

July 1915

Beginnings of the Community Property System in California and the Adoption of the Common Law

Orrin K. McMurray

Follow this and additional works at: <https://scholarship.law.berkeley.edu/californialawreview>

Recommended Citation

Orrin K. McMurray, *Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CALIF. L. REV. 359 (1915).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38D235>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

California Law Review

Volume III.

JULY, 1915

Number 5

The Beginnings of the Community Property System in California and the Adoption of the Common Law

IN A PREVIOUS volume of this Review appeared an article by Mr. Walter Loewy upon The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California.¹ This article traced the origin and stated the main principles underlying the Spanish-Mexican system of community of goods, but did not undertake the task of following the development of the system after its adoption by the first legislature of California. It is proposed to trace its history in that State from the American occupation until the present day, discussing the principal authorities upon the subject.

The early history of the community property system is so closely interwoven with that of the story of the adoption of the common law as the basis of the jurisprudence of the State that it is necessary to say something concerning that story. The present article will deal with the adoption of the common law and of the community system by the State of California.

I

The peculiar character of the American settlement of California casts a flood of light upon the history and nature of many of her legal institutions. Never, perhaps, in the history of the United States, has there been such a rapid transformation of national life and character as that which California experienced within a very brief period after Marshall's discovery of gold on Sutter Creek. The population leapt at a bound from 26,000, on January 1, 1849, of whom 8,000 were Americans, to 107,069, on

¹ 1 Cal. Law Rev. 32.

January 1, 1850, of whom 76,069 were Americans.² And this population, made up of active men in the prime of life from every part of the country, brought with it ideas and habits of thought far indeed removed from those of the native Californian and Mexican people who were the former possessors of the land. The rude institutions that served well enough for a pastoral people living in a sparsely settled community, whose disputes, if any arose, the alcalde or justice of the peace, administering a patriarchal justice, summarily adjusted, were wholly unsuited for Americans, accustomed to regularly constituted courts and statutory law.

The consequence of this condition of things was that, though theoretically the law of the conquered country remained, under well settled principles of international law, unchanged until superseded by statute, practically, the majority of the population of the new territory regarded themselves as bound in their legal relations by the common law of England, modified by American tradition, rather than by the civil law of Spain and Mexico. Even the most conservative of the new settlers, in so far as they observed any system as controlling, ignored the civil law and treated the common law as their rule of conduct, both as private citizens and as magistrates exercising judicial functions. Thus, though no trial by jury was recognized by the native law, the Rev. Walter Colton, the first newspaper editor in California and the first American alcalde at Monterey, called a jury in serious criminal cases.³ How vague and undefined was the

²The figures are taken from the "Memorial to Congress," presented by the Senators and Representatives elected from California, praying for admission of the State into the Union. Browne, Debates in the Convention of California, Appendix, pp. XXII and XXIII.

³Colton, *Three Years in California*, p. 47. The account of this first jury trial may be of interest. "Friday, Sept. 4 (1846). I empannelled today the first jury ever summoned in California. The plaintiff and defendant are among the principal citizens of the country. The case was one involving property on the one side, and integrity of character on the other. Its merits had been pretty widely discussed, and had called forth an unusual interest. One-third of the jury were Mexicans, one-third Californians, and the other third Americans. This mixture may have the better answered the ends of justice, but I was apprehensive at one time it would embarrass the proceedings; for the plaintiff spoke in English, the defendant in French, the jury, save the Americans, Spanish, and the witnesses all the languages known to California. But through the silent attention which prevailed, the tact of Mr. Hartnell, who acted as interpreter, and the absence of young lawyers, we got along very well. The examination of the

legal and judicial system appears from Mr. Colton's description of his jurisdiction. He says in his journal, under date of September 15, 1846,⁴ in speaking of his election as *alcalde* by the citizens of Monterey, a position he had already been filling for two months under a military commission:

"Their election devolves upon me duties similar to those of mayor of one of our cities, without any of those judicial aids which he enjoys. It involves every breach of the peace, every case of crime, every business obligation, and every disputed land title within a space of three hundred miles. From every other *alcalde's* court in this jurisdiction there is an appeal to this, and none from this to any higher tribunal. Such an absolute disposal of questions affecting property and personal liberty never ought to be confided to one man. There is not a judge on any bench in England or the United States, whose power is so absolute as that of the *alcalde* of Monterey."

Mr. Colton's notions of his jurisdiction were far more exalted than the Mexican law of 1837 would seem to give him justification for asserting. As a matter of fact the *alcalde* was, so far as the written law went, vested with hardly any functions which we would call judicial. He might fine vagrants to the extent of \$25 or four days' imprisonment, and he might, in very urgent cases, take the first steps in criminal proceedings.⁵ But the judicial power was for the most part vested in higher courts.

witnesses lasted five or six hours; I then gave the case to the jury, stating the questions of fact upon which they were to render their verdict. They retired for an hour, and then returned, when the foreman handed in their verdict, which was clear and explicit, though the case itself was rather complicated. To this verdict both parties bowed without a word of dissent. The inhabitants who witnessed the trial, said it was what they liked—that there could be no bribery in it—that the opinion of twelve honest men should set the case forever at rest. And so it did, though neither party completely triumphed in the issue. One recovered his property, which had been taken from him by mistake, the other his character, which had been slandered by design. If there is anything on earth besides religion for which I would die, it is the right of trial by jury."

