

## POSITIVE AND NATURAL LAW IN CALIFORNIA, 1846-1849

Natural law, the higher law that is beyond human positive law, has been used in periods of political change both to introduce new legal concepts or reforms and to justify existing law. The resort to this natural law has been particularly important in the evolution of the United States on the Pacific as well as on the Atlantic coast. While the invocation of the natural law by the English colonists just prior to the Revolution has been examined at length,<sup>1</sup> less attention has been paid to its appearance a century later at the opposite end of the North American continent.

The English colonists called upon the natural law to justify their political claims of right and, ultimately, to support a revolution. Their spokesmen were educated men who drew on sources which included both English and Continental philosophers: not only Bracton and Coke,<sup>2</sup> but also Grotius and Montesquieu.<sup>3</sup> The American emigrants in California, on the other hand, relied on the natural law for purely judicial purposes and only after the political revolution had taken place. These new Californians invoked the higher law without resort to authority other than the Bible because the Mexican and common-law authorities available to them failed to answer their questions. The result of their efforts was a combination of Mexican and common law, with natural law where the other authorities failed them.

*The Alcalde System*

On July 7, 1846, the Mexican Territory of California was invaded and seized by a flotilla of the United States Navy under the command of Commodore John Drake Sloat. War had begun between the United States and Mexico on May 13 of that year and Sloat, coming to secure California, disembarked two hundred and fifty men without bloodshed at Monterey, the capital, raised the American flag over the custom house, and posted a proclamation declaring California annexed to the United States. The commander of the United States naval forces thus became the first of a series of military governors of the new United States territory. These military governors ruled the Territory not only until the treaty of Guadalupe Hidalgo concluded the Mexican War in 1848, but until November 13, 1849, when Peter H. Burnett was elected first state governor pursuant to the California Constitution of 1849.

General Stephen Kearny, a successor of Sloat, proclaimed that until a free territorial government could be organized, the laws then in force which did not conflict with the Constitution of the United States would be continued unless altered by competent authority.<sup>4</sup> Those holding office were to retain their positions provided they swore to support the Constitution and to perform their duties faithfully. The policy of the military government was to maintain as far as possible in the Territory both the Mexican law which had subsisted prior to the annexation and its administering officers, the *alcaldes* and justices of the peace.

The legal and judicial structure of California to which the conquerors fell heir was based on the local Mexican judicial officers, the magistrates or *alcaldes*. Sub-

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<sup>1</sup> MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-1776* (1933).

<sup>2</sup> *Id.* at 33.

<sup>3</sup> *Id.* at 32.

<sup>4</sup> GOODWIN, *THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA* 40 (1914).

ject only to the control of the governor, the *alcaldes* had been the only legal officers in California, and of them an observer said:<sup>5</sup>

There were no regularly established courts in the department at that time. The *alcalde* exercised the office of judge, jury, lawyers and all, inasmuch as no lawyers were employed; in fact, there were none in the department. . . . The *alcalde* decided all cases of minor importance, and the penalty for lesser crimes was fine or imprisonment. Cases of more magnitude, like those of murder and other high crimes, were brought before the governor and cabine at Monterey, and their decision in the matter was final.

While in theory the trial and appellate court framework was governed by the Mexican laws of March 20 and May 23, 1837,<sup>6</sup> in practice the only trial courts were those of the *alcaldes*, and there was little appeal to the governor.

The *alcalde* system was retained unaltered by the military government, which, however, added a new system of Courts of First Instance which had been provided for by the laws of 1837 but never employed by the Mexicans.

What changes did appear in the Mexican system after 1846 came about gradually and in general unofficially. The influx of emigrants from the United States caused the displacement of the Mexican *alcaldes* by Americans, and in the new emigrant communities where there had been no *alcaldes*, new *alcaldes* were generally chosen from among the emigrants. Under the unsettled conditions of the occupation there was little to limit the powers of the *alcalde* which, although originally restricted under the Mexican government, became extensive under the rule of the military governors. Of these powers the American *Alcalde* of Monterey, an ex-naval chaplain named Walter Colton, says in his diary:<sup>7</sup>

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

And Stephen J. Field, the New York attorney who came to California during the Gold Rush and was elected *Alcalde* of Yubaville (Marysville), says in his reminiscences:<sup>8</sup>

Under the Mexican law, *Alcaldes* had . . . a very limited jurisdiction. But in the anomalous condition of affairs under the American occupation, they exercised almost unlimited powers. They were, in fact, regarded as magistrates elected by the people for the sake of preserving public order and settling disputes of all kinds. In my own case and with the approval of the community, I took jurisdiction of every case brought before me.

During the occupation disputes were settled not only by the *alcaldes* but also by the Mexican statutory Courts of First Instance set up by the military government. Although these were courts organized according to the Mexican system with their duties delineated by the laws of 1837, most of the judges who were elected to preside over them were, like many of the *alcaldes*, common-law lawyers from the United States. Such men were entirely unacquainted with the Mexican law or

<sup>5</sup> DAVIS, *SIXTY YEARS IN CALIFORNIA* 105-06 (1889).

<sup>6</sup> HALLECK & HARTNELL, *TRANSLATION AND DIGEST OF THE MEXICAN LAWS* (1849).

<sup>7</sup> COLTON, *THREE YEARS IN CALIFORNIA* 55 (1850).

<sup>8</sup> FIELD, *CALIFORNIA ALCALDE* 27 (1850).

the pre-annexation usages. The Courts of First Instance were for this reason substantially common-law courts and rendered decisions based for the most part on the common law.<sup>9</sup> An exception must be made of the southern part of the Territory, where a few judges did follow the local Mexican traditions.<sup>10</sup>

### *The Law of the Alcaldes*

The sources of the law during the American occupation were the Mexican law, the common law, and natural law. As has been pointed out, the California law applying prior to the annexation was retained by the conquerors where such law did not conflict with the Constitution of the United States. This law consisted primarily of the Mexican laws of March 20 and May 23, 1837, which had established a government for the territory, set the judicial procedures, and designated the judicial officers and their functions. These statutes contained, however, no substantive law to direct the alcaldes and justices of the peace.

The references available to the alcaldes were not extensive. Bancroft, the great California historian, says of the period:<sup>11</sup>

As late as 1847 Bryant found no written statute law, the only law books being a digested Code entitled *Laws of Spain and the Indies*, published in Spain, a century before, and a small pamphlet defining the powers of various judicial officers, emanating from the Mexican government since the revolution.

However, the Alcalde of Monterey says in his diary:<sup>12</sup>

The laws by which an alcalde here is governed, in the administration of justice, are the Mexican code as compiled in Frebrero and Alvarez—works of remarkable comprehensiveness, clearness, and facility of application. They embody all the leading principles of civil law, derived from the institutes of Justinian.

To overcome the lack of information regarding the Mexican law, the governor in 1849, General Bennett Riley, had prepared and distributed a document entitled *Translation and Digest of such portions of the Mexican Laws of March 20th and May 23d, 1837, as are supposed to be still in force and adapted to the present condition of California*. This pamphlet, after setting forth the legal basis for the application of the Mexican law in the Territory, pointed out that the Mexican laws of 1837 were regarded as the laws in force and reprinted them as a "temporary guide and assistance to the inferior officers of government" until more complete works could be prepared. The document went on to say:<sup>13</sup>

In putting in practice the existing laws of California important assistance will be derived by consulting the "Frebrero Mejicano," "Alvarez, *Instituciones de derecho real de Castilla y de Indias*," "Gutierrez, *Practica Criminal*," the work of "Salas" &c. The codes of Louisiana, which are almost identical with the Spanish codes, will also be found applicable in most of the cases which may arise in the courts of California.

Apart from the Alcalde at Monterey and the few who had been in office prior to the annexation, few of the magistrates during the occupation were familiar with the Mexican law or knew where to find it.

The emigrants had no knowledge of the Mexican civil law but brought with

<sup>9</sup> 1 Cal. 577 (Appendix).

<sup>10</sup> McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CALIF. L. REV. 359, 364 (1915).

<sup>11</sup> BANCROFT, *CALIFORNIA PASTORAL, 1769-1848*, at 575 (1886).

<sup>12</sup> COLTON, *THREE YEARS IN CALIFORNIA* 249 (1850).

<sup>13</sup> See HALLECK & HARTNELL, *TRANSLATION AND DIGEST OF THE MEXICAN LAWS* 4 (1849).

them a great respect for the common law and a bewildering variety of legal documents embodying various manifestations of that law. When the new alcaldes wished, however, in good faith to apply the Mexican law, new situations constantly arose for which the little Mexican law they could find was not sufficient.

One of the new arrivals, Elisha O. Crosby, who was later to be chairman of the judiciary committee of the first California Senate in 1850, said that "Spanish law was in operation here and there," but that "it was an unknown system to our people." As to the legal situation in general, he said:<sup>14</sup>

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

Walter Colton, the Alcalde of Monterey, was one of the few who conscientiously tried to apply the Mexican law and usage wherever possible, referring, as has been noted, to the Mexican law as compiled in Frebrero and Alvarez. He reported in his diary, however, that although the common law of England was hardly known in California, "its rules and maxims have more or less influenced local legislation."<sup>15</sup> And when in 1847 Colton was appointed "Judge of the Court of Admiralty, in and for the Territory of California," in order to deal with an admiralty problem he had recourse to "the eloquent commentaries of Kent, the able dissertations of Wheaton, the lucid expositions of Chitty, and the authoritative decisions of Sir William Scott."<sup>16</sup>

One of the major problems of the occupation alcaldes was the great shortage of law books. The new settlers were frequently unable to find what the law was or had been, and even when the military officials wished to resort to the statutory law of the United States, they could not always find authorities. On April 9, 1849, the military commander General Persifor F. Smith wrote from San Francisco to the Adjutant General:<sup>17</sup>

I cannot find a copy of the Laws of the United States in California, and they are of the greatest necessity. . . . Some laws, especially navigation laws, cannot be enforced for want of knowing the phraseology of the statute.

Many of the new alcaldes were laymen, who made up the law as the circumstances seemed to require. Some, however, like Stephen J. Field, Alcalde of Yuba-ville, where lawyers who had been trained in the common law. Lacking any knowledge of the Mexican law or ability to use the civil law texts which were printed in Spanish, these alcaldes tended to employ an unorthodox array of authorities of their own. For example, James C. Zabriskie, a native of New Jersey, arrived in Sacramento in 1849 and in August of that year was elected Second Alcalde. His law library consisted of a single volume, entitled *The New Jersey Justice*.<sup>18</sup>

The law of New Jersey was not the only law imported from the United States

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<sup>14</sup> See McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CALIF. L. REV. 359, 364 (1915).

<sup>15</sup> COLTON, *THREE YEARS IN CALIFORNIA* 249 (1850).

<sup>16</sup> *Id.* at 194.

<sup>17</sup> See Stevenson, *The Glorious Uncertainty of the Law, 1846-1851*, 28 CALIF. S.B.J. 374, 375 (1953).

<sup>18</sup> *Id.* at 376.

and used by the newcomers. The newspaper *California Star* for January 23, 1847, complained:<sup>19</sup>

We heard a few days since that the alcalde of Sonoma had adopted the whole volume of Missouri statutes as the law for the government of the people in his jurisdiction. If this is allowed, we will have as many legislatures in California as we have alcaldes or justices of the peace, and the country will be thrown into more confusion in a short time than ever existed in any part of the world inhabited by civilized men.

The editor went on to point out that the alcalde's business was to find the law of the territory and enforce it—a reasonable request but, it is to be feared, a vain one.

Thus, because of the prevalence of the American alcaldes and judges the common law was the general rule of decision even prior to its formal adoption in 1850. In deciding cases arising out of the territorial courts, the newly-constituted California Supreme Court was obliged to use the common law together with such Mexican law as could be ascertained and applied to the case considered.<sup>20</sup>

There was an attempt to amalgamate the two systems, but the courts moved further away from what was believed to be the Mexican law existing under the occupation. For example, the California Supreme Court said that though a Mexican statute required "conciliacion" prior to the institution of a suit, such a proceeding had been regarded as a useless and dilatory formality by the Americans since the conquest and in an 1849 suit overruled an objection founded on the lack of "conciliacion."<sup>21</sup> The laws of Mexico expressly prohibited slavery. Nevertheless, in a case involving runaway slaves who had been brought into California by their owner prior to the adoption of the state constitution, the same court employed the rule that the political institutions of a conquered country gave way to those of the conqueror, and so replaced the Mexican law forbidding slavery with that of the United States, permitting it.<sup>22</sup> The United States Supreme Court said, in confirming the title to property deeded to a United States citizen by a Mexican national in 1847:<sup>23</sup>

Every American citizen who was then [1847] in California had at least equal rights with the Mexicans; and any law of the Mexican nation which had subjected them to disabilities, or denied to them equal privileges, were necessarily abrogated without a formal repeal [by the conquest].

It was perhaps inevitable that with the formal law so uncertain, many of the alcaldes would turn to natural law for the solutions to the problems they encountered. Indeed, prior to the annexation in 1846 the Mexican alcaldes had resorted to such law with official approval. Bancroft reports that one Mexican governor of California had instructed a magistrate to administer the law "in accordance with the principles of natural right and justice" and that these principles were the foundation of California jurisprudence.<sup>24</sup> While the American military governors made no such suggestions, the post-annexation alcaldes also had occasion to employ the same sources.

It is, of course, not surprising that Colton, the Alcalde of Monterey, who had been educated as a clergyman, would say, when distinguishing between offenses

<sup>19</sup> See ROYCE, CALIFORNIA: FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANCE COMMITTEE IN SAN FRANCISCO 206 (1886).

<sup>20</sup> 1 Cal. 579 (Appendix).

<sup>21</sup> Von Schmidt v. Huntington, 1 Cal. 55 (1850).

<sup>22</sup> In the Matter of Perkins, 2 Cal. 424 (1852).

<sup>23</sup> Fremont v. United States, 58 U.S. 542, 564 (1854).

<sup>24</sup> BANCROFT, CALIFORNIA PASTORAL, 1769-1848, at 575 (1886).

caused by moral hardihood and those provoked by untoward circumstances, that there was a wide difference between the two and that "an alcalde under the Mexican law, has a large scope in which to exercise his sense of moral justice."<sup>25</sup> To determine what Colton meant by moral justice, it is perhaps sufficient to refer to his diary entry of December 13, 1847, in which he states that rather than being governed by the law of the United States, he looks to the law of the Bible for direction.<sup>26</sup>

Colton is not niggardly with examples of his justice. He relates:<sup>27</sup>

In minor matters the alcalde is often himself the law; and the records of his court might reveal some very exquisite specimens of judicial prerogative; such as shaving a rogue's head—*lex talionis*—who had shaved the tail of his neighbor's horse; or making a busybody, who had slandered a wealthy citizen, promenade the streets with a gag in his mouth; or obliging a man who had recklessly caused a premature birth, to compensate the bereaved father for the loss of that happiness which he might have derived from his embryo hope had it budded into life. This last has rather too many contingencies about it; but the principle, which reaches it and meets the offender, does very well out here in California, and would not be misapplied in some of those pill-shops which slope the path to crime in the United States.

Stephen J. Field, the Alcalde of Yubaville in 1850, said that while he knew none of the Mexican law, he was able to make decisions which were readily accepted by the community:<sup>28</sup>

The Americans in the country had a general notion of what was required for the preservation of order and the due administration of justice; and as I endeavored to administer justice promptly, but upon a due consideration of the rights of everyone, and not rashly, I was sustained with great unanimity by the community.

Even the succeeding California state courts allowed the rules of natural justice to dictate the outcome of disputes occurring during the occupation. For example, the California Supreme Court held that to allow the Mexican laws of usury and implied warranty to apply to a sale of land in January 1850 would "work the grossest injustice" and that even though the Mexican law had not yet been abolished by the Legislature, it had been abrogated by the customs and usages of the newcomers.<sup>29</sup> Later, the same court determined that the Mexican law of escheats had been abrogated by the conquest of California in 1846 insofar as United States citizens were concerned, and that following the death of a Mexican citizen in May 1848 "his mother by the rule of natural justice, became entitled to the possession . . . ."<sup>30</sup>

In general, both the alcaldes, legally trained and lay, and the succeeding courts appear to have used their own concepts of justice whenever, as frequently happened, no suitable written law was at hand. This practice fitted the requirements of what was in substance a frontier culture, as the flexibility of the natural law has generally done in frontier communities. The justice of the natural law was immediate and unsubtle and matched the expectations of the emigrants by whom or upon whom it was principally enforced.

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<sup>25</sup> COLTON, *THREE YEARS IN CALIFORNIA* 357 (1850).

<sup>26</sup> *Id.* at 224.

<sup>27</sup> *Id.* at 249.

<sup>28</sup> FIELD, *CALIFORNIA ALCALDE* 28 (1850).

<sup>29</sup> *Fowler v. Smith*, 2 Cal. 39 (1852).

<sup>30</sup> *People v. Folsom*, 5 Cal. 373, 378 (1855).

*Conclusion*

In a study of this nature it is easy to concentrate on the law and ignore the men who made it and the time at which it was made. The writer has hoped to show, however, that the men who were responsible for the law of the occupation period were not scholars and philosophers but rather laymen and practicing attorneys, precipitated from the relatively orderly states into a frontier culture where a great many decisions had to be made quickly to solve concrete problems. Thus, it was both the dearth of accessible legal precedent in the Territory and the inexorable pressure of events that forced the emigrant alcaldes to develop the potpourri of natural and positive legal principles which came out of the occupation courts.

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