Seventy-five Years of California Jurisprudence

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Seventy-five Years of California Jurisprudence.

The date of the admission of California into the Union marks almost precisely the meridian between the birth of the nation and the present day. Seventy-four years and a couple of months carry us back from September 9, 1850, to July 4, 1776. So that in honoring the seventy-fifth anniversary of California statehood, we are recalling an era as near to that of the Declaration of Independence as our own is to that of Clay's great Compromise. 1776 created a nation out of peoples dwelling on the shores of the Atlantic; 1850 witnessed the final extension of that nation to the Pacific. Difficult as it is to realize the fact in all its connotations, the pioneers who laid the foundations of our state were nearer to the days of Washington, Adams and Jefferson than to our own.

The first three-quarters of a century of our national existence had witnessed a territorial expansion and a growth of population and resources unique in world history. Our area had increased from the 827,844 square miles ceded by the Treaty of Paris to 2,939,021 square miles; our population from about 3,000,000 to 23,191,876. Our resources had increased in even greater proportion. Important inventions had produced great changes in life. The first railway in our country, using in part wind and sails for the motive power, had been built and was operated in 1830; by 1850, the railway mileage, now employing only steam, had increased from 23 miles to 9,021. The first telegraph line had been put into operation in 1844 between Washington and Baltimore. Fulton, Goodyear, McCormick, Howe, Morse, Hoe, and others, contributed inventions that revolutionized industry and social customs.

The period had witnessed other changes even more profound. First of all, we had become conscious of our nationality, although it was to take a bloody civil war to settle finally the paramountcy of

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1 Address before California State Bar Association, September 4, 1925.
the nation over the states. Our literature responded to this development and began to draw its subjects and inspiration from native sources. The structure of our society suffered radical transformation. By 1845 practically the last property qualifications for voting and holding office had disappeared from the statute books and manhood suffrage was generally prevalent. The common school system had been almost universally established, and elementary education was within the reach of almost everyone. In short, the democratic tendencies had gained ascendency in our national organization. Agricultural interests were immensely preponderant over the manufacturing and commercial interests, and the virtues and defects of the civilization were those incident to the farmer's life.

It was inevitable that law and its development should reflect existing society, and therefore that the securing of the rights of the individual should have occupied the foremost position in legal science. Consequently, the period is characterized by such important movements as that for the relief of married women from the limitations of the common law, especially with regard to their property interests, the humanization of the penal code, the abolition of imprisonment for debt, the establishment of statutory exemptions from execution, the evolution of the homestead idea. Much of this important legislation had its origin in the South. Thus, Mississippi, in 1839, was the first state to make a statutory incursion into the common law of husband and wife by passing an act authorizing a married woman to hold her property for her separate use by ante-nuptial agreement. In the next decade, similar and even more liberal, statutes were passed in most of the states. The homestead law, a conception recognizing the rights of humanity as against the formal compulsion of law, also owes its origin to the South, the first homestead act having been adopted by the Republic of Texas in 1839. Kentucky led the way in the abolition of imprisonment for debt by its statute of 1821. Obviously, many of these laws owed their origin to the fact that the debtor class was largely in control of the organs of legislation. Such, for example, must have ben the origin of the statute of Mississippi of 1822, re-enacted in several other Southern States, under which defences to bills and notes available against the payee were open also as against bona fide purchasers. The spirit and social conditions which prompted these so-called "anti-commercial acts" at times found extreme expression in attempted repudiation of their debts, particularly those incurred in support of railroad construction. But though there may be much to criticize in some of the results of the movement, it nevertheless
reflected, if sometimes distortedly, the fundamental theory of democracy in regard to the supreme worth of the individual. It is true that the jurisprudence of England and that of the continent were also subjected during this period to the influence of the growing ideas of equality, but the results in the United States were more practical, more immediate, more easily defined than elsewhere.

Side by side with the democratic movement, though at times that movement was hostile, was the firm establishment of the common law of England as the basis of our jurisprudence and its adjustment to meet changing needs. This task was the great achievement of the bench and bar. While certain names, like Kent and Story and Shaw, stand forth as leaders in this service, it was, in fact, chiefly the result of the co-operative efforts of many whose names are not written in large letters on the pages of history. New situations resulting from the introduction of railways and other corporate enterprises produced new problems for solution. Could a private corporation, for example, be held in tort for the negligence of its servant? The question is one that causes us no difficulty but gave rise when broached to some judicial aberrations, and required the courts to reconsider the corporation idea, as well as the bases of tort liability, before the modern notions triumphed. How, it was argued, could an artificial and fictitious being have a will sufficient to intend an assault or to be guilty of negligence or libel? The philosophy of individualism was ill-adapted to embrace the new concepts, and required modifications to meet the new situations. Yet the courts and the lawyers were able gradually so to mould the principles of law as to harmonize them with the needs of the day. Thus, the right of laborers to combine and to declare a strike for the purpose of exerting economic pressure to secure better wages was in spite of earlier views of English judges to the contrary recognized as one of the rights of individuals under the common law. The period, indeed, admirably illustrates the process of judicial law making as described by one of our greatest legal thinkers, Judge Cardozo. "Life," he says, "casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds which have taken form and shape from life."