⁴ Colton, *Three Years in California*, 55.

⁵ Law of March 30, 1837, translated in Appendix to *Browne's Debates in the Convention of California*, Part I, § VI, and Part II, sec. III. pp. xxxiii and xxxviii. This translation was made under the authority of General Riley, Military Governor of California, by W. E. P. Hartnell, with introduction and notes by J. Halleck. It was not issued until July 2, 1849, too late to have much influence upon the jurisprudence of the State. A brief account of the judicial systems before 1850 may be found in the Preface to volume 1 of the *California Reports*.

The written law provided for judges of first instance and for a superior tribunal, but the written law seems not to have been known in upper California in 1846.⁶ Mr. Colton did not hesitate to impose the death penalty, though he would have been hard put to it to justify his jurisdiction by written law.⁷

It is true, he speaks of his powers as *alcalde* and of his administration of the law as if he acted under a regular code. Thus he says, under date of July 22, 1847:⁸

"The laws by which an *alcalde* here is governed, in the administration of justice, are the Mexican Code as compiled in *Frebrero*(sic) and *Alvarez*(sic)—works of remarkable comprehensiveness, clearness and facility of application. They embody all the leading principles of the civil law, derived from the Institutes of Justinian. The common law of England is hardly known here, though its rules and maxims have more or less influenced local legislation. But with all these legal provisions a vast many questions arise which have to be determined *ex cathedra*. In minor matters the *alcalde* is often himself the law; and the records of his court might reveal some very exquisite specimens of judicial prerogative; such as shaving a rogue's head—*lex talionis*—who had shaved the tail of his neighbour's horse; or making a busy body, who had slandered a worthy citizen, promenade the streets with a gag in his mouth."

Notwithstanding the encomiums lavished upon *Febrero* and *Alvarez*, the description of their works and the spelling of their names must leave some doubt in the reader's mind as to how far the worthy *alcalde* of Monterey had explored the law contained in their tomes. The instances cited in the pages of his journal certainly show more of the style of justice administered by *Sancho Panza* in his famous island city of *Barataria* than of that expounded in the Institutes of Justinian or the Commentaries of Blackstone.

Alcalde Stephen J. Field at *Marysville* in 1849 understood the limits of his jurisdiction better than *Alcalde* Colton in *Monterey*, but he administered justice in much the same way.

⁶ The oath of office was administered to Governor Burnett by "Chief Justice" K. H. Dimmick, on December 20, 1849. Journals, Legislature of California, 1850, 20. Bancroft says Mr. Dimmick was judge of the Court of First Instance of San Jose. 6 Bancroft, History of California, 310.

⁷ Colton, 232.

⁸ Id. 249.

Justice Field in his very interesting Personal Reminiscences says:⁹

"Under the Mexican law Alcaldes had, as already stated, a very limited jurisdiction. But in the anomalous condition of affairs under the American occupation, they exercised almost unlimited powers. They were, in fact, regarded as magistrates elected by the people for the sake of preserving public order and settling disputes of all kinds. In my own case and with the approval of the community I took jurisdiction of every case brought before me. I knew nothing of Mexican laws, did not pretend to know anything of them; but I knew that the people had elected me to act as a magistrate and looked to me for the preservation of order and the settlement of disputes and I did my best that they should not be disappointed. . . . In civil cases, I always called a jury if the parties desired one; and in criminal cases when the offence was of a high grade, I went through the form of calling a grand jury and having an indictment found; and in all cases I appointed an attorney to represent the people, and also the defendant, when necessary.¹⁰ The Americans in the country had a general notion of what was required for the preservation of order and the due administration of justice; and as I endeavored to administer justice promptly, and upon a due consideration of the rights of every one, and not rashly, I was sustained with great unanimity by the community."

A German writer preparing a careful descriptive pamphlet guide for prospective settlers, in 1849, says:¹¹

"The country possesses no written law book, with the exception of the Laws of Spain and the Indies, published in Spain a hundred years ago, and a little pamphlet, setting forth the duties of various judicial officers, which was published by the Mexican government since the revolution. When one of the last of the Mexican governors was approached

⁹ Field, Personal Reminiscences, (not published, but privately printed,) 27, 30.

¹⁰ Field was more liberal in this respect than was Colton. The latter writes, at p. 199 of the work before cited: "We have at this time three young lawyers in Monterey, as full of legal acuteness as the lancet cup of a phlebotomist. All want clients and fees, and the privilege of a practice in this court. Mexican statutes, which prevail here, permit lawyers as counsel but preclude their pleas. They may examine witnesses, sift evidence but not build arguments. This spoils the whole business and every effort has been made to have the impediment removed, and the floodgate of eloquence lifted. I should be glad to gratify their ambition, but it is impossible. I should never get through with the business pressing on my hands in every variety of shape which civil and criminal jurisprudence ever assumed."

