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The Acquisition of California, Its Influence and Development Under American Rule[1]

THE acquisition of California by the United States is a matter of great historic interest and concerning which there exists an extensive literature. The economic, political and legal consequences of the development of the state have been of much wider influence than is generally appreciated. The subject of this paper is one that well merits careful consideration, that we may, while not overrating our own achievements, have a due appreciation of the importance of the commonwealth of which we form a part.

If we look back nearly a hundred years, we find American trappers and settlers beginning to enter the Californian country, while a substantial commerce with New England is rapidly developing along the coast.

Looking far to the east, we see, between the years 1821 and 1836, an extensive emigration from the United States to Texas, many of the emigrants bringing their slaves with them. The year 1836 saw Texas independent of Mexico. In March, 1845, Texas was admitted to the Union, by a joint resolution of Congress, after a previous effort to bring about the annexation by treaty had failed.

The Mexican War quickly followed the admission of Texas. It was brought on largely by a desire to obtain additional territory in which slave labor could be economically used. It is unfair, however, to claim that the movement did not have substantial support from other sources wholly unconnected with what Calhoun termed the "peculiar institution."

A fair consideration of the history of the time will convince any reasonable man that the administrations of Presidents Tyler and Polk were committed to the project of the extension of the

[1] Address delivered before the tenth annual convention of the California Bar Association, October 23, 1919.

territory of the United States at the expense of Mexico, and that one of the moving causes of this project was the desire to maintain the balance of power in population and influence between the northern and southern States, which the increasing immigration from Europe constantly tended to disturb. Great effort was made at all times by the national authorities to conceal the existing intention to seize California and other Mexican territory.

The moral questions involved in the Mexican War will long be a matter of controversy. A few citations on this subject seem to be appropriate. Rhodes in his History of the United States,[2] says:

> "The story of the annexation of Texas and the conquest of New Mexico and California is not a fair page in our history."

President Wilson, in his History of the American People,[3] referring to the Mexican War, says:

> "The war with all its inexcusable aggression and fine fighting was brought to a formal close by a treaty signed at Guadalupe Hidalgo on the 2nd day of February, 1848."

Goldwin Smith, the eminent English historian, refers to the Mexicans defending themselves against "over-mastering wrong."

General Grant, a participant in the Mexican War, referring to the annexation of Texas, said:[4]

> "For myself, I was bitterly opposed to the measure and to this day regard the war which resulted as one of the most unjust ever waged by a stronger against a weaker nation."

In contradistinction to these opinions, it is interesting to contemplate the views of the moralist Emerson. In 1844 he said:[5]

> "The question of the annexation of Texas is one of those which look very differently to the centuries and to the years. It is very certain that the strong British race which have now overrun so much of this continent must also overrun that tract and Mexico and Oregon also; and it will in the course of the ages be of small import by what particular occasions and methods it was done."

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[2] Vol. I, p. 75.
[3] Vol. IV, p. 122.
[4] Memoirs, Vol. I, p. 53.
[5] Cabot, A Memoir of Ralph Waldo Emerson, Vol. II, p. 576.

The occupation of a territory by a hostile force may have no moral justification. It may be accomplished by the most cruel and unworthy means, and yet it may result in the greatest development and extension of civilization. As Emerson accurately said, it will look very differently to the centuries and to the years.

An incident in the negotiation of the treaty between the United States and Mexico will be of interest here. Under the Mexican law, slavery did not exist and New Mexico and California were free territory. During the progress of the negotiation, downtrodden and defeated Mexico begged for the insertion in the treaty of an article providing that slavery should not be permitted in the ceded territories. Our commissioner replied that the bare mention of the subject in a treaty was an impossibility; that if the ceded territory should be increased ten-fold in value and covered over a foot deep in pure gold on the single condition that slavery should be excluded therefrom, the suggestion could not be introduced nor communicated to the President of the United States. This occurred within the memory of men still living.