A people so intelligent and progressive early began to realize the inadequacy of the machinery of the existing civil procedure to meet life. That system of procedure, the product of forces operating through centuries, was replete with rules that had lost all relation to common sense. Such a rule as that which excluded the testimony of the parties to an action to prove the truth or falsity of the claim
made in the action, though it found defenders in those eulogists of the past that abound in every generation, was shocking to the practical mind of the average American citizen. The assaults of Bentham in England found echoes on this side of the Atlantic; the anomaly was gradually removed by legislation. Finally, the whole cumbrous system of forms of action at law and bills in equity was subjected to criticism, and reforms, varying from conservative improvement to radical destruction, were attempted in several states. Under the influence of David Dudley Field, New York, in 1848, took a radical step and adopted a Code of Civil Procedure, which substantially put into force the instructions given by the Legislature to the Commissioners appointed as draftsmen, "to provide for abolition of the present forms of action and pleading in cases at common law; for a uniform course of proceedings in all cases whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues so far as the same shall by them be deemed practicable, and any form and proceedings not necessary to ascertain and preserve the right of the parties."

The democratic movement of the forties, in spite of its great virtues, was responsible for ills from which we still suffer. In its distrust of privilege and in its devotion to equality, it debased the standards of the legal profession and did injury to the independence and ability of the judiciary. During this period of our history, admission to the bar was by statute not infrequently made the privilege of every citizen, without inquiry into fitness, and the system of a judiciary composed of judges owing their position to appointment by executive or legislature and holding office during good behavior, was swept away in deference to the mania for direct election by the people, with frequent elections. It is difficult to exaggerate the evil effects of these twin errors upon our legal system. The first we are perhaps beginning to cure by stricter inquiry into the qualifications as to ability and character of those seeking admission to the bar. The experience of a typical state may be of interest. In 1843, the legislature of Maine enacted the following law: "Any citizen of this State of good moral character, on application to the Supreme Court shall be admitted to practice as an attorney in the judicial courts in this State." The statute was practically ineffective because the bar of Maine refused to acknowledge such statutory lawyers, and the public learned to avoid them. But it was not until 1881 that an examination by the court as to ability, two years training in a law office and proof of good character were required. New Hampshire also authorized "moral character" lawyers, so called, by
a statute of 1842, and with results similar to those in Maine. In 1872, the State returned to the system of expert qualification. Indiana embedded her prejudice against lawyers in a section of the constitution of 1852, still in force, under which every person of good moral character, shall be entitled to admission to practice law in all courts of justice. Our own State, under the Statute of 1851, required that applicants for admission to the bar should undergo strict examination in open Court as to their qualifications, with a provision for District Court lawyers, later amended to include Superior Court lawyers. It was not until 1895 that the “Superior Court attorney” ceased to be a possibility, and it was not until 1919 that examination for entrance to the profession was placed upon a more definite basis by the establishment of a board of bar examiners. Gradually the States of the Union are returning to that earlier condition of which De Tocqueville was able to say, in 1835, “The special information which lawyers derive from their studies ensures them a separate station in society, and they constitute a sort of privileged body in the scale of intelligence. Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority.” The old prejudice against an expert bar, it must be confessed, still lingers. Measures such as the recent Sample bill against the unlawful practice of the law and the bill providing for the incorporation of the bar, meet with obstacles in popular opinion or in the established dogmas of political thinking, but slowly and inevitably the efforts of the best elements in the legal profession are bringing about improvement in the character and attainments of the average lawyer.

The injury done to the judicial system by the democratic movement of the second quarter of the nineteenth century was even greater than the injury suffered by the bar. In thirty-three of our states the judges are elected by the people, and in all cases for terms varying in length, but in none of these states during good behavior. The judiciary in these states is perforce required to appeal to the favor of the public. The wonder is that under such circumstances the character and the ability of our bench has, on the whole, remained so high. The weakness of the elective system betrays itself chiefly in a certain laxity in regard to details in the administration of procedure, such as a lack of control over counsel in examination of witnesses and in argument, and a tendency toward looseness in the granting of excuses of citizens called on jury duty. In spite of the unquestionable evils attendant on a properly elected judiciary one can scarcely express the hope that the system of judicial selection
will soon be abandoned. On the contrary, there has not only been an increasing disposition to localize the judiciary by electing trial magistrates in districts, but there has been some tendency to add to the uncertainty of tenure by the enactment of the judicial recall. In one State, Mississippi, where the elective system was abandoned after a trial of sixty-eight years, the people soon demanded and secured a return to that system. When the magistrate selected by his neighbors by popular vote—and it must be remembered that the direct primary has rendered him more immediately the servant of the people rather than of the law—is forbidden from expressing his opinion as to the weight which should be given to testimony and from commenting on the evidence, when his functions are limited merely to ruling upon the admissibility of evidence and reading abstract statements of law to the jury, in short, when he is made at best the umpire in a game of skill, should it be matter for amazement that our court machinery does not operate with the utmost celerity and precision? The bar, perhaps, should bear the onus of some of the blame, the substantive law and the procedural law too should have a share of just criticism, but beyond and above the faults of the bar, beyond and above the defects of the substantive law, and of the law of procedure, lies the essentially defective system of our judicial organization. Are the critics of that system, however, willing to concede to the judges that judicial independence, that certainty of tenure during good behavior which the Commons of England demanded from the Crown when they expelled James II, to accord them the privilege of free comment on the evidence, to release them from a host of trivial limitations, such as the duty of written opinions and the necessity of deciding cases within strict limits of time, to take example from England, from Canada, or from our own federal system, and restore the judicial office to the power, the dignity, the honor it possessed in the earlier days of our Republic? It may be that the ideal of a democratic society is not after all government by law but government by opinion, or forces independent of law. If so, our judicial system answers as well as institutions usually answer their purpose, the aims of our society. But as lawyers, sworn to support the law, we cannot, without stultifying our profession, concede that courts exist for any purpose save to apply the rules and principles of law to situations of fact arising out of the complex interactions of life. As lawyers, we must insist, it seems to me, that our judicial organization is indeed ill-fitted to achieve that end.