¹¹ Oszwald, Californien und seine Verhältnisse, Leipzig, 1849, 71.

by a judge for instructions upon the way he should administer the law in his district, he answered: 'Administer it in harmony with the fundamental principles of the law of nature and of justice!' And this is, in fact, the basis of California jurisprudence."

Mr. E. O. Crosby tells us that "Spanish law was in operation here and there," but that "it was an unknown system to our people."¹² The decisions of the courts in 1849 are hardly to be counted as judicial decisions. As to the legal situation in general, he says:¹³

"The fact is that the application of the common law in deciding cases was made in direct violation of the old Spanish law. The Spanish civil law was so little known that the proceedings were not conducted under its provisions. Not many of the old Spanish officers were retained, a few in some of the Southern counties. In fact there was very little law of any kind, very few courts and very little proceedings during the first year of the emigration to California. The first vessel arrived in February, 1849, and in December of that year we organized the Supreme Court under the State organization."

II

So strong, indeed, was the predisposition of the majority of the people towards common law ideas and legal institutions that even official expressions denying the validity of the Spanish Mexican law may easily be found. In the elaborate report of the judiciary committee of the Senate in the legislature of 1850, recommending the adoption of the common law as the basis of our jurisprudence, an able document submitted by Mr. E. O. Crosby, the chairman of the committee,¹⁴ it was argued that the civil law of Spain and Mexico was not then in force. This document is entitled to serious consideration not only by reason of its intrinsic merit but by reason of the character of its authorship. Mr. Crosby was a man whose opinions command respect. He was an educated lawyer, from New York City, an examiner in chancery in the Chancery court of that State, and had been in the active practice of his profession in New York City for several years. Coming to California, in part for his health, and in

¹² MSS. by Elisha O. Crosby in Bancroft Library entitled, *Events in California*, 41.

¹³ *Id.* 132.

¹⁴ *Journals, Legislature of California, 1850, 459-480.*

part to report to clients upon the business situation here, he found such a good field that he decided to remain. He was Prefect of the District of Sacramento under Governor Riley, a member of the constitutional convention of 1849, a member of the Senate of 1850 and the chairman of the judiciary committee of that body.¹⁵ He remained in California for a decade, in very extensive practice in connection with the prosecution of land claims. Returning to New York, he was appointed by President Lincoln as Minister to Guatemala. In the preparation of the report upon the common and civil law, he tells us that he was assisted by Nathaniel Bennett, one of the justices of the Supreme Court of California, appointed by the legislature at its first session,¹⁶ a very scholarly and capable lawyer whose decisions alone, among the earliest justices, show any considerable acquaintance with the Spanish Mexican system.

The views expressed in the report are, therefore, entitled to more than ordinary respect, as the work of such competent and cool headed men. Yet these conservative men say:¹⁷

"We wish to remark at the outset that we by no means concede the position that the civil law is in full force in this State at the present time. It is extremely uncertain to what extent it ever did prevail. Situated at so great a distance from the Mexican capital, occupying months in the interchange of communication with that central point of law and legislation, connected with it by the fragile tie of common descent, rather than by any intimate communion of interests or sympathy of feeling, exposed to frequent revolutions of the general and departmental governments, finding but little stability in the Mexican Congress, little convenience for the promulgation of its laws, and less power to enforce them, the people of California seem to have been governed principally by local customs, which were sometimes in accordance with the civil law, sometimes in contravention of it. However this may be, it is very certain that it now prevails to but a limited extent and equally certain that the common law controls most of the business transactions of the country. The American people found California a wilderness—they have peopled it; they found it without commerce or trade—they have created them; they found it without courts—they have organized them; they found it

¹⁵ Crosby, *Events in California*, 2, 3, 26.

¹⁶ *Journals, Legislature of California, 1850*, 48-55.

¹⁷ *Journals, Legislature of California, 1850*, 474-5.

destitute of officers to enforce the laws,—they have elected them; they found it in the midst of anarchy—they have bid the warring elements be still, have evoked order out of confusion, and from the chaotic mass have called forth a fair and beautiful creation. Throughout all this, they have taken the common law, the only system with which they were acquainted, as their guide. Their bargains have been made in pursuance of it—their contracts, deeds and wills have been drawn and executed with the usual formalities—the courts have taken its rules to govern their adjudications—their marriages have been solemnized under it—and, after death, their property has been distributed as it prescribes. Are you to hold all or a great portion of these things as naught? Will you overturn or invalidate the immense business transactions of a great community? And yet to this you must come if you say that the civil law is in force throughout the State. The first settlers of the United States brought with them from the mother country the common law and established it in an uninhabited region. The emigrants to California have brought with them the same system, and have established it in a country almost equally unoccupied. If a change, therefore, is made, it must be a substitution of the civil law in place of the common law. If you sanction the latter by legislative enactment, you only give your authority to what had already been done in anticipation of such authority.”