Nine days before the treaty with Mexico was signed, gold was discovered in California. No one in the United States, nor in Mexico, knew of the discovery when the treaty was ratified.

The discovery of gold in California was one of the important events of the nineteenth century. It brought at once fleets of ships to the unplowed waters of the Pacific, and a great influx of population to the new land. It opened the routes of travel across the continent and the Isthmus of Panama, and produced an agitation for the construction of a transcontinental railway and the Panama Canal. It definitely extended our country to the Pacific and brought it in contact with the civilization of the Orient. It became a source of great strength to the Union during the Civil War. It poured into the channels of trade an immense amount of gold, which, together with that developed in the mines of Australia a few years later, brought about an almost world-wide increase in prices, a phenomenon not unappreciated by the present generation.

Many estimable people, who in 1846 condemned the Mexican War, later accepted the view that the result justified the means.

It is apparent to anyone who surveys the situation as it existed in California from 1845 to 1850 that this land would in all probability have been occupied by the United States had the Mexican War not taken place. When we consider that in 1845 the American people were everywhere moving into the later-acquired territory and that the Mexican government had shown its inability to hold the country, it is manifest to anyone that the discovery of gold in California would have brought about such an influx of Americans as to have rendered annexation a certainty.

Referring to the slender hold that Mexico had on California, our minister to Mexico, Mr. Thompson, as early as 1842, said:

> "Whenever the foreigners in California make the movement of separation it must succeed. The department of Sonora, not half the distance from Mexico, has been in a state of revolt the last four years and the government has been unable to suppress it."

In California itself the Mexican rule was unstable and little recognized. Four governors were driven out of office between 1831 and 1845. The revolutions, however, seem to have been conducted in good humor and with little effusion of blood.

During the year 1849 an immense number of immigrants poured into California. By the close of that year, probably eighty thousand had entered the state. No part of the continent had been so quickly peopled. We read of the great migrations of history, of the tribal forbears of our modern nations moving from eastern to western Europe, and of the migrations which colonized the eastern coast of America, but it is doubtful if history records an authentic case where such a deluge of humanity poured into an unpeopled land in so short a time as in the case of California in 1849.

The other states admitted after the formation of our government had been peopled from adjoining communities. The growth of the population had been gradual. Political institutions had developed along with the population. All of the state governments had been preceded by organized territorial governments, and in some cases these latter governments had extended over many decades.

Owing to the ever-increasing contention over the question as to whether territories should be admitted as free or slave states, no territorial government had been organized in Cali-

fornia. After the signing of the Mexican treaty, two successive sessions of Congress had adjourned without making any provision for a government.

The great mining rush of 1849 found the state without a governing head, other than the temporary military establishment. The President, Zachary Taylor, invited the people of California to form a state government, and while the gold-seekers were moving in vast numbers to the mines, the men of the interregnum, proceeding from the extreme necessity based upon the political chaos of the time, were taking steps to adopt a constitution. The constitutional convention was called pursuant to an election held under direction of General Riley, the military governor. A noticeable feature of the convention was the youth of the delegates. It was fitting that the pioneer community should be represented by the hope and buoyancy of youth. Sectional feeling had not entered in the selection of the delegates. It had at first been supposed that the slavery question would be a matter of sharp controversy, but it soon developed that California, the permanent boundaries of which were fixed and determined by the constitutional convention itself, was not a country adapted to the institution of slavery, and it was prohibited by the express terms of the constitution adopted by a unanimous vote.

The Constitution of 1849 was, to a large extent, the stereotyped constitution of the time. It wisely left the widest powers to the Legislature. The history of the period between 1850 and 1870 demonstrates that any other constitution would have seriously impeded the progress of the time. The rapid changes in different parts of the state in population and industries, with the accompanying demand for changes in the political structure, illustrated the need of elasticity in the government.

