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California Courts in Historical Perspective

William Wirt Blume

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California Courts in Historical Perspective

By William Wirt Blume*

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Part One

I. Court System Prior to the First Constitution

IN a proclamation dated June 3, 1849, General Bennett Riley, acting governor of California, announced his intention to complete "the organization of the civil government by the election and appointment of all officers recognized by law," and designated August 1, 1849, as the day "for filling the offices of Judges of the Superior Court, Prefects and sub-Prefects, and all vacancies in the offices of 1st Alcade [*sic*] (or Judge of First Instance,) Alcades [*sic*], Justices of the Peace, and Town Councils."¹ The "law" referred to was Mexican law set out in statutes dated March 20 and May 23, 1837.²

The March 20 statute ("POLITICAL") prescribed the duties of prefects and sub-prefects, ayuntamientos (town councils), alcaldes, and justices of the peace. The May 23 statute ("JUDICIAL") provided for a superior court (tribunal), courts of first instance (primeria instancia), alcaldes, and justices of the peace.

The May 23 statute provided that the Superior Court (Tribunal) of California should consist of four judges; the three senior judges were to sit as the first bench (sala) and hear second appeals (en tercera instancia), and the junior judge was to sit as the second bench and hear first appeals (en segunda instancia). The courts of first instance, consisting of one or more judges, were to be held in the chief town (cabecera) of each district, and were to exercise jurisdiction over all suits and civil and criminal causes of whatever description except where members of the clergy or military were privileged. According to General (Governor) Riley, the duties of prefects and sub-prefects corresponded "in a great measure to those of District marshals and sheriffs."³

1. Riley, *Proclamation Recommending the Formation of a State Constitution, or a Plan of a Territorial Government*, in REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, 3-4 (J.R. Browne ed. 1850) [hereinafter cited as *1849 Proclamation*]. Although California had been ceded to the United States by Mexico by treaty dated February 2, 1848, Congress had failed to establish a territorial government for the area.

2. Halleck & Hartnell, *Translation and Digest of Such Portions of the Mexican Laws of March 20th and May 23rd, 1838, as are Supposed to Be Still in Force and Adapted to the Present Condition of California*, in REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, app. p, XXIV (J.R. Browne ed. 1850).

3. *1849 Proclamation*, *supra* note 1, at 4. In his memoirs E.O. Crosby, a delegate to the Constitutional Convention, wrote: "When we were about to disperse, Sacramento having no Prefect the delegates from there requested Gen. Riley to

Under the above statutes, judicial functions of alcaldes and justices of the peace were limited to conciliations and minor civil and criminal matters, but "by a custom not inconsistent with the laws" the office of judge of first instance was "vested in 1st Alcade [sic] of the District."⁴ In 1851 former Justice Bennett, in his preface to the first volume of California Reports (1851), stated it to be the belief "that judges of First Instance were never appointed and never held office in California under the Mexican regime, but the Alcaldes possessed the powers and jurisdiction of judges of First Instance."⁵ This custom may explain the exercise of almost unlimited judicial power by "first" alcaldes both before and after the Occupation.⁶

appoint one and I was appointed. The Prefects were a sort of petty governor of the districts. Their duties were executive and partly judicial and they had supervision of the Town Councils." E. CROSBY, MEMOIRS OF ELISHA OSCAR CROSBY, REMINISCENCES OF CALIFORNIA AND GUATEMALA FROM 1849 TO 1864, at 52 (C. Barker ed. 1945) [hereinafter cited as CROSBY MEMOIRS].

4. 1849 Proclamation, *supra* note 1, at 4.

5. Bennett, *Preface* to 1 Cal. at vii (1851) (italics omitted).

6. Orrin K. McMurray in *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 CALIF. L. REV. 359 (1915), quoted at some length from the writings of two Americans who served as alcaldes after the Occupation. One was Rev. Walter Colton, a chaplain in the United States Navy, formerly a professor of moral philosophy in Middleton, Connecticut, and a newspaper editor in Washington, D.C.; the other, Stephen J. Field, who had practiced law in New York with his brother David Dudley Field, and who later became a member of the Supreme Court of California. Still later, he became a justice of the Supreme Court of the United States.

The title page of Colton's book reads: THREE YEARS IN CALIFORNIA by Rev. Walter Colton, U.S.N., *Together with excerpts from the author's DECK AND PORT Covering his arrival in California and a selection of his letters from Monterey.* It was published in 1850, and reprinted by the Stanford University Press in 1949, with introduction and notes by Marguerite Eyer Wilbur. Under the date of July 28, 1846, Colton wrote at 17: "Com. Stockton informed me to-day that I had been appointed Alcalde of Monterey and its jurisdiction. I had dreamed in the course of my life, as most people have, of the thousand things I might become, but it never entered my visions that I should succeed to the dignity of a Spanish alcalde." Under the date of September 15, 1846, at 55, Colton wrote: "The citizens of Monterey elected me to-day alcalde, or chief magistrate of this jurisdiction—a situation which I have been filling for two months past, under a military commission. It has now been restored to its civil character and functions. Their election . . . devolves upon me duties similar to those of mayor of one of our cities, without any of those judicial aids which he enjoys. It involves every breach of the peace, every case of crime, every 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."

Field's book was entitled PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA (copyright 1880) ("Printed for a few friends—NOT PUBLISHED.") It had been

In "The Alcalde System of California,"⁷ Judge Wilson wrote:

The proclamation of General Riley of June 3d, 1849, established a new era in the political and judicial administration of California. He called upon the people in the several districts to indicate, by an election, the persons whom he should appoint as Judges of First Instance and Prefects, and also in districts composed of several primary ones, to indicate the persons who should be appointed Judges of Second Instance.

The Judges of Second Instance, when assembled *in banco*, constituted the Superior Tribunal or Court of Appeals. But neither the Courts of Second Instance nor the Superior Tribunal did any business, except granting a few orders, before they were superseded by the present judiciary. The Courts of First Instance originated a large portion of the cases which went up on appeal to the [State] Supreme Court.⁸

II. Constitution of 1849

The convention to "frame a State Constitution or a Territorial organization," proposed by General (Governor) Riley in his proclamation of June 3, 1849, met on September 1, 1849, and by a vote of 28 to 8 decided to draft a "State" constitution.⁹ The delegates who voted

dictated to a stenographer in San Francisco in 1877. Field's *REMINISCENCES* along with other materials and a foreword by Jos. A. Sullivan, was reprinted in *Biobooks* in 1950 with this on the title page: *CALIFORNIA ALCALDE* by *Stephen J. Field, Late Justice of the Supreme Court of the United States*.

Field's oath of office as Alcalde is printed in *CALIFORNIA ALCALDE* at 154. It was dated January 22, 1850, and refers to him as "First Alcalde of Yubaville in the District of Sacramento." Referring to his experiences as alcalde, Field stated: "Under the Mexican law Alcaldes had, as already stated, a very limited jurisdiction. But in the anomalous conditions 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." *Id.* at 27.

7. Wilson, *The Alcalde System of California*, in *Appendix* to 1 Cal. at 559 (1851).

8. *Id.* at 577. An act passed by the Legislature of the State of California February 28, 1850, abolished the courts of second and third instance, and transferred pending business to the State Supreme Court. Existing courts of first instance were recognized as courts of the State, and were authorized to continue until superseded, with appeals to the Supreme Court. Cal. Stat. 1850, ch. 23, §§ 1-2, at 77. Early court rules relating to appeals from courts of first instance will be found in C. KENYON, *A GUIDE TO EARLY CALIFORNIA COURT ORGANIZATION, PRACTICE ACTS AND RULES, WITH THE TEXT OF CALIFORNIA SUPREME COURT RULES, 1850-1853* (CALIFORNIA STATE LAW LIBRARY Paper No. 21, 1968). Rule 8 adopted by the Supreme Court, June Term 1850, provided: "Appeals from judgments rendered by Courts of First Instance shall be entered on the Calendar & brought to a hearing in the manner prescribed in section 277 of the practice act approved April 22d 1850." *Id.* at 13.

9. *REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE*

in the negative favored a territorial form of government, some going so far as to propose a state government in the north, and a territorial government in the south. One delegate, W. M. Gwin, took it upon himself to have copies of the Iowa Constitution printed and distributed, and another, M. M. McCarver, moved that it be taken into consideration "as a basis for the Constitution of California."¹⁰ It should be noted, however, that the convention did not limit itself to any one source, but had before it, and, presumably, took into consideration, the constitutions of all the states.¹¹

On September 20, 1849, Myron Norton, chairman of the Drafting Committee, reported upon an article entitled "Judicial Department."¹² K. H. Dimmick gave notice that he would present a minority report. Consideration of the majority report was delayed until it could be translated into Spanish. Taken up by the Committee of the Whole on September 25, it was debated at length.¹³ The chief question was whether the "Supreme Court of Appeals should be separate and distinct from the District Courts."¹⁴

As first proposed, there were to be four Supreme Court judges, each to try cases in separate circuits; three would sit as an appellate court to review the judgments of the fourth. Arguments in favor of this system were based on the economy of having fewer judges and, therefore, less expense. Arguments against this system called attention to the great amount of time that would be lost in traveling great distances between the trial districts and the places where the judges would

FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 20-23 (J.R. Browne ed. 1850) [hereinafter cited as BROWNE DEBATES].

10. *Id.* at 24. It may be of interest to compare Mr. Crosby's account of this episode as set out in his memoirs: "When we arrived at Monterey it was understood that Gwin had a copy (in fact we knew he had) of a state Constitution with open lines and blanks to be filled in. He had in his pocket a combination of the State Constitutions of Ohio and Iowa. He had it printed taking from the Constitutions of those states what he liked and adding to it to suit himself, and had spaces to fill in what might be required, and blank dates." CROSBY MEMOIRS, *supra* note 3, at 40. In a letter dated August 8, 1849, J. Ross Browne, after referring to his chance meeting with Gwin in San Francisco, stated: "Dr. Gwin laid before me his whole plan, which is this. He came out to California to form a constitution and identify himself with the political interest of the country. After forming a constitution he will undoubtedly be made Senator of the United States from California. . . . He says I must be elected Stenographer to the Convention." J. BROWNE, J. ROSS BROWNE, HIS LETTERS, JOURNALS AND WRITINGS 121 (L. Browne ed. 1969).

11. Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 HASTINGS L.J. 701, 718 n.63 (1966).

12. BROWNE DEBATES, *supra* note 9, at 153.

13. *Id.* at 212-39.

14. *Id.* at 223.

meet to consider appeals. It was further argued that different combinations of three of the four possible appellate judges might result in contradictions, and that expense should not be a controlling consideration. In deference to these arguments, a resolution favoring complete separation of trial courts from appellate courts was adopted.¹⁵

The article on the judicial department,¹⁶ as finally adopted, is outlined below:

JUDICIAL TRIBUNALS

Supreme Court—to consist of a Chief Justice and two associate justices.

District Courts—to be held by one judge in each district as established by the Legislature.

County Courts—to be held in each county by the county judge.

Courts of Sessions—to be held by the county judge and two justices of the peace.

Municipal Courts—Legislature to establish such municipal and other inferior courts as may be deemed necessary.

Tribunals for Conciliation—may be established by the Legislature.

Justices' Courts—to be held by justices of the peace; the number in each county, city, town, and incorporated village to be determined by the Legislature.

JUDICIAL OFFICERS

Justices of the Supreme Court—first justices to be elected by the Legislature; subsequent justices elected by electors of the State; to hold office for 6 years.

District Judges—first judges to be appointed by the Legislature, to hold office for 2 years; later judges to be elected by electors or respective districts, to hold office for 6 years.

County Judges—to be elected by voters of the county; to hold office for 4 years.

Justices of the Peace—justices to be elected in each county, city, town, and incorporated village.

15. *Id.*

16. CAL. CONST. art. VI (1849).

OTHER OFFICERS

Legislature to provide for the election of a Clerk of the Supreme Court, county clerks, district attorneys, sheriffs, coroners, and other necessary officers; county clerks to be ex officio clerks of district courts.

SUBJECT-MATTER JURISDICTION

Supreme Court—to have appellate jurisdiction in all cases when the dispute exceeds \$200, when legality of a tax, toll, impost or municipal fine is in question, and questions of law in all criminal cases amounting to felony; court and justices to have power to issue writs of habeas corpus, and all writs necessary to the exercise of appellate jurisdiction.

District Courts—to have original jurisdiction in law and in equity in all civil cases where the amount in dispute exceeds \$200, in criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts.

County Courts—to have such jurisdiction in cases arising in justices' courts, and in special cases, as prescribed by the Legislature, but no other original civil jurisdiction; county judge to perform duties of surrogate or probate judge.

Courts of Sessions—to have such criminal jurisdiction as the Legislature may prescribe.

Justices of the Peace—powers, duties, and responsibilities to be fixed by the Legislature.

VENUE AND RANGE OF PROCESS

No provisions.

L.W. Hastings moved to strike the provision which authorized the Legislature to appoint the first justices of the Supreme Court. He desired that the election of justices and other officers should be left to the people.¹⁷ Myron Norton replied that members of the committee were as much in favor of the election of judges as Mr. Hastings, adding that he believed "a great majority of the members of this House are in favor of leaving the election of these officers to the people."¹⁸ He pointed out the difficulties of having an immediate election of judges,

17. BROWNE DEBATES, *supra* note 9, at 224.

18. *Id.*

and Mr. Hastings' amendment was rejected.¹⁹ E.O. Crosby participated in the judicial department debates, but did not speak out on the subject of the election of judges. In an account of the proceedings of the convention in his *Memoirs*,²⁰ Crosby wrote:

The other point that I took most interest in and did the most work in connection with, was in the Judicial Dept. I took an interest in the organization of the Judiciary of the State and did what I could to direct the Organization according to my conceptions for the best interest of the people. I was opposed to an elective Judiciary, I doubt its policy now My idea was to give a life term or during good behavior with a salary sufficient to ensure him a fair competence enough to live on with something for his support after he became too old for his work: and I did what I could to prevent the elective judiciary. It went against me because the sentiment of the Convention was the other way.²¹

A matter discussed at length on the convention floor was a suggestion by a Mr. Noriego "that the jurisdiction of the Appellate Court should be limited to the sum of \$200."²² The time of the appellate judges should not be occupied by "trivial disputes" often indulged in to satisfy some whim or caprice or to gratify a malicious feeling against the opposite party. Arguments against the limitation emphasized that cases involving less than \$200 often involve important principles of law. In this connection it was suggested by J.M. Jones that exceptions should be made in cases involving any tax, toll, impost, or municipal fine.²³ L.W. Hastings stated that he could not support the limitation because "[i]t strikes fatally at another unfortunate class of men—the poor."²⁴ The limitation was adopted by a vote of 18 to 17.²⁵ Elam Brown was "not surprised at the excitement this question has made"

19. *Id.* at 225.

20. CROSBY MEMOIRS, *supra* note 3, at 44.

21. In seeming explanation of why he did not argue his views on the Convention floor, Crosby added: "There was a great deal of work done outside the Convention perhaps more by consultations outside than by public debate. The time was so short most of the determinations were made by discussions in Committees and interviews outside of the public sittings and debates. In looking through the debates you see how short and meagre they are. A great many of the men most active and influential in the making of the Constitution hardly appeared as debaters on the floor." *Id.* at 45. For "conditions and events and ideas . . . which produced our system of electing judges and limiting their tenure to terms of years," see Haynes, *The Selection and Tenure of Judges* in *THE DEMOCRATIC REVOLUTION IN AMERICA 1830-1850*, ch. 4 (1944). The California Convention was held at the time "the swing toward the democratization of government" was at its height.

22. BROWNE DEBATES, *supra* note 9, at 225.

23. *Id.* at 226.

24. *Id.* at 227.

25. *Id.* at 231.

because one class of delegates is "going to be deprived of very important employment," obviously referring to the lawyer members of the convention.²⁶ This remark caused more excitement.

Interpretation of the \$200 limitation was involved in a case which came before the California Supreme Court in 1858.²⁷ Speaking for the court, Justice Stephen J. Field stated:

As we read the section, the Court possesses appellate jurisdiction in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost, or municipal fine is drawn in question. . . . The sixth section of the same article declares that "the District Courts shall have original jurisdiction, in law and equity, in all civil cases, when the amount in dispute exceeds two hundred dollars, exclusive of interest."

It could never have been the intention of the framers of the Constitution to deny to the higher Courts, both original and appellate, any jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation—such as suits to prevent threatened injury—respecting the guardianship of children—honorary offices, to which no salary is attached, and the like.²⁸

Another matter discussed at length on the convention floor was a provision proposed by Pacifus Ord that judges should not charge juries with respect to matters of fact, but may state the testimony and declare the law.²⁹ Mr. Ord stated that the proposed section had been taken from the Constitution of Tennessee. W.M. Gwin, a native of Tennessee, reported how the section got into the constitution of that state: "It originated from the acts of two of the judges. They were impeached on the very charge of having abused the power of making charges to the jury. The case involved the State in great expense, and caused excitement throughout the country."³⁰ C.T. Betts did not think the custom of charging juries with respect to matters of fact should be preserved simply because it was old.³¹ W.S. Sherwood agreed.³² K.H. Dimmick, however, was opposed to introducing into the constitution sections which were "more properly matters of legislative action."³³ Nevertheless, the provision was adopted.³⁴

26. *Id.*

27. *Conant v. Conant*, 10 Cal. 249 (1858).

28. *Id.* at 253.

29. BROWNE DEBATES, *supra* note 9, at 234-39.

30. *Id.* at 235.

31. *Id.* at 236.

32. *Id.* at 237.

33. *Id.* at 239.