Whatever may be said in praise or criticism of the democratic
movement in the second quarter of the nineteenth century, it remains true that by the end of that era, the fundamentals of the common law of England constituted the basis of jurisprudence in the various states, with some slight influence from continental sources. The three cardinal principles in that system, according to Dean Pound, are the idea of the supremacy of law as distinguished from the Byzantine theory of the will of the sovereign, the doctrine of judicial precedent, and finally, trial by jury. These principles had fully triumphed, not without struggle. There had been danger, indeed, during the period of the French revolution and the Napoleonic wars that the hostility toward England and the admiration for the liberty, fraternity and equality of Danton and Robespierre and for the achievements of the great First Consul might lead our people to the abandonment of the English law. The radicals in New Jersey, who secured the passage of a statute in that state in 1799 to the effect that no decision made or treatises published in Great Britain after the 4th of July, 1776, should be quoted in any New Jersey court, was not alone in its zeal. Kentucky, in 1807, followed New Jersey with a similar provision, and Henry Clay in argument before the Supreme Court of that commonwealth was stopped when he cited Lord Ellenborough's decision as an authority on the law of England. In 1810, Pennsylvania also adopted a like statute. Jefferson in 1812, in a letter to Judge Tyler, of the United States District Court in Virginia said, "I deride with you the ordinary doctrine that we brought with us from England the common law rights. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. But it was that of men who felt their rights before they had thought of their explanation. The truth is that we brought with us the rights of men," and he then proceeded to expound the advantage of getting rid of all Mansfield's innovations by rejecting the notion of the continuity of the common law. And the staunch though peppery John Adams, the man who gave us Washington as Commander-in-Chief in 1775, who later gave us Marshall as Chief Justice, in a letter to Joseph Story published in the life of that jurist by his son, gave utterance to expressions concerning the decisions of Lord Mansfield not a whit less hostile than those of his great contemporary and political opponent, the author of the Declaration of Independence. In spite of all; however, the common law of England, moulded indeed more nearly to the heart's desire of the American became everywhere in the United States, save in Louisiana, the basis of our jurisprudence.

It was almost inevitable that the conquest of California should
carry the common law westward to the Pacific. Yet here too the victory was not won without a struggle. Theoretically, and under the principles of international law, it is true, the Spanish-Mexican law continued in force from the date of the raising of the American flag by Commodore Sloat at Monterey on July 7th, 1846 until the formal adoption of the common law by act of the legislature on April 15, 1850. But the thinly settled Pueblos and Missions were, to quote the language of Judge Bennett in the Preface to the first volume of California reports, "on the outskirts of civilization. They needed but few laws. The government was of a patriarchal character, little regard being paid to the strict letter of the laws, either of Spain or Mexico. . . . 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 administered 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."

Between the traditional rule of international law, plainly adapted to conquests of settled territory, and the actual situation in California, where the vast majority of inhabitants knew only the common law, it was, indeed, difficult to make decision. The Supreme Court when the question was presented first held that under the conditions existing in California, the common law of contracts should govern commercial transactions had between citizens of the United States prior to 1850 and after July 7, 1846. Later, however, on rehearing, it decided in favor of the Spanish-Mexican law notwithstanding all the difficulties of ascertainment and enforcement. Meanwhile, the legislature had adopted the act of April 13, 1850, re-enacted as section 4468 of the Political Code: "The Common Law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of the State of California, shall be the rule of decision in all the courts of this State." There had indeed been opposition in the legislature from men of force, ability and influence. Governor Burnett in his first message had recommended the adoption of the Civil Code of Louisiana and the Louisiana Code of Practice; John W. Dwinelle, the author of Dwinelle's Colonial History of San Francisco, one of
the founders of the University of California, and later a member of the commission to revise our codes, with many other lawyers of San Francisco, petitioned that the civil law be retained as recommended by the Governor; Horace Hawes, a prominent lawyer of early days, in his inaugural address as prefect to the ayuntamiento of San Francisco advocated the retention of the civil law. But the triumph of the common law in the legislature was complete. Nothing soon remained of the Spanish-Mexican law, save the doctrines concerning community property, and those in so altered and strange a form that Escriche or Sanchez or Febrero would never have recognized the original text after its gloss by interpreters guided by the spirit of the common law.

Possibly the adoption of the common law was the most important achievement of the early law makers in California, but the era witnessed the accomplishment of other acts in the advancement of our jurisprudence, interesting as shedding light upon the juristic ideals of the time. The Constitution of 1849, if one can judge from comparing it with the State constitutions contained in a manual published in 1846 for the use of the constitutional convention added scarcely any new ideas to the stock of constitutional law. It is surprisingly similar in many respects to the constitutions of Texas adopted in 1845 and those of Iowa and New York adopted in 1846. One might think that he detected the Spanish-Mexican influence in section 13 of Article VI: “Tribunals for conciliation may be established, with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment to be obligatory on the parties, except they voluntarily submit their matters in difference, and agree to abide the judgment, or assent thereto in the presence of such tribunal, in such cases as shall be prescribed by law.” But the article is taken verbatim from the New York Constitution of 1846 Article VI, section 23. The spirit of the common law has ever been so strongly in favor of a contentious system of procedure that the seed fell on barren ground. In Von Schmidt v. Huntington,2 Justice Bennett gives some account of the Spanish-Mexican proceedings in conciliation. But apparently it was the New York example, not the existing Spanish-Mexican system which was responsible for the section in the constitution of 1849.

Distrust of the legislature was already a commonplace of democracy when California’s convention met at San José, and this distrust is reflected in several provisions of the constitution of 1849—witness

2 (1850) 1 Cal. 55.
the requirement that each bill should embrace a single subject, an attempt to legislate honesty into presumably dishonest representatives, and an insistence of the confiding faith of our people in the efficacy of rules and written legislation. Corporations, too, might not be formed by the legislature under special acts—a result of experience in bribery by rival commercial interests. An interesting clause, retained in our present constitution, is the provision disqualifying parties and seconds in a duel from holding office or enjoying the suffrage, which seems to have been borrowed from the Texas constitution. It is by no means clear that this clause ever produced any effect; the early history of the state was characterized by an enormous number of duels in proportion to the population. The practice died out because it became the fashion not to issue or accept challenges to duels, not because of the written law. The fate of duelling provokes the thought that fashion may produce deeper effects in the evolution of jurisprudence and the alteration of society than the most Draconian code, unsupported by opinion.

An interesting sidelight on the fluctuation of opinion in respect to an important matter in our economic system is afforded by the history of usury statutes. The story also involves changing economic conditions and their reflection in legislation. In some of our older states, for example, in New York, the laws against usury have long been severe in the extreme. Any contract for the payment of interest beyond the legal rate, 6%, is usurious under the New York law, and the penalty for disobedience of the statute is to render the obligation void. Under the statute, in 1918 the Court of Appeals of New York felt itself obliged to hold void even in the hands of a bona fide purchaser, a note bearing on its face 6% interest, but usurious in fact by reason of the payee's withholding a portion of the principal at the time of the loan. One might wonder how in the face of the decision in Sabine v. Paine, one may, with any sense of security, discount a note or bill drawn and payable in New York. Manifestly this law was drafted under the belief that borrowers would be protected against the rapacity of lenders, a view traditional in the early economic legislation of England and the colonies. But Jeremy Bentham, in his "Defense of Usury", John Stuart Mill and other economists and publicists, believed they had demonstrated that usury laws are always evaded by the necessitous debtor and the greedy lender, that the borrower ultimately pays the increased cost due to the risk that the lender takes in violating the statute. A wave

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3 (1918) 223 N. Y. 401, 119 N. E. 849.
of legislation modifying and repealing usury statutes occurred during the first half of the nineteenth century, and the statute of California on that subject passed in 1850, fell in with the prevailing Benthamite theories. Perhaps, too, the needs of pioneer communities contributed to liberal views as to the amount of interest that might be charged on loans. The act of March 13, 1850, provided that “parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due on any contract.” And thus the law of California remained until November 5, 1918, when the people of the State approved an elaborate initiative measure, forbidding usurious interest, in whatever guise it is taken. Plainly, the theories underlying the two statutes are fundamentally opposed. One rests on the belief that the utmost freedom of contract best suits the needs of the individual and the welfare of society; the other, on the conviction that in the complex organization of modern society, the privilege of being as reckless or foolish as one wishes must be restricted in the interest of the general good.

Many of the statutes of our pioneer legislatures—which originally met annually—are interesting for the light they shed on the social life and customs of the day. Thus, an act of 1851 licensed gambling houses, though certain percentage games were declared illegal. Strangely enough, the same legislature declared lotteries illegal. An act of the same year may be compared with section 10 of the Code of Civil Procedure defining holidays. While our code section enumerates twelve regular holidays, with provision for extensions where they fall on Sundays, the Act of 1851 recognized only the first of January, the fourth day of July and the 25th day of December, “commonly called Christmas day.” Sundays were not defined as holidays in the early act; they are now so designated. What a striking illustration of the change in customs, manners, social conditions!

The act of April 25, 1851, entitled “an act providing for securing the State Prison Convicts” is illustrative of conditions where the state has not yet fully undertaken the primary purpose of dealing finally and exclusively with offenders against the penal code. It begins in this wise, after the enacting clause: “§ 1. M. G. Vallejo and James M. Estell are hereby made the lessees of the prison, prison grounds of the State and of all prisoners who are now in custody under sentence of imprisonment in the State Prison, and of all persons hereafter convicted in this State who may be sentenced to imprisonment in the State Prison by sentence of a competent court.”
of the penal problem, would fortunately be inconceivable today. And equally unthinkable would be such an act as that approved April 15, 1852, which deals with the situation, to quote the language of the Act, "when a person held to labor in any State or Territory of the United States under the laws thereof, shall escape into this State," and which denies to such "fugitive" the "privilege of testifying in any proceeding under the Act." The circumlocution "person held to labor" is a sop to the conscience of the legislators in a state whose constitution and whose public opinion forbade slavery, but which was obliged to deal in some manner with the troublesome matter of fugitive slaves. The act forbidding the testimony of any black, mulatto or Indian to be received in a criminal case in favor of or against any white person, and defining a mulatto as one having one-eighth part or more of negro blood and an Indian one-half of Indian blood gave rise to some peculiar decisions. In People v. Hall, the Supreme Court held that for the purposes of the statute a Chinese was an Indian, and in the case of People v. George Washington, decided in 1869 after the adoption of the Fourteenth Amendment and the Civil Rights Act, extended the privilege of immunity to negroes. George Washington, a negro, was charged with robbing a Chinese, and the only witnesses against him were of that people. The majority of the court held that by the Fourteenth Amendment to the United States Constitution, and the Civil Rights Act passed by Congress, Washington was entitled to the same privileges and immunities as white persons, one of which seems to have been the immunity from the adverse testimony of his Chinese victim. The statute forbade the testimony of Indians, blacks, and Chinese as against white men, but the court in effect held a black defendant to be a white man for the purpose of the statute. There were dissents in both the Hall and the Washington cases. Though slavery never existed in our State, the condition of the free black and of other persons not of the white race; prior to the Fourteenth Amendment, was, indeed, almost that of one outside the law. Protection of their persons and property must have been a sham under such legislation. However, we must not be too critical of a past era, for even the free white, under the rules of evidence then existing as a survival of the English common law and maintained in sections 393 and 417 to 423 of the Practice Act of 1851, might have been unable, under the rules