The abuses under this constitution brought about the demand for the instrument of 1879, with its attempt to legislate on every subject. In turn, the restrictions of the present constitution are constantly raising a demand for a return to the simplicity of the earlier instrument.

The constitution was ratified in November, and the first legislature met in December of 1849. The organization of the state government rapidly proceeded, and in March, 1850, the first decision of the Supreme Court was announced. It seems appropriate under the doctrine of averages that the title of

this case is "People v. Smith." I emphasize the fact that the constitution was adopted, the first and most important session of our legislature held, the courts organized, and a thousand details necessary to form the state government proceeded with, without any warrant of congressional authority.

The month of March, 1850, found our senators and representatives at Washington anxious to be admitted to the respective houses of congress. The course of their admission was not, however, destined to run so smoothly.

The anti-slavery clause, which in our constitution had been so easily adopted, at once became a national question and threatened to disrupt the entire country. The demand of California to be admitted to statehood brought about what is called the "Compromise of 1850," and the controversy over the same resulted in one of the greatest battles ever waged in our national congress.

The question of the admission of California came forcibly before congress when it assembled in December, 1849, and continued a burning question until the final approval of the bill, September 9, 1850. The controversy over the slavery question became so acute that Senator Henry Clay, in January, 1850, introduced in the senate eight resolutions designed to settle the various matters. These eight resolutions embraced the subjects constituting the great Compromise of 1850. The first of these called for the admission of California wtih her free constitution. The other most important one provided for the enactment of a national fugitive slave law. Practically all the other resolutions were in some way connected with the slavery question.

The congress considering the matter was one of the most interesting in our history. The great senatorial triumvirate, Webster, Clay and Calhoun, all took part in the debates which practically constituted their valedictories to the scene of their earthly contentions. In the same senate were Thomas B. Benton of Missouri, the romantic figure of Samuel Houston of Texas, both staunch advocates of the admission of California; Jefferson Davis, Lewis Cass, and the incoming senators famous during the Civil War period, Chase and Seward.

It is well here to remember that the Constitution of the United States itself called in polite but thinly veiled language for the passage of a fugitive slave law. The demand for the

passage of the law under consideration arose from the fact that several northern states had passed laws obstructing the return of slaves, and one state, Massachusetts, had gone to the length of making it a penal offense for any of its officers to assist in the enforcement of a law of congress on the subject. The position of many of the southern representatives was that they were willing to admit the state of California, but demanded that the northern states should not refuse to sanction the existence of property rights recognized by the Constitution of the United States itself. Based on the conditions of 1850, the southern representatives were right in their legal contention and in this they had the support of Webster himself. Thus, the bill for the admission of California to the Union was in all its heated course through congress coupled with what was probably the most unpopular law that was ever passed by that body, a law that blighted the reputation of every man who supported it.

The admission of California may well be considered the most radical step ever taken in admitting a state. The nearest other states to the new commonwealth were Missouri and Texas. A pathless wilderness lay between them, and the only feasible route of travel to the seat of national government was by the Isthmus of Panama. The new state was so distant that we find it early requesting that the canvassing by congress of the electoral vote at presidential elections be postponed to enable its electors to reach the national capital in time to take part therein.

The admission bill having been approved, let us turn and contemplate the California of the fifties.

When we consider the California of 1850 we can readily agree with Professor Royce in saying that no American community was ever so severely tried morally. As he aptly says, in no other part of the country were the people ever forced by circumstances to live at the mercy of every wayward chance and to give to even legitimate business a dangerously speculative character.

The task which confronted the legislature and courts of 1850 was a most difficult one. The laws of the primitive Mexican community, under the law of nations, necessarily remained in force until superseded by other laws. Their binding effect until repealed was expressly recognized by the Constitution of 1849. As pointed out in the first volume of California Reports, a

large amount of labor devolved upon the courts in searching for authorities in an unfamiliar language, and in an unfamiliar system of jurisprudence. In order to ascertain what was the law in California, it was necessary to examine the codes of Spain; the royal and vice-royal ordinances and decrees; the laws of the Imperial Congress of Mexico; the laws of the later Republican Congress of Mexico; presidential regulations; decrees of dictators and acts of pro-consular governors. Many ordinances and decrees claimed to have the force of law had not been printed even in Mexico, and they, as well as other books upon Spanish and Mexican law, could be procured only with great difficulty and at much expense. Many of these laws had never, as a practical matter, been enforced in California, and particularly in northern California.

As the great population poured into California in 1849, commercial transactions in an immense amount, and large transactions in real estate, were entered into under 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. The case of Fowler v. Smith[6] shows that very frequently the legality of contracts entered into during the interregnum between the signing of the treaty and the passage of the statute adopting the common law, hereinafter referred to, was attacked on the ground that such transactions were inhibited by the principles of the civil or Mexican law. The questions thus raised were very difficult of determination and emphasized the demand for the passage of the statute adopting the common law.

A careful examination of the statutes of 1850 will convince anyone that the legislators met the difficult questions before them with ability and zeal. When we consider how largely the distant and primitive community was compelled to rely on its own resources, our admiration must be excited at the variety and mass of legislation enacted after seemingly careful consideration.

The legislature met the complicated legal situation detailed above by the enactment of a statute passed April 13, 1850, adopting the common law of England as the rule of decision in the courts of the state. This act was followed April 22, 1850, by the passage of an act repealing all laws in force excepting

[6] (1852) 2 Cal. 39.

those passed at that session of the legislature, saving, however, the rights of parties under former laws.

The legislature of 1850, which met at San Jose, has often been termed "the legislature of a thousand drinks," but an examination of surrounding conditions in an exceedingly primitive community, with inadequate housing and meeting facilities, and unusually severe winter without, and a decidedly wet senatorial campaign within, would convince the unprejudiced mind that the members were entitled to the drinks.

The very fact that the pioneers of the fifties were here is sufficient to demonstrate that they were not men who cared to walk in the well-trodden paths of the older communities. They braved the dangers of the plains, the tropics and the seas to cast their fortunes in the new land. They had dared themselves to experiment in the untrodden paths of adventure, and it is little wonder that they were seemingly equally willing to experiment in legislation. It has in fact been pointed out that one of the distinctive features of the history of legislation in California is the willingness of the inhabitants to try experiments.

The progress of political, legal and moral ideas has been so rapid in the modern world that it is difficult to bridge the gap of sixty years which separates us from the decade of 1850 and 1860. It is hard to realize that in that decade state fugitive slave laws were enacted and enforced in California; that the rigid restrictions of the common law applied to the capacity of married women to contract; and, that by express enactment of the legislature, no Indian or negro was allowed to testify in a case to which a white person was a party. In the case of People v. Hall[7] the defendant, a white person, had been convicted of murder partly upon the testimony of Chinese witnesses. On appeal, it was contended that the testimony was erroneously admitted on the ground that the term "Indian" was used in the act in the generic sense and included Chinese as well as Indians. This contention was sustained and the conviction reversed. This decision was placed partially on the ground that when Columbus discovered America he imagined that he had accomplished the object of his expedition and had reached the Indies and had designated the islanders by the name of Indians, and that the appellation had been universally adopted and extended in its

[7] (1854) 4 Cal. 399.

use to the aborigines of Asia, as well as those of the new world.

This decision represents the extreme prejudice of the age against what have been termed inferior races, a prejudice somewhat softened, but by no means absent, in succeeding years. The unreasoning prejudice and gross injustice to foreigners in the early history of California have been the subject of caustic comment by eminent writers.

If the acts to which I have referred take us back to the era of human slavery, to the seemingly unwarranted restrictions of the common law, and to limitations on the capacity of witnesses which now appear to belong to the dark ages, we nevertheless find that the statutes of this decade have their hopeful as well as their prophetic side, for an examination of the statutes shows that the legislature as early as the year 1859, as if in anticipation of the development of the great community in southern California, passed an act permitting the city of Los Angeles to extend its boundaries in every direction.

The necessary limits of this address preclude more than a reference to the more important phases of the early development of California. I have discussed generally the history of the acquisition of California, and the organization of its state government. It now seems appropriate to touch on some of the important instances in which this commonwealth has molded and influenced the law of the American Union.

Until the discovery of gold in California, the mining of precious metals in the United States had been on a very small scale. Such laws as had been passed for the disposition of minerals in the public domain had been of purely local application. So that when the great rush to the gold-bearing lands of California came in 1849, it not only found the lands wholly unsurveyed, but also found no legislation authorizing their occupation or acquisition. In all the districts occupied by the miners, however, rules were quickly framed for the establishment and protection of titles to mining locations. These rules unanimously recognized priority of rights by discovery and possession, and the necessity of reasonably continued occupation and use as essential to a maintenance of such priority of right. The rules thus adopted afforded to all an absolute equality of opportunity and are really the basis of the law governing the mining of gold and silver in what may be termed the precious metal states and territories.

These rules and customs of miners were given legislative sanction by Section 621 of the Practice Act of California, drafted by Justice Field, and adopted in 1851. This section provided that:

> "In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claims; and such customs, usages or regulations when not in conflict with the constitution and laws of this state, shall govern the decision of the action."

The Supreme Court of this state applied this act in Morton v. Solambo Copper Mining Company.[8] Chief Justice Sanderson, referring to these rules, said:

> "These customs differed in different localities, and varied to a greater or less extent according to the character of the mines. They prescribed the acts by which the right to mine a particular piece of ground could be secured and its use and enjoyment continued and preserved, and by what non-action on the part of the appropriator such right should become forfeited or lost, and the ground become, as at first, *publici juris,* and open to the appropriation of the next comer. They were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end desigued to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the legislature not only not to supplant them by legislative enactments, but on the contrary to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well-defined rules for their guidance applicable to the new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application and unsatisfactory results. Having received the sanction of the legislature, they have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form. . . . These customs and usages have, in progress of time, become more general and uniform, and in their leading features are now the same throughout the mining regions of the state."

Looking back from the present time, it seems remarkable that for eighteen years, from 1848 to 1866, no legislation was enacted providing for the sale of mineral lands. During all this time the

[8] (1864) 26 Cal. 528.

regulations and customs of miners, as sanctioned by the legislature of California, constituted the only laws governing mines and waters on the public lands of the United States.

Throughout this period the vast gold fields of California, title to which was at all times in the United States, were occupied and worked, and gold of the value of approximately a billion dollars was extracted and appropriated by the workers without any warrant of congressional authority, and except for the tacit consent implied from the neglect to legislate on the subject, all the miners might well have been regarded as trespassers on the public domain.

As pointed out by Judge Lindley,[9] the first formal recognition by congress of possessory rights to mineral lands occurs in an act providing for a district and circuit court for the state of Nevada, approved February 27, 1865. Section nine of this act provided:

> "That no possessory action between individuals in any of the courts for the recovery of a mining title or for damages to any such title shall be affected by the fact that the paramount title to the land on which such mines lie is in the United States, but each case shall be adjudged by the law of possession."

This act is perpetuated in Section 910 of the Revised Statutes.[10]

The first general law passed, under which title might be acquired to mineral lands within what is known as the precious mineral-bearing states and territories, is what is generally known as the Lode and Water Law of 1866,[11] approved July 26, 1866.

One of the important provisions of this act was that providing that rights which had been acquired in these lands under a system of local rules with the apparent acquiescence and sanction of the government should be recognized and confirmed. Judge Lindley states his conclusions in reference to the passage of this act as follows:[12]

> "The federal government had practically acquiesced from the beginning in the system of local rules established in the various mining districts. That is to say, no overt act was

[9] Lindley on Mines (3rd ed.), §47.
[10] Supra, n. 9.
[11] 14 U. S. Stats. at L. 251.
[12] Lindley on Mines (3rd ed.), §56.

done by the government to overthrow or repudiate the system. No attempt was made to interfere with mining upon the public domain. The process by which these primitive systems came to be recognized, first by the states, and then by the national government, was natural. When mineral discoveries were made in other territories and states, the system inaugurated in California was adopted to govern and regulate the new mining districts.

"Local legislatures and local courts followed the precedent set in California, by enacting and upholding laws confirming the right in the newly discovered mineral districts to establish rules governing the mining industry. As the supreme court of the United States said, before the act of 1866 was passed:

" 'We cannot shut our eyes to the public history which informs us that under the legislation (state and territorial), not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country.' "

The discovery of gold had early developed a heated controversy as to whether the precious metals belonged to the state or to the nation. In Hicks v. Bell[13] it was first held that the gold on the public domain belonged to the state of California by virtue of its sovereignty. This doctrine was subsequently repudiated in Moore v. Smaw,[14] which finally decided that the gold in the public domain belonged to the United States.

Miners from time to time asserted the right to go upon and explore for gold land patented by the United States. In Freemont v. Flower[15] this important and interesting point was presented, and it was held that, notwithstanding the fact that a grant of land from the Mexican government to an individual carried no right to minerals, unless express mention was made of them, the patent to such lands, issued pursuant to confirmation by the Board of Land Commissioners, vested in the patentee all the rights of the United States, including all rights to such minerals, thus decisively repudiating the right so claimed.

Dr. Raymond, in his monograph, entitled, "The Force of the United States Mineral Land Patent," in Mineral Industry,[16] commenting on this decision, said:

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[13] (1853) 3 Cal. 220.
[14] (1861) 17 Cal. 199, 79 Am. Dec. 123.
[15] (1861) 17 Cal. 199, 79 Am. Dec. 123.
[16] Vol. IV, p. 781.

> "The very acute and sound decisions of the Supreme Court of California in these cases (the chief credit for which is due to Stephen J. Field, now on the bench of the United States Supreme Court), may be said to have placed upon indestructible foundations the public land system of the United States, the cornerstone of which is the completeness and invulnerability of the title of the patentee."

Notwithstanding that this decision was rendered in California sixty years ago, it is still a common popular belief, in which the wish is probably father to the thought, that a prospector has a right to enter upon and explore private land for minerals.

In referring to the adoption of the customs of miners as a matter of peculiar interest in the history of California, I must not be understood as ascribing to these miners the actual origin of all the customs under consideration. A student of legal history should hesitate before definitely stating that a law or custom was originated at a certain time. Investigation nearly always develops that laws and customs, may, in their more primitive development, be traced back until their origin is lost in the twilight of history. Certain features of modern mining customs can thus be traced to very remote ages. Prior mining customs doubtless influenced and molded customs in California. It would be fair, however, to state that these prior customs were greatly developed and extended in California by miners of unusual intelligence and capacity, and finally that these customs were used and applied in this state on a scale, over an extent of country and covering values, such as the world had never before witnessed. The adoption of these customs into statutory law has affected such vast populations and interests as to make their development a landmark in legal history. Credit should be given to the fairness and intelligence of the miners, to the capacity of our legislators and judges, and particularly to the broadmindedness and great ability shown by Justice Field in developing and expounding the law.

One branch of the rules and regulations of miners, that relating to the appropriation of waters, since it ultimately, through the influence of California, grew into a doctrine applicable to all appropriations of waters upon the public domain, is entitled to separate consideration.

The doctrine that prior appropriation of water running in a natural stream gives the appropriator a prior right to the water so diverted, developed as a law of necessity among the early miners in California, and was first recognized and defined in the

rules and regulations adopted for the government of their mining districts. It was peculiarly a Californian doctrine, and finds its first judicial recognition in the decision of the California Supreme Court in the case of Irwin v. Phillips.[17] While some doubt as to the originality of this doctrine is expressed in Clough v. Wing,[18] where the doctrine is ascribed to the civil law, this only emphasizes what I have said about the early development of legal principles. It does not detract from the statement that the doctrine as developed and followed in the western states had its origin in the custom of miners in California. Some legislative sanction for this departure from the common law doctrine of riparian rights in running water is found in the act heretofore referred to recognizing the customs of miners which was early followed in most of the western states.

The California Supreme Court, however, early made application of the doctrine to appropriations of water for uses other than mining, holding in Tartar v. Spring Creek Water & Mining Company[19] that the prior appropriation for motive power of a saw mill was superior to a subsequent appropriation for mining purposes. Likewise, in Wixon v. Bear River & Auburn Water & Mining Company,[20] an appropriation for mining purposes was held subject to rights acquired by a prior use of the waters for irrigation.

This doctrine of appropriation soon spread to other western states where like conditions existed, and earlier cases in these other jurisdictions, and cases which reached the United States Supreme Court, usually give credit to California for the establishment of this doctrine, and repeatedly cite the California cases in which the doctrine was announced. As is said in Justice Field's opinion in the case of Basey v. Gallagher,[21] where the United States Supreme Court was considering a case on appeal from the Supreme Court of Montana, concerning the California case of Tartar v. Spring Creek Water & Mining Company.[22]

> "Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection."

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[17] (1855) 5 Cal. 140, 63 Am. Dec. 113.
[18] (1888) 2 Ariz. 371, 17 Pac. 453, 456.
[19] (1855) 5 Cal. 396.
[20] (1864) 24 Cal. 367, 85 Am. Dec. 69.
[21] (1874) 20 Wall. 670, 682, 22 L. Ed. 452, 454.
[22] Supra, n. 19.

The Act of July 26, 1866,[23] heretofore referred to, which first provided a method by which the miners might obtain title from the federal government, also recognized the right to water by a prior appropriation, although in that respect it can be regarded as no more than declaratory of rights already existing.

> "The early California decisions had long been practically authority throughout the west for waters on the public domain, and had been ratified by the act of 1866, establishing free appropriation upon public land."[24]

Justice Miller reaffirms this view in the opinion in Broder v. Natoma Water & Mining Company,[25] where he says:

> "We are of opinion that it is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866, and that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one."

Samuel C. Wiel points out in his treatise on Water Rights in the Western States[26] that the doctrine of appropriation is law in the following states and territories: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, Nebraska, Oregon, Texas, Utah, Washington and Wyoming. It is interesting to note that the greater number of these states have refused to follow California's lead in restricting this doctrine to waters and lands of the public domain, as was done in Lux v. Haggin.[27]

The foregoing to some extent illustrates the adoption and development of the crude customs of California miners, the sanction thereof as common law by the legislature and courts of the state, and the subsequent adoption thereof by the government of the United States. The subject well merits the careful consideration of the law student and historian, and, as pointed out

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[23] Supra, n. 11.
[24] 1 Wiel, on Water Rights in the Western States (3rd ed.), p. 139.
[25] (1879) 101 U. S. 274, 25 L. Ed. 790, 791.
[26] (3rd ed.) p. 387.
[27] (1886) 69 Cal. 255, 10 Pac. 674.

by Professor McMurray,[28] affords a remarkable illustration of the process by which the unwritten usages of California gold miners became an important part of the law of mines and waters.

In many other instances important laws which originated in, or which were taken from, the laws of other jurisdictions by, California, have either by reason of the peculiar applicability of such laws to local conditions, or of the peculiar influence of California as the pioneer state of the Pacific, been extended to, or have greatly affected the laws of neighboring states.

The Wright Law providing for the formation of irrigation districts has been followed in fact, or in principle, in a number of western states.

California, in adopting the community property system, as a logical continuation of the rule of property under the Spanish and Mexican governments, has to a considerable extent influenced its adoption by other western states. The great number of California decisions under this system has given considerable influence to the state in molding the law. The community property system has, by reason of its more liberal treatment of property rights between the spouses, shown remarkable ability to crowd out the common law, even in states peopled by those holding only common law traditions.

California was the first state, after New York, to abolish the distinction between forms of proceedings in actions at law and suits in equity. As this reform was adopted practically coincident with the formation of the state government, the former distinctions have been practically unknown to California law.

The codes of California, though based on the Field codes of New York, were revised by a code commission prior to their adoption in this state. These codes constituted at the time of their adoption the most exhaustive attempt yet made at codifying the English common law in the United States. The California Civil Code has formed the basis of the codes of Idaho, Montana, North and South Dakota. While codes of civil procedure based on the Field code have been adopted in many western states, a number of these codes have been much influenced by the California laws and code revisions on the same subjects.

This state was, whether for good or for bad, the first to adopt a constitution which is in effect a code of laws adopted

[28] Orrin K. McMurray, Legal and Political Development of the Pacific Coast States.

directly by the people as distinguished from the original conception of an organic act.[29] Justice Temple in Winchester v. Howard,[30] referring to the Constitution of 1879, said:

> "When the federal constitution and first state constitutions were formed, the idea of a constitution was that it merely outlined a government, provided for certain departments and some officers and defined their functions, secured some absolute and inalienable rights to the citizens, but left all matters of administration and policy to the departments which it created. The law-making power was vested wholly in the legislature. Save as to the assurances of individual rights against the government the direct operation of the constitution was upon the government only. And such assurances were themselves in part but limitations upon governmental powers. Latterly, however, all this has been changed. Through distrust of legislatures and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character. These are, in fact, but laws made directly by the people instead of by the legislature, and they are to be construed and enforced in all respects, as though they were statutes."

It was the revolutionary character of this constitution with its minutiae of regulation that caused James Bryce to select it in the first edition of his American Commonwealth as an illustration of this tendency. It is well to note that in the second edition of his work the author has dropped this constitution from the text and inserted in lieu thereof the Constitution of Oklahoma of 1907, as better illustrating modern tendencies.

California in the Constitution of 1879 adopted the provision that in civil cases three-fourths of a jury may render a verdict. This provision had prior thereto been used to a very limited extent in other jurisdictions, but was first applied to litigation on a large scale in this state. Its validity has been universally admitted and in practice it has worked so satisfactorily that a return to the former system has never been attempted. Subsequently this provision has been adopted in other jurisdictions, notably by the Oklahoma Constitution of 1907.

The historical facts and legal achievements referred to in my brief sketch may well impel the respect of our citizens. Every Californian may justly look with pride on the courage and daring

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[29] Orrin K. McMurray, Some Tendencies in Constitution Making, 2 California Law Review, 203.

[30] (1902) 136 Cal. 432, 64 Pac. 692, 89 Am. St. Rep. 169.

of the early voyagers who explored our coast; on the zeal and self-denial of the Franciscan Fathers who first settled our lands; on the optimism and industry of the argonauts of the golden age.

He may justly look with admiration on the works of those who by their incessant toil in field, in forest and in mine, have in the short space of seventy years wrought the California of today. Lastly, he may look with gratification on the works of the law-givers in molding our government and institutions.

I confidently assert that in no other country on this earth are there today three million people living in a greater degree of comfort, safety and abundance, or under a more beneficent government than in the case of California.

As optimism was the keynote alike of voyager, priest and argonaut, so should we, with the achievements of our forefathers behind us, and with a remarkable degree of prosperity now present, have an abiding faith in popular government and in the hope that our commonwealth may endure as long as the streams from the Sierras extend their bounty to the plains, and as long as the waters of the Colorado flow to the Californian sea.

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