Official expression denying the force of the Mexican law is found two years later in the case of *Fowler v. Smith*,¹⁸ where Justice Murray held, upon the first hearing, that a conveyance made in January, 1850, three months before the formal adoption by the legislature of the common law, by one American to another was to be governed by the common, not the civil law, with respect to the question of implied warranty, and that the Mexican statutes with respect to usury had ceased to be in effect at that date, though the formal act of abolition was passed on April 22, 1850. The reasoning of the court seems to leave open the question as to whether or not the transaction, if it had been between native Californians or Mexicans, would have been governed by the civil law. The learned justice points to the condition of Italy and Gaul, after the overthrow of the Roman Empire of the West, with its system of personal law, as distinguished from territorial law, governing the rights of the various peoples, Roman law for Romans, Lombard law for the Lombards, Salic law for

¹⁸ (1852) 2 Cal. 39.

the Salian Franks. He also cites the situation in India, the modern example of a system of personal law, and refers to the situation in Gibraltar where, he says, the English law prevails, without legislation under the King's "charter of justice", and invokes the doctrine that custom makes law. The principle, *communis error facit jus*, ought, he thinks, to prevail in such a case as that of California in 1849. And he closes his argument with what, indeed, would seem to be a "poser" to the defendant, by asserting that nothing could better show the injustice of the rule of international law when applied to conditions in California than the fact "that this court has been unable to procure a copy of the law on which this contract is sought to be avoided."¹⁹

Though a rehearing was had, and, in a second opinion delivered by Justice Heydenfeldt,²⁰ the theories of Justice Murray were wholly repudiated, the opinion on the first hearing so well illustrates what was undoubtedly the prevailing popular sentiment and gives withal so excellent a description of the legal situation, that we take the liberty of quoting from it at some length. The taste for mixed metaphor which the learned justice displays in the latter part of the quotation reminds one rather too forcibly of the famous Sir Boyle Roche's, "Sir, I smell a mouse, I see him brewing in the air, but I will nip him in the bud." But the fault of style was one of the times, a passion for overstatement marked the era. Says Justice Murray:²¹

"California, at the time of its acquisition by the United States, contained but a sparse population. It had long been looked upon as one of the outposts of civilization. Its commercial, agricultural and mineral resources undeveloped, it was considered of little importance by the Mexican Government. The body of Mexican laws had been extended over it, but there was nothing upon which they could act, and they soon fell into disuse. The system of government was a patriarchal one, and administered without much regard to the forms of law, which were scarcely alike in any two districts. Such was the state of the country when the discovery of our mineral wealth roused the whole civilized world to its importance. In a few months the emigration from older States exceeded five times the original population of the country. A State government was immediately formed to meet

¹⁹ Id. 49-50.

²⁰ (1852) 2 Cal. 568.

²¹ (1852) 2 Cal. 47-48.

the wants of this unexpected population. The whole world was amazed by our sudden progress; and even the Federal Government, startled from her usual caution by so novel a spectacle, beheld us take our place as a sovereign State before her astonishment had subsided. Emigration brought with it business, litigation, and the thousand attendants that follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to them a sealed book. The necessities of trade and commerce required prompt action. This flood of population had destroyed every ancient landmark, and finding no established laws or institutions, they were compelled to adopt customs for their own government. The proceedings in courts were conducted in the English language, and justice was administered by American judges, without regard to Mexican law. Custom was for all purposes law. No law concerning usury was recognized, or supposed to exist. Under this peculiar system this country acquired its present wealth and prosperity. But it would have been much better for the permanent interests of this country that its progress had been less rapid, if, after escaping from the tutelage of a territorial government, we are to be fettered by the dead carcass of law which expired at its birth, for want of human transactions on which to subsist, the application of which would overturn almost every contract entered into before the act abolishing all laws, etc.;²² would unhinge business and entirely destroy confidence in the country."

As a final specimen of the expression of an official view denying the applicability of Mexican law to Americans, in his preface to the first volume of California Reports, Nathaniel Bennett, not only one of the first Justices of the Supreme Court, but the editor of the first volume of its reports, says:²³

"Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition. This was the case more particularly in Northern California and in the mineral region,—in Southern California, perhaps to a less extent. Commercial transactions to an immense amount had been entered into, and large transactions in real estate had taken place between Americans, with reference to the Common Law as modified and admin-

²² Thus in the report. The clause as extended should read "abolishing all laws in force in the State except those passed by the first session of the legislature." The reference is to the Statute of April 22, 1850, found in Statutes, 1850, p. 342.

²³ (1852) 1 Cal., Preface, vi-vii.

istered in the United States, and without regard to the unknown laws of the republic of Mexico, and the equally unknown customs and traditions of the Californians; and the application of the strict letter of Mexican law in all cases, would have invalidated contracts of incalculable amount, which had been entered into without any of the parties having had the means of knowing that such laws ever existed."

III

The debate in the constitutional convention of 1849, upon the adoption of the clause in the proposed constitution defining the wife's separate property, brought to the front the champions both of the common law and of the civil law. The committee²⁴ reported the section as it was finally adopted, as follows:²⁵

"All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The provision thus recommended and finally adopted occurs verbatim in the Constitution of the State of Texas of 1845.²⁶

Mr. Lippitt, representing San Francisco, submitted as a substitute the following:²⁷

"Laws shall be passed more effectually securing to the wife the benefit of all property owned by her at her marriage, or acquired by her afterwards, by gift, devise or bequest, or otherwise than from her husband."

He presented his substitute, with the brief statement that he objected to the section as proposed by the committee upon the

²⁴ Browne, *Debates in the Convention of California*, 257-269.

²⁵ *Id.*, 257. Constitution of California, 1849, Art. XI, § 14.

²⁶ 6 Thorpe's *American Charters, Constitutions and Organic Laws*, 3561; Constitution of Texas, 1845, Article VII, § 19. The statement is made by Hunt, *Genesis of California's First Constitution*, 45, and reiterated by Goodwin, *The Establishment of State Government in California*, 218, that the provision in the California Constitution "is believed to be the first instance on record when 'a section recognizing the wife's separate property was embodied in the fundamental law of any state.'" Michigan adopted a provision guaranteeing the wife's separate property in 1850. Constitution of Michigan, 1850, Art. XVI, § 5; 4 Thorpe, 1966. Texas is entitled to the honor of being the first state to protect the separate property of a married woman by constitutional guaranty.

²⁷ Browne, *Debates*, 257.

ground that it changed "the present system". His substitute, he points out, left it to the legislature to act, while the proposed section, he thought, altered the existing law,—a matter with which the constitutional convention should not interfere. Mr. Tefft, afterward appointed by the first legislature judge of the Second District Court, on behalf of his constituents, native Californians of the district of San Luis Obispo, urged that in justice to them, the section as reported by the committee should be adopted.²⁸ He seems to have been the only member who urged the rights of the native citizens. Mr. Halleck, from Monterey, later a general in the United States army, during the civil war, indulged in a little persiflage.²⁹ As a bachelor who thought he might some time marry, he suggested that the section as proposed was likely to bring women of fortune to California.

Mr. Botts, of Monterey, an ardent advocate of the common law, though ill, was so moved by the proposed section that he felt compelled to take up the debate.³⁰ He expressed disappointment that Mr. Lippitt had not attacked the principle of the proposed section, for he had understood before the meeting that that gentleman had proposed to fight the section tooth and nail. Mr. Botts apparently thought Mr. Lippitt's substitute too mild; he would have neither the constitutional convention nor the legislature alter the common law. He took exception to Mr. Halleck's facetious remarks. His argument consisted of a tirade against women's rights, and a laudation of the common law, especially for its treatment of married women. He referred to the "poetical position" in which that law had placed woman.

Mr. Lippitt evidently regarded Mr. Botts' words as a challenge for him to come forward in support of the common law, and he too entered into a discussion of reasons why the common law should prevail in the new Territory.³¹ He said:

"I must confess that, for one, I am wedded to the common law. I am wedded to it as a member of this convention, as representing a portion of the people, and as a citizen of California; and if I were in the legislature, I should be, as a member of the legislature, and for this reason—that the common law and no other law is the law under which

²⁸ Id. 258-9.

²⁹ Id. 259.

³⁰ Id. 259-60.

³¹ Id. 260-262.

nine-tenths of the people now in California were born and educated; it is the only law which is known, the only law which her lawyers and judges know, and which we have access to It is very certain we have all got to come under one uniform code of laws. The general rights of property must be considered with reference to the great mass of the population, the Americans; the smaller party, the Californians, must yield. *But the right of property in reference to man and wife and a thousand other matters are totally different at present. The Americans have been living under the common law: the Californians have been living under the civil.* It is useless to disguise the fact that in course of a few months, the question has to be settled under what code of laws the people are to live. The great mass must live under the common law. It would be unjust to require the immense mass of Americans to yield their own system to that of the minority."

The speaker, after reiterating the well worn argument that you cannot have two heads in the family, referred to his experience in Paris, where he blamed the civil law system for the unfortunate situation that two thirds of the married people were living separate from each other. If the proposed section should be adopted, Mr. Lippitt said a husband might be ruined by his wife's debts. He feared the consequences that might result from the failure of the legislature to follow the recommendation of the section with respect to passing a law providing for the registration of the wife's separate property, in which event creditors of the husband would be at the mercy of a fraudulent debtor, who might transfer his property secretly to his wife.

A few very sensible remarks were made by Mr. Dimmick,³² of San Jose, the first "Chief Justice" of California, appointed by Governor Riley, who pointed out that the proposed section did not change the law but merely stated what was existing law. Three years of residence in the Territory had convinced him of the justice of the system of property rights between husband and wife existing under the native laws and customs.

Mr. Jones, from the San Joaquin district, was the champion of the civil law and the determined foe of the common law in this debate.³³ He had come to California from Louisiana, al-

³² Id. 262-3.

³³ Id. 263-5.

though a native of Kentucky, so that he had lived under both systems.³⁴ Like Mr. Botts, he took the discussion outside of the question of the adoption of the particular section. If the common law was to be adopted, he was ready to meet the issue, he said, or, to quote his own language, "I will meet the gentleman at Philippi." He attacked the common law with the same vehemence as Mr. Botts had praised it. He defied its supporters to tell where it could be found, or to produce anyone who understood it. For his part, he wanted the law so plain "that every man in the Territory could go into a court of justice and defend himself, and he has just as much right to do that as to defend himself in a street fight." Rather inconsistently with his former statement that nobody knew or could know the common law, Mr. Jones said that if that system were "visited upon the country," he could "stand it", for, he said, "I have practiced under it and can comprehend it, but do not, I entreat you, make woman the subject of its despotic provisions!"

Mr. Norton pointed out that both Mr. Botts and Mr. Jones were wide of the mark in their discussions.³⁵ The question was not, he said, whether the common law or the civil law was to be adopted, but merely as to the rights of a married woman in her separate property. If the civil law should be adopted by the legislature, it would, of course, be unnecessary to have the proposed section in the constitution, but if the common law, then he thought the section was imperative. For though he believed that the common law system should in most respects be adopted in California, he recognized that the treatment of the married woman with respect to her separate property by that system of law was unjust and unsuited to modern conditions.

Mr. Botts closed the debate with another eulogium on the common law, reading a quotation from Blackstone. To that law, he said, we owe the principles of liberty, including the writ of habeas corpus.³⁶ Mr. Jones here interrupted with the somewhat cryptic utterance, "The writ of habeas corpus is contained in the first Justinian." Mr. Jones' superior learning seemed somewhat to have disturbed Mr. Botts, for he did not reply to

³⁴ Royce, California, 262; see Table of Members in Browne's Debates, p. 479.

³⁵ Browne, Debates, 265-7.

³⁶ Id. 267-9.

the interruption.³⁷ Posterity would have been interested to know the precise citation of Mr. Jones' authority for the novel, apparently original, proposition advanced by him. But it sufficed to turn the current of Mr. Botts' eloquence. In closing, Mr. Botts reiterated Mr. Lippitt's arguments about the possibility of collusion between husband and wife to the detriment of creditors, but rather weakened his case on this point, by his gallant exordium, "Thank God, you cannot by any of your laws crush that Spirit of integrity which abides in the breast of woman!"

The section was adopted as originally proposed by the committee.³⁸

One or two observations will occur to the reader of the debate upon this question. First, the fact that several of the speakers regard the clause of the constitution as a change in the existing law. To their minds the common law is the law of the Territory. Secondly, there is, during the rather extensive debate, absolutely no word spoken regarding the common property although the section implies the existence of the community system in the phrase, "and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that *held in common* with her husband." It is doubtful whether most of the speakers had any clear conception of the existing system. It is abundantly plain that those who took the main part in the debate, Messrs. Lippitt, Botts and Jones considered that the section was revolutionary with reference to existing law. Lastly, though the clause was taken *literatim et verbatim* from the constitution of the State of Texas of 1845, nobody mentioned that fact.

IV.

The debates on the clause of the constitution of 1849 guaranteeing the separate property of the wife brought forward as we see at least one champion of the civil law. It had other friends. Governor Burnett in his message to the first legislature which assembled at San Jose in the winter of 1849-50 recommended that both the Civil Code and the Code of Practice of Louisiana be adopted by the legislature, while the common law should be left to control the matters of crimes, evidence and commercial

³⁷ Id. 268.

³⁸ Id. 269.

law.³⁹ The Governor stated that he had given much attention to the matter, and thought the Civil Code and Code of Practice of Louisiana peculiarly adapted to conditions in California. Lawyers and judges would, in any event, be obliged to familiarize themselves with the civil law, and apparently the Governor thought they might save the time and trouble of studying two systems by using the codifications made by Livingston. He suggested that copies of the codes could easily be procured from New Orleans.

The Governor's recommendation seems to have called forth the protests of most of the lawyers of San Francisco.⁴⁰ A petition was presented to the Assembly, signed by eighty lawyers of that city, out of a bar consisting, it is said, of about one hundred members. The petitioners prayed that the common law be adopted, as modified by the American States, and that the simplest forms of practice and pleading compatible with the common law system be also adopted by the legislature.⁴¹

The bar was, however, not unanimous. Eighteen lawyers, headed by John W. Dwinelle, the learned author of the Colonial History of San Francisco, a work based upon his argument as counsel in the Pueblo case of San Francisco, and a man whose name is inseparably interwoven with the foundation and early history of the University of California, filed in the Senate a petition praying that the civil law, in its substantial elements, be retained.⁴² The petition was referred to the judiciary committee of the Senate consisting of Messrs. Crosby, Bennett and Vermule.⁴³ To the same committee had been referred a part of Governor Burnett's message which recommended the necessity of passing laws providing for the registration of the separate property of the wife.⁴⁴

The result of Mr. Dwinelle's petition was the elaborate report of the judiciary committee filed on February 27, 1850,

³⁹ Journals, Legislature of California, 1850, 33-34, 598-599.

⁴⁰ See the Report on the Adoption of the Common or Civil Law, Journals, 1850, 459. The report is also printed as an appendix to vol. 1 of the California Reports.

⁴¹ Journals, 1850, 735-6.

⁴² *Id.* 126. Besides Dwinelle, Horace Hawes, another distinguished San Francisco lawyer and Prefect of San Francisco, favored the civil law. Bates, Bench and Bar of California, p. 48.

⁴³ *Id.* 28, 126.

⁴⁴ *Id.* 65.

to which reference has already been made.⁴⁵ Mr. Crosby says, in the manuscript entitled "Events in California" in the Bancroft collection:⁴⁶

"As chairman of the judiciary committee, it devolved upon me to originate and examine almost the entire code of laws of the State. I never did work so hard as during the winter of 1849-50. Among other things there came up the question of the adoption of the common or civil law as the rule governing the decisions of the courts in the absence of statutes. There was quite an element of civil law in the legislature and many wanted that adopted as a rule, the old Roman law, the civil law coming down under the Latin races in contradistinction to the English law. Of course, being from the common law states, I thought it was vastly important that we should adopt the common law. The petitions on that subject were referred to the judiciary committee, and I made a report on the matter, the subject of common and civil law. I prepared the basis of this report, and was assisted in its filling up by Bennett, afterwards one of the judges of the Supreme Court.⁴⁷ That is one of the things I take some pride in. I was very much complimented on the work at that time, and my law friends in New York, to whom I sent a copy were so pleased with it that they sent me out a little testimonial, a handsome seal with my family crest engraved upon it."⁴⁸

The bill making the common law of England the basis of the jurisprudence of the State did not pass without some difficulties upon the floor of the Assembly. On its final reading, a substitute was proposed by Edmund Randolph of San Francisco, a member of the judiciary committee, in effect embodying the Governor's recommendation that the civil law be the basis of the jurisprudence of the new State.⁴⁹ He moved as a sub-

⁴⁵ Id. 459-480.

⁴⁶ Crosby, *Events in California*, 132. Although the credit for procuring the adoption of the simplified system of procedure is usually given to Judge Field, it would seem that Mr. Crosby was better entitled to the claim. Field was not a member of the first legislature.

⁴⁷ Shuck, *Bench and Bar of California*, 262, says that the adoption of the common law is owing to Judge Bennett more than to any other one person.

⁴⁸ A mischievous compositor or proof-reader evidently did not have so high an opinion of Mr. Crosby's work. At page 460 of the *Journals*, Mr. Crosby cited a little Latin which may be found in *Blackstone*. He referred to the industry of lawyers and spoke of the "viginti annorum lucubrationes." It appears in the printed report, "viginti asinarum lucubrationes."

⁴⁹ *Journals, Legislature of California*, 1850, 1123.

stitute that "the English law of evidence and the English commercial law as understood in the courts of the United States" be the rule of decision in cases not provided for by statute. The substitute was lost by a vote of 16 to 10, and the original bill was passed.⁵⁰ It became a law April 12, 1850.⁵¹ Mr. Randolph, though a native of Virginia and educated in that State had, like Jones, the friend of the civil law in the Convention, practiced for a number of years in Louisiana, where he had also been for a time clerk of the United States District Court.⁵² The chairman of the Assembly Committee which had the duty of presenting the bill and securing its passage in that body was A. P. Crittenden of Los Angeles. The bill was introduced in the Assembly by Mr. Brackett, of Sonoma.⁵³ In the Senate the bill was in charge of the judiciary committee of which Mr. Crosby was the chairman.⁵⁴

V.

We have seen that Governor Burnett's message had also recommended that measures be taken in accordance with the constitutional recommendation providing for the registration of the separate property of the wife, and that this portion of the message had been referred to the judiciary committee of the Senate. A bill was introduced in the Assembly covering not only this matter but also the whole subject of community and separate property of the spouses, by Mr. A. P. Crittenden, chairman of the Assembly judiciary committee.⁵⁵ It was afterwards amended in certain respects, not designated in the journal in the committee of the whole.⁵⁶ The 12th section of the act, providing for division of the community property upon divorce, met with some opposition. Mr. Wheeler moved to strike it out, but the motion was lost by a vote of 12 to 7.⁵⁷ Later on April 10, 1850, Mr. Brackett moved to refer the bill to a

⁵⁰ Id. 1124.

⁵¹ Statutes, 1850, 219. Mr. Goodwin states that the bill was signed by the Governor on April 13. Goodwin, *The Establishment of State Government in California*, 286.

⁵² Shuck, *Bench and Bar of California*, 261.

⁵³ Journals, Legislature of California, 1850, 1111.

⁵⁴ Id. 28, 324.

⁵⁵ Id. 1053.

⁵⁶ Id. 1162.

⁵⁷ Id. 1166.

select committee with instructions to strike out the same section, and the motion was carried.⁵⁸ But a reconsideration was had and the bill passed in its final form by a vote of 17 to 4.⁵⁹ It was reported in the Senate as passed by the Assembly on April 12,⁶⁰ and on April 13, was passed by the Senate under a suspension of the rules.⁶¹ It was signed by the Governor on April 17.⁶²

The measure which thus became a law, like the previous constitutional provisions upon the same subject, was plainly modelled upon the experience of Texas.⁶³ True, the act of April 17, 1850, does not slavishly follow the language of the Texas act of January 20, 1840, but the similarity of the two pieces of legislation leads inevitably to the conclusion that the draftsman of the California act had before him the Texas statute.

The Texas law in substance was as follows: Section 1 adopted the common law. Section 2 repealed all laws in force prior to 1840, with a few exceptions. Section 3 provided that neither the lands nor slaves which the widow may own or claim or which she may acquire during coverture by gift, devise or descent, nor the increase of such slaves, nor the paraphernalia of the wife as defined at common law shall become the property of the husband, but shall remain the property of the wife, provided that during the marriage, the husband shall have the sole management of such lands and slaves. It will be noted that the above definition of separate property was extended by the Texas Constitution of 1845, so as to include personalty.⁶⁴ It will also be noted that, as in the Mexican system, the increase of her separate property (other than slaves) does not constitute the separate property of the wife.⁶⁵

Section 4 of the Texas statute defines the common property.

⁵⁸ Id. 1166-7.

⁵⁹ Id. 1167.

⁶⁰ Id. 324.

⁶¹ Id. 326.

⁶² Statutes, 1850, 254.

⁶³ Laws of the Republic of Texas, An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws and to Regulate the Marital Rights of Parties. 2 Gammell, Laws of Texas. 177-180.

⁶⁴ See, ante, note 26.

⁶⁵ 1 Cal. Law Rev., 40.

All property, except lands and slaves, which either husband or wife shall bring into the marriage or shall afterwards acquire, other than by gift, devise, or descent, is common property, and during marriage shall be sold or disposed of only by the husband. It shall be first liable for the husband's debts and for debts contracted by the wife for necessaries. Upon the dissolution of the marriage by death, after the payment of such debts, the remainder of the common property shall go to the survivor, if the deceased have no descendant or descendants; if there be a descendant or descendants, the survivor shall have one-half of the common property, the other half shall pass to such descendant or descendants. The third and fourth sections of the Texas act are practically identical with the first, second and ninth sections of the California act.

Section 5 of the Texas statute provides, in almost the language of sections 22 and 23 of the California statute, that the parties may enter into a marriage contract, but cannot alter the legal order of descent as to their children, nor must they by such contract impair the legal rights of the husband over the person of the wife or the children of the marriage. Section 6 provides that marriage agreements, changing the rights of the spouses, must be executed before a notary, and provides how a minor may enter into such contract. The sections are practically identical with sections 16 and 20 of the California act. Section 7 of the Texas act, like section 21 of the California statute, provides that the marriage agreement cannot be altered after marriage. Section 8 in the Texas act and section 17 of the California act require such contracts to be recorded.

The Texas law provided that the husband should be required, by order of court, if he neglected to support the wife or to educate the children, to pay over to the wife out of her property, sufficient for those purposes (sec. 10). The California statute (sec. 8) provided that in case of mismanagement of the separate property by the husband, the wife might have a trustee appointed to manage it.

Express provision is made in the Texas act that all property possessed during marriage is presumed to be common until the contrary is proved (sec. 12). The California act omits this provision, but the presumption necessarily follows

from a reasonable construction of the statute, and has always been recognized by the courts.

The most peculiar sections in both statutes are those dealing with the application of the statute. Under section 13 of the Texas act, it applies (1) to all persons who enter into marriage in Texas after the passage of the act; (2) to all married persons, who, though married elsewhere, remove to Texas and acquire property there after the passage of the act. It does not apply to the rights of persons (1) married in Texas before the passage of the act or (2) married elsewhere but having moved to Texas before that date. The marital rights of such persons are to be governed by the pre-existing law.

The California statute (sections 14 and 15) is equally detailed on the subject of its application. Though the language is in many respects similar to that of the Texas law, there are some important differences. The California statute applies (1) to all parties to marriages thenceforth contracted; (2) to all persons married in the State prior to April 17, with respect to property subsequently acquired; (3) to persons married out of the State who shall reside therein and acquire property, with respect to such property.

Questions of legal interpretation arising under this and other sections of the Act of 1850 will be discussed in a later article. It is here sought only to compare the two acts for the purpose of showing the origin of the California statute and its connection with the law of Texas. The California act is the more neatly arranged and expressed, and contains in addition to the provision for the filing of the inventory of the wife's separate property, provisions for the mode of conveyance, both of which matters were provided for by other statutes in Texas.

In both States, the community property system was the only part of the older law that survived the shock of contact with the American common law. Why this happened, we can only guess. The fact that the few married people in both communities had entered into marriage under the former system and the inherent fairness of its fundamental idea of a marital partnership doubtless contributed to preserve the Mexican law upon this subject, in both jurisdictions.

Questions of some difficulty might have arisen in California

from the fact that the act adopting the common law and that adopting the common property system were passed on different days, and not, as in Texas, by the same act or on the same day. The case of a man or woman marrying in California between April 12 and April 17, or of a married man or woman dying between those dates might have given rise to some interesting questions. As the common law was in force for these five days, would not a man who married a woman between those days be entitled to curtesy in her lands? And would not a woman whose husband died between those days be entitled to dower in his separate lands?

Orrin K. McMurray.

Berkeley, California.