34. *Id.*

The section of the constitution which authorized the Legislature to establish "Tribunals for conciliation" was adopted without debate.³⁵ In *Seventy-five years of California Jurisprudence*,³⁶ Orrin K. McMurray wrote:

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* [1 Cal. 55 (1850)], 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 1849.³⁷

The case referred to by Professor McMurray was an appeal in 1850 from a decree of the Court of First Instance of the District of San Francisco. This court had been established under Mexican law, and was supposed to follow Mexican procedure. In that case, the court had proceeded to trial without requiring a certificate showing that *conciliacion* had been attempted. The California Supreme Court held that *conciliacion* had been a necessary prerequisite to suit under Mexican law, but its omission was not error. Justice Bennett stated:

[S]ince the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the Courts and by the people; . . . it has, in fact, passed into disuse and become obsolete. . . .

. . . Notwithstanding the importance which seems to be attached to the trial of *conciliacion* by Spanish and Mexican writers (see 5 Tapia Feb. 209, and 1 Prac. For. Meg. 72, *et seq.* by Peña y Peña), and even conceding that it may operate beneficially in the nations for which it was originally designed, still amongst the American people it can be looked upon in no other light than a use-

35. *Id.* at 234.

36. 13 CALIF. L. REV. 445 (1925).

37. *Id.* at 453.

less and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of any case.³⁸

This being the attitude of the Americans in California at the time of the adoption of the Constitution of 1849, it seems unlikely that the mere fact that New York had authorized tribunals of conciliation would have induced the American members of the California Convention to do likewise. More probably, the inclusion of the provision was in deference to the feelings of the members of the convention who had lived in California prior to the Occupation.³⁹ Although provided for by the New York Code Commissioners in their report published in 1850,⁴⁰ which became the source of California's Code of Civil Procedure,⁴¹ tribunals of conciliation were not established by the Legislature in the State of California.

Another matter not discussed on the floor of the convention of 1849 was the change in the authority of the Supreme Court to issue writs. The article on the judicial department as originally drafted provided that the Supreme Court should have power to issue "all writs and processes necessary to do justice to parties" and to "exercise a supervisory control" over "all inferior tribunals."⁴² The article adopted provided that the Supreme Court should have power to issue writs of habeas corpus, and "all other writs and processes necessary to the exercise of their appellate jurisdiction."⁴³ The Supreme Court as originally proposed was a unified court having both trial and appellate divisions; the Supreme Court as established was an appellate court.⁴⁴ In a case decided in June 1850⁴⁵ Chief Justice Hastings interpreted the adopted article and denied that the Supreme Court should be consid-

38. Von Schmidt v. Huntington, 1 Cal. 55, 64-65 (1850).

39. Some members of the Convention had lived in California all their lives (toda la vida); others, for long periods of time up to 20 years. Most of the pre-Occupation delegates had Spanish names. BROWNE DEBATES, *supra* note 9, at 478-79.

40. THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK §§ 180-81, & §§ 1523-42, at 641-47 (1850) ("reported complete" by the Commissioners on Practice and Pleadings) [hereinafter cited as NEW YORK DRAFT CODE]. In a note preceding section 1523, at 641, the New York Code Commissioners stated: "This title is the same as that reported by us, in our third report. The provisions are few and simple; but they appear to us sufficient for the purpose. In the French code of civil procedure, eleven sections only are devoted to the proceedings in conciliation; and that they are not found defective in details is proved by the fact, that in a single year 726,556 cases were settled in that way."

41. Blume, *Adoption in California of the Field Code of Civil Procedure: A Chapter in American Legal History*, 17 HASTINGS L.J. 701 (1966).

42. BROWNE DEBATES, *supra* note 9, at 212.

43. CAL. CONST. art. VI, § 4 (1849).

44. BROWNE DEBATES, *supra* note 9, at 212-13.

45. *People ex rel. Attorney-General, ex parte*, 1 Cal. 85 (1850).

ered as having the same relation to the people as the English Court of King's Bench. He recognized that the Supreme Court could exercise a "supervisory control" over the inferior courts of the State, but the "only original jurisdiction conferred either by the act of the Legislature or the constitution, is in the isolated case of issuing writs of habeas corpus."⁴⁶

III. Acts of the First Legislature: 1850

The Constitution of 1849 left to the Legislature the determination of the number of justices of the peace "to be elected in each county, city, town, and incorporated village of the State," and the fixing of their "powers, duties, and responsibilities."⁴⁷ The Legislature was authorized, but not required, to establish tribunals for conciliation and "such municipal and other inferior courts as may be deemed necessary."⁴⁸

To discover how the First Legislature exercised its power to establish municipal courts, it is necessary to examine the general "ACT to provide for the incorporation of cities" passed March 11, 1850,⁴⁹ and each of the special acts which incorporated particular cities. The general act provided for the election of a mayor, recorder, city marshal, city attorney, and other municipal officers. It further provided that the recorder, "as to offenses committed within the city," should have the examining and committing powers of a justice of the peace and "jurisdiction over all violations of the City Ordinance."⁵⁰ Similar grants of jurisdiction had been included in the previously enacted special act for the incorporation of Sacramento.⁵¹ In the act which incorporated Benicia, passed March 27, 1850,⁵² the mayor was given exclusive

46. The Act of the Legislature referred to by Chief Justice Hastings was "AN ACT to organize the Supreme Court of California" passed February 14, 1850, which provided that "said Court, and each of the Justices thereof, shall have power to issue writs of Habeas Corpus, of Mandamus, of Injunction, Certiorari, Supersedeas, and such other writs and processes known to the law, and may be necessary in the exercise of their jurisdiction. . . ." Cal. Stat. 1850, ch. 14, § 7, at 57. "AN ACT to organize the District Courts of the State of California" passed March 16, 1850, provided that these courts should have power "to issue and direct writs of mandamus, prohibition, quo warranto, habeas corpus, ne exeat, and all other writs and processes to courts of inferior jurisdiction, and to corporations and individuals which shall be necessary to the furtherance of justice and the regular executions of the laws; . . ." *Id.* ch. 33, § 8, at 93.

47. CAL. CONST. art. VI, § 14 (1849).

48. *Id.* §§ 1, 13.

49. Cal. Stat. 1850, ch. 30, at 87.

50. *Id.* ch. 30, §§ 23-24, at 90.

51. *Id.* ch. 20, at 71.

52. *Id.* ch. 45, at 119.

jurisdiction "of all violations" of city ordinances, and "all the powers of a Justice of the peace." In the other special acts, incorporating the cities of San Diego,⁵³ San Jose,⁵⁴ Monterey,⁵⁵ Sonoma,⁵⁶ Los Angeles,⁵⁷ Santa Barbara,⁵⁸ and San Francisco,⁵⁹ the powers conferred on the recorder by the general act were conferred on the recorder if one were provided; otherwise, they were conferred on the mayor.

To complete the judicial system established by the constitution, the Legislature from time to time, between February 2 and April 22, 1850, passed a number of separate acts.⁶⁰ Nevertheless, in a report to the Senate dated February 27, 1850,⁶¹ the Senate Committee on the Judiciary rejected proposals to codify all the law as "impractical and absurd," saying:

The most, therefore, that can be expected from the present Legislature is, to set the machinery of government in operation in all its departments, establish a system of pleadings and practice, enact certain statutes providing for the most common cases of judicial investigation; and for the rest, resort to one of the two great repositories of legal learning, the Common or the Civil Law.⁶²

IV. Court Act of 1851

"AN ACT concerning Courts of Justice of this State, and Judicial Officers" was passed by the Second Session of the California Legislature

53. *Id.* ch. 46, at 121.

54. *Id.* ch. 47, at 127.

55. *Id.* ch. 50, at 131.

56. *Id.* ch. 56, at 150.

57. *Id.* ch. 60, at 155.

58. *Id.* ch. 68, at 172.

59. *Id.* ch. 98, at 223.

60. Cal. Stat. 1850, ch. 11, at 55 (concerning the office of Attorney General); ch. 14, at 57 (to organize the Supreme Court); ch. 23, at 77 (to supersede certain courts); ch. 33, at 93 (to organize the district courts); ch. 39, at 112 (concerning the office of county attorney); ch. 40, at 112 (concerning the office of district attorney); ch. 63, at 159 (to establish a municipal court in the City of San Francisco to be called the superior court); ch. 73, at 179 (to regulate proceedings in justices' courts in civil cases); ch. 84, at 203 (to regulate proceedings in county court); ch. 86, at 210 (to organize the court of sessions); ch. 90, at 216 (concerning the office of reporter); ch. 92, at 217 (to organize the county courts); ch. 105, at 257 (to fix the terms of the Superior Court of San Francisco); ch. 106, at 258 (to prescribe the duties of sheriff); ch. 110, at 261 (to define the duties of county clerk); ch. 112, at 263 (to prescribe the duty of constable); ch. 142, at 428 (to regulate proceedings in civil cases in the district court, Superior Court of San Francisco, and Supreme Court); ch. 129, at 377 (to regulate the settlement of the estates of deceased persons); ch. 119, at 275 (to regulate proceedings in criminal cases); ch. 141, at 425 (concerning the forcible entry and detainer).

61. *Appendix* to 1 Cal. at 588 (1851).

62. *Id.* at 591.

on March 11, 1851.⁶³ In his "Personal Reminiscences"⁶⁴ Stephen J. Field, after an account of his running for the Legislature, wrote:

Immediately after the election, I commenced the preparation of a bill relating to the courts and judicial officers of the State, intending to present it early in the session. The Legislature met at San José on the first Monday of January 1851, and I was placed on the Judiciary Committee of the House. My first business was to call the attention of the Committee to the bill I had drawn. It met their approval, was reported with a favorable recommendation, and after a full discussion was passed. Its principal provisions remained in force for many years, and most of them are retained in the Code, which went into effect in January 1873.⁶⁵

On the day the California Court Act of 1851 was passed⁶⁶ another act amending it was passed.⁶⁷ The following is an outline of the judicial system established by these acts:

COURTS OF JUSTICE

Supreme Court—to consist of a Chief Justice and two associate justices.

District Courts—to be held by one judge in each of 11 judicial districts.

Superior Court of San Francisco—to be composed of three judges until next election; afterwards, one judge.

County Courts—to be held in each county by the county judge.

Courts of Sessions—to be held by the county judge and two justices of the peace.

63. Cal. Stat. 1851, ch. 1, at 2.

64. S. FIELD, CALIFORNIA ALCALDE app., at 153 (1950).

65. While running for the Legislature, Field stated publicly that his "object in wishing to go to the Legislature was to reform the judiciary, and among other things, to remove [Judge Turner] from the district." *Id.* at 45. Reviewing the results of his legislative career Field stated: "I drew, as already stated, and carried through the Legislature a bill defining the powers and jurisdiction of the courts and judicial officers of the State; and whilst thus doing good, I also got rid of the ignorant and brutal judge of our district who had outraged my rights, assaulted my character, and threatened my life. I also, as I have mentioned, introduced bills regulating the procedure in civil and criminal cases, remodeled with many changes from the Codes of Civil and Criminal Procedure reported by the Commissioners of New York; and secured their passage." *Id.* at 63. For accounts of Fields work as a legislator, see series of articles published in the San Jose Daily Herald in 1879, reprinted in SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD, 3-14 (C. Black & S. Smith eds. 1881).

66. Cal. Stat. 1851, ch. 1, at 9.

67. *Id.* ch. 2, at 31.

Probate Courts—to be held in each county by the county judge as a probate judge.

Justices' Courts—to be held by justices of the peace.

Recorders' Courts—to be held, in cities where established, by one judge designated recorder of the city.

Mayors' Court—mayors of cities having mayors' courts are the judges of such courts.

JUDICIAL OFFICERS

Justices of the Supreme Court—to be elected by voters of the State; to hold office for 6 years.

District Judges—to be elected by voters of their respective districts; to hold office for 6 years; to be eligible, must be a citizen of the United States, a resident of the State for 1 year, and a resident of the district for 6 months.

Judge of the Superior Court of San Francisco—to be elected by voters of the city; to hold office for 3 years.

County Judge—to be elected by voters of the county; to hold office for 4 years.

Associate Justices of the Court of Sessions—to be chosen by the justices of the peace of the county.

Judge of the Probate Court—same as county judge.

Justices of the Peace—to be elected by voters of their respective townships or cities; to hold office for 1 year.

Recorder of the City—to be elected by voters of the city; to hold office for 1 year, unless a longer time is prescribed by the act incorporating the city.

Judges of Mayors' Courts—selection of mayors and their term of office not covered by the act.

OTHER OFFICERS

No provision, except the county clerk is to be the clerk of the court of sessions.

SUBJECT-MATTER JURISDICTION

Supreme Court—to have appellate jurisdiction in all cases where the dispute exceeds \$200, when the legality of a tax, toll, impost, or municipal fine is in question, and questions of

law in all criminal cases amounting to felony; may review on appeal (1) judgments and intermediate orders involving merits and necessarily affecting judgments of district courts and of the Superior Court of San Francisco, and (2) orders granting or refusing a new trial or affecting substantial rights; may review proceedings of inferior tribunals, boards, or officers on certiorari, and issue writs of mandate; the Supreme Court and each justice may issue other writs necessary or proper to the complete exercise of constitutional and statutory powers.

District Courts—to have original jurisdiction in all civil cases where the amount in dispute exceeds \$200, in criminal cases not otherwise provided for, and in all issues of fact joined in probate courts; jurisdiction is to be unlimited in cases involving title or possession of land, and in all issues of fact joined in probate courts; may review on appeal (1) final judgments and intermediate orders involving merits and necessarily affecting judgments in actions commenced in county courts, (2) judgments of county courts in appealed cases involving a tax, toll, impost, license, fine, or the possession of land, (3) judgments of courts of session in criminal actions, (4) orders of county courts and courts of session granting or refusing a new trial or affecting a substantial right, and (5) orders and judgments of probate courts in cases prescribed by statute; may review proceedings of inferior tribunals, boards, or officers on certiorari, and issue writs of mandate; the court and judge may issue other writs necessary or proper to the complete exercise of constitutional and statutory powers.

Superior Court of San Francisco—to have jurisdiction coextensive with the district court in like cases, in all civil cases where the amount in dispute exceeds \$200 or which involve title or possession of land in San Francisco; may review proceedings of inferior tribunals, boards, or officers on certiorari, and issue writs of mandate; court and judge (or judges until next election) may issue other writs necessary or proper to the complete exercise of constitutional and statutory powers.

County Courts—may review on appeal judgments rendered in civil actions or proceedings by justices' court or recorders' courts within the county; to have original jurisdiction (1) to enforce mechanics' and other liens, (2) to prevent or abate

a nuisance, (3) to prevent waste or give damages therefor, and (4) in cases, of insolvency; may review proceedings of inferior tribunals or offices on certiorari, and issue writs of mandate; court and judge may issue other writs necessary or proper to the complete exercise of constitutional and statutory powers.

Court of Sessions—to have jurisdiction (1) to inquire by grand jury into public offenses committed or triable in the county; (2) to try grand jury indictments except murder, manslaughter, and arson, and to try these when the indictment is against a district judge; (3) to hear and to determine appeals from justices', recorders', and mayors' courts in criminal cases; may issue and make all writs and orders necessary for the complete exercise of powers.

Probate Court—to have exclusive jurisdiction, in the first instance, to take proof of wills in six specified situations;⁶⁸ may (1) grant and revoke letters testamentary and of administration, (2) control conduct and accounts of executors and administrators, (3) enforce payment of debts and legacies, and distribution of estates, (4) order sale and disposal of real property of deceased persons, and (5) take care and custody of the person and estate of infants residing in the county, and of persons incapable of caring for themselves or their property; may appoint and remove guardians, direct and control their conduct, and settle their accounts; may issue and make all writs and orders necessary for the complete exercise of its powers.

Justices' Courts—to have jurisdiction of actions and proceedings not exceeding \$500 (\$200 in San Francisco and Sacramento Counties) in actions or proceedings involving (1) contracts for money only, (2) damages to persons or personal

68. *Id.* ch. 1, §§ 80-81, at 21-22. The six specified situations are: (1) When the testator, at or immediately before his death, was an inhabitant of the county, in whatever place he may have died; (2) when the testator, not being an inhabitant of this State, shall have died in the county, leaving assets therein; (3) when the testator, not being an inhabitant of this State, shall have died out of the State, leaving assets in the county; (4) when the testator, not being an inhabitant of this State, shall have died out of the State, not leaving assets therein, but where assets thereafter come into the county; (5) where real property, devised by the testator, is situated in the county, and no other probate court has gained jurisdiction, under any of the four preceding situations; and (6) when the testator shall have died out of this State, not being an inhabitant thereof, and not leaving assets therein, shall leave a will relative to real property situated in the county.

property, (3) fines, penalties, and forfeitures, (4) money bonds, (5) surety bonds taken by justices' courts (amount unlimited); (6) enforcements of mortgages and liens on personal property, (7) possession of personal property, (8) confessed judgments, and (9) forcible entry and detainer (amount unlimited); not to have jurisdiction (1) where title to real property comes into question, (2) to enforce mortgages and liens on real property, nor (3) of actions against executors and administrators; to have jurisdiction to try with a jury of 12 (or less, if agreed to) the right to "mining claims" within their respective cities or townships; to have jurisdiction (except in the cities of San Francisco, Sacramento, and Stockton) of (1) petit larceny, (2) assault and battery, except on a public officer or with intent to kill, and (3) breaches of the peace, riots, affrays, willful injury to property, and all misdemeanors punishable by fine not exceeding \$500 or imprisonment not exceeding 3 months.

Recorders' Courts—to have jurisdiction of actions and proceedings (1) for violation of any city ordinance, (2) to prevent or to abate nuisance within city limits, and (3) respecting vagrants and disorderly persons; to have jurisdiction of certain offenses committed within the city including (1) petit larceny, (2) assault and battery, except on a public officer or with intent to kill, (3) breaches of the peace, riots, affrays, willful injury to property, and all misdemeanors where the fine does not exceed \$500 or imprisonment in excess of 3 months; may exercise powers and duties of committing magistrates in criminal cases not within their jurisdiction; may issue and make all writs and orders necessary for the complete exercise of their powers.

Mayors' Courts—to have the same jurisdiction of actions and public offenses committed in their respective cities as is conferred by this act on recorders' courts; may exercise the same powers as committing magistrates as are conferred on recorders by this act; may issue and make all writs and orders necessary for the complete exercise of their powers.

VENUE AND RANGE OF PROCESS

No provisions.

The Court Act of 1851 specified the jurisdiction of justices' courts,

recorders' courts, and mayors' courts. But to know which of these courts, if any, was established in a particular city, it is necessary to examine the special acts incorporating particular cities and all acts amending them.⁶⁹ These special acts not only specified the type of court to be established, but, in practically all instances, prescribed its jurisdiction. The jurisdiction of these courts, therefore, might or might not be the same as set out in the Court Act of 1851. The Mayor's Court of Monterey, in addition to the criminal jurisdiction usually conferred, was given jurisdiction within the city of "civil actions to the same extent as Justices of the Peace."⁷⁰ Recorders' courts in the cities of Nevada⁷¹ and Sonora⁷² were given jurisdiction of actions to determine the right to "mining claims" within the city.

Jurisdiction to determine the right to "mining claims" conferred on justices of the peace by the Court Act of 1851⁷³ was given in these words:

These Courts shall also have jurisdiction; 1st, To try with a jury of twelve men, or with a jury of a less number if the parties agree thereto, the right of "mining claims," within their respective cities or townships.

It does not appear that this jurisdiction was limited in amount. Section 621 of Field's Civil Practice Act of 1851 provided:⁷⁴

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 claim; 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 significance of this provision in the development of American mining and water law has been often noted.⁷⁵

A court not included in the Court Act of 1851 was established by "AN ACT concerning Judges of the Plains (Jueces del Campo), and defining their duties" passed April 25, 1851.⁷⁶ These judges were

69. *Id.* ch. 78, at 329 (Los Angeles); ch. 80, at 330 (Marysville); ch. 82, at 339 (Nevada); ch. 83, at 348 (Benecia); ch. 84, at 357 (San Francisco); ch. 85, at 367 (Monterey); ch. 86, at 375 (Sonora); and ch. 89, at 391 (Sacramento).

70. *Id.* ch. 85, art. V, § 2, at 373.

71. *Id.* ch. 82, art. V, § 2, at 347.

72. *Id.* ch. 86, art. V, § 2, at 382.

73. *Id.* ch. 1, § 89, at 23.

74. *Id.* ch. 4, tit. XVI, ch. V, § 621, at 149.

75. See the comments by Professor Pomeroy in his Introduction to SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD, *supra* note 65, at 17-19, and the article at 5, reprinted from the San Jose Daily Herald of November 18, 1879. Also see Field's opinion in *Jennison v. Kirk*, 98 U.S. 453, 462 (1878).

76. Cal. Stat. 1851, ch. 131, at 515.

to be appointed by courts of sessions for terms of 1 year. They were charged with the duty of attending "all rodeos or gathering of cattle" to decide disputes respecting "ownership, mark, or brand." Appeal to a justice of the peace was authorized. The judge of the plains was directed to arrest and take before a magistrate all persons accused of "killing, hiding, or otherwise taking away animals belonging to others."

V. Court Act as Revised in 1853

The Court Act of 1851 was repealed, and a new act with the same title was passed and approved May 19, 1853.⁷⁷ After referring to Stephen J. Field's work in drafting the Court Act of 1851, a writer in the *San José Daily Herald* of December 26, 1879, added "that the Act of 1853 with the same title—which was the original act carefully revised, and introduced into the Legislature by Mr. Samuel B. Smith of Sutter County—was also prepared by him [Field]."⁷⁸ Field, at this time, was not a member of the Legislature.

The act of 1853 contained the same chapters as the act of 1851, but fewer sections. It provided for the same courts and judicial officers, and made only minor changes in jurisdiction. Nonjudicial officers were not included. The general scheme of the judicial system remained the same.

VI. Constitution of 1849 as Amended in 1862

A revision of article VI of the Constitution of 1849—"Judicial Department"—was proposed in 1861; it was ratified September 3, 1862.⁷⁹ The revised article provided that the "Judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts, and in Justices of the Peace and in such Recorders' and other inferior Courts as the Legislature may establish in any incorporated city or town."⁸⁰ The authority given by the original article VI to establish tribunals for conciliation and its provision for courts of sessions were omitted. After directing the Legislature to provide for the election of clerks and other nonjudicial officers, revised article VI authorized the Legislature to provide "for the appointment by the several District Courts of one or more Commissioners in the several counties of their respective Districts, with authority to perform

77. Cal. Stat. 1853, ch. 180, at 287.

78. "Samuel B. Smith" is the name of one of the editors of *SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD* (1881) in which the newspaper article was reprinted at 11-13.

79. CAL. CONST. art. VI (1862).

80. *Id.* art. VI, § 6 (1862).

chamber business of the Judges of the District Courts and County Courts, and also to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.”⁸¹ The Legislature was directed to “determine the number of Justices of the Peace to be elected in each city and township of the State, and fix by law their powers, duties, and responsibilities.”⁸² It was also directed to fix by law “the jurisdiction of any Recorder’s or other inferior municipal Court which may be established.”⁸³ The revised article further provided that the Supreme Court should consist of a Chief Justice and four (instead of two) associate justices who should hold office for 10 years (instead of 6). Jurisdiction was prescribed as follows:

The Supreme court shall have appellate jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the Probate Courts; and also, in all criminal cases amounting to felony, on questions of law alone. The court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and also, all writs necessary or proper to the complete exercise of its appellate jurisdiction.⁸⁴

The wording of the revised article indicates that the Supreme Court was to have both “appellate” and “original” jurisdiction, the latter to be exercised through the writs listed in the article. Article VI, as originally adopted, had been interpreted as conferring on the Supreme Court, besides habeas corpus powers, only appellate jurisdiction.⁸⁵ The California Code Commissioners of 1871, in a note accompanying their draft of the Code of Civil Procedure, stated:⁸⁶

We have not used the phrases “cases in equity,” “cases at law,” and it is a little singular, to say the least, that these phrases were inserted in the constitution more than ten years after the adoption of our practice act, the very first section of which declared that there should be one form of civil action, obliterating at once the

81. *Id.* § 11 (1862).

82. *Id.* § 9 (1862).

83. *Id.* § 10 (1862).

84. *Id.* § 4 (1862).

85. See text accompanying note 15 *supra*. Part I of the Code of Civil Procedure proposed in 1871 states that the court’s jurisdiction is of two kinds: “original” and “appellate.” 3 REVISED LAWS OF THE STATE OF CALIFORNIA IN FOUR CODES: POLITICAL, CIVIL, CIVIL PROCEDURE AND PENAL—CODE OF CIVIL PROCEDURE pt. I, tit. I, ch. II, § 42 (1871) [hereinafter cited as PROPOSED CODE OF CIVIL PROCEDURE OF 1871].

86. PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pt I, tit. I, ch. II, § 44.

distinctions between actions at law and suits in equity.⁸⁷

The commissioners stated that they had experienced "no little difficulty" in framing a section that would "clearly define the appellate jurisdiction of the supreme court," observing that "to have simply followed the terms of the constitution in defining the jurisdiction, would have conveyed to one not familiar with the construction placed upon those terms by our court of last resort, but a faint idea of the extent or limit of that jurisdiction."⁸⁸ The section framed by the commissioners⁸⁹ reads:

Sec. 44. Its appellate jurisdiction extends—

1. To all civil actions for relief formerly given in courts of equity.

2. To all civil actions in which the subject of litigation is not capable of pecuniary compensation.

3. To all civil actions in which the subject of litigation is capable of pecuniary compensation, which involves the title of possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

4. To all special proceedings,

5. To all cases arising in the probate courts; and,

6. To all criminal actions amounting to a felony, on questions of law alone.

In support of their statement of the extent of the Supreme Court's jurisdiction, the commissioners quoted at length from the opinion written in 1858 by Justice Field in *Conant v. Conant*⁹⁰ and from the opinion written in 1866 by Chief Justice Currey in *Knowles v. Yates*.⁹¹ In the latter opinion the Chief Justice, after referring to *Conant v. Conant*, stated:

The highest courts of original jurisdiction have been in the practice, from the beginning, of taking cognizance of cases in which the subject-matter was not susceptible of pecuniary estimation, and concerning which no mention in terms was made in the Constitution. Cases of divorce are in this class, as also suits to prevent threatened injuries, respecting the guardianship of children,

87. Stephen J. Field, in drafting his Court Act of 1851, omitted the words "in law and equity" which had been employed by the Constitution of 1849. Compare Cal. Stat. 1851, ch. 131, §§ 5-8, at 10, with CAL. CONST. art. VI, § 4 (1849).

88. PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pt. I, tit. I, ch. II, § 42.

89. *Id.* § 44.

90. 10 Cal. 249 (1858). The statement concerning jurisdiction is quoted in text accompanying note 27 *supra*.

91. 31 Cal. 83 (1866).

honorary offices, and proceedings in the nature of writs of *quo warranto*; and in all such cases the Supreme Court, throughout the same period, entertained and exercised appellate jurisdiction.⁹²

Article VI of the Constitution of 1849, as amended in 1862, provided that the district courts should have

original jurisdiction in all cases in equity; also, in all cases at law which involve title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for.

In their attempt to codify the extent of the jurisdiction of the district courts, the California Code Commissioners of 1871 were "met", according to their report, "with the same difficulties that were encountered in drafting the section relative to the appellate jurisdiction of the supreme court. . . . The truth is, that the amendments of 1862, in so far as they *attempt* to fix and define the jurisdiction of the several courts of record, were so framed that to have given their terms any fair or reasonable construction, would have emasculated our whole judicial system."⁹³ The section framed by the commissioners⁹⁴ reads:

Sec. 57. The jurisdiction of the district courts extends—

1. To all civil actions for relief formerly given in courts of equity.
2. To all civil actions in which the subject of litigation is not capable of pecuniary compensation.
3. To all civil actions (except actions of forcible entry and detainer) in which the subject of litigation is capable of pecuniary compensation, which involves the title or possession of real estate or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amount [sic] to three hundred dollars.
4. To all special proceedings not within the jurisdiction of the county court, as defined in this code.
5. To the issuance of writs of mandamus, certiorari, prohibi-

92. *Id.* at 89.

93. PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pt. I, tit. I, ch. IV, § 57. The commissioners referred to the following statement made by Justice Rhodes in *Courtwright v. Bear River & Auburn Water & Mining Co.*, 30 Cal. 573, 578 (1866): "It is a matter of some doubt whether that Article [Article VI before amendment] deserved the commendation of having been drawn with great skill . . . ; but there is less question that the same cannot be said of the Article as it now stands." The commissioners referred, also, to *Perry v. Ames*, 26 Cal. 372 (1864). In this case Currey, J., pointed out that under Article VI of the Constitution of 1849, both before and after amendment, the District Courts had original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus. *Id.* at 383.

94. PROPOSED CODE OF CIVIL PROCEDURE, *supra* note 85, pt. I, tit. I, ch. IV, § 57.

tion, habeas corpus, and all writs necessary to the exercise of its powers.

6. To the trial of all indictments for treason, misprision of treason, murder and manslaughter.

The jurisdiction of only one other court was fixed by the Constitution of 1849. Article VI, as amended in 1862, provided:

The county courts shall have original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all such special cases and proceedings as are not otherwise provided for; and also, such criminal jurisdiction as the legislature may prescribe; they shall also have appellate jurisdiction in all cases arising in courts held by justices of the peace and recorders, and in such inferior courts as may be established, in pursuance of section one of this article, in their respective counties. The county judges shall also hold in their several counties probate courts, and perform such duties as probate judges as may be prescribed by law.

The extent of the county court's jurisdiction in criminal cases, and the duties of probate judges—matters left to the Legislature—will be found in the Court Act of 1863,⁹⁵ referred to next below. The California Code Commissioners of 1871 added a provision extending the jurisdiction of the county courts to the issuance of writs of mandamus, certiorari, and prohibition.⁹⁶

VII. Court Act as Revised in 1863

The 1862 revision of article VI of the Constitution of 1849 made necessary a revision of the Court Act of 1853. The earlier act was therefore repealed, and a new act with the same title and arrangement was passed; it was approved April 20, 1863.⁹⁷ This act, like the prior acts, was limited to "Courts of Justice" and "Judicial Officers." Non-judicial officers were not included. The act listed as the courts of the State: (1) The Supreme Court; (2) the district courts; (3) the county courts; (4) the probate courts; (5) the recorders' and other inferior municipal courts.⁹⁸ In a new chapter,⁹⁹ provision was made for court commissioners, one to be appointed in each county (or each part of divided counties). The specific duties of these officers were set out in the act.¹⁰⁰ In the sections of the act which stated the jurisdiction of

95. Cal. Stat. 1863, ch. 260, at 333.

96. PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pt. I, tit. I, ch. V, § 84.

97. Cal. Stat. 1863, ch. 260, at 333.

98. *Id.* ch. I, § 1, at 333.

99. *Id.* ch. V, § 39, at 338.

100. *Id.* ch. V, § 40, at 338.

the Supreme Court and of the district courts, there was no attempt at codification, but merely re-use of the terms of the constitution. Two courts included in the Court Acts of 1851 and 1853 disappeared: the Superior Court for the City of San Francisco¹⁰¹ and the court of sessions.¹⁰²

With reference to the probate courts authorized by the Constitution of 1849, Justice Heydenfeldt, speaking for the California Supreme Court in 1855, declared: "The Probate Court is a Court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the Court of Chancery, which still retains all its jurisdiction."¹⁰³ The constitution had provided that the district courts should have unlimited jurisdiction "in all issues of fact joined in the probate courts."¹⁰⁴ This provision was omitted when the constitution was amended in 1862. Referring to this omission Justice Rhodes stated in 1868:

The omission is very significant, and can be accounted for in no other way than upon the theory that it was not intended that the District Courts should possess such jurisdiction. Section eight of the same Article, relating to the County Courts, provides that "the County Judges shall also hold in their several counties Probate Courts, and perform such other duties as Probate Judges as may be prescribed by law." This is a comprehensive grant of probate jurisdiction, and as there is nothing in the Article granting concurrent jurisdiction, the grant to the Probate Courts must be held exclusive. There may be cases involving matters peculiar to Probate Courts of which the District Courts may have jurisdiction; but matters like the probate of a will, the granting of letters testamentary or of administration, the allowance of claims, the settlement of accounts of the executor or administrator, etc., were well understood at the time of the adoption of the amendments to the Constitution as falling within the probate section.¹⁰⁵

VIII. Code of Civil Procedure: 1872

"AN ACT to establish a Code of Civil Procedure" was approved March 11, 1872.¹⁰⁶ The code was divided into four parts:

101. This court was abolished by the Legislature in 1857. Cal. Stat. 1857, ch. 117, at 128; Ames, *The Origin and Jurisdiction of the Municipal Courts in California*, 21 CALIF. L. REV. 117, 119 (1933).

102. This court was abolished by being omitted from article VI of the Constitution of 1849 as amended in 1862. Concerning the time of its demise, see *In re Oliverrez*, 21 Cal. 415, 417-18 (1863).

103. *Clark v. Perry*, 5 Cal. 59 (1855), *quoted in*, *Deck v. Gerke*, 12 Cal. 433 (1859). See note following report of *Clark v. Perry*.

104. CAL. CONST. art. VI, § 6 (1849).

105. *In re Will of Bowen*, 34 Cal. 682 (1868).

106. This act was not printed in the 1871-1872 statutes. A copy of the act

- I. Of Courts of Justice
- II. Of Civil Actions
- III. Of Special Proceedings of a Civil Nature
- IV. Of Evidence

Part I was made up of five titles:

- I. Of their organization, jurisdiction and terms
- II. Of judicial officers
- III. Of persons specially invested with powers of a judicial nature
- IV. Of the ministerial officers of the courts of justice
- V. Of persons specially invested with ministerial powers relating to courts of justice

The headings of the parts and titles of the code as adopted were exactly the same as in the code proposed by the California commissioners in 1871.¹⁰⁷ Further, except for two minor additions, they read exactly the same as in the proposed draft of the New York Code of Civil Procedure¹⁰⁸ which was "reported complete" by the New York commissioners in 1849 and printed in 1850.¹⁰⁹ It is at once apparent that titles III, IV, and V of part I of the California Code adopted in 1872 covered matters not included in the earlier California court acts, and that the "complete" New York commissioners' draft code was the pattern followed in framing the California Code.

Title I of part I of the California Code declared: "The following are the Courts of Justice of this State:

1. The Court for the trial of impeachments;
2. The Supreme Court;
3. The District Courts;
4. The County Courts;
5. The Probate Courts;
6. The Municipal Criminal Court of San Francisco;
7. The Justices' Courts;
8. The Police Courts."

certified by the code commissioners was printed separately by the state printer in 1872. In their certificate the commissioners refer to the fact that the act was approved March 11, 1872.

107. PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pts. I-IV.

108. NEW YORK DRAFT CODE, *supra* note 40, at x-xcv.

109. The two additions were "of a civil nature" added to the heading of part III and "and Terms" added to the heading of title I of part I.

The jurisdiction of the Supreme Court and district courts is stated in exactly the same language as in the proposed code printed in 1871, but in stating the jurisdiction of the county courts slight changes in wording were made. For instance, the courts were said to have power to issue writs of "mandate" and "review" instead of writs of "mandamus" and "certiorari."¹¹⁰ This was done in line with provisions of part III of the code which changed the names of these writs from Latin to English as was done in the proposed New York commissioners' draft code¹¹¹ printed in 1850.

As noted above,¹¹² the California Code commissioners' draft code of 1871 did not merely follow the terms of the amendment to the constitution in stating the jurisdiction of the Supreme Court and district courts; rather, by a process of codification, it undertook to state their jurisdiction more clearly by using constructions of terms that had been previously interpreted by the Supreme Court. Also, in place of the phrase "cases in equity" used in the constitution, the code commissioners referred to "civil actions for relief formerly given in courts of equity."¹¹³

According to a note to section 106 of the California commissioners' draft code of 1871, the jurisdiction of the Municipal Court of San Francisco was set out in section 796 of the Penal Code. This court had been established by the Legislature in 1870.¹¹⁴

In a note to section 114, which specified the jurisdiction of the justices' courts, the commissioners stated:

The preceding section is based upon the act of 1863 (Stat. 1863, p. 340). . . . Subdivision 5 of the original section gave these courts jurisdiction of actions of foreclosure when the debt secured did not exceed three-hundred dollars, trenching upon the equity jurisdiction cast by the constitution upon the district courts; therefore we have omitted this subdivision, and for kindred reasons we have omitted the provisions of the eighth subdivision of the original section, conferring jurisdiction upon justices' courts to determine the right to a mining claim, when the value of the claim did not exceed three hundred dollars.

California Code of Civil Procedure section 121, as officially printed

110. Compare PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pt. III, tit. I, ch. IV, § 1108, with NEW YORK DRAFT CODE, *supra* note 40, pt. III, tit. I, ch. 2, §§ 1271, 1282.

111. NEW YORK DRAFT CODE, *supra* note 40, pt. III, tit. I, ch. 2, §§ 1271, 1282.

112. See text accompanying notes 85-91 *supra*.

113. PROPOSED CODE OF CIVIL PROCEDURE OF 1871, *supra* note 85, pt. I, tit. I, ch. III, § 44 & ch. IV, § 57.

114. Cal. Stat. 1870, ch. 384, § 1, at 528.

in 1872, provided: "Police Courts are established in incorporated cities and towns, and their organization, jurisdiction, and powers provided in the POLITICAL CODE, Part IV." This reference was to sections 4426 and 4427 of the Political Code, which was approved March 12, 1872. The jurisdiction conferred was both criminal and civil; jurisdiction of specified offenses "committed within the city boundaries" being exclusive. Because of the distinction which existed between "charter" municipal courts and "statutory" municipal courts¹¹⁵ it is necessary to check the provisions of the city charters to determine just what police and other municipal courts were in existence at any particular time.

Attention was called above to a note by the California Code commissioners explaining why they had not used the phrases "cases in equity" and "cases at law" employed by the constitution.¹¹⁶ Similarly, in a note to section 259 of their draft code of 1871, a section concerning court commissioners, the California Code commissioners stated that they had "purposely omitted 'commissioners in equity'." The New York Code commissioners had carefully avoided the use of the terms "law" and "equity" in stating the jurisdiction of the New York courts.¹¹⁷

IX. Summary and Comment

In a case before the Supreme Court of the United States in 1871,¹¹⁸ Chief Justice Chase, after a review of the acts of Congress which had established the Territories of the United States, observed: "In 1836 the Territory of Wisconsin was organized under an act, which seems to have received full consideration, and from which all subsequent acts for the organization of Territories have been copied, with few and inconsiderable variations."¹¹⁹ The Wisconsin Act provided: "That the Judicial Power of the said Territory shall be vested in a Supreme Court, district courts, probate courts, and in justices of the peace. The Su-

115. *In re Carrillo*, 66 Cal. 3 (1884).

116. See text accompanying note 86 *supra*.

117. In a note to section 42 of the New York commissioner's draft Code of Civil Procedure, *supra* note 40, the New York commissioners called attention to the language of the New York Constitution giving jurisdiction to the Supreme Court: "There shall be a supreme court, having general jurisdiction in law and equity." N.Y. CONST. art. VI, § 3 (1846). They also called attention to a statute providing that the Supreme Court should have the powers and jurisdiction "exercised by the present supreme court and court of chancery." Law of May 12, 1847, ch. 280, § 16, [1847] N. Y. Laws 323. The code commissioners, in stating the jurisdiction of the court in section 41, used the phrases "civil actions" and "special proceedings" without reference to "law," "equity," or "chancery."

118. *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434 (1871).

119. *Id.* at 661.

preme Court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum."¹²⁰ The judicial system established in the Iowa Territory in 1838¹²¹ was the same as that of Wisconsin, except the superior judges were to be appointed for a limited term (4 years) instead of "during good behavior," and each was required to reside in his assigned district. The Wisconsin Act had provided for election by the people of "all township officers and all county officers, except judicial officers, justices of the peace, sheriffs, and clerks of courts." But by acts passed in 1839¹²² and 1843¹²³ the legislatures of Iowa and Wisconsin were authorized to provide for "the election or appointment of sheriffs, judges of probate, justices of the peace." The Iowa court plan, as thus developed out of the carefully considered Wisconsin plan, became the master plan of court organization for the territories. And when states were formed from the seventeen territories which had the master plan, their first constitutions established court systems which were strikingly similar.¹²⁴

It can be seen at a glance that the plan of court organization set out in California's first constitution was an adaptation of the master plan developed for the territories. Article VI reads:

Sec. 1. The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, and in Justices of the Peace. The Legislature may also establish such municipal and other inferior courts as may be deemed necessary.

Sec. 2. The Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum.¹²⁵

To adapt the territorial plan to state use it was necessary to find a substitute for Presidential appointment of the superior judges, and to eliminate jurisdiction which was exclusively federal. Election by the people was then the obvious substitute for Presidential appointment, and this was provided by the California Constitution.¹²⁶ A major question was whether to retain the territorial plan of having the same superior judges sit separately as trial judges, and together as an appellate court.¹²⁷ The first draft of article VI of the California Constitution

120. Act of Apr. 20, 1836, ch. 54, § 9, 5 Stat. 13.

121. Act of June 12, 1838, ch. 96, § 9, 5 Stat. 235.

122. Act of Mar. 3, 1839, ch. 92, 5 Stat. 357.

123. Act of Mar. 3, 1843, ch. 96, 5 Stat. 630.

124. Blume & Brown, *Territorial Courts and Law (Part I. Establishment of a Standardized Judicial System)*, 61 MICH. L. REV. 103 (1962).

125. CAL. CONST. art. VI, § 2 (1849).

126. CAL. CONST. art. VI, § 3.

127. See text accompanying note 14 *supra*.

followed the territorial plan, but after debate in the convention, the article was changed to provide for separate trial and appellate judges. This was true of almost all the seventeen states formed from the territories having the master plan.¹²⁸ In six of these states separate probate courts were established in accordance with the territorial plan;¹²⁹ in another six, county courts having jurisdiction which included probate were established.¹³⁰ In California this county court modification was adopted. California, and all but two of the seventeen states provided for justices of the peace; and all seventeen, including California, provided that other inferior courts might be established by legislative action. Although, due to the rush of events, California missed becoming a territory before becoming a state, it was created under frontier conditions similar to those which existed in the territories; thus, it is not surprising that it began with a distinctively American-frontier judicial system.¹³¹

128. Blume & Brown, *supra* note 124, at 103.

129. *Id.* at 104.

130. *Id.*

131. For a different view as to the source of the State's first judicial system, see Mason, *Constitutional History of California* in CONSTITUTION OF THE UNITED STATES * * * CONSTITUTION OF THE STATE OF CALIFORNIA 75 (California Legislature pub. 1969), where the author states: "The judicial system provided for the provinces of Mexico corresponds very closely with the present judicial system of California; the tribunal and courts of segunda instancia correspond with our Supreme and appellate courts; the courts of primera instancia, with our superior courts; the alcaldes courts, with our municipal courts and the justices' courts with our own justices' courts. The judicial system adopted by the first constitution was the system already established in California under the laws of Mexico." *Id.* at 77. He further states: "The Judicial Department, while very similar to that of other states, was a continuation of the Mexican courts established by the law of 1837 with the one modification, that the Justices of the Supreme Court did not sit separately as judges of the district courts as the corresponding judges had done under the Mexican system." *Id.* at 90. Referring to the first constitution as a whole he states: "In arrangement, the Constitution follows generally the Constitution of Iowa. Sixty-six of the 137 sections of the original Constitution of California appear to have been taken from the Constitution of Iowa, and 19 from the Constitution of New York." *Id.* at 91.

Part Two

I. Constitution of 1879

A. Constitutional Convention of 1878-1879.

September 5, 1877, the people of California voted in favor of calling a convention to revise the State's constitution. This was followed by an act of the Legislature setting up the convention. Looking forward to this act, the editors of the *San Francisco Law Journal*, in their issue of November 3, 1877, emphasized the importance of having a convention "large enough to represent all of the leading interests of a great and rapidly-growing state."¹³² They stated:

In the convention which framed the old constitution there were forty-eight members, and they began their work on the first day of September, 1849, concluding it on the thirteenth day of October following, occupying altogether less than one month and a half. It was at a time when gold fever was at its high and the only interest of importance in the territory out of which the new State was to be formed was that of mining. The population of the country was not permanent, and at most did not exceed one hundred thousand. . . . The present population of the State is probably about 800,000, and the interests of the country are almost as diversified as in any other State of the Union. Mining is no longer the only industry, nor indeed the principal occupation of our people. We have an immense agricultural interest; our commerce commands the tribute of the civilized world; our railways are penetrating every corner of the State; manufacturers and all the advocations of life now demand the fostering care of legislation, and year by year grow in importance.¹³³

The anticipated Enabling Act,¹³⁴ approved March 30, 1878, provided for the election on June 19, 1878, of 152 delegates to meet in convention at Sacramento on September 28, 1878, to frame a new constitution. Specified numbers of delegates were to be elected by specified counties: 32 by the State at large, 8 from each Congressional District.

The election of delegates took place in a period of economic depression and political controversy. Dennis Kearney and the members of his Workingmen's Party were demanding that cheap Chinese labor be eliminated, land monopoly be restricted, and other economic reforms

132. *The Constitutional Convention*, 1 SAN FRANCISCO L.J. 145 (1877).

133. *Id.* at 145-46.

134. 1 E. WILLIS & P. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 11 (1880) [hereinafter cited as CALIFORNIA CONSTITUTIONAL CONVENTION].

be effected.¹³⁵ They made a determined effort to elect enough delegates to control the convention.¹³⁶

In most counties, the Democrats and Republicans made joint nominations of nonpartisan delegates.¹³⁷ In each of the four Congressional Districts, conventions were held without regard to politics at which nonpartisan delegates-at-large were nominated.¹³⁸ When the votes were counted it was found that 77 nonpartisans, 51 Workingmen, 11 Republicans, 10 Democrats and 3 Independents had been elected.¹³⁹ Of the total number of delegates, 57 were lawyers; of the 32 delegates elected by the State at large, 22 were lawyers.¹⁴⁰ "That California was still a pioneer state is indicated by the fact that only two of the one hundred fifty-two delegates had been born in the state."¹⁴¹

One of the convention's important standing committees was announced on October 8, 1878; it was the Committee on Judiciary and Judicial Department (Judiciary Committee).¹⁴² Samuel M. Wilson, a well-known and highly-paid corporation lawyer of San Francisco, was named chairman. In the course of the convention, he stated that his committee was composed of 19 lawyers, some of whom were the oldest lawyers in the State, and who for many years had been attending every session of the Supreme Court.¹⁴³ He referred to the fact that two members of the committee—Isaac S. Belcher and David S. Terry

135. II J. BRYCE, *THE AMERICAN COMMONWEALTH* 385, 389-402 (2d ed. 1891) [hereinafter cited as BRYCE].

136. For *Kearneyism in California*, see BRYCE, *supra* note 135, at 385. Bryce visited San Francisco in 1881 and again in 1883. *Id.* at 388 n.1. See also W. DAVIS, *HISTORY OF POLITICAL CONVENTIONS IN CALIFORNIA, 1849-1892*, chs. XXVII-XXVIII (STATE LIBRARY pub. 1893) [hereinafter cited as DAVIS]; IV T. HITTELL, *HISTORY OF CALIFORNIA* ch. XI (1897); C. SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-1879*, ch. I (1930) [hereinafter cited as SWISHER].

"Although Kearney's violent stand against the Chinese was unpopular in some reform circles, he did advocate measures such as taxation and restraint of railroads, control of public utilities and the eight-hour day that were well supported by the State Grange and other respectable groups. With such backing, Kearney and his newly formed Workingmen's Party of California (W.P.C.) forced the calling of a constitutional convention." Hall, *The San Francisco Chronicle: Its Fight for the 1879 Constitution*, 46 *JOURNALISM Q.* 505, 509 (1969).

137. DAVIS, *supra* note 136, at 389.

138. *Id.*

139. For a list of the delegates to the Convention giving "Names and Party Electing," "Former Pol." (i.e. political party), and "Occupation." See *id.* at 390-92.

140. *Id.*

141. SWISHER, *supra* note 136, at 31.

142. 1 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 63.

143. 3 *id.* at 1455.

—had been justices of the Supreme Court. The Davis list of delegates shows that 15 members of the committee were elected to the convention as nonpartisans, 2 as Republicans, and 2 as Workingmen.¹⁴⁴

The Constitutional Convention met September 28, 1878, and adjourned March 3, 1879.¹⁴⁵ The new constitution was adopted May 7, 1879, by a vote of 77,959 to 67,134.¹⁴⁶ According to Davis, "Most of the newspapers of the state were bitterly opposed to its adoption, the San Francisco *Chronicle* being the only leading newspaper that favored it."¹⁴⁷

In their issue of April 20, 1878, the editors of the *Pacific Coast Law Journal*¹⁴⁸ called attention to a "Plan of a Judicial System" published in pamphlet form by Solomon Heydenfeldt, a former justice of the Supreme Court. The pamphlet, according to the editors, submitted to the profession a draft of an entirely new article for the future constitution, to be entitled "The Judicial Department." The proposed new article provided for a Supreme Court, three courts of appeal, county courts, and justices' and police courts. The county court would have law, equity, probate, criminal, and special proceedings jurisdiction, as well as appellate jurisdiction from justices' and police courts. No terms were to be stated, but the court would always be open for business.¹⁴⁹

In response to Heydenfeldt's proposal that three courts of appeal be established, Judge Eugene Fawcett of the First Judicial District submitted to the bar a "plan for the reorganization of the Supreme Court" which was published in the *Pacific Coast Law Journal* of June 1, 1878.¹⁵⁰ He first stated his objections to Justice Heydenfeldt's proposal: the cost and delay in carrying causes through two appellate courts; the increase in the number of courts with attendant expense to both State and litigants; and the unwieldiness of a Supreme Court of nine justices.¹⁵¹ Judge Fawcett then proposed that the Supreme Court

144. DAVIS, *supra* note 79, at 390-92.

145. *Id.* at 393.

146. *Id.*

147. *Id.*

148. Baggett, *Current Topics*, 1 PAC. COAST L.J. 141 (Baggett ed. 1878).

149. Heydenfeldt's proposal that terms of court be abolished was generally approved, and became a distinctive feature of the new constitution. See CAL. CONST. art. VI, § 4 (1879). Roscoe Pound, after referring to the fact that the English Judicature Act of 1873 had abolished terms of court, suggested that this feature of the English Act was reflected by the California Constitution of 1879. R. POUND, ORGANIZATION OF COURTS 167 (1940) [hereinafter cited as R. POUND]. Pound further stated that "[t]erms were abolished in California [1879], Washington [1889], Montana [1889], and Arizona [1912]." *Id.* at 175.

150. Baggett, *Current Topics*, 1 PAC. COAST L.J. 261 (Baggett ed. 1878).

151. *Id.*

consist of six justices; that it be divided into two sections; that each section composed of any three of the justices have authority to hear and to determine appeals and to exercise its original jurisdiction; that the sections be authorized to sit at the same time at the same or different places; and that cases necessarily involving constitutional questions be argued before the full bench along with other specified cases.¹⁵² After pointing out that he had merely outlined his proposals, Judge Fawcett stated, "I do not claim entire originality for the plan, Alexander H. Stephens of Georgia having proposed, in Congress, a somewhat similar division of the Supreme Court of the United States."¹⁵³

In line with Justice Heydenfeldt's proposal that county courts be established with law, equity, probate, criminal, and special proceedings jurisdiction, were proposals by James A. Waymire, published in the *Pacific Coast Law Journal* of July 6, 1878: "For the district, county, probate, and criminal courts, substitute municipal courts—one for each county or [city and county] capable of expansion into as many branches as may be necessary."¹⁵⁴ In the *Pacific Coast Law Journal* of July 20,

152. *Id.* at 261-62.

153. *Id.* at 262. Various proposals to relieve the burdens of the Supreme Court of the United States were discussed by Felix Frankfurter in *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System (pt. II)*, 39 HARV. L. REV. 35 (1925) [hereinafter cited as Frankfurter]. He noted that "[a]n early suggestion for the division of the Supreme Court into sections appears in 1876," citing *The Supreme Court*, 9 AM. L. REV. 668, 675 (1876). Frankfurter, *supra* at 62 n.124. Referring to the English practice the 1876 article stated: "[T]he separate courts of common law, too, often sit in two divisions, and, by this means, it is said, the Queen's Bench has recently disposed of nearly all the arrears in that court. The same plan has also been adopted for the proposed Court of Appeal." *The Supreme Court*, 9 AM. L. REV. 668, 675 (1876). Roscoe Pound assumed that the Judicature Act of 1875, which had authorized the English Court of Appeal to sit in divisions, had served as a "model" for California. R. POUND, *supra* note 149, at 166.

154. Waymire, *Our Judicial System*, 1 PAC. COAST L.J. 367, 370 (1878). Pound referred to another development of major significance: "The constitution of 1879 took a notable step forward by leaving the county and probate courts out of the enumeration of constitutional courts and committing 'all matters of probate' to the superior court, the court of general jurisdiction of first instance. This had already been done in Nevada and was followed in Montana, Washington, Wyoming, Utah, and Arizona." R. POUND, *supra* note 149, at 178-79. Simes and Basye, after quoting an argument made in the Nevada Constitutional Convention (1864) in favor of combining the jurisdiction of the district and county courts, stated: "Whether California was influenced by the reform in Nevada is not clear. At least no reference to the system already in operation in Nevada is to be found. From the discussions on this proposed system, it is probable that California was influenced solely by considerations peculiar to itself.

"This plan of conferring probate jurisdiction upon the courts of general jurisdiction was widely copied from California, especially in the western states." L. SIMES & P. BASYE, *The Organization of the Probate Court in America*, PROBLEMS IN PROBATE LAW 385, 425 (1946).

1878,¹⁵⁵ reference was made to a draft of an entire constitution prepared by E. D. Sawyer of the San Francisco Bar: "The plan for a judiciary has been taken from that of Hon. Sol. Heydenfeldt, which we have heretofore noticed."¹⁵⁶

Following the announcement on October 8, 1878, of the appointment of the Judiciary Committee,¹⁵⁷ members of the Constitutional Convention proposed numerous changes in the existing judicial system.¹⁵⁸ A judicial department proposed by Thomas H. Laine of Santa Clara on October 11, 1878,¹⁵⁹ became a source of the committee's final report.

Two reports of the committee's progress were published on October 26, 1878: one in the *California Legal Record*,¹⁶⁰ the other in the *Pacific Coast Law Journal*.¹⁶¹ According to the first report, the committee was inclined to leave the system as it then existed, with one exception—it wished to abolish district courts and probate courts as separate entities, and to place the whole judicial procedure of the county in county courts as proposed by Delegate Laine. According to the second report, the committee had agreed that the judicial power should be vested in a Supreme Court, superior courts, justices' courts, and such inferior courts as the Legislature might establish; also, the committee agreed that a commission of five might be appointed by the Legislature to act as an appellate court to assist the Supreme Court when necessary.

155. Baggett, *Current Topics*, 1 PAC. COAST L.J. 401-02 (Baggett ed. 1878).

156. Referring to early justices of the California Supreme Court still living in 1881, Justice Field of the United States Supreme Court observed that "[n]o one ever questioned the integrity or ability of Hydenfeldt [sic]" Graham, *Four Letters of Mr. Justice Field*, 47 YALE L.J. 1100, 1101 (1938).

157. See text accompanying notes 142-44 *supra*.

158. 1 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 77 (Edgerton), 78 (Hager), 82 (Rolfe), 94 (Cross), 95 (Dean), 102 (Smith), 111 (Edgerton), 113 (Laine), 119 (Shoemaker), 140 (Mansfield), 141 (Martin), 142 (McCallum), 144 (Tully), 155 (Hager), 165 (Edgerton), 165 (Schell), 219 (Barton), 225 (Graves), 250 (Barbour). The proposals ranged from complete schemes of court organization to single features such as the appointment, instead of the election, of judges. A significant number proposed that the Supreme Court sit in divisions, and that there be one trial court with all types of jurisdiction. Hager's first proposal (October 9, 1878) included a provision that district courts have multiple judges, each to hold court at the same time.

159. *Id.* at 113.

160. *Legal Notes*, 2 CAL. LEGAL RECORD 37, 39 (1878).

161. Baggett, *Current Topics*, 2 PAC. COAST L.J. 161, 163 (Baggett ed. 1878). Notes and memoranda of the proceedings of the Committee made by its Secretary were not preserved due to the Secretary's death. 2 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 972.

A few days after these progress reports were published, the San Francisco Bar Association adopted a plan of judicial organization and sent Judge John W. Dwinelle to Sacramento to present it to the committee. This plan, as reported in the *California Legal Record* of November 2, 1878,¹⁶² made the following proposals: abolish inferior trial courts, leaving only superior courts; give equal powers to all superior court judges; provide one judge for each of 48 counties out of 52, three judges for 3 specified counties, and for San Francisco County, a single court with ten judges of equal powers—one assigned to probate matters, another to criminal, and so on.¹⁶³ It was further recommended that there be one Supreme Court composed of one Chief Justice and six assistant justices. The latter were to be divided into two departments of three each, and the Chief Justice was to preside in either department. Henry Edgerton, a member of the Judiciary Committee, stated to the convention that the scheme of having the Supreme Court sit in two departments had been approved by many eminent judges and lawyers in San Francisco, and had been devised by the bar association of that city, "borrowing it theoretically from the suggestions in the bill of Alexander H. Stevens, introduced into the House of Representatives, and which receives the sanction of Judge Davis in the Senate of the United States."¹⁶⁴

The following is an outline of the court system approved by the convention and incorporated in article VI of the California Constitution of 1879:

COURTS OF JUSTICE

Supreme Court—to consist of a Chief Justice and six associate justices; may sit in two three-judge departments and in bank; to be always open for business.

162. *Legal Notes*, 2 CAL. LEGAL RECORD 49, 58 (1878).

163. In ORGANIZATION OF COURTS at 176, Roscoe Pound stated: "California, in 1879, fixed the number of judges of the Superior Court for each county, allowing the legislature to make changes, and provided that there could be as many separate sessions at the same time as there were judges. In such cases the judges could choose a presiding judge to distribute the business. In Minnesota, where there was more than one judge in a district, the constitutional amendment of 1875 allowed each to exercise the powers of the court under such limitations as might be prescribed by law. Nevada [1864] provided that in the district in which there were three judges, they should have 'co-extensive and concurrent' jurisdiction." According to Pound, Colorado and Arizona adopted similar provisions after 1879. *Id.*

164. 3 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 1456. The Judge Davis referred to was, presumably, Senator Davis of Illinois who had been a justice of the Supreme Court of the United States. Frankfurter, *supra* note 153, at 60.

Superior Courts—one for each county or city and county; specified courts to have one judge, others to have two judges, San Francisco to have twelve judges; to be always open (legal holidays and nonjudicial days excepted).

Justices' Courts—number to be fixed by the Legislature.

Inferior Courts—to be established at discretion of the Legislature in any incorporated city, or town, or city and county.

JUDICIAL OFFICERS

Justices of the Supreme Court—to be elected by electors of the State at large; to hold office for 12 years.

Judges of Superior Courts—to be elected by electors of county, or city and county; to hold office for 6 years.

Justices of the Peace—to be elected in townships, incorporated cities and towns, or cities and counties.

Judges of inferior courts—powers, duties, and responsibilities to be fixed by law.

Superior Court Commissioners—Legislature may provide for appointment of one or more commissioners by each superior court; to perform chamber business of the judges; to take depositions; to perform such other business as may be prescribed by law.

OTHER OFFICERS

Clerk of Supreme Court—election to be provided by the Legislature.

Supreme Court Reporter—to be appointed by justices; to hold office and be removable at their pleasure.

County Clerks—to be ex officio clerks of courts of record in respective counties, or cities and counties.

SUBJECT-MATTER JURISDICTION

Supreme Court—appellate jurisdiction of cases in equity (except such as arise in justices' courts), cases at law involving title or possession of real estate, the legality of any tax, impost, assessment or municipal fine, and demands amounting to \$300, and in cases of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance,

probate matters as provided by law, questions of law in criminal cases prosecuted by indictment or information in courts of record; court to have power to issue writs of mandamus, certiorari, prohibition, habeas corpus, and other writs necessary or proper to the complete exercise of its appellate jurisdiction; each justice individually to have power to issue writs of habeas corpus.

Superior Courts—original jurisdiction of all cases in equity, of certain cases at law involving title or possession of real property, the legality of any tax, impost, assessment, toll, or municipal fine, and demands amounting to \$300, and of criminal cases amounting to felony, misdemeanor cases not otherwise provided for, actions of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance, all matters of probate, divorce, and for annulment of marriage, and special cases and proceedings not otherwise provided for; to have power of naturalization; appellate jurisdiction of cases arising in justices' courts and other inferior courts as are prescribed by law; courts and judges to have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus.

Justices of the Peace—powers, duties, and responsibilities to be fixed by law; not to encroach on jurisdiction of courts of record, but shall have concurrent jurisdiction with superior courts in cases of forcible entry and detainer where rental value does not exceed \$25 per month and damages are not in excess of \$200, and in cases to enforce liens on personal property where neither the lien nor the value of the property exceeds \$300.

Inferior courts—to be fixed by the Legislature.

VENUE AND RANGE OF PROCESS

Superior Courts—process to extend to all parts of the State; actions to recover possession of, quiet title to, or enforce liens upon real estate, are to be commenced in the county where the real estate or any part of it is situated.

B. *Supreme Court*

When the report of the Judiciary Committee was presented to the Constitutional Convention on January 8, 1879, Robert Crouch, a law-

yer from Napa, moved to strike the provision which increased the number of Supreme Court justices to seven and authorized them to sit in two departments. He proposed, instead, that the justices of the existing court be reduced from five to three, saying, "I think a Court of three men is sufficient to transact all the business"¹⁶⁵ In reply, the chairman of the committee referred to a report made to the convention by the clerk of the Supreme Court showing that during the past 4 years the court had decided 2,242 cases, an average of 566 and one-half cases a year, requiring "an almost incredible amount of labor;" but to accomplish that work it had to decide 559 cases without giving any opinion in writing.¹⁶⁶ The chairman predicted that seven justices sitting in two departments would be able to keep abreast of the flow of cases, and write opinions in all.¹⁶⁷

When the matter came before the convention on February 11, 1879, Clitus Barbour, a Workingmen Party lawyer from San Francisco, offered a substitute providing for seven justices and two departments; but instead of prescribing in the constitution the procedure to be followed in operating the court in departments, he proposed, for the sake of better control, that this be regulated by the Legislature. To give unheard of powers, as he felt the procedures prescribed in the constitution did, to a Chief Justice you cannot get rid of for 12 years is a "monstrous proposition."¹⁶⁸ The chairman of the Judiciary Committee replied that he did not see any "horror" in it, or anything to "alarm" anybody, nor did the committee see anything of the kind in the section.¹⁶⁹ James S. Reynolds, another Workingmen Party lawyer from San Francisco, argued that an "inflexible rule" giving the Chief Justice the entire power of assigning justices to departments, and of assigning business, should not be in the constitution. "It never was done before, and this is one of the experiments we do not need to try."¹⁷⁰ On a later occasion he stated: "I have been examining the constitutions of the other states, and I can find nothing like it between the lids of any book. . . . I can find nothing like these transcendental powers given to a Chief Justice."¹⁷¹ N. G. Wyatt, a Workingmen Party lawyer from Monterey County, likened the powers given to the Chief Justice to those

165. 2 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 950.

166. *Id.*

167. *Id.* at 951.

168. 3 *id.* at 1331.

169. *Id.*

170. *Id.* at 1332.

171. *Id.* at 1454.

of the Czar of Russia; that his powers are "so plenary" and "so unlike anything that has gone before him, that he is entitled to that degree which the Emperor of China has found necessary to give to Chin Lan Pin. . . . [I]n consequence of . . . the great power conferred upon him, [the Emperor] had honored him with the decoration of the third order of the peacock feather."¹⁷² C. W. Cross, a Workingmen Party lawyer from Nevada County, proposed that three justices of the court be authorized to order a case heard in bank; after an amendment suggested by Chairman Wilson that the number be four, the proposal was adopted.¹⁷³

A note in the *California Legal Record* of April 6, 1878, referred to a law passed at the last session of the Legislature providing "that after October next the January and July terms of the Supreme Court shall be held in San Francisco,—the April and October terms in Los Angeles, and the May and November terms in Sacramento."¹⁷⁴ In its issue of May 11, 1878, the *Record* noted that the clerk of the Supreme Court would start for Los Angeles the next day "to make arrangements for court room, etc." for the court's October term which was to be "the first term under the new law."¹⁷⁵

172. *Id.* at 1454-55.

173. *Id.* at 1333. In ORGANIZATION OF COURTS at 166, Roscoe Pound outlined, with apparent approval, the procedure which the Workingmen Party lawyers in the constitutional convention referred to as unprecedented—transcendental—monstrous. "The California constitution established a Supreme Court of a Chief Justice and six associate justices who, after the model of the Judicature Act, were authorized to sit in two departments as assigned by the Chief Justice and changed by him from time to time. The associate justices were made competent to sit in either department and might interchange among themselves or as ordered by the Chief Justice. The Chief Justice was to apportion the business of the court between the departments or might order a case to be heard before the court in bank, but after judgment in a department such an order was required to be made within thirty days, and to be concurred in by two justices, thus providing for a rehearing. Either before or after judgment in a department four justices might order a cause to be heard in bank. The Chief Justice could order a court in bank at any time, four being necessary to constitute it, and the concurrence of four being required for a judgment. The Chief Justice was to preside when the court sat in bank. Also, he might sit and preside in either department, but the judges assigned to each department were to choose one of their number to exercise the powers of the Chief Justice during his absence or inability to act." Pound introduced his discussion with this statement: "Among the relatively new features with respect to the highest court of review developed in the constitutions we are considering, first place must be given to the organization of the Supreme Court laid down in the constitution of California in 1879." *Id.* at 165. He concluded by referring to the fact that the constitutions of Kansas and Colorado were amended in 1900 and 1904 to provide for a supreme court of seven justices authorized to sit separately in divisions or departments. *Id.* at 166.

174. *Legal Notes*, 1 CAL. LEGAL RECORD 39-40 (1878).

175. *Legal Notes*, 1 CAL. LEGAL RECORD 121 (1878).

October 9, 1878, Henry Edgerton from Sacramento proposed to the constitutional convention that all terms of the Supreme Court be held "at the seat of government."¹⁷⁶ This was referred to and subsequently approved by the Judiciary Committee,¹⁷⁷ of which Edgerton was a member, but when the matter came before the convention on January 8, 1879, there was vigorous opposition. Volney E. Howard from Los Angeles moved that the section be amended to provide for sessions not only "at the capital of the State," but also "in Los Angeles and such other places the Legislature may provide."¹⁷⁸ The chairman of the Judiciary Committee opposed the amendment, pointing out the expense of maintaining two courtrooms in three different places with clerks, deputies, and records in each place.¹⁷⁹ He emphasized the importance of having an adequate library such as had been provided at Sacramento, and noted that under the proposed amendment the court could not "always be in session, on account of the time consumed in traveling."¹⁸⁰ Although one-third of the business of the court was being transacted in San Francisco, the lawyers of that city, according to the chairman, were willing to give up the convenience of having the court sit at their "very doors" in exchange for a system that would "insure a more speedy dispatch of business."

In the debate that followed, two principal questions were raised: (1) Which is better, a Supreme Court held at one place (the State capital), or a Supreme Court held at different places in the State, referred to as a "Court on wheels?"¹⁸¹ (2) If the latter, should the places be fixed by constitutional provision, or left to the Legislature? After extended discussion which included the climate, population, and other features of the three cities mentioned, Byron Waters, a delegate-at-large from the Fourth Congressional District, moved to strike the whole provision, warning, "You had better leave this to the Legislature."¹⁸² His motion was carried by a vote of 64 to 45.¹⁸³ This result must have placated those who had suggested that *any* provision adopted would antagonize many voters, and jeopardize the approval of the constitution.

176. 1 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 77.

177. *Id.* at 392.

178. 2 *id.* at 950.

179. *Id.* at 951.

180. *Id.*

181. *Id.* at 954.

182. *Id.* at 956.

183. *Id.* at 957.

Another choice between constitutional and statutory regulation was presented when the convention was called upon to approve a section authorizing the justices of the Supreme Court to appoint a reporter of their decisions who should hold his office and be removable at their pleasure, his annual salary not to exceed \$2500. Former Justice Belcher, a member of the Judiciary Committee, stated that "this section would not have been suggested by the Committee if it had not been for the fact that the Legislature had changed this appointment from the Court to the Governor."¹⁸⁴

Horace C. Rolf, a lawyer from San Diego and San Bernadino counties, moved to strike it out as "entirely unnecessary in the Constitution," stating: "This is one among many things that had just as well be left to the Legislature. I am sick and tired of having matters of so little importance thrust upon this Convention, when so many weighty matters are waiting our attention."¹⁸⁵ Belcher replied: "[T]his is one of those provisions that ought to be inserted in the Constitution. It is proper that the salary should be limited. It is proper that the Judges should have the appointment. The section puts it where it has always been up to the last session of the legislature."¹⁸⁶

In addition to Belcher, other delegates spoke in favor of a constitutional limitation on the reporter's salary. N. G. Wyatt, a Workingmen Party lawyer from Monterey County, thought that if the matter remained in the hands of the Legislature "then they will have the salary five or ten thousand dollars a year [rather than twenty-five hundred], as it can be lobbied through the Legislature."¹⁸⁷ John P. West, a Workingmen Party farmer from Los Angeles County, observed, "I think by retaining this section in the Constitution we would avoid all that jobbing."¹⁸⁸ The section was retained.

184. *Id.* at 1000. The *California Legal Record* of April 13, 1878, noted: "By an act of the last Legislature the appointment of Reporter of the decisions of the Supreme Court of this State, was taken from the Judges of the Court and vested in the Governor. Hon. Gideon J. Carpenter, of El Dorado, who represented that county as Assemblyman for two terms, during the last of which, two years since, he filled the responsible position of Speaker, has been selected to fill this important office for four years. The new appointee is an old resident of California, is an able lawyer, and will undoubtedly discharge the arduous duties of his position satisfactorily to all parties." *Legal Notes*, 1 CAL. LEGAL RECORD 41 (1878).

185. 3 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 999-1000.

186. *Id.* at 1000.

187. *Id.*

188. *Id.* In II THE AMERICAN COMMONWEALTH, *supra* note 135, at 390, Bryce stated: "The legislature was composed almost wholly either of office-seekers from the city or petty country lawyers, needy and narrow-minded men. Those who had virtue enough not to be 'got at' by the great corporations, had not intelligence enough to know

C. *Other Courts*

The county and probate courts established under the Constitution of 1849 were readily accessible, but it was found that many county judges did not have sufficient work to keep them busy at all times. The judge of the district court was available in a particular county only during terms of court held in that county, and when needed in a civil or criminal matter at other times, he might be holding court in some distant county, and not readily available. The "simple" solution was to combine the three courts into one superior court for each county with "perpetual sessions." This solution would have pleased the English reformer, Jeremy Bentham, who "warmly and constantly advocated the establishment of local courts within at the very least half a day's journey of every individual, courts which should deal out every kind of justice that might be required . . . accessible, like hospitals, every day in the year, and at every hour in the night."¹⁸⁹

The "simple" solution, referred to above, was widely accepted both before and during the constitutional convention. There remained, however, two questions to be answered: (1) What if the business of a particular superior court proves to be too much for one judge? (2) What if the business of a particular superior court is not sufficient to keep one judge busy at all times? The answer to the first question was to provide additional judges for the particular court, each with power to hold the court at the same time. This solution was generally approved. A proposed answer to the second question was a provision authorizing the Legislature to provide one judge for two or more counties.

In line with this suggestion, former Justice Belcher, a member of the Judiciary Committee, moved "that until otherwise ordered by the Legislature, only one Judge shall be elected for the Counties of Yuba

how to resist their devices. It was a common saying in the State that each successive legislature was worse than its predecessor. The meeting of the representatives of the people was seen with anxiety: their departure with relief. Some opprobrious epithet was bestowed upon each. One was 'the legislature of a thousand drinks'; another 'the legislature of a thousand steals.'" In *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-1879*, *supra* note 136, at 96, Swisher stated: "If the delegates had come to the convention determined to cinch capital, tax mortgages, and expel the Chinese, they were also determined to put the legislature in its place. Session after session charges of incompetence and corruption had been made against the legislature, not always without reason. The convention set out to chastise the legislature by limiting its sphere of action, through depriving it of most of its powers of special legislation."

189. *A CENTURY OF LAW REFORM* 231 (London 1901).

and Sutter."¹⁹⁰ In support of this motion Belcher stated that he knew that one judge could take care of all the business of the superior courts of the two counties and that no inconvenience would result as the county seats of the two counties were within 15 or 20 minutes walk of each other.¹⁹¹

While agreeing to Belcher's particular proposal, another member of the Judiciary Committee, George V. Smith, strongly opposed any grant of power to the Legislature to make similar combinations of other counties. Smith pointed out that under the old system the probate judge was always available when needed; but by giving probate powers to a superior court judge and then providing that he hold court in two or more counties, "you throw it back to the position of a Circuit Judge or District Judge without the advantage of the Probate Judge being in the county."¹⁹² Dennis W. Herrington, a Workingmen Party lawyer from Santa Clara county, accused Wilson, chairman of the Judiciary Committee, of having repudiated the court plan proposed and "unanimously approved" by the committee.¹⁹³ Chairman Wilson hotly denied that he or his committee had abandoned their "grand plan" of having a superior court and judge in each county; he had agreed to one special exception and recognized the possibility of others, but preferred that the original plan be adopted without any change, emphasizing the importance of having a probate judge always present in each

190. 2 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 969.

191. *Id.*

192. *Id.* at 973-74. Continuing, Smith said: "The judge may be located hundreds of miles over the mountains where the railroads can never run, and where it takes two weeks to go and come. In the meantime our probate business cannot be attended to. Other matters cannot be attended to. As it is now, we have almost practically no District Court down there; our Judge has to travel over these mountains, and is gone most of the time." *Id.* at 974.

193. *Id.* at 974. Referring to the plan originally proposed by the Judiciary Committee, Harrington stated: "It was a system that was unanimously agreed to, as I understand it, by that committee. It was a system that was based upon three primary main propositions: First, that the people would have justice at their doors, without having the necessity of traveling a long distance to obtain it. Next, they would have perpetual sessions, and business could be transacted constantly in these courts. In the immediate future, all the interests of litigants would be attended to. The other was that of dispensing with numerous Courts, or rather, a consolidation of jurisdiction; the doing away, so far as that is concerned, with this thing of terms for Court in the various counties. . . . They are asking now to engraft upon this same system, a system of District Courts by having the Courts sit first in one county, and then sit in another county. . . . Now, where is all this beautifully spun theory with reference to the consolidation of jurisdiction in one Judge, and this beautiful theory of continuous sessions, and this beautiful open theory of having justice administered at the very doors of litigants? It has all vanished into thin air"

county.¹⁹⁴ Belcher's proposed amendment was defeated 70 to 45,¹⁹⁵ and no similar provision, except for Yuba and Sutter counties, was in the constitution as finally approved.

Section 5 of article VI as finally approved declared that the superior courts "shall be always open (legal holidays and nonjudicial days excepted), and their process shall extend to all parts of the State; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." The venue proviso was not in section 5 as proposed by the Judiciary Committee, but was added when the section came before the convention on February 11, 1879.¹⁹⁶ In view of the provision that the superior court's process would extend to all parts of the State, fears were expressed that the Legislature might permit corporations to enforce in their home counties liens and mortgages on lands situated anywhere in the State.

James E. Hale, from the Second Congressional District, stated, "We know that a very large proportion of the real property is owned or controlled by the twenty thousand corporations of the State, and as nineteen thousand of them, probably, have their chief place of business in San Francisco, the business would all have to be done in the San Francisco courts."¹⁹⁷ To a suggestion that the matter was covered by statute, Hale replied: "We have had four or five efforts to repeal that statute. Therefore, I hope the constitution will settle the matter forever."¹⁹⁸

Empowered by the Constitution of 1849 to fix the powers, duties, and responsibilities of justices of the peace, the Legislature, in the Court Act of 1851, provided that they should have jurisdiction of a number of specified matters including forcible entry and detainer, and enforcement of liens on personal property.¹⁹⁹ As amended in 1862, the constitution provided that the county courts should have original jurisdiction of forcible entry and detainer, and that powers given to justices of the peace by the Legislature should not "trench upon the jurisdiction of the several Courts of record."²⁰⁰ The Judiciary Committee of the

194. *Id.* at 975.

195. *Id.* at 976.

196. 3 *id.* at 1334.

197. *Id.*

198. *Id.*

199. See the outline of the judicial system established by the Court Act of 1851, outlined in text following note 67 *supra*.

200. CAL. CONST. art. VI, §§ 8-9 (1862).

Constitutional Convention of 1878-1879 recommended the same limitation "except that such Justices shall have concurrent jurisdiction with the Superior Courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars."²⁰¹

When the matter came before the convention on January 10, 1879, former Supreme Court Justice Terry, a member of the Judiciary Committee, moved to strike out the exception, saying, "When the Superior Courts are always in session, I cannot see any reason for giving Justices of the Peace jurisdiction over a class of cases in which sometimes the most difficult questions arise."²⁰² As an additional reason for striking the exception, John C. McCallum from Alameda County stated that he had been checking the constitutions of other states and had found no instance of a constitutional grant of forcible entry and detainer jurisdiction to justices of the peace. If left in the California Constitution, he said, "[W]e will stand alone in this respect."²⁰³

On the other hand, S. G. Hilborn from Solano County called attention to the inconvenience of being required to bring all forcible entry and detainer cases at the county seat, noting "that there are considerable towns growing up at a distance of from twenty to sixty miles from the county seat." He referred to the fact that most such cases involve "trivial" matters which ought to be decided summarily.²⁰⁴ The chairman of the Judiciary Committee, Wilson, stated that the exception had been adopted by the committee "for the reasons, mainly, referred to by the gentleman from Solano, Mr. Hilborn."²⁰⁵ A vote was taken and the Terry motion to strike the exception was defeated 69 to 31.²⁰⁶

Abraham C. Freeman from Sacramento County then moved to amend the general provision that powers given to justices of the peace should not overlap with jurisdiction given courts of record by adding another exception "in cases to enforce and foreclose liens on personal property, when neither the amount of the lien nor the value of the property amounts to three hundred dollars."²⁰⁷ After a discussion of the desirability of giving justices of the peace equity jurisdiction in any

201. 1 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 393.

202. 2 *id.* at 976.

203. *Id.* at 979.

204. *Id.* at 976.

205. *Id.* at 977.

206. *Id.* at 979.

207. *Id.* at 981.

kind of case, the Freeman amendment was adopted.²⁰⁸ This led to an amendment of section 4 which had provided that the Supreme Court "shall have appellate jurisdiction in all cases in equity."²⁰⁹ At a session of the convention held February 11, 1879, the words "except such as arise in justices' courts" were added to section 4.²¹⁰

II. Supreme Court Commissioners: 1885

Commencing with January 1880, proceedings in the "new" Supreme Court were reported as decided in department 1, in department 2, or in bank. March 6, 1880, the editors of the *Pacific Coast Law Journal* reported that the Supreme Court had delivered opinions in 94 cases since the beginning of the year, that the justices were making rapid progress in clearing their calendar, and that before many months they would "doubtless be even with their work."²¹¹ March 20, 1880, the editors of the *Journal* made this comment:²¹² "If we may judge from the wholesale denial of applications for hearing in bank which has just been made, the court is determined to clear up the calendar of old cases."²¹³

Two years later, however, the story was different. In their issue of February 4, 1882, the editors reported that "[a]t the commencement of the January term, 1882, there were 790 cases not disposed of."²¹⁴ July 29, 1882, they stated that responses to a note circulated by them showed that almost all members of the bar wanted a change in the mode of arguing and disposing of cases in the court, all conceding that the practical working of a system under which a case must remain on the calendar nearly 2 years before it is reached for hearing and decision is a "positive denial of justice."²¹⁵ The editors noted that at the opening of the January term, 1882, the Chief Justice had remarked that members of the bar would have to rely mainly on their briefs as the court had no time to listen to oral arguments.²¹⁶

Despite the passage of 2 more years, the situation did not im-

208. *Id.* at 982.

209. 3 *id.* at 1333.

210. *Id.*

211. Baggett, *Current Topics*, 5 PAC. COAST L.J. 29 (Baggett ed. 1880).

212. Baggett, *Current Topics*, 5 PAC. COAST L.J. 85 (Baggett ed. 1880).

213. A rule governing applications for hearings in bank was included in Rules of the Supreme Court effective March 22, 1880. Cal. Sup. Ct. R. 30, 64 Cal. 635, 645-46 (1884).

214. Baggett, *Current Topics*, 8 PAC. COAST L.J. 983 (Baggett ed. 1882).

215. Baggett, *Current Topics*, 9 PAC. COAST L.J. 721-22 (Baggett ed. 1882).

216. *Id.* at 722.

prove. According to a statement made by Superior Court Judge A. Van R. Peterson of San Joaquin County, reprinted in the *West Coast Reporter*, February 7, 1884, the system had failed to meet the expectations of its advocates:²¹⁷ "The working power of the two departments of the Supreme Court is not much greater than that of a single court, for after a hearing in department many cases are reheard in bank."²¹⁸ He felt that to remedy the situation, the working power of the court should be increased to correspond to that of the 71 departments of the superior court, that an intermediate court of appeal should be established as in New York, or that a greater jurisdictional amount should be required. He did not suggest the appointment of commissioners to aid the court.

At one point in the course of their deliberations, the Judiciary Committee of the constitutional convention agreed that a commission of five might be appointed by the Legislature to act as an appellate court to assist the Supreme Court when necessary.²¹⁹ This was abandoned in favor of the scheme of having the court sit in two departments.

In 1885, the Legislature, acting without constitutional authorization, directed the Supreme Court to appoint "three persons of legal learning and personal worth" as commissioners of the court.²²⁰ The act provided that it should be the duty of the commissioners, under such rules and regulations as the court might adopt, to aid and assist the court in the performance of its duties, and in the disposition of "the numerous causes now pending in said court undetermined."²²¹

That Governor Stoneman was not satisfied with this development is shown by a message he sent to the Legislature July 16, 1886.²²² This message, as summarized by Hittell, averred that the existing system had not given satisfaction, and that the evils connected with it were growing worse instead of better. It was cumbersome and unwieldy. Business before it was greatly in arrears, notwithstanding the creation of a commission to assist the justices and relieve them of a large portion of their work. The division of the court into departments had not worked well due to the practice of hearing cases twice without

217. Pomeroy & Pomeroy, *Notes*, 1 W. COAST REP. 639 (Pomeroy eds. 1884).

218. *Id.*

219. Baggett, *Current Topics*, 2 PAC. COAST L.J. 161, 163 (Baggett ed. 1878).

220. Cal. Stat. 1885, ch. 120, § 1, at 101. The text of the act and the names of the commissioners will be found at the beginning of each volume of California Reports commencing with volume 68.

221. *Id.*

222. IV HITTELL, HISTORY OF CALIFORNIA 693-94 (1898).

any advantage and at the expense of too much time. The Governor recommended that the constitution be amended to cure these evils. In 1889 the number of commissioners was increased from three to five.²²³

In a case decided by the Supreme Court in bank on February 8, 1890,²²⁴ Justice Fox and Chief Justice Beatty discussed at length the duties of the commissioners and their relation to the court. The case was in the nature of quo warranto commenced in the Superior Court of San Francisco against the five Supreme Court commissioners to inquire "by what authority they claim to exercise any judicial powers within the state of California, and particularly of considering and determining cases on appeal to the supreme court of the state."²²⁵ The defendants answered that their duties were not judicial, and the trial court agreed, dismissing the action. On appeal the judgment was affirmed, Justice Fox stating that the commissioners "do not usurp the functions of judges of this court, and do not exercise any judicial power whatever."²²⁶ After demonstrating that the justices, and not the commissioners, made the decisions, Chief Justice Beatty found it necessary to answer this question: "[I]f the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission? It saves the court no labor, and does nothing to facilitate the disposition of causes."²²⁷ The only answer given was that

[t]here are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task; but

223. Cal. Stat. 1889, ch. 16, § 1, at 13. The text of this act and the names of the five commissioners will be found in the California Reports beginning with volume 80. This development was noted by Roscoe Pound in ORGANIZATION OF COURTS, *supra* note 149, at 204-05 (citing Cal. Stat. 1885, ch. 120; Cal. Stat. 1889, ch. 16; Cal. Stat. 1893, ch. 1; Cal. Stat. 1901, ch. 113): "When they were three, they sat as a department on cases assigned, rendering an opinion as a court, to which the Supreme Court added a *per curiam*, 'for reasons given in the foregoing opinion the appeal is' allowed or dismissed, or this or that order made, as the case might be. Or one judge might sit with two commissioners, one of the commissioners writing the opinion, and a *per curiam* adoption being added. When there came to be five, they sat in rotation in a bench of three, as before, leaving two free to be writing opinions as in the federal Circuit Courts of Appeals. Here, as in the present practice in Texas there is a combination of the division system and the system of calling in judges to reinforce the highest court in bank." For an illustration of the operation of the Supreme Court in departments, in bank, and with the aid of commissioners, see *Niles v. Edwards*, 90 Cal. 10, 27 P. 159 (1891) & 95 Cal. 41, 30 P. 134 (1892) (motion for *remittitur* denied).

224. *People ex rel. Morgan v. Hayne*, 83 Cal. 111, 23 P. 1 (1890).

225. *Id.* at 112.

226. *Id.* at 121.

227. *Id.* at 125.

I apprehend that, according to the experience of most judges, the putting of their opinions in form, even after their minds are fully made up, is a very serious labor, requiring the expenditure of a large portion of the time at their disposal.

By the labors of the commission, this time and much serious labor is saved to the court and in a large proportion of the cases referred to them, without any abdication or delegation by the court of its constitutional functions.²²⁸

Time saved by having commissioners listen to oral arguments was, understandably, not mentioned.

The California experiment of combining divisions and commissioners was ended in 1904 when a new section was added to article VI of the constitution providing that "[t]he present Supreme Court Commission shall be abolished at the expiration of its present term of office, and no Supreme Court Commission shall be created or provided for after January 1st, A.D. 1905."²²⁹ It should be noted that at the same time provision was made for district courts of appeal.²³⁰

III. District Courts of Appeal: 1904

A. *The Federal Solution*

While California was experimenting with the organization of its Supreme Court, proposals to reorganize the Supreme Court of the United States were being considered in Washington and elsewhere. A special committee appointed by the American Bar Association in August 1881 filed two reports.²³¹ The minority report recommended that the Supreme Court of the United States be divided into two or more sections, each to hear appeals except for those more properly heard by the whole court;²³² causes decided by each division were to be reported to the whole court, and all judgments were to be rendered as judgments of the whole court.²³³ The majority report, after referring to bills introduced in Congress by Davis of Illinois, Manning of Mississippi, Miller of California, and others, stated that the majority members of the committee were "unable," for reasons stated, "to approve any plan for dividing the [United States] Supreme Court," having "reached the con-

228. *Id.*

229. CAL. CONST. art. VI, § 25.

230. CAL. CONST. art. VI, § 4 (1904).

231. Stevenson, Bradley, King, Lawton & Hitchcock, *Majority Report on the Relief of the United States Courts*, V A.B.A. REP. 343 (1882); Phelps, Parker, Evarts & Merrick, *Minority Report on the Relief of the United States Courts*, V A.B.A. REP. 363 (1882).

232. *Minority Report*, *supra* note 231, at 368.

233. *Id.* at 370.

clusion that the general scheme for the relief of the federal judiciary which proposes the establishment of intermediate courts of appeal in the several circuits is that which promises the largest measure of success."²³⁴

In the *Pacific Coast Law Journal* of January 14, 1882, the editors referred to the Davis bill as providing for a federal court of appeal in each circuit.²³⁵ They urged support of the bill so "the people and the bar in each circuit will have an *Appellate Court at home*," noting that members of the Washington Bar were pushing vigorously for a division of the United States Supreme Court into coordinate departments or the establishment of a subordinate court of appeals in Washington.²³⁶ The plan of establishing a court of appeals in each federal circuit was adopted in 1891.²³⁷

B. *California's Division of Appellate Business*

The 1904 amendment to the California Constitution²³⁸ divided the State into three appellate districts, specifying the counties that were to comprise each district. It also established in each district a district court of appeal, consisting of three justices to be elected by the electors of the districts. The amendment further provided that the district courts of appeal should hold their regular sessions respectively at San Francisco, Los Angeles, and Sacramento, and should always be open for business.

When the multi-division Supreme Court was being discussed in the constitutional convention, the Chairman of the Judiciary Committee stated that the judges of a department could properly review the "ordinary current of cases" leaving the "great and important" cases to the court in bank, the latter being necessary to secure uniformity of decisions and to settle important questions of law.²³⁹ This classification was fundamental, and there was no difficulty in using it as a guide as long as all appeals went to one court having a chief justice empowered to classify and assign the cases.

When the appellate courts were established, it was understood that appeals in the "ordinary current of cases" would go to the appellate

234. *Majority Report*, *supra* note 231, at 357, 360.

235. Baggett, *Current Topics*, 8 PAC. COAST L.J. 835 (Baggett ed. 1882).

236. *Id.* at 836.

237. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; R. POUND, *supra* note 149, at 198.

238. CAL. CONST. art. VI, § 4 (1904).

239. 2 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 951.

courts whereas appeals in "great and important" cases would go to the Supreme Court. But, to avoid double appeals, it was thought necessary to provide a means of determining before appeal to which court a particular case should go. The scheme adopted, suggested by the federal development, was twofold:²⁴⁰ First, appeals from superior courts in specified types of cases (equity cases, land cases, law cases involving more than \$2000, and certain others) were to go to the Supreme Court; appeals from superior courts in other specified types of cases were to go to a court of appeal. Second, after appeal, the Supreme Court would have power to transfer an appealed case from itself to one of the courts of appeal, or from a court of appeal to itself, or from one court of appeal to another.

The division of appellate jurisdiction between the Supreme Court and the appellate courts only remotely promoted the separation of "ordinary cases" from the "great and important" cases.²⁴¹ A "case in equity" might or might not involve a significant question of law. And there was the necessity of distinguishing "cases at law" from "cases in equity"—a distinction which had been abolished by the Code of Civil Procedure.²⁴² There was the further necessity of distinguishing "cases at law" which involved \$2000 from "cases at law" which did not involve \$2000. The latter distinction was made unnecessary by an amendment to article VI in 1928 which provided that all appeals in "cases at law" except land title cases and cases involving the legality of any tax, impost, assessment, toll, or municipal fine, should go to a court of appeal regardless of the amount involved. The provision for transfer of an appealed case both before and after decision made it possible for the Supreme Court to correct any mistake made in selecting the right appellate court,²⁴³ and also made it possible for the court to classify a particular

240. CAL. CONST. art. VI, § 4 (1904).

241. The only grant of jurisdiction which clearly fell on one side of the dividing line was that which provided that appeals in cases involving "the legality of any tax, impost, assessment, toll or municipal fine" should go to the Supreme Court regardless of the amount involved. For the origin of this jurisdictional-amount exception, see text accompanying note 22 *supra*.

242. See text accompanying note 86 *supra*. In ORGANIZATION OF COURTS, *supra* note 149, at 234, Roscoe Pound stated: "The reports show a little over fifty cases on points of the distribution of jurisdiction decided in twenty years after these courts were set up. The exclusive appellate jurisdiction of the Supreme Court in equity cases is capable of raising nice questions as to what are such under the procedure of today. By 1922, eleven such questions had been before the courts. See 7 Cal. Jur. 769."

243. In *New California Rules on Appeal*, 17 S. CAL. L. REV. 232 (1944), at 237 B. E. Witkin, then Supreme Court Reporter, stated: "[T]he Supreme Court, unlike the District Court of Appeal, has unlimited constitutional power to transfer

case as "ordinary" or as "great and important" and see to it that it was heard in the proper court. Writing in 1954, B. E. Witkin observed that

[t]he practice of the Supreme Court is to transfer nearly all direct appeals in civil cases to the district courts of appeal. The result has been that practically all cases in equity, cases involving title to real property, cases involving the legality of a tax, etc., and probate matters, are now determined by the district courts of appeal in the first instance, in exactly the same manner as if they were appealed to those courts.²⁴⁴

As amended in 1928, article VI divided the State into the same number of districts as before (three) with one court of appeal for each district;²⁴⁵ as was provided earlier in the 1918 amendment,²⁴⁶ two of the three district courts of appeal were to have two divisions of three judges each.²⁴⁷ The Legislature was given power to increase the number of these divisions; also to create and establish additional courts of appeal and divisions. Each division was to have and to exercise all the powers of the court. In view of the practice of transferring "great and important" cases to the Supreme Court, any two judges of a court of appeal could properly review any "ordinary" case pending in that court.²⁴⁸ This meant that the courts of appeal and their divisions could be multiplied indefinitely to take care of the ever-increasing judicial business of the State.²⁴⁹

IV. Municipal Courts: 1924

As amended in 1924, article VI of the constitution authorized the Legislature to establish a municipal court "in any city and county and in any city which is governed under a charter framed and adopted under the authority of this Constitution containing a population of more than forty thousand inhabitants."²⁵⁰ Acting under the authority of this amendment, the Legislature in 1925 passed "An act authorizing the

any case, pending either before itself or before a District Court of Appeal, for jurisdictional or any other reasons. Hence it is unnecessary to consider at length where the jurisdiction properly resides; in any doubtful case the Supreme Court may transfer the appeal to itself, and thereafter its jurisdiction would be safe from attack, either because it always had jurisdiction or because it obtained it by a transfer pursuant to the authority given by Section 4c of the constitution."

244. 1 B. WITKIN, CALIFORNIA PROCEDURE *Courts* § 115, at 244 (1954).

245. CAL. CONST. art. VI, § 4a.

246. CAL. CONST. art. VI, § 4 (1918).

247. CAL. CONST. art. VI, § 4a.

248. *Id.*

249. As of 1970, the Legislature had divided the State into five appellate districts. CAL. GOV'T CODE § 69100. The Second Appellate District is the largest, consisting of five divisions of four judges each. *Id.* § 69102.

250. CAL. CONST. art. VI, § 1 (1924).

establishment of municipal courts, prescribing their constitution, regulation, government, procedure and jurisdiction, and providing for the election and appointment of the judges, clerks, and other attachés of such courts, their terms of office, qualification and compensation, and for the selection of jurors therein.”²⁵¹ The courts were given jurisdiction of misdemeanors committed within the county; cases at law involving \$1000 or less; actions of forcible entry and detainer involving rentals of \$100 or less per month and damages of \$1000 or less; and cases to enforce liens on personal property involving \$1000 or less.²⁵² According to Alden Ames, a Judge of the Municipal Court of San Francisco and a member of the Judicial Council, “The idea of creating the Municipal Court is to be credited to Justice John W. Shenk of our Supreme Court and the late Judge Leslie Hewitt of Los Angeles.”²⁵³ In an earlier article he had referred to the courts established by the Municipal Court Act of 1925 as “[t]he most recent, and, perhaps, among the most important, additions to the California judicial system.”²⁵⁴ In a speech delivered October 28, 1949, Chief Justice Gibson stated, “Although the organizational basis of the municipal court is a city, that court exercises exclusive jurisdiction within the county in certain cases and is generally supported by the county.”²⁵⁵

V. Judicial Council: 1926

A section added to article VI of the constitution in 1926 established a Judicial Council, to consist of the Chief Justice or Acting Chief Justice and of one associate justice of the Supreme Court, three justices of courts of appeal, four judges of superior courts, one judge of a police or municipal court, and one judge of an inferior court, assigned by the Chief Justice for terms of 2 years.²⁵⁶ The council was directed to (1) meet at the call of the chairman; (2) survey the con-

251. Cal. Stat. 1925, ch. 358, at 648 (preamble).

252. *Id.* §§ 28-29, at 658.

253. Ames, *Municipal Court Trial and Practice*, 13 CAL. ST. B.J., Dec. 1967-Jan. 1968, at 23.

254. Ames, *The Origin and Jurisdiction of the Municipal Courts in California*, 21 CALIF. L. REV. 117 (1933). “The first city to take advantage of the Act was Long Beach, which established a municipal court of five judges commencing to function on July 24, 1925. Los Angeles followed on December 1, 1925, with a court composed of 24 judges, which number has since been increased to 30. The municipal court in San Francisco began to function on July 1, 1930, with 12 judges. These courts succeeded and displaced in their respective cities the existing justices’ and police courts and also took over the small claims courts.” *Id.*

255. Gibson, *Reorganization of our Inferior Courts*, 24 CAL. ST. B.J. 382, 385 (1949).

256. CAL. CONST. art. VI, § 1a (1926).

dition of business in the several courts with a view toward simplifying and improving the administration of justice; (3) submit such suggestions to the several courts as might seem in the interest of uniformity and the expedition of business; (4) report to the Governor and Legislature with recommendations; (5) adopt or amend rules of practice and procedure for the several courts; (6) submit to the Legislature recommendations regarding changes in existing laws relating to practice and procedure; (7) exercise such other functions as may be provided by law.²⁵⁷ The chairman was directed to expedite judicial business and to equalize the work of the judges; to assign any judge to another court of a like or higher jurisdiction to assist in clearing a congested calendar; or to act where a judge has been disqualified or unable to act, or where a vacancy has occurred.²⁵⁸ The Clerk of the Supreme Court was directed to act as secretary of the council.²⁵⁹

In *Minimum Standards of Judicial Administration*,²⁶⁰ published for the National Conference of Judicial Councils in 1949, Arthur T. Vanderbilt stated:

California's council has no provision for representation by either the bar or the legislative committees, yet its achievements have . . . been outstanding. Furthermore, it has statutory powers of management possessed by no other judicial council in the country, i.e., the power to shift judges of any court according to the needs of litigation and also the power to promulgate rules of appellate procedure.

The omissions referred to by Justice Vanderbilt were supplied by a 1960 amendment to article VI which added to the council four members of the state bar and one member of each house of the Legislature.²⁶¹

VI. Superior Courts: 1928

Instead of vesting the superior courts with jurisdiction of specified types of civil cases, as had been done previously, article VI of the constitution as amended in 1928 simply provided that the courts should have "original jurisdiction in all civil cases and proceedings" except those assigned to lower courts and except as otherwise provided in the article.²⁶² The superior courts were given appellate jurisdiction of

257. *Id.*

258. *Id.*

259. *Id.*

260. A.B.A. MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 72 (A. Vanderbilt ed. 1949).

261. CAL. CONST. art. VI, § 1a (1960) (now CAL. CONST. art. VI, § 6).

262. CAL. CONST. art. VI, § 5 (1928).

cases arising in municipal courts, justices' courts, and in other inferior courts.

The amended article authorized the Legislature to provide "for the establishment of appellate departments of the superior court in any county or city and county wherein any municipal court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments."²⁶³ A similar authorization had been included in the 1924 amendment,²⁶⁴ but had not been acted upon by the Legislature. A detailed "history" of the legislation which followed the adoption of the 1928 amendment will be found in *Whittaker v. Superior Court*,²⁶⁵ decided by the Supreme Court in 1968. Attached to the *Whittaker* opinion is a list of all California counties showing the population of each, the number of superior court judges, and the existence or lack of a municipal court. More than half the counties had no municipal court and, therefore, no superior court appellate department. The court held that a statute²⁶⁶ which had provided appellate departments only for counties having municipal courts was valid.²⁶⁷

A superior court might or might not have a probate department depending on the number of judges. In *Schlyen v. Schlyen*²⁶⁸ decided by the Supreme Court in 1954, Acting Chief Justice Shenk gave the following instructive account of the manner of dealing with probate matters:

In a one-judge county the court entertains and disposes of probate cases as a superior court. The judge in such a county is not required to adjourn as a court exercising general jurisdiction and to reconvene as a probate court in order to dispose of matters in probate. He disposes of them on his calendar along with other cases, applying of necessity the rules of procedure especially applicable to probate cases.

263. *Id.*

264. CAL. CONST. art. VI, § 5 (1924).

265. 68 Cal. 2d 357, 438 P.2d 358, 66 Cal. Rptr. 710 (1968).

266. CAL. CODE CIV. PROC. § 77.

267. In *Whittaker*, Justice Sullivan, continuing his legislative history of CAL. CODE CIV. PROC. § 77, stated: "In November of 1966 the constitutional provisions relating to appellate departments found in former article VI, section 5, were repealed; the new section dealing with appellate jurisdiction—article VI, section 11—makes no specific mention of appellate departments and provides as here relevant only that 'Superior Courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.' Official commentary on the new provision indicates that the deletion of earlier constitutional language specifically dealing with appellate departments is intended only to render the matter subject to legislative control." 68 Cal. 2d 357, 361 n.2, 438 P.2d 358, 362 n.2, 66 Cal. Rptr. 710, 714 n.2 (1968).

268. 43 Cal. 2d 361, 273 P.2d 897 (1954).

In counties having two superior court judges probate proceedings are usually entertained and determined in accordance with the mutual convenience of the judges who likewise apply to such matters the rules and regulations applicable in probate practice.

In counties where there are more than two judges there is a presiding judge whose duty it is to distribute the business of the court among the judges and to prescribe the order of business. (Const., art. VI, § 7.) There may be at least one department of that superior court devoted largely if not exclusively to the handling of probate matters. Such a department is established generally by court rule or by special order of court. When so designated probate matters usually go by court rule to that department. But that does not mean that a probate matter, a will contest, for example, may not by order of the presiding judge or other appropriate court order be transferred for trial from the probate department to a department of the court normally exercising general jurisdiction. In this connection it may be noted that when so transferred for trial a will contest does not lose its identity as a part of the probate proceedings.²⁶⁹

An act of the Legislature approved April 22, 1931, provided "that at least one session of the superior court shall be held in each city containing a population of not less than forty-five thousand . . . wherein the city hall of said city is not less than eight miles from the site of the county courthouse."²⁷⁰ Later statutes provided that the places of holding branch courts should be at least fourteen miles apart,²⁷¹ while reducing the population requirement to thirty-five thousand.²⁷² In 1959, a Commissioner of the Superior Court of Los Angeles County called attention to the great need for branch courts in his county, "the most populous county in the United States," and pointed out that "the branch system of that county [which he described in detail] is the one which has been developed more extensively than that of any other California county."²⁷³

VII. Election of Judges and the Commission on Judicial Appointments: 1934

A section added to article VI in 1934 provided that any justice of the Supreme Court, or of a court of appeal, or any judge of a superior court of a county adopting the plan, may file a declaration of candidacy to succeed himself.²⁷⁴ If he did not do so, the Governor was to nom-

269. *Id.* at 371-72, 273 P.2d at 902.

270. Cal. Stat. 1931, ch. 182, § 1, at 299.

271. CAL. GOV'T CODE § 69749.

272. *Id.* § 69742.

273. Marshall, *The Branch Court*, 47 CALIF. L. REV. 689 (1959).

274. CAL. CONST. art. VI, § 26 (1934) (now CAL. CONST. art. VI, § 16).

inate a suitable person for the office.²⁷⁵ In either event the name of such candidate was to be placed on the ballot in a form calling for "yes" or "no" to a question asking whether the candidate should be elected.²⁷⁶ If a vacancy occurred by reason of the failure of a candidate to be elected or otherwise, the Governor was to appoint a suitable person to fill the vacancy.

Any nomination or appointment by the Governor was to be ineffective unless approved by a majority of a Commission on Qualifications consisting of the Chief Justice or Acting Chief Justice of the Supreme Court, the presiding justice of a court of appeal, and the Attorney General. By a new section added in 1960,²⁷⁷ the name of the commission was changed to "Commission on Judicial Appointments."

In a case before the Supreme Court in 1939,²⁷⁸ Acting Chief Justice Shenk stated:

The new method of electing Justices of the Supreme Court and Justices of the District Courts of Appeal has brought about an important change in the method of their selection. But they have continued to be elective officers as distinguished from appointive officers of the state. . . .

The language of the new section 26 and of the older sections of the same article which were left undisturbed indicate without question that the Justices of the Supreme Court hold and continue to occupy their offices only at the will of the electorate.²⁷⁹

275. *Id.*

276. *Id.*

277. CAL. CONST. art. VI, § 26a (1960) (now CAL. CONST. art. VI, § 7).

278. *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal. 2d 179, 93 P.2d 140 (1939).

279. *Id.* at 188-89, 93 P.2d at 145. At a meeting of the California State Bar on October 12, 1929, Henry E. Monroe, former President of the Bar Association of San Francisco, gave a talk entitled "*The Commonwealth Club Plan*" in which he stated: "What is the Commonwealth Club plan? It proposes that all judges in office shall retain their office, and when the term of any judge is about to expire, if he desires reelection, he must simply file a declaration of that intention. If this is done, that name, and that name alone, goes on the ballot, and the only question is: 'Shall judge So and So be retained in office?' If the electorate says 'Yes,' he holds that office for another term. If the electorate says 'No,' then the Governor appoints someone to fill the vacancy, and at the next election that name, and that name alone, goes on the ballot and the question is: "'Shall the appointment of So and So, judge for such and such court, be confirmed?'" 2 CAL. ST. B. PROCEEDINGS 115, 119 (1929). Mr. Monroe pointed out that the four or five thousand members of the Commonwealth Club were, almost unanimously, in favor of the plan, and willing to work for its adoption. *Id.* According to Malcolm Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571, 573 (1951), the Commonwealth Club had been interested in finding some method of securing the appointment, instead of the election, of judges since 1912.

In 1934 a proposal was made that appointments by the Governor be made by

VIII. Municipal and Justice Courts: 1950

In 1947 the Legislature requested the Judicial Council to study the courts below the superior courts, and to make recommendations for their improvement.²⁸⁰ In 1948 the council made a report pointing out defects in the existing system, and recommending the adoption of a constitutional amendment and certain statutes needed to establish a new system.²⁸¹ According to the council's report, "the principal defect" in the existing system was "the multiplicity of tribunals and their duplication of functions," there being "six separate and distinct types of inferior courts, totaling 767 in number, created and governed under varied constitutional, statutory and charter provisions."²⁸² The Legislature, in the Court Act of 1949, enacted the recommended statutes,²⁸³ providing that they should go into effect if and when the proposed constitutional amendment should be adopted. In 1950 the voters approved the proposed amendment; by so doing, in effect, they approved the entire system.

As amended, the constitution directed the Legislature to provide for the division of each county into judicial districts, and for the establishment of a municipal or justice court in each district.²⁸⁴ A municipal

selecting one of two candidates named by a nominating commission. "The Commonwealth Club, which had originally taken up the cause, became interested in this proposal as did the State Chamber of Commerce. The State Chamber of Commerce proposed a change to a confirmation commission, rather than a nominating commission, which was to be called a Commission on Qualifications. This change the Commonwealth Club later approved, and then with the addition of a county local option clause, the plan was ready for submission to the voters." Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 21 (1962).

280. Sen. Con. Res. No. 19, Cal. Stat. 1947, ch. 47, at 3448.

281. JUDICIAL COUNCIL OF CALIFORNIA, 1948 REPORT TO THE GOVERNOR AND THE LEGISLATURE 13-73. An extensive quotation from the report will be found in Vanderbilt, *supra* note 260, at 308-09.

282. *Id.* at 15. Continuing, the report stated: "The jurisdiction of those courts overlaps, since in almost every instance each court serves a locality which is also served by at least one other court. Conflict and uncertainty in jurisdiction is one result of such multiplicity and duplication. Another result is that many courts are operated on a part-time basis and are presided over by laymen engaged in outside businesses or by lawyers engaged in private practice." *Id.* For the beginning of this confusion, see text accompanying notes 47-62 *supra*. Chief Justice Gibson delivered a speech at Modesto before the Stanislaus Bar Association on October 28, 1949, in which he demonstrated the need for reform, and outlined in some detail steps taken to accomplish the reform. He referred to a study made by the Judicial Council some 10 years earlier, and to the fact that the State Bar, the Justices' and Constables' Association, the Commonwealth Club of California, the Lawyers Club of Los Angeles, and many others had made recommendations. 24 CAL. ST. B.J. 382 (1949).

283. Cal. Stat. 1949, chs. 1286, 1510-18, at 2268, 2681-702.

284. CAL. CONST. art. VI, § 11 (1950) (now CAL. CONST. art. VI, § 5).

court was to be established in each district of over 40,000 population, and in each consolidated city and county; a justice court was to be established in each district of 40,000 or less.²⁸⁵ The Legislature was further directed to provide by general law for the "regulation, government, procedure, and jurisdiction" of the new courts, and to "fix by law the powers, duties, and responsibilities of such courts and of the judges thereof." The amendment declared that, with the exception of such municipal or justice courts, there should be no other court inferior to the superior court, and provided that pending business and all records of the superseded courts be transferred to the municipal or justice courts in the district.²⁸⁶

Writing in 1949, Arthur T. Vanderbilt remarked, "If this amendment is ratified, California will join the states having a statewide system of courts of limited jurisdiction."²⁸⁷ According to Dorothy W. Nelson, "The objectives of the 1950 reorganization plan were to reduce the number and types of courts, to have a court structure adaptable to urban and rural areas, to have a court reasonably accessible to the inhabitants of each community, and to have a uniform system throughout the state responsive to changing conditions."²⁸⁸ In her enthusiasm she stated that the 1950 reorganization of the lower courts was "[t]he most important reform to take place in the California judicial system in the past 100 years."²⁸⁹ The Court Act of 1949, passed in anticipation of the adoption of the constitutional amendment, authorized as many concurrent sessions of a municipal or justice court as there were judges, declaring that the judgments, orders, and proceedings of any session should be "equally effectual as though all the judges of said court presided at such session."²⁹⁰ It was further provided that a municipal court with more than five judges might keep one department open for criminal business all hours of the day or night and on legal holidays.²⁹¹

285. Anticipating the adoption of the Amendment, the Legislature, by an act approved July 27, 1949, had provided that "[a]s public convenience requires, the board of supervisors shall divide the county into judicial districts for the purpose of electing judges and other officers of municipal and justice courts." Cal. Stat. 1949, ch. 1511, § 1, at 2694, *as amended*, CAL. GOV'T CODE § 71040.

286. CAL. CONST. art. VI, § 11 (1950).

287. Vanderbilt, *supra* note 260, at 309.

288. Nelson, *Should Los Angeles County Adopt a Single-Trial-Court Plan?*, 33 S. CAL. L. REV. 117, 119 (1960).

289. *Id.*

290. Municipal and Justice Court Act of 1949, Cal. Stat. 1949, ch. 1510, § 17, at 2687, *as amended*, CAL. GOV'T CODE § 71340.

291. *Id.* § 34, at 2691, *as amended*, CAL. GOV'T CODE § 72300 (five changed to three or more).

The Court Act of 1949 provided that municipal and justice courts should have jurisdiction of civil cases as provided in Code of Civil Procedure sections 89, 112, and 117.²⁹² As amended in 1949, section 89 in effect denied municipal courts jurisdiction of cases involving the legality of any tax, impost, assessment, toll or municipal fine;²⁹³ of forcible entry or forcible or unlawful detainer involving rental values in excess of \$200 per month;²⁹⁴ of any and all cases involving more than \$2000.²⁹⁵ Subject to these exceptions and limitations, the court was given jurisdiction over the following cases and proceedings: cases at law; dissolution of a partnership; interpleader; cancellation or rescission of a contract in connection with recovery of consideration; revision of a contract in an action upon such contract; forcible entry or forcible or unlawful detainer; enforcement and foreclosure of liens on personal property; enforcement and foreclosure of liens of mechanics, artisans, laborers, and others;²⁹⁶ cases in equity to try title to personal property; equitable defenses. In an action within the court's jurisdiction it may issue temporary restraining orders and preliminary injunctions; order an accounting; appoint receivers; determine title to personal property seized in the action or upon execution.²⁹⁷ Penal Code section 1462 as amended in 1949²⁹⁸ provided that each municipal court should have jurisdiction of misdemeanors committed within the county except where the juvenile or other court has exclusive jurisdiction. Of misdemeanors within the jurisdiction of the justice court, the municipal court was given concurrent jurisdiction. The court was given exclusive jurisdiction of all violations of city and town ordinances within its district.²⁹⁹

292. Cal. Stat. 1949, ch. 1510, § 15, at 2686.

293. Cal. Stat. 1949, ch. 1286, § 1, at 2268, *as amended*, CAL. CODE CIV. PROC. § 89. The 1968 amendment added: "[S]uch courts shall have jurisdiction in actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant."

294. *Id.* at 2269. Since 1961, the amount has been \$600. CAL. CODE CIV. PROC. § 89(a)(4).

295. *Id.* at 2268. Since 1961, the amount has been \$5000. CAL. CODE CIV. PROC. § 89(a)(4).

296. Cal. Stat. 1949, ch. 1519, § 1, at 2703 [now CAL. CODE CIV. PROC. §89(a)(6)] includes "all other persons to whom liens are given under the provisions of Chapter 2 [commencing with Section 1181], Title 4, Part 3 of this code"

297. *Id.* at 2702-03. In 1969, the court was given power "[t]o vacate a judgment or order of such municipal court obtained through extrinsic fraud, mistake, inadvertence, or excusable neglect." CAL. CODE CIV. PROC. § 89(b)(3).

298. Cal. Stat. 1949, ch. 1518, § 2, at 2701.

299. *Id.* These provisions have continued unchanged. CAL. PEN. CODE § 1462. For establishment and jurisdiction of the "Juvenile Court," see CAL. WELF. & INST'NS CODE §§ 500-940. In *Singer v. Bogen*, 147 Cal. App. 2d 515, 524, 305 P.2d 893, 899 (1957), Fourt, J., stated: "The superior court is a court of general jurisdiction,

Penal Code section 1425 as amended in 1949³⁰⁰ provided that justice courts should have jurisdiction of misdemeanors committed within the county punishable by fine not exceeding \$1,000 or imprisonment not exceeding 6 months or both, except where other courts were given exclusive jurisdiction, and of cases amounting to misdemeanors under section 270 of the Penal Code.³⁰¹ Each justice court was given exclusive jurisdiction over violations of ordinances of cities and towns within its district. In 1949, Code of Civil Procedure section 112,³⁰² in effect, denied justice courts jurisdiction of civil cases involving the legality of any tax, impost, assessment, toll, or municipal fine;³⁰³ of cases involving title or possession of real estate; of proceedings in forcible or unlawful detainer involving rental values in excess of \$75 per month;³⁰⁴ and of any and all cases involving more than \$500.³⁰⁵ Subject to these exceptions and limitations the justice court was given jurisdiction of cases at law; forcible entry or forcible or unlawful detainer, including the power to determine any question properly involved therein; enforcement and foreclosure of liens on personal property; proceedings to charge the interest of a debtor partner with payment of an unsatisfied amount of a judgment rendered by the court (including the power to appoint a receiver); proceedings to determine title to personal property seized in a pending action or upon execution; and proceedings to appoint receivers of perishable property under Code of Civil Procedure section 547a.³⁰⁶

and the juvenile court is but a part thereof. True it is that there are special procedures and rules adopted for proceedings in the juvenile court. However, when a judge sits as a judge of the juvenile court, he is sitting as a judge of the superior court, exercising a part of the general jurisdiction conferred by the law in such cases, and is referred to as a judge of the juvenile court."

300. Cal. Stat. 1949, ch. 1518, § 1, at 2701, which was passed in anticipation of the 1950 amendment to the constitution.

301. Section 1425 was amended in 1955 by adding misdemeanors "under section 502 of the Vehicle Code." Cal. Stat. 1955, ch. 1173, § 1, at 2185. A further amendment in 1957 added misdemeanors "under subdivision (b) of section 476a of the Penal Code." Cal. Stat. 1957, ch. 1193, § 1, at 2483.

302. Cal. Stat. 1949, ch. 1286, § 2, at 2269-70, which was passed in anticipation of the 1950 constitutional amendment.

303. This provision was amended in 1968 by adding that "such courts shall have jurisdiction in actions to enforce payment of delinquent and unsecured personal property taxes if the legality of the tax is not contested by the defendant; . . ." Cal. Stat. 1968, ch. 503, § 2, at 1147.

304. In 1959, the amount was increased from \$75 to \$125. Cal. Stat. 1959, ch. 880, § 1, at 2913.

305. In 1968, the upper limit was changed to \$1000. Cal. Stat. 1968, ch. 1260, § 1, at 2378.

306. Cal. Stat. 1949, ch. 1286, § 2, at 2269-70. In 1959, the court's jurisdiction

Code of Civil Procedure section 117, as amended in 1949³⁰⁷ and again in 1951³⁰⁸ to conform to the constitutional amendment of 1950, conferred on the judges of the municipal and justice courts jurisdiction of cases for money only not exceeding \$100, including actions for injury to person and to personal property.³⁰⁹ While exercising this jurisdiction the judges were to be "known and referred to as the small claims court." If the defendant had a counterclaim over \$100, he might commence an action on it in a proper court and have the small claims case transferred to that court.³¹⁰ In a 1964 study titled the "California Small Claims Court,"³¹¹ it was pointed out that "[i]n 1920 Massachusetts became the first state to pass a state-wide act of general application to small claims actions. California passed a similar statute in 1921."³¹² The study further pointed out that "[t]he small claims court is not a separate and independent judicial tribunal existing apart from the other California courts; it is an adjunct to all municipal and justice courts of the state and is 'in the nature of a special procedure'."³¹³

IX. Removal of Judges and the Commission on Judicial Qualifications: 1960

Section 10-b, added to article VI of the constitution in 1960, provided that a justice or judge of any court of the State may be removed for "willful misconduct in office or willful and persistent failure to perform his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties,

was extended to "actions under section 720 for the recovery of an interest in personal property or to enforce the liability of a judgment debtor." Cal. Stat. 1959, ch. 1097, § 2, at 3169.

307. Cal. Stat. 1949, ch. 451, § 1, at 795.

308. Cal. Stat. 1951, ch. 1737, § 11, at 4083.

309. In 1957, the upper limit was increased from \$100 to \$150. Cal. Stat. 1957, ch. 1201, § 1, at 2489. In 1967, the amount was increased to \$300. Cal. Stat. 1967, ch. 195, § 1, at 1303. The section was amended in 1955 to provide that in municipal courts the small claims court should have jurisdiction in proceedings in unlawful detainer. Cal. Stat. 1955, ch. 1927, § 1, at 3553. This provision was declared invalid by the Supreme Court because of the summary nature of the small claims procedure. *Mendoza v. Small Claims Court*, 49 Cal. 2d 668, 321 P.2d 9 (1958). In 1968, the small claims courts were given "jurisdiction in actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant." Cal. Stat. 1968, ch. 503, § 3, at 1148.

310. Cal. Stat. 1949, ch. 451, § 2, at 796 (now CAL. CODE CIV. PROC. § 117r).

311. Pagter, McCloskey & Reinis, *The California Small Claims Court*, 52 CALIF. L. REV. 876 (1964).

312. *Id.* at 877.

313. *Id.* at 878.

which is, or is likely to become, of a permanent character."³¹⁴ This new section authorized a commission, created by another 1960 amendment,³¹⁵ to order a hearing concerning the removal or retirement of a justice or judge, and, after the hearing, to make a recommendation to the Supreme Court to be approved or disapproved by that court. The new section declared that the procedures provided were alternative to, and cumulative with, the methods of removal of justices and judges provided in article VI, section 10 (two-thirds vote of both houses of the Legislature), article VI, section 10-a (removal by the Supreme Court for crime involving moral turpitude), article IV, sections 17 and 18 (impeachment), and article XXIII (recall).³¹⁶

Section 1-b, added to article VI in 1960, provided for a "Commission on Judicial Qualifications" to consist of five judges appointed by the Supreme Court, two lawyers named by the Governors of the State Bar, and two non-lawyer citizens named by the Governor of the State, each to serve 4 years. In an account of the establishment of the commission,³¹⁷ Jack E. Frankel, its "Executive Secretary," noted that before the creation of the commission "the informed opinion was unmistakable that the traditional remedies of impeachment, recall, and concurrent legislative resolutions were inadequate."³¹⁸ He added, however, that the scope of his article did not permit "a full discussion of this history."³¹⁹ According to Frankel, "California's experience is noteworthy inasmuch as apparently no other state has an independent body with authority to receive information, make investigations, conduct hearings and recommend removal of judges for cause."³²⁰ A "full discussion" of the "history" referred to will be found in an article published by Secretary Frankel in 1962.³²¹

X. Revision of Article VI: 1966

Referring to the Constitution of 1879, Justice Temple, in an opin-

314. CAL. CONST. art. VI, § 10b (1960).

315. *Id.* § 26a (1960).

316. *Id.* § 10b (1960); 41 OPS. CAL. ATT'Y GEN. 140 (1963).

317. Frankel, *The Commission on Judicial Qualifications*, 36 CAL. ST. B.J. 1008 (1961).

318. *Id.* at 1009.

319. *Id.*

320. *Id.*

321. Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, 36 S. CAL. L. REV. 72 (1962). In the Opinion of the Attorney General, *supra* note 316, at 212, the secretary of the Commission on Judicial Qualifications was advised that the Judicial Council had authority to provide for the temporary suspension of a judge involved in a matter before the commission, but that the Legislature was without authority to enact a statute on the subject.

ion delivered in 1902,³²² stated: "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. . . . Latterly, however, all this has been changed. Through distrust of the legislature and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character."³²³ Charles S. Cushing, after quoting the above passage, pointed out that "[i]t was the revolutionary character of this [1879] 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."³²⁴

In a speech before the Commonwealth Club of California in September 1969, Bruce W. Sumner, a member of the Legislature from 1957 to 1962 and chairman of the Constitution Revision Commission since 1965, reported:

Some of us in the legislature during the late 1950's and early 1960's thought that another approach should be taken. In 1962 the people were asked the question: Do you want the Legislature to submit to you a new constitution? The proposition passed by a 2-1 vote.

The legislature appointed the Constitution Revision Commission. This makes our group wholly distinctive, being appointed by the legislature. We serve at the pleasure of the legislature but we adopt our own rules, elect our own officers and set our own procedure.³²⁵

Commenting on the role of the Legislature in the process of constitutional revision, he further stated that "California is recognized throughout this nation as having the finest state legislature."³²⁶

Revisions of the articles dealing with the legislature, executive branch, and the judiciary were approved by the Legislature and the voters in 1966. Other proposed revisions submitted to the voters in 1968 and again in 1970 were not approved. According to Chairman

322. *Winchester v. Howard*, 136 Cal. 432, 69 P. 77 (1902).

323. *Id.* at 439, 69 P. at 78-79.

324. Cushing, *The Acquisition of California, