express, hoping to find a clue. At last, in a corner of an inside page of the December 31 issue, I found a brief paragraph:
"A short time ago, we published an imaginary case of bigamy, to show that under the new California Codes a man may have two legal wives. The case was artfully worked up by the author, and by a process of *reductio ad absurdum*, he showed a defect in the codes which could not have been so strikingly illustrated in any other way. And now some asinine reader from San Bernardino gets mad at us for publishing the case. The ninny! He thought every word of it was true!"

Whoever the legal jokester was who wrote the article, he sure had us all rooting for Mr. Oades.
Early in the evening of the first Sunday in May 1938, the justices of the California Supreme Court and I gathered at a wharf in San Francisco and boarded the Delta King for a trip up the river to Sacramento. I had organized that gathering and boarding. Today you will find the Delta King, a now-historic paddlewheel steamer, moored in about the same place in "old" Sacramento, where we ended our trip on it that day.

I was doing my duty. I was the first graduate of a law school to be appointed to the newly created position of secretary-bailiff of the California Supreme Court. I loved my work and grew to love the chief justice, William H. Waste, and each of the other justices: Jesse W. Curtis, to whom I reported as a clerk-secretary-at-large to the court; John W. Shenk, who crafted the goodbye minute of the court to me at the end of my term; William H. Langdon, for whom I did research in English literature; Emmet Seawell, who told me the way to succeed was first to become a deputy district attorney; Douglas L. Edmonds, who taught me, by example, how to dress sharply (my blue serge suit was shiny and baggy); and Frederick W. Houser, who, having been appointed on September 29, 1937, was as new at his job as I was at mine. I did some kind of duty for each and loved them all. Still do.

My term commenced on October 1, 1937, and ended on December 31, 1938. This autobiographical sketch is my semicentennial bow to the court for the honor it granted me. I had been graduated from the Boalt Hall School of Law at the University of California in the spring of 1937, and had taken the California State Bar Examination in San Francisco in the fall of that year. The results of that examination were not yet known as I commenced my term. I could not then practice law. I could do legal research and draft material for opinions under the auspices and tutelage of Justice Curtis. I can see his kindly, almost cherubic

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face and head of gray curls as he patiently reviewed my first stumbling efforts to carry out this, my “secretary” function. If Jesse W. Curtis was my father on that court, Arlene Matheron, his full-time clerk-secretary, was my mother. She, too, was a graduate of Boalt Hall and tutored me with great kindness. I loved her, too.

My work product as a clerk-secretary was thus in part mine, in part Arlene Matheron’s, and in part—the crucial final part—Jesse Curtis’s. But I felt important. I believe that today, if I studied carefully enough the opinions of the court by Justice Curtis, or by the whole court, issued during my term, I could still find bits of one or more of them that were mine. At the time, I knew just which those bits were and I would fairly burst with pride.

I was recommended for the position by Professor William E. Kidd (we called him “Captain”), who wrote the letter on behalf of Boalt Hall. Recruitment letters had gone out from the court to all law schools in the state. I was summoned into the presence of the chief justice for an interview. First I was presented to Miss Cohen, his secretary and protector. A tall, gaunt woman, with white hair and piercing black eyes, she commanded me to seat myself. I did so, as ever after I did whatever she commanded. Her eyes raked me a number of times. I could feel the shininess of my blue serge suit and the rough edges of my once white shirt, by then somewhat yellowed. My tie made it difficult to breathe. I believed I was not at all passing Miss Cohen’s muster. I twisted my new hat by its brim, round and round, and waited.

Before I tell you of my interview with the chief justice, I must tell you my understanding of how my job was created.

For a number of years before my term, the court had taken various steps, with budgetary and other assistance of the California State Legislature, to obtain help in carrying out its ever-increasing burdens. The compensation for secretarial help to the justices was increased, the required skills and duties were changed to include legal research, and lawyers were recruited to fill these changed positions. To name a few: Arlene Matheron was Justice Curtis’s clerk-secretary; Martha Naylor, another Boalt Hall graduate, was Justice Shenk’s clerk-secretary; and H.H. McCabe, a University of Southern California Law School graduate, was Justice Edmonds’s clerk-secretary. The shorthand and typing remained.

Also, the new position of clerk-secretary-at-large to the court was created. Raymond E. Peters, who himself later became a member of the court, and William Sullivan held such positions during my term.

Shortly before my term, the court had espied the position of bailiff (traditionally a non-lawyer functionary) as a source of further help. The title of the position was changed to secretary-bailiff and its function from the “hear-ye,” receptionist and peace-
keeping duties to a combination of "hear-ye," reception and law-clerk-at-large duties to the court. Academically proficient law-school graduates were to be recruited for the position to serve the court for about a year, perhaps emulating the positions of clerks who serve the individual justices of the U. S. Supreme Court. Not following that example, the requirement to take shorthand and to type was applied to the position.

Back to Miss Cohen and me. At some signal not known to me, she arose, took my hat, hung it on a rack, and bade me follow her. As she shepherded me into the presence of the chief justice, I felt a light, motherly touch on my shoulder as she guided me to an exact position in a chair facing him. She retired from the scene and the color in my cheeks rose from bashfulness.

I shall not describe the chief justice. If I did, I would be tempted to say things like "small, wizened, wisp of mustache," and so on, but perhaps this is a reaction to the presence of Miss Cohen. What I will say is that he had a face that mirrored a lifetime of kindness, one that put this anxious and shy applicant immediately at ease. As he began to question me, what cropped up in my mind was that his outstanding quality of leadership must be gentle persuasion; he grew in stature before my very eyes, and remains in my mind a big man today.

The chief justice examined me in depth: what courses had I taken, what were my grades in the principal courses, what were my fields of interest in the practice of law when my term was over, where did I live (not far from his home in Berkeley), was I married and did I have children (yes, and one son, who had arrived mid-course in my second law-school year), what were my outside interests. One final question will stay in my mind forever—could I type and take shorthand? I said that I was a fast touch-typist but could not take shorthand. He asked me whether, if selected, I would take a course in shorthand. I said yes, and Miss Cohen arrived to take my perspiring body away. She hatted me out the door.

Some weeks later I was thrilled to learn that I had been appointed by the court.

Matchless Memories

Back to the San Francisco waterfront, where the justices and I had boarded the Delta King for the gentle paddlewheel trip across the bay and through the twists and turns of the Sacramento River, to a downtown landing in Sacramento, not far from the State Court Building, where the court's sessions would be held. I should say that although there were other people in the traveling group, the important thing to me, then and now, was that I was
there—others may tell their own stories. The court and I comprise the “we” I talk about here. “We” were on the first road trip to a session outside San Francisco.

Before I tell you about that overnight trip, I must tell you about a new function the court had added to my position—that of providing matches to members of the court, a number of whom smoked. The chief justice described this duty, specifying, with merry eyes, that I was not to buy the matches or have anyone buy them for me. Now, I must approach this part of the story with the greatest of care. I cannot say that the California Supreme Court ordered me to filch (isn’t there a lesser word?) these matches. Even though Webster includes “appropriate in a casual manner” in the definition of that verb, I cannot use it. No, no! I evolved a theory that the displays of matches in restaurants and bars were unilateral gift offers to patrons and prospective patrons, only awaiting completion by appropriation. And what better person than I, an arm of the court, to complete those gift offers, acting on behalf of the court? Several of those offers, within the reach of my arm, were thus completed into the bulging side pockets of my blue serge jacket.

On board the Delta King, we retired to our staterooms to unpack and freshen up. At an appointed time, we seated ourselves on deck at dining tables set with crackling white linen, handsome dinnerware, polished silver—and copious supplies of matches.

I, of course, was never seated at the chief justice’s table. Yet I am a reasonably courageous person. How else could I have worked my way through law school, starting from scratch with a lovely wife, an unlovely used Chevy coupe, fifty dollars in cash and no income? As I walked by the chief justice’s table, with a sweeping, dexterous motion I removed all the book matches therefrom. The eyes of the chief justice glimmered with a smile, and just detectably his head nodded. In a strong voice, he called the waiter for more matches.

The dinner and service were excellent, and smoke filled the air. We retired to our staterooms and slept to the gentle lapping and rise and fall of the King in the Sacramento River. At an appointed time, we breakfasted, arrived at a berth in downtown Sacramento, and taxied to the Senator Hotel and from thence to the court building and work. Thus began my first trip “on the road” with the court. What a delightful way to go to work!

Equally pleasant trips occurred for the Los Angeles sessions. The Southern Pacific Railroad’s overnight Overland Pacific run to that city took the place of the trip on the Delta King. The dining-car service was excellent, and the sleep-inducing click of the wheels on rails replaced the lap and wash of the steamer. And matches flowed into my gear. As I gained friends among the traveling group, I sought their assistance in my match-collecting activities.
All my days with the court were busy ones, and I usually worked after hours doing research in its fine library. When the first evening sessions of Berkeley High School opened after my term commenced, I registered to take a course in Gregg shorthand. I learned to make an "a." This was easy, because in Gregg it is an "o." However, with the burdens of my office, travels, and the like, this evening stint almost immediately fell by the wayside. I sought the dispensation of the chief justice to relieve me of my promise. He asked if I had bought the textbook, and I replied that I had. He asked me if I would keep it for study at home. I replied that I would. On that condition I was excused.

My term sped by. A new kid on the block, I was making many friends. I stood enthralled, not only of the justices, but of Ray Peters, Bill Sullivan, and Bernie Witkin; Clerk of the Court B. Grant Taylor; all the clerk-secretaries of the justices; court reporters Joe Dryden and George Sturtevant; the chief deputy clerk, San Francisco, A.V. Haskell; and the court’s janitor. The latter proudly explained that in preparation for my arrival he had torn off the roll-top from the bailiff’s old desk in the reception area and replaced it with a flat top, which he had then covered with dark-green linoleum. I would have preferred the ancient roll-top, but said nothing.

So many memories! Before the results of the fall bar examination were out, each justice, as he walked by my desk in the reception area to go to his chambers in the right or left wings, would look at me sadly, shake his head, and make “tsk, tsk” sounds. (In speaking of wings, I am using geographical directions; I do not believe that the court otherwise had a left wing.) Driven to desperation by this conduct, I sought out Clerk B. Grant Taylor. He had once invited my wife and me to his house in Strawberry Canyon, behind the Memorial Stadium on the U.C. Berkeley campus, to view a football game from seats built on the rooftop of his home. I asked him if the bar results had been lodged with him and if I had passed. He bade me lean over while he whispered in my ear, “Yes, but don’t you tell the Chief!” For the remainder of that day I smiled smugly into the “tsks.” I obeyed the clerk’s injunction and spoke to no one. My wife and I may have had a drink that evening. I slept soundly. The bar results were in the papers next morning. I should have known that that ever-kindly court would not have taunted me, had I indeed failed, and that the clerk would have given me only a momentary lead time on the results.

Getting on board meant being sworn in before my court, a high point of my life. When the day for that arrived, on November 9, 1937, I was the acting bailiff; I had declared the court in session. A large group of successful bar applicants was assembled before the court, standing in its well. The chief justice turned to me and nodded his head. I walked over, head high, to join the group, and
was sworn in with them. I gladly shared my court with others that day.

**Homely Counsel**

I became friends with Ray Peters and Bill Sullivan. I noticed they wrote in longhand on a foolscap tablet when they prepared their memoranda and draft opinions, which were then typed for them. But it's the more mundane things I remember. Often, for economy and relief from our sedentary work, we would walk down Market Street to lunch, trying not to notice the raucous clanging of two competing trolley-car systems in the center of Market Street, dangerously racing each other for the ten-cent fares of potential customers grouped along the way. At Dinty Moore's, near the intersection of Grant and Market, we would lunch on a corned-beef sandwich on rye with a scoop of potato salad and a cup of coffee—all for twenty cents.

Ray was a neighbor in the Berkeley hills. When I visited him, he cautioned me never to buy a house like his, with a recessed floor in the living room—an architectural fad at one time. A quite short and tubby man, he explained that the steps, day in and day out, would eventually kill you. I sorrowed with him that summer day in 1938 when Bernie Witkin's increasingly popular bar-exam cram course all but wiped out Ray's competing course. The preceding summer, I had taken Bernie's. My expressions of sorrow walked a tight center line. I liked both men.

Bernie Witkin flabbergasted me with the many hats he wore and the intensity of his activity day and night. He was the clerk-secretary to Justice Langdon, he edited the official reports of the court's opinions, he was writing and publishing his "Summary of California Law," and he ran his bar-exam cram course. He, too, was a neighbor of mine in the hills of Berkeley. When I went to his house, with its various stories on a steep lot, he advised me to buy one built all on one level. The constant climbing up and down, he said, would kill you. All my homes, except the first one, have complied with these Witkin and Peters rules.

I would sometimes ride with Bernie from Berkeley to San Francisco on the old, red Southern Pacific train, and the ferry. Not a second of his time was wasted. Page proofs of his "Summary" in hand, he would flash his editorial pen. I was silent in my awe.

Justice Langdon called upon me to perform a special research duty, not in the law as such, but in English and American literary source materials. Whenever he was assigned to study for the court and prepare a memorandum on an automatic appeal, provided by statute, from a death sentence, he did so with an intensive review of all the records in the case, and much research. In my term I remember one such case, in which he found some indication in
the record that he thought might support a view that the convict-
ed defendant had been defending his home. He sent me to the
books for all the quotes I could find on "A man's home is his
castle." As he explained the case and my task, his deep-set eyes
were sad as he contemplated being the last hope of a man about
to die. I found him many quotes, including some flowery ones
written in Latin, the dead language of our profession. He used one
of the latter, giving its English translation.

I performed the traditional duties of a bailiff when the court
was in session. After the justices had filed in and seated them-
selves, I would announce in my querulous voice, "Hear ye, hear
ye, hear ye. The Honorable Supreme Court of the State of Califor-
nia is now in session." Whether this concluded with some version
of "Draw nigh and you will be heard," I cannot remember.
Perhaps "Please be seated by the clerk" finished it off. The
seniority seating of Justice Shenk placed him directly above my
seating as bailiff. Several times a year, when a session ended, I
was required to end my "hear yes" with "This court now stands
adjourned for the term." As the justices stood in readiness to file
out, Justice Shenk would say, sotto voce but sternly, "Bailiff, you
know this court has not had terms for decades." A man of fine
features and trim figure, he carried his robe smartly as he marched
out of the courtroom. I never did tell him that the speech about
terms was mandated. I never spoke back to any of the justices.
I knew on which side my $125-a-month salary was buttered. And I
knew it was his joke, and he said it every time; I
wanted this very conservative justice to have a sense of humor.
I received a $25-a-month raise during my term, less a deduction for
the state retirement fund, which was returned to me later—like
found money.

I do not remember having to keep the peace in the courtroom
and I do not know quite what I would have done if the peace had
been threatened, but nothing untoward happened during my
term.

Each of the justices evidently had an allowance or budget to
furnish his chambers. If Justice Seawell had one such, he had not
used it. His grand old furniture probably came from other quarters
he had occupied, but it was comfortable, and I loved it. He had the
high forehead, full face, and high collar of Herbert Hoover and, I
later learned, was proud of his "Hooverizing," eschewing his
furnishing budget. With a glint in his eye and a flash of gold in his
teeth as he smiled, he tried again and again to pump my well-
spring of matches dry, but I and my backup gang foiled him. He
did cross-examine me as to whether I had sought employment as
a deputy district attorney [he had started his legal career as
district attorney of Sonoma County]. I reported that I was trying.
District Attorney Degnan of Del Norte County in Crescent City
had sent out an enticing recruitment letter for an assistant D.A.
and a partner in his civil practice. Partner! My eyes rounded, and I made the long trip up to that corner of our state. He and I made the rounds of his clients scattered about the countryside, but, with war rumored, I would have felt lonesome up there. I was a city boy, I guess. At the time, Earl Warren was district attorney of Alameda County, and his requirements for a deputy district attorney were high grades and no salary for six months; the former I had, the latter I could not afford. To become a deputy D.A. in the City and County of San Francisco at the time, you needed to be Irish; this Norwegian failed that test. Whenever Justice Seawell inquired about my progress, I would report that the matter was pending. Later I conducted evasive action until the whole subject died down. During World War II, I became an enforcement attorney for the Office of Price Administration. I hoped the justice was proud of me. I did so like him.

The home of “my” Justice Curtis was several blocks down McAllister Street from the State Building in San Francisco, the permanent headquarters of the court. His home was an apartment in the William Taylor Hotel, a high-rise hotel named after a Methodist missionary. During my term, he gave me a memento of his office—a small piece of polished steel, too worn for further use, that had been used in making the court’s letterheads, envelopes, and cards. I treasure it. It reposes in my toolbox today, where it has been for over half a century, serving many purposes. As I use it in repairing window frames, tapping it with a hammer as I drive home the tiny triangular wedge, I always think of the curly head and benign countenance of Justice Curtis. On the court he was a diplomat, helping to bring the court together, just as the wedges bring glass and frame together. A few wedges would be needed to fasten some of those justices together some of the time.

As my term drew to a close, Justice Langdon drafted a minute, flowery and complimentary to me, recording my term and its close. Justice Shenk, ever the conservative, drafted another version, which was adopted by the court. It flowered not and said in substance that I would, as I went forward in life, undoubtedly receive whatever reward my future conduct merited. I studied the official minute and concluded that if I should steal a horse and be hung, it would be consistent with the Shenk resolution. In any event, I felt proud to be noticed by my beloved court as I left it.

I carried the banners of my law school and my court full speed ahead, through a war and then into private practice. I became a senior partner of the law firm of Brobeck, Phleger and Harrison in San Francisco, of which firm I am still, in retirement, counsel.

I stole no horses and was never hung. I stand before my court this day, proudly and without blemish, save one. Please forgive me, Chief! I did it all without ever learning to make a “b” in shorthand.

In 1891 the Fifty-first Congress, after lengthy debate, passed the Evarts Act, which established the modern system of geographically based federal courts of appeal. Before that, federal circuit courts had been mainly nisi prius courts, having original jurisdiction over different classes of litigation from the district courts. During the debate Rep. John Rogers of Arkansas expressed the hope that with the new law "we should have a system rather than a medley."1 With the centennial of the Evarts Act this year, it is appropriate to consider how far this hope has been fulfilled.

Although the framers of the act did not anticipate such a consequence of their reform, the geographical circuit system has become—at least to contemporary observers—a "laboratory" for developing innovative solutions to governmental problems without having them imposed from the center (much as the states form a "laboratory" within the federal system). During his long and productive term as chief judge of the Ninth Circuit, from

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The reviewer is deeply indebted to David F. Phillips, without whose assistance this article would not have been accomplished.

1House Debate of February 28, 1891, 22 Cong. Rec. 3584.
1976 to 1988, James R. Browning led the court (and the circuit) through a course of experimentation and development that has well justified this role for the circuits.  

The pressures on the court during the period were great. In 1961, when Judge Browning was first appointed to the bench, 443 cases were filed in the Ninth Circuit. In 1976, when he became chief judge, the number was 2,907—an increase of 556 percent over fifteen years. In 1988 the number was 6,334—an increase of 117 percent during his term and an overall increase since 1961 of 1,329 percent. If filings per judgeship had remained at the same level as in 1961, by 1988 the Ninth Circuit would have had 125 circuit judges instead of 28.

When James Browning became chief judge the response favored in Congress was to split the circuit (as the Fifth Circuit was eventually split). But splitting the Ninth Circuit was tied to splitting the Fifth Circuit, an explosive political issue because of the feared impact on civil-rights litigation. One of the judge’s first major achievements was to obtain an interim legislative solution in Congress. Without waiting to resolve the splitting question, the Omnibus Judgeship Act of 1978 authorized ten new judgeships for the Ninth Circuit, making a then-unheard-of total of twenty-three judges. At the time few people thought an appeals court of that size could function effectively. It is a measure of Browning’s patience, ingenuity, and managerial and political skills that, by the time the Fifth Circuit issue had been resolved, the extra-large Ninth Circuit was working well enough for splitting it to be no longer generally thought necessary.

2 Judge Browning kept this in mind. For example, in 1984 he told the Alaska Bar Association’s Annual Convention that “The Ninth Circuit is the only remaining laboratory in which to test whether the values of a large circuit can be preserved. If we fail, there is no alternative to fragmentation of the circuits, centralization of administrative authority in Washington, increased conflict in circuit decisions, a growing burden on the Supreme Court, and creation of a fourth tier of appellate review in the federal system. If we succeed, no further division of the circuits will be necessary.”

3 Splitting circuits as a response to caseload pressure has been a recurring proposal for many decades. It was anticipated during the debate on the Evarts Act in 1891, when Rep. William Breckinridge of Kentucky opposed the new appellate system because he believed “that it will result in the multiplication of these circuit courts. It will be found that they will be congested, and each Congress will be asked to create another circuit court and another court of appeals. From nine they will grow to twelve, and from that to fifteen and to eighteen; and every time they grow there will be the personal interest of friends of members of Congress that will stand in the way of reorganizing the system.” 22 Cong. Rec. 3586 (1891).

4 This reviewer first explored the issue of circuit division in 1973 as a member of a committee of the Bar Association of San Francisco. Its conclusions were that any such proposal would either make California into a one-state circuit or divide it between two circuits, with resulting problems of inconsistency in diversity cases and in federal-question decisions in which California law was implicated.
The deliberate transformation of the Ninth Circuit as an institution, in response to the pressure of changing conditions, is one of the most important occurrences of recent years in western legal history. Arthur D. Hellman, of the University of Pittsburgh School of Law, has edited and contributed to a thorough and detailed assessment of this transformation in his book *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*.

This collection of essays by fourteen legal scholars on various aspects of the Ninth Circuit's development during the Browning years was commissioned by the Executive Committee of the Circuit Conference as a *Festschrift*, "to pay tribute to Judge Browning and to the spirit of reform that animated his regime." Two years of research, analysis, and discussion among the scholars and the advisory committee has produced a valuable (if sometimes uneven) contribution to understanding that spirit of reform and the historical context that brought it forth and within which it operated.\(^5\)

Some of the reforms of the Browning era were primarily administrative, such as the move to geographically organized administrative units, the establishment of the court's executive committee, and the institution of a conference of chief district judges. Others affected the adjudicative process more directly, such as the Bankruptcy Appellate Panel, the new, limited *en banc* procedure, and the efforts to articulate standards for review. The present structure of the Office of Staff Attorneys, with its accompanying apparatus of case-inventory and screening systems, had a major impact on both administration and adjudication. A series of reforms in the organization and operation of the Circuit Council and Circuit Conference was designed to bring the whole constituency of the court (including district judges, Article I personnel, and practitioners) into the governance of the circuit. Most of these reforms required confident and sensitive political guidance for their implementation, and John Schmidhauser's chapter, "Remaking Circuit Institutions," gives many examples...

of Judge Browning's political abilities. Perhaps the most important reform of all was the fact that, as Leo Levin puts it in his chapter on lessons for other circuits, "willingness to innovate, the receptivity to experimentation, to new ideas, became part of the climate of the circuit."

Restructuring Justice differs from the usual run of legal literature in its application of political- and social-science methods and empirical research to analysis of the Ninth Circuit's activities. Students of government are used to this approach in studies of the internal workings of the executive and legislative branches, but similarly rigorous analyses of the judicial branch (except in the context of specific cases) are much rarer.

It must be admitted that this academic approach does not always yield pleasing results. The social scientist has as much of a weakness as the lawyer for arid and repetitious language, but lawyers are used to their own conventions and resent it when they encounter these tendencies in the style of another discipline. Some of the essays in Restructuring Justice are heavily laced with academic muffle. Others (such as the articles on the screening docket) are models of how to apply empirical methods to a legal subject and create results intelligible and useful to both communities.

One of the main strengths of Restructuring Justice is the highly privileged access its contributors had to the raw materials of court and circuit. Researchers were allowed access to internal memoranda and to the court's computer database; many court professionals, including judges, gave interviews and reviewed draft chapters. Not every chapter is based on original research, but those that are state their methods in scrupulous detail.

The book is most useful when it concentrates on research and places its assumptions and conclusions in the context of clearly stated values. Some of the articles (such as Maurice Rosenberg's excellent essay on standards of review) are closer to those in law reviews, while others (like Leo Levin's "Lessons for Smaller Circuits, Caution for Larger Ones") are critical commentaries rather than research papers. But each makes a contribution, and most of the contributions are worthwhile.

Only the most determined court or government buffs will want to read Restructuring Justice all the way through. Many of the essays, though well written, address technical issues with a comprehensiveness only an expert would enjoy. For example, Stephen L. Wasby leads us through the structural changes in the

6Dan Meador, of the University of Virginia Law School, remarked in this connection that he did not "recall another situation where a court has opened itself up to this kind of collective strip search." "Conference on Empirical Research," supra note 5, at 115.
circuit council in minute detail, identifying concerns raised at nearly every meeting throughout a long debate. Similarly, Michael Berch’s meticulous treatment of the origins and development of the Bankruptcy Appellate Panel is not likely to have more than a narrow appeal. However, it is in the nature of a Festschrift that not everyone is equally interested in every contribution. For most readers, the main interest of Hellman’s book will be in the attempt of a large governmental structure to understand itself and respond to the pressures that force it into change. Even those not particularly interested in the evolution or operation of, for example, the circuit conference may be drawn to read about the efforts of courts and of judges [especially Judge Browning] to identify and accommodate constituencies and institutional needs.

The book does bear some marks of its origins as a group effort. Virtually every contributor felt the need to exclaim about the geographical extent of the Ninth Circuit [from Arizona to Alaska! from Montana to the Marianas!], which becomes tedious by the tenth or eleventh reading. The frequency with which the contributors cite each other’s work lends a slightly incestuous air to the proceedings, and the insistence of the editor on recapitulating articles that recapitulate themselves internally (and sometimes even recapitulate each other) gives a disorienting, hall-of-mirrors effect that could have been avoided by more careful editing. But these are minor cavils, and scarcely detract from the overall achievement.

Many of the contributors to Restructuring Justice have made valuable suggestions which the circuit would do well to entertain. For example, John B. Oakley and Robert S. Thompson suggest a corps of appellate magistrates to relieve Article III judges of the need to process cases now diverted to the screening docket. As well as saving judges’ time, this would give greater legitimacy to the screening process [now performed by staff] by increasing visibility and allowing for oral argument; safeguards would permit return of a case to the regular docket where needed. A variation on the theme is one in which this reviewer has a particular interest, as the current chairman of the circuit’s Senior Advisory Board. Under the leadership of Moses Lasky, the board submitted a proposal to the circuit concerning the “winnowing” of meritless appeals. At an early stage, a judge or specially designated panel [not unlike the motions panel that meets several times a month] would review appeals with staff attorney assis-

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7 Appellate magistrates could also be a valuable resource if the court were to inaugurate a meaningful settlement program. One possible model would have an appellate magistrate and two experienced appellate practitioners hold settlement conferences.
tance. If an appeal appeared to be without merit the appellants would be so notified, with the advice that sanctions could be imposed.

Berch concludes his analysis of the Bankruptcy Appellate Panel by suggesting that specialist panels of generalist judges, who would not work exclusively in their specialties, could provide the steadying influence of a known bench while avoiding the dangers of tunnel vision and special-interest domination of appointments that often affect exclusively specialist tribunals. Such panels might concentrate on social security, labor, immigration, tax, and sentencing issues. Paul D. Carrington suggests revising the screening procedure by stabilizing the panels and permitting oral argument in every case, but with immediate, unpublished, non-precedential decisions from the bench in nine cases out of ten. The tenth case would get more measured consideration by a larger panel, and would indeed establish the law of the circuit when published. This would save judges' time by reducing the number of opinions, and this in turn could help make the law more predictable and thus eventually limit the number of appeals. The circuit might well consider even Rosenberg's modest suggestion that slightly fuller decision memoranda in screened cases would improve attorney and litigant perceptions of procedural fairness.

*Restructuring Justice* provides a number of insights of a technical nature. For example, the mechanics of the screening process, known to few litigants (or their attorneys), are thoroughly explained from internal sources. The incidence of intracircuit conflict is shown experimentally to be not very great after all. Some commentators provide unsettling insights into unsuspected problems—for example, Carrington shows that the opt-out provisions of the Bankruptcy Appellate Panel have a self-defeating effect.8

The book's greatest value probably lies in its portrayal of a large and complex institution's attempts to adapt to the pressures of volume and growth without sacrificing its core values. It is a problem that affects almost every institution in our society, including most large law firms. Even smaller practitioners are faced with allocating their resources among competing demands. As we learn from these studies, good predictors of success include a conscious understanding of the values to be preserved, a commitment to openness, receptivity, and power sharing, a willing-

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8If Bankruptcy Appellate Panel judges give "law of the circuit" precedence over "law of the district," a party standing to benefit from the law of the district will opt out to secure enforcement by the district court and the panel will lose jurisdiction. However, if the panel gives "law of the district" precedence, it will fail in its purpose of providing circuit-wide uniformity.
ness to plan; a complementary willingness to experiment with mechanics (especially to conserve scarce resources when no substitute is available); and the ability to have innovative proposals not only adopted but accepted by all the constituencies involved. The Ninth Circuit's reforms have succeeded in large measure because Judge Browning brought all these qualities to his task, and we would do well to emulate them as we make our own responses to changing conditions.
BOOK REVIEWS


As public awareness of the value of history increases, it is only natural that agencies of all types should be creating the position of “house” historian. While professional historians have been on the staff of the military services for years, the field has recently broadened, and we are now seeing the fruits of such endeavors. One of these is the subject book by Frederick S. Calhoun, who describes himself as the first historian for the U.S. Marshal’s Service. He has produced a comprehensive and readable history of the service, but, as he writes in the introduction, his intention is greater than that: “The subject of this book, then, is the Constitution. The context is federal law enforcement; the example is the work of the U.S. Marshals and their deputies.”

The story takes the reader through a great deal of interesting constitutional history, and shows how centralization has worked on a practical level in the last two hundred years. The marshal’s service began with no overall plan and was largely at the whim of the marshals, their deputies, and the supervisory federal officials. By the end of Calhoun’s book, it is evident that the service is in a position to greet the twenty-first century with an efficient, conceptually oriented organization that finally knows what it is and what it is supposed to do.

As Calhoun narrates the tortuous ups and downs that have led to this point, the reader cannot fail to be amazed at the pettiness of bureaucrats and the gross insensitivity of politicians. The marshals have wended their way through labyrinthine difficulties, including the aftermath of the Alien and Sedition Act, the problems engendered by obstructionists, and the tragedies resulting from the Fugitive Slave Law, which themselves were only precursors to the larger tragedy of the Civil War. The stories concerning attitudes toward slavery, slaves, and slavers in the nineteenth century are revisited in the twentieth, as the author takes us through integration in the schools, including Little Rock and Ol’ Miss.

Calhoun has collected a series of anecdotes to illustrate the obstacles encountered by the service, both from within and from without. Among the people who appear from time to time in the
narrative is George Williams, U.S. senator from Oregon during the Civil War, an author of the Fourteenth Amendment, and a manager of the Johnson impeachment trial. He later became attorney general under President Grant, and in many ways showed great insensitivity to the plight of the marshals in their attempt to carry out their various duties. ("Various" is an appropriate term, since those duties ran the gamut.)

One can only be impressed by the dedication of these men, who exposed their lives for a pittance and probably got no thanks for a job well done. An ironic twist is that the marshals almost put themselves out of business by having too many functions. This led to the creation of other specialist agencies within the executive department, including the Federal Bureau of Investigation, the Internal Revenue Service, and the Secret Service. The marshals’ duties are now limited to serving process (which was their original charge), and to acting as police for the U.S. courts and as managers of the extensive movement of federal prisoners between the many facilities and courts. This movement is no longer undertaken by wagon, but by two 727 jets, used exclusively by the service to carry out its functions.

The present professionalization of the service stems essentially from the 1970s, when the entire organization was brought under coherent central control. This was critical for hiring, training, and budgeting, and thus eliminated one of the last vestiges of Jacksonian democracy’s spoils system.

Anyone interested in this country’s history will find The Lawmen engrossing. Readers should bear in mind that the author has no hesitation in debunking myths. Recently I visited Portland’s Riverview Cemetery, where Virgil Earp is buried; I hope he is not turning over in his grave from the statements in Calhoun’s book.

Charles S. Crookham, Senior Judge
Multnomah County Circuit Court, Portland, Oregon


For lawyers and historians, this well-organized use of new evidence and thoughtful criticism of earlier work sheds important light on the intent of Congress in its first effort to implement Article III of the recently ratified Constitution.

Not light reading, and not likely to cause restless lines to form in front of bookstores, Wilfred J. Ritz’s expose of unfounded generalization and wishful thinking by earlier writers rings true. The author admits at the outset that the burden of the book is
to show why the distinguished quartet of Joseph Story, Earl Warren, Louis Brandeis, and Julius Goebel were wrong about Section 34.

_Erie Railroad Co. v. Tompkins_, 304 U.S. 64 (1938), unquestioned as law today, was based on false gospel, Ritz tells us, and gives his reasons for the next two hundred pages. Library shelves are stuffed with learning about _Erie Railroad_, and such questions as whether Justice Brandeis acted out of character in reaching out to decide in constitutional terms to put it out of harm's way from Congress, a question the parties had not briefed or argued. There is no space or need here to add to that lore.

A more practical question today might be whether the rule of decision in private-law diversity cases will matter much in the twenty-first century if Congress and the Supreme Court continue to load the district-court calendars with public-law controversies to the exclusion of private-diversity cases. But the exploration of the meaning of Section 34 is nonetheless fascinating because of the insight it provides into the first piece of legislation passed by the First Congress.

Ritz scrutinizes the words of Section 34 in light of the paucity of statutes and reported cases available to the state courts in 1789, and in light of the common understanding of the words "several" and "respective" when used in connection with "states." The text of Section 34 runs: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the Courts of the United States in cases where they apply."

What was intended by reference to the laws of the several states? Statutes? Case law? Both? Could Congress have meant only that the new national courts, when they started to hear cases in the various districts, should apply American law instead of English law? There was obviously no federal law to apply, and precious few state statutes or cases that could be found and applied to the kind of questions likely to come before federal courts.

Ritz makes a good case for his argument that when twentieth-century lawyers read the text with the view of federalism that has prevailed since 1938, we probably read it with completely different assumptions from those that prevailed among the senators and representatives who drafted the language.

It is thus possible that Section 34 meant nothing more than that the national courts should use existing American law, which could be found only in the statutory laws or common law to be found in the several states (as distinguished from the United States, for which no law yet existed).

It is equally possible, Ritz points out, that Section 34 meant that until Congress got around to defining crimes, the national
courts should look to the local criminal law in the rare case in which a criminal charge was brought in federal court, as for piracies and felonies committed on the high seas. (There were, of course, no federal crimes, but piracy and some other crimes were considered to be against the law of nations.)

It is worth reading this book if for no other reason than to enrich the reader's understanding of the remarkable task confronting Congress at the beginning of the Republic. One gains renewed respect for the gifted and industrious volunteers who put this country together at a time when there were virtually no law libraries, no collections of American cases, and no collection of the statutes that had been enacted in the respective states. It was helpful that half of the new senators had been members of the constitutional convention, however, and knew what they wanted to accomplish. They were also singularly unburdened about the problems of fund raising and reelection. Their productivity, accordingly, was amazing, by modern standards.

Returning to the laws of the "several states" again, there is evidence that the laws of the "respective" or individual states also found a place in legal history. It was not unheard of for one state to borrow, and enact as its own with local modification, statutes that had proved to be useful or expedient in another state or country. That practice was still widely followed when Oregon and California came into the union. One recalls accounts of the early state legislators asking each other if anyone had a copy of New York civil or criminal statutes, and, if not, settling for a friend's copy of Indiana or Iowa session laws. Charles Henry Carey's The Oregon Constitution recalls that in 1857 Oregon's constitutional convention relied upon the state constitution of Indiana as "a model for substance and phraseology."

When the Judiciary Act of 1789 became law, the only point that was clear was that English law was not the first choice of new legislators, and whatever law the several states (as distinguished from the United States) could produce would have to suffice until Congress could do better.

The editors, Wythe Holt and L.H. LaRue, give appropriate credit to the quarter-century of research by Ritz before his health called a halt to his writing. They deserve more than passing mention for their work in organizing and placing in order the author's voluminous notes and appendices. They admit that they took more than the usual liberties with the work they were editing, and the reader has cause to be grateful.

Alfred T. Goodwin, Senior Judge
U.S. Court of Appeals for the Ninth Circuit, Pasadena

1(Salem, 1926) 28.

The publication of Fifty Years of Legal Writings by Wilbur F. Bowker, 1938-1988, compiled and edited by Marjorie M. Bowker, is a notable achievement. The editor was a member of a major law firm in Alberta at a time when women lawyers were few and far between (especially in major law firms), and served as a judge of the Alberta Juvenile and Family Court at a time when women judges were novel. A published scholar, she was catapulted to national prominence when she wrote a simple and straightforward analysis of the proposed free-trade agreement between Canada and the United States. On Guard for Thee: An Independent Analysis became the focal point of the 1988 federal election, and Marjorie Bowker was transformed into a national symbol, lionized by many, and attacked by ministers whose policies ran into difficulty when exposed to the light of day. Virtually the entire process was repeated two years later with the publication of her analysis of the prime minister's Meech Lake Accord.1

Wilbur Fee Bowker, many of whose writings are reproduced and celebrated in this volume, is no less remarkable an individual. A lawyer and a teacher, he is the recipient of many awards, including an honorary doctorate of laws from the University of Alberta and an honorary professorship from the University of Calgary. The main offices for the Alberta Attorney General's Department are housed in the Bowker Building in downtown Edmonton, and the Faculty of Law at the University of Alberta has created a Bowker visiting fellowship in his honor. Both Wilbur Bowker and Marjorie Bowker—who are married to each other—were appointed to the Order of Canada in the summer of 1990.

Wilbur Bowker joined an Edmonton firm in 1933, and worked on some of the most important litigation arising during the last years of the Brownlee administration and the early period of Social Credit in Alberta. After serving in the military in World War II, he joined the Faculty of Law at the University of Alberta, first as a lecturer and then as dean. In this role he took an active part in discussions with the Canadian Association of Law Teachers, at a time when Ontario's legal-education profession

was torn apart by debate over whether to follow the Western/Atlantic Canadian lead by establishing university-based professional education. He served as one of the commissioners on uniformity of legislation in Canada for more than two decades, and, on retiring from the deanship in 1968, became director of the Alberta Institute of Law Research and Reform. In 1975 he retired again to devote himself to his work on Albertan and western Canadian legal history.

Even this brief outline suggests that any assessment of Bowker's scholarship is also, in part, an assessment of law, lawyers, and legal education in Canada in the twentieth century. His career coincided with the period in which modern lawyers' professionalism took its form in Canada. Given his work, and the fact that Alberta has exhibited an unusual degree of national leadership in matters touching on the legal profession, the publication of a consolidation of his legal writings provides a useful and convenient source of information on Canadian legal scholarship. For the historian of Canadian law, the volume is of value both as primary and as secondary source material. The author is simultaneously a historian of law and a historical subject, so that the reader is constantly off balance, shifting gears frequently, in a creative and altogether delightful way.

The book should be of considerable interest to students of the legal profession in Canada. Post-Larsonian scholarship on the professions has directed attention to the central importance of university-based education and scholarship in establishing "cognitive exclusiveness" and justifying or legitimating professional monopolies to the wider political community.2 At the same time, an emerging body of literature in reaction to the now decade-long preeminence of the Larson thesis is more directly addressing questions of the constitutive character of scholarship and other legal "discourses." In these contexts, the scholarship of the most important individual in Alberta's legal-education profession during the last quarter century is an unparalleled resource.

What is immediately striking on even a cursory scan of the book's table of contents is its breadth of scholarship. The subject matters range from the law of divorce to legal biography, legal education, professional ethics, medical law, civil liberties, jurisprudence, and legal history. The mode of analysis employed encompasses doctrinal, historical, and theoretical approaches to legal issues.

On the history side alone, Bowker's contribution has been outstanding. "The Honourable Horace Harvey, Chief Justice of

Alberta" (59-117) is a fine piece of judicial biography—perhaps the best article of its kind yet published in Canada. Similarly, each of the works in legal history represents invaluable research. Often, the author's contribution is the only scholarship available in the particular area under study. Varied in style and depth of coverage, from after-dinner speeches to scholarly articles, among the many essays that contribute significantly to the literature are "Malcolm Murray MacIntyre: 1904-1964" (323-25), "Extra-Judicial Writing: the Alberta Law Quarterly, the Alberta Law Review, and Reviews in General" (466-79), "Fifty-five Years at the Alberta Bar: George Hobson Steer, Q.C." (537-94), "A Lighthearted View of the History and Traditions of the Legal Profession of Alberta" (616-25), and "Metaphors and other Notable Passages in Judgments" (735-57). The "History of the Association of Canadian Law Teachers" (133-61) is the only account of the early years of that association.

Apart from legal history, Bowker's early work on professional conduct, law reform, and human-rights protection was pioneering, and is of considerable interest to the legal historian as evidence of Canadian legal thought in these areas during crucial periods in Canada's professional and political history.

All in all, Fifty Years of Legal Writings is an exceptional contribution to Canadian legal scholarship. Diverse, engaging, informed, and informative, it should be read by everyone with an interest in Canadian legal education, Canadian legal history, the Canadian legal professions, or the law dean who shaped modern legal education in Alberta.

W. Wesley Pue
University of Manitoba


In traditional Native American societies from southeastern Alaska to southwestern Washington, no one could assume an important name or title without potlatching—inviting guests from other groups to demonstrate the legitimacy of the host's claim, exercise ceremonial privileges, and offer gifts to the guests as payment for their witnessing and acknowledging that claim. Defining the social standing and property rights of individuals, the composition of social groups, and their relationship to one another, the potlatch was thus the central social and
legal institution for Indians in the area. However, in British Columbia this institution was illegal from 1885 until 1951. In *An Iron Hand upon the People*, Douglas Cole and Ira Chaikin trace the history of the law banning the potlatch and explore the moral questions this history raises.

A commonly held view of the history has it that culture-bound whites banned the potlatch either because they were ignorant of its functions and shocked by heathen ceremonies, or because they understood its functions all too well and were out to destroy Native American society. In either case the Indians were hapless victims of white ignorance or malevolence. But, as Cole and Chaikin show, it was not so simple.

The law was promoted by reformists. In the 1870s and 1880s, missionaries and most Indian agents opposed the potlatch on the grounds of health—the large gatherings were hazardous, especially to children; of morals—potlatches were often financed through prostitution; and of economics—potlatches took time away from productive work and destroyed accumulated savings that might be used for social betterment. Missionaries and agents also opposed the winter dance, because among some groups it included performances involving (real or feigned) cannibalism, self-mutilation, or the devouring of a live dog. In response to these objections, the Canadian Parliament banned both the potlatch and the winter dance. The ban was consistent with Canadian Indian policy of the time, which promoted assimilation in an attempt to persuade the Indians to become healthy, productive, Christian Canadians. It was also consistent with the prohibition elsewhere in the world of slavery, child marriage, suttee, and other practices offensive to western values.

The Indians, except for a few Christian converts, believed that the ban on potlatches was the result of a tragic misunderstanding, which would be corrected if the government would only listen to their side. They argued that the ban was unfair, the potlatch being comparable to the whites’ Christmas. Over the years they presented more sophisticated arguments supporting the potlatch as having positive social and economic functions, while at the same time they gradually eliminated the most objectionable features of the winter dance. But they did not altogether stop their practices. By the 1920s some groups had transformed the potlatch into more acceptable institutions, while others had developed ways of potlatching covertly. The law was broken many more times than it was enforced.

The history of the law’s enforcement is of a struggle between the Indians and a paternalistic Canadian bureaucracy, with Canadian justice and public opinion occasionally coming to the aid of the Indians. Justice triumphed in 1888, when the chief justice of British Columbia, Sir Matthew Begbie, declared that a
trial conducted by an Indian agent was an abuse of justice and that the law, by its failure to define the offences, was flawed and unenforceable. Paternalism triumphed in 1918, when it had become clear that public opinion would not allow the courts in British Columbia to convict potlatchers. Deputy Superintendent of Indian Affairs D.C. Scott, admired for his poetry portraying the Indians as "a noble but waning race," slipped through Parliament a change in the law that would again, as in the case condemned by Begbie, allow an agent to act as both prosecutor and judge.

This change made possible the trial and conviction, in 1922, of participants in the potlatch given by Dan Cranmer of Alert Bay. At the insistence of the Royal Canadian Mounted Police officer who had acted as both arresting officer and prosecutor, the defendants were given the choice of turning in all their masks, coppers, and other ceremonial paraphernalia or going to prison. Many gave up their treasures, while others refused and served time. (Most of the items surrendered in 1922 were returned in 1969-70, and are now on display in the Native American museums at Cape Mudge and Alert Bay.)

Justice triumphed again in 1934, when Parliament rejected a proposal that would have prohibited attending dances, and would have permitted the confiscation of dance and potlatch paraphernalia with no appeal. A.W. Neill, a former Indian agent who represented central Vancouver Island, asserted that confiscating property because of a supposed intention was unreasonable, unjust, and un-British. But even Neill favored the prohibition of the potlatch, and the prohibition was retained, though unenforced, until 1951.

By then, suggest Cole and Chalkin, interest among the Native Americans in their own cultures had reached a nadir. Since that time, however, there has been a great revival of tradition, including, in many cases, a revival of the potlatch. However, it is unclear to what extent this revival is a result of the change in the law.

Cole and Chaikin's book is a well written, scholarly, and balanced treatment of the subject, with insight into some of the leading characters. I strongly recommend it. It is not, though, the whole story. For the twentieth century the focus is on the Kwakiutl, and, because of the importance of the trials after the Alert Bay potlatch, this is understandable. But potlatching continued elsewhere. Citing this reviewer, the authors state that the Coast Salish had ceased potlatching by 1920. However, what I have tried to describe is how the potlatch ceased to exist as a separate event while continuing as a part of the winter dance, which the authorities were still trying to suppress. Despite its subtitle, the book does not deal with the whole Northwest
Coast. U.S. Indian agents were also trying to eradicate Indian ceremonies, including the potlatch and winter dance, in western Washington, and the history of that struggle has not yet been fully told. Finally, a curious error runs throughout the book. The Chinook jargon word *tamanawas*, or mystic power, used for shamans' curing and winter dancing, appears as "tamananawas." If this is the way the term appeared in the original law, Chief Justice Begbie was quite correct in dismissing its prohibition on the grounds that it was "utterly unknown" in British Columbia.

Wayne Suttles
Portland State University
Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.


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