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^4 (1854) 4 Cal. 399.
^5 (1869) 36 Cal. 658.
forbidding the testimony of parties in their own behalf, to prove a civil injury to his person or property or to recover on a contract, not evidenced by writing.

The criminal code of the fifties was simple compared with our own, at least so far as concerns the enumeration and definition of offences punishable. It is of interest to note that it too represents the influence of the tradition, perhaps the product of Puritan prosecutions by the Star Chamber, the Council and the King's judges, that no act should be a crime unless defined by statute. The spirit that we have already referred to as manacling the magistrate in his conduct of the trial here found expression in a strict definition of penal offenses with the consequent limitation of the power of courts to create law by the judicial process. The so-called common law crimes ceased to exist, and it was deemed better that occasionally a wrongdoer should escape, because his act though base and injurious to society, had not been defined, than that a judge should have power to declare an offense for the first time after its commission. Whether or not, as some cynics think, civilization is a disease, it is obvious that the number of acts defined as crimes is constantly increasing. Not a session of the legislature passes without a number of new definitions of acts as crimes, which before had been immune from legal consequences. But the character and definitions of crimes were comparatively limited in 1850. There were, for example, no degrees of murder, and the punishment for murder was death. Manslaughter was defined as it is at the present day. Robbery, grand larceny and petit larceny were defined in practically the same way as they are today, and punishment by imprisonment and fine imposed under the Act of 1850. The legislature of 1851, however, seems to have been rather bloody-minded. It made robbery and grand larceny punishable by death, in the discretion of the jury, and petit larceny by flogging. In People v. Tanner, the Supreme Court felt itself obliged to affirm a conviction of grand larceny with a sentence of death, and a note to the official report states that the defendant was executed pursuant to the sentence. The court, however, said: "We regret that our legislature have considered it necessary to thus retrograde, and in the face of the wisdom and experience of the present day, resort to a punishment, for less crimes than murder which is alike disgusting and abhorrent to the common sense of every enlightened people." Seduction was not a crime, nor under the Practice Act of 1850 might a civil action be maintained.

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6 (1852) 2 Cal. 257.
for that wrong. The latter provision, however, was repealed in 1851. It may be interesting to note that under the rules of the common law applied to the definition of personal property in the larceny statute, a defendant who stole gold quartz from the ledge was not guilty of the crime, for it was real estate.\footnote{People v. Williams (1868) 35 Cal. 671.}

The last named case is typical of much of the judicial work of the courts during the pioneer period of our legal system. The task of the judges was to fit the legislation and the customs of a pioneer community into the setting of the common law and equity system. In performing this task, much practical wisdom was demanded. It demanded not alone learning in the existing legal system, but a vision of the actual life of the community. Such a rule, for example, as that of the common law requiring owners of cattle to prevent them from trespassing on their neighbor’s land, was manifestly unsuited to a country where stockraising was a prime industry and agriculture subordinate, where the expense of fencing would usually exceed the value of both land and cattle. Again, the rules of the English prerogative concerning ownership of precious minerals, were unworkable, and in fact were set aside by the customs of miners. Stephen J. Field early recognized the practical needs of the situation, and secured, he tells us, the adoption in the Practice Act of 1851, of section 621, now section 748 of the Code of Civil Procedure, allowing evidence in actions respecting mining claims of the customs in force at the “diggings” and making such customs govern the decision when not in conflict with the laws of the State. The subsequent decision in Moore v. Smaw\footnote{(1861) 17 Cal. 199.} written by Field when a Justice of the Supreme Court settled the law in favor of the customs of miners and against the royal theory of precious minerals. So, too, the enunciation by the courts of the rule regarding priority of appropriations in running streams departed from the common law rules and initiated a new doctrine on the subject.

Most of the work of adaptation of law to social needs, however, was not marked by such striking instances of the exercise of judicial power as those just referred to. In the main, it consisted in the ordinary “interstitial” legislation that Mr. Justice Holmes attributes to courts, the coral-reef method of building. In this pioneer country, every branch of our legal system, the law of persons, obligations, property, succession, procedure, constitutional law, criminal law, the law of public officers, required careful, conscientious and minute
study and application to the facts involved in litigation. First of all, the land titles of the State, left in the utmost confusion, required to be settled. The unfamiliar Mexican law must be applied, and such great interests as those depending on the great Pueblo case involving the title to the lands in the city of San Francisco determined with the least possible amount of injustice. Researches must be conducted in a foreign language, with inadequate means. The very statutes of Mexico, applicable to upper California, were frequently not printed and sometimes could not even be found. Novel questions in actions between successive possessors of land, almost metaphysical doctrines in regard to adverse possession, constructive possession, forcible and unlawful entries and detainers must be settled reasonably. Moreover, a new system of pleading and practice required interpretation and application. The novel and unfamiliar law concerning community property, the changing legislation concerning the wife's separate property and her powers to contract obligations, were repeatedly before the courts. To add to the difficulties, in the earlier part of the period, there existed an almost utter lack of order in judicial proceedings before the judges of the Courts of First Instance and Alcaldes, Mexican and American. The confusion is well illustrated by People v. Daniels,9 where defendant was convicted in 1849 of the crime of murder on an indictment presented by a grand jury impanelled by the judge of the Court of First Instance in the District of San Francisco, Territory of Upper California. The Supreme Court said: "It will be unnecessary to enter into a detail of the proceedings in this case from the fact that the laws of the country then in force were but imperfectly understood, and error and irregularity are found in all of the proceedings of the Courts, especially in criminal cases. The errors in this record are so numerous that the execution of the defendant would not be the judgment of the law, but the mere will of the court and executioner. We therefore think that the defendant ought again to be put upon his trial upon an indictment presented by a regular grand jury, and that the defendant be held in custody to abide the order of the District Court." And in Mena v. Le Roy10 in the same volume at page 216, the court had before it on appeal from the same court, to use its own language, "some kind of a proceeding" against the master and owners of the ship Rolland. The court says, "for what the action was brought nowhere appears nor does it appear that

9 (1850) 1 Cal. 106.
10 (1850) 1 Cal. 216.
there were any pleadings in the cause on either side, but that there was some kind of a trial before the Alcalde." Afterwards the matter seems to have got before the Court of First Instance, and was affirmed by him. "After a diligent examination, we can scarcely procure a glimpse of light into the nature of his [the plaintiff’s] demand." The Supreme Court said that the record presented no "tangible point" for decision and ordered a new trial. Though the matter was subsequently explained, the decision is novel, though perhaps justifiable, in presuming against the regularity of proceedings before magistrates who suffered such records to be entered. Even the district judges appointed in 1850 often seem to have had very vague notions as to their power and privileges. The struggle between Judge Turner and Stephen J. Field as recounted in the early pages of our reports put at rest the extreme claims of judicial power, amounting to tyranny, that characterized at least one judge. Field triumphed in every proceeding, his commitment for contempt was annulled, his disbarment was set aside. The incident was an important one in the establishment of order under the common law in a frontier community too ready to resort to the rule of force or arbitrary edict.

The uncertainty in respect to the application of law in such a community was undoubtedly one of the moving causes that led to the codification of our legal system under the Codes going into effect in 1873. Another, and possibly more immediate cause, was the interest of Field in the movement for codification of which his brother, David Dudley Field, was the chief American exponent. But lying back of the whole matter were centuries of discussion. Bacon as early as 1592 had proposed that the English law be codified, and Sir Matthew Hale in the time of Cromwell actually headed a commission charged with that purpose. In some of the colonies so-called codes had even been adopted. Thus, Connecticut in 1650 passed such a code, really consisting of an alphabetical arrangement of statutes, prepared by Roger Ludlow. With the opening of the nineteenth century and the influence of such men as Bentham, Mackintosh, Austin, and Romilly in England, the movement was closely united with that of legislative reform. The notion that underlay the theories of these men, which coincided in many ways with the democratic and revolutionary tendencies toward equality, was expressed, in perhaps an exaggerated form by Jeremy Bentham in his address in 1817 to the people of the United States: "Friends and fellow men," he says, "Accept my services,—no man of tolerably liberal education but shall, if he pleases, know—and know without
much effort—much more law than, at the end of the longest course of the intensest efforts, it is possible for the ablest lawyer to know at present. No man, be he even without education in other respects—no man but in his leisure hours, so he can but read—may, if it so pleases him, know more of law than the most knowing among lawyers can possibly know at the present.” In our own country, the response was the adoption of such Codes as Livingston’s Louisiana codes and the Revised Statutes of 1827 in New York, which so grieved Chancellor Kent by their ruthless demolition of the common law learning of tenures and estates. In Massachusetts a commission was appointed to consider codification and reported to Governor Everett in 1836. The report which was signed by Joseph Story, Theron Metcalf, Simon Greenleaf, Charles E. Forbes and Luther S. Cushing was not unfavorable. The efforts of David Dudley Field in New York culminated in the adoption of the Code of Civil Procedure for that State in 1848, though his draft of a Civil Code failed of adoption by his own State, though later forming the chief basis for our own Civil Code. Georgia in 1860 adopted a Civil Code prepared by Howell Cobb.

In our state a bill was introduced as early as 1860 to provide for preparing a code for the State, but failed of passage. Governor Stanford in 1863 twice urged in messages to the legislature the desirability, nay “the absolute necessity”, for codification. There seems, however, to have been some difference of opinion upon the subject. Attorney General McCullough, in his report in 1865, was scarcely favorable to the plan. In the session of 1870, however, an act was passed providing for a commission to revise the laws, and pursuant to the act the Governor appointed the commissioners, Messrs. Creed Haymond, J. C. Burch and Charles Lindley. Messrs. Charles A. Tuttle and Sydney L. Johnson acted as advisers to the commissioners. The Codes prepared by the commissioners were adopted by the legislature in 1872, and a commission of revision consisting of Stephen J. Field, Jackson Temple and John W. Dwinelle was appointed to examine the Codes thus adopted and to suggest amendments. Their work was presented to the legislature of 1873-4, and their recommendations in regard to certain sections adopted. This is not the time or place to discuss the Codes, their merits and demerits. That has recently been done in an admirable manner by Mr. Maurice E. Harrison, the former Dean of Hastings College of the Law. It may not be amiss to quote, without comment, from a pamphlet issued by David Dudley Field, and preserved by his brother, Stephen, the opinion of Chief Justice Wallace, which may not be
generally available. The Chief Justice said: "I think the Civil Code the most important and beneficial piece of legislation that has ever been enacted in California. It has effected more for our people than all other legislation taken together since the foundation of the State. I have never seen a criticism of it which was, in my judgment, well founded. I believe that while at first there was some inclination in our profession to hesitate about the propriety of its adoption, our bench and bar are now, with remarkably few exceptions, unanimous in its commendation."

In spite of the unrest and agitation that accompanied its inception and final adoption, the Constitution of 1879 made but slight impression upon the legal structure of the State. The ideas which gave it birth were in large part those involved in the Granger and Greenback movements, combined with local causes, such as Chinese immigration and the hard times resulting from the collapse of the Comstock mining boom. The chief evils that the Constitution, in rather a futile way, attempted to cure were the real or fancied inequalities in the taxation system, under which it was believed the burden was shifted from the rich to the poor, and the evils inherent in special legislation, which seems to have been regarded as a chief source of the corruption of government. Indeed, perhaps the outstanding feature in the debates is distrust of the legislature joined with a blind hatred of corporate enterprises. This distrust was part of the political background of the convention. The Workingmen's party in its platform in 1878 had, for example, declared in favor of limiting meetings of the legislature to one in every four years. Another and most striking element in the debates in the convention was the rather prevalent tone justifying and favoring extreme state's rights doctrine, perhaps due to the fact that the federal government had been unwilling to attack the problem of Chinese immigration. We seem to have gone back to the days of Calhoun and of the Virginia and Kentucky resolutions when Mr. Ringgold declares, "The Constitution of the United States is a political abortion. . . . It has outlived its usefulness. . . . I believe in State sovereignty and shall ever stand by it as long as I live." Mr. McFarland (afterwards a Justice of the Supreme Court), himself a loyal supporter of the Constitution, taunted his opponents, declaring "It is a mistake to say that the people of California are loyal. No such thing. . . . Perhaps a majority of this convention are in favor of secession." But in spite of loose talk about the federal government, the state legislatures of the past, the corruption of governments, the oppression of the poor by unjust taxation, in spite also of the drastic
legislation embodied in the Constitution concerning corporations and Chinese, the practical results of the work of the convention were almost negligible in changing the actual course of legal development. Perhaps the most interesting experiment embodied in the Constitution was the establishment of the State Railroad Commission. The proposed remedy indicated a willingness to turn away from the neutrality of the common law, with its negative prohibitions, and to introduce with reference to the railroads in their relation to the public a positive element of control. The scheme actually proposed was a failure, but it marks a change in modes of thought concerning social and economic problems that is of great significance, and that later bore fruition in a practical application of the administrative principle to public service corporations.

The last quarter of the nineteenth century was, in the main, a period of legal quiescence. There was, of course, some development in legal doctrine, but neither in the field of legislation nor in that of judicial decision was the spirit of reform significantly active. In fact, a strong tendency might even be noted to revert to earlier conditions. Thus, the important case of Lux v. Haggin, the reasoning of which is largely based on historical precedent, reëstablished the common law doctrine of riparian rights to the astonishment of a large part of the community and of the legal profession. Moreover, and indicative of the same tendency, there was to a marked degree, a return to early nineteenth century conceptions with regard to the spirit in which procedure was treated. A statute commanding courts to disregard errors in pleading and practice unless the party complaining showed in the Supreme Court that he had suffered injury by reason of such error, was said by the Supreme Court to be unconstitutional. It is during this period that we find such rulings as that in People v. Lee Look to the effect that an indictment omitting to state that Lee Wing, the victim, was a human being was fatally defective, even after verdict. A surprisingly large number of cases turned upon rules of evidence, pleading or practice. In truth, one can scarcely point to any major developments in jurisprudence by the courts of California during the period, and the statute book is equally devoid of novelty. The limits of the police power were even less clearly defined than at present, and legislatures, even if willing to try experiments, were restrained by fear of the

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11 Lux v. Haggin (1886) 69 Cal. 255, 10 Pac. 674.
12 San Jose Ranch Co. v. San Joaquin Land, etc. Co. (1899) 126 Cal. 322, 58 Pac. 325.
13 (1902) 137 Cal. 590, 70 Pac. 660.
annulling power of the courts under the Fourteenth Amendment. The constructive work of the lawyer, in shaping existing principles to meet the needs of business and social life, was probably at an equally low ebb. The prevailing timidity affected his enterprise. Rather than steer his clients through uncharted seas, he preferred, from the vantage ground of his experience and the traditions of his predecessors, to warn them of the dangerous rocks and shoals that lay ahead or to defend them from attack. He rarely visualized his profession as a constructive one.

But shortly after the turn of the century, the spirit of experiment in human affairs broke forth. Four major amendments to the Constitution of the United States adopted since the beginning of the century have materially changed the structure of our government, and have shifted the balance of political power as between State and Nation. The prestige and power of the legislature by various means, the most important of which are the initiative and referendum, have been further diminished, and as a consequence the power of the executive department further increased. Boards, administrative tribunals, rules and regulations of government departments, municipalities, and other political subdivisions of the State have radically changed the aspect of our legal system and, indeed, have not only profoundly affected lawyers and courts, but have influenced the activities, ideals and habits of the mass of mankind. Our life at every point is affected by regulation, from the registration of our birth to our burial permit. Even wages and income are to a large extent fixed by rulings of the Federal Reserve Board which under its regulation of the currency and the credit of the nation, fixes the actual, as distinguished from the nominal, price of goods and services. If we contrast the opening of the twentieth century with the opening of the nineteenth, the difference is amazing. Water supply, sanitation, police protection, fire protection, elementary education, these commonest necessities of our daily life, in 1800 either did not exist at all, even in our largest cities, or if they existed were of the most primitive and elemental sort. The individual was free to go through life without the constant interference of organized society. He was also free to live in ignorance and to die from preventable epidemics.

The problems that the law has to solve today are those incident to a people forced by economic conditions to live in congested areas of population, to serve for the most part as soldiers in a highly organized army of workers. It has inevitably been obliged to respond to the needs of industrial and commercial life. Freedom
of contract has been limited to a greater or less extent. Mine
workers, for example, no longer may contract to labor for more
than eight hours daily. The freedom of parents to place their
children at labor for their own financial profit has been materially
abridged. The law of torts has in large part been remodelled, and
the set of ideas lying back of the Workmen’s Compensation Acts,
which eliminate the notion of fault as a basis for liability for recovery
is still fermenting and producing effects in other departments of
tort law. Redlight abatement laws and the Volstead Act have
familiarized men with the principle that police regulations may be
enforced by injunctive relief and that a property owner without
actual fault may suffer the loss of rents and the enforced suspension
of occupation of his real property because of the crime of his tenant.

Even in that portion of the criminal law which deals with the
problem of the older forms of crime, a different juristic approach
has developed. The newer criminal science studies the criminal
rather than the crime. Juvenile courts, the probation system, the
indeterminate sentence, have introduced new agencies in the treat-
ment of the world-old problem of the offender against society. The
science of medicine is called upon as contributory to the problem
of what to do with the criminal. Of course, there are not wanting
critics in the daily press and elsewhere who would solve the problem
at once by enforcing a system of certain and severe punishments,
speedily administered and without mercy, and who would imme-
diately abolish the innovations in the treatment of crime and the
criminal. But we are not likely to return to the method, or lack of
method, of the eighteenth century in dealing with crime. What we
must do is to study the problems involved more profoundly, to
learn more of underlying causes, above all, not to expect immediate
solution or to work out simple formulas covering the whole field.
That we had 270 murders in Chicago in 1923 and 27 in London
in the same year, if it be a fact, proves very little. One would
like to know many circumstances before basing conclusions on
such data: for example, how many police there are in Chicago as
compared with London, how are police problems handled in both
places, what are the practices in respect to carrying fire-arms and
what the opportunities of escape from discovery in England and
America. Above all, one should like to compare the psychology of
the Englishman, reared in an atmosphere of tradition, with century-
long habits of obedience to law behind him, with the psychology of
the American, just emerging from pioneer conditions, relying on
self help, too ready to condone the offense of the man who protects
what he deems his honor with the sacrifice of human life. One should also consider the number of deaths by negligence and accident in the two countries,—indeed, the whole problem of waste, of which crime is one part.

Any study that is to be fruitful of beneficial results must take account of such matters, and indeed of many other factors, and ought to be pursued by competent experts in an attitude of sufficient detachment to enable them to view the problems dispassionately. Judge Oscar Hallam, of St. Paul, in an address before the American Bar Association in 1923 pointed out that there was a greater percentage of convictions for crime in Minnesota than in Great Britain. It is not certain that the United States is failing materially in administering the criminal law.

The danger in the attitude of many critics of our law, is that crude thinking, based on false assumptions, may be enacted into legislation, and may impair the guarantees of orderly legal procedure that are at the basis of our liberty. Possibly, we have already gone too far in our interference with the individual. Freedom, Mussolini said the other day, is an outworn shibboleth, and there are not wanting voices in our country to echo the sentiment. Legislation has been passed and sustained under which men are imprisoned because of beliefs,—beliefs fundamentally opposed, it is true, to our institutions and even to organized society, but none the less merely beliefs and opinions. The warning of one of our greatest judges that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," has been set at naught. Some voices among the leaders of our American bar have indeed been heard in protest against the new doctrines. But in the main the profession has been apathetic, occasionally lawyers have even joined in the hue and cry raised by busy-bodies and witchhunters. The words of Thomas Jefferson have been almost forgotten. "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

There is no doubt a modicum of truth in Mussolini's dictum. The individual must today suffer restraints in the interests of the common welfare from which in earlier conditions he was exempt. Whether or not the restraint should be imposed in particular situa-
lations is a question of weighing conflicting interests and determining the delicate issue whether or not the restraint is necessary. Everyone no doubt chafes, and with justice, at this or that limitation upon his power to act with impunity, in a field where he feels he should not be limited by rule of law. But so far as the limitation affects our outward life alone, most of us admit, though often with discontent, that we must submit to the curtailment of our liberty. Recently, however, a tendency has developed to go beyond the objective life and to control, by affirmative or negative commands, the inner life of the individual. Here we must deny absolutely Mussolini's pronouncement.

In a peculiar degree, the duty devolves upon the bar to uphold, in the face of criticism and against temporary majorities, the fundamental principles upon which our legal system is founded and for which indeed organized society exists. The lawyer is always ready to do this where his client's rights are involved. But beyond his professional engagement the lawyer always has been and still is a leader of thought in his community. His experience and training qualify him in an unusual manner to aid in the formation of opinion on governmental affairs. Especially, in the present day with its encouragements to loose thinking, to ill informed judgment, to nostrums of all sorts, political and social, the lawyer is almost the only man in our society who is in a position to reach cool and dispassionate conclusions. The very nature of his work excludes superficiality. Above all, his instincts lead him to cherish freedom under law. May we not confidently hope that the bar will preserve its best traditions and continue to be in the future, as it has been in the past, the chief conservator of liberty and of law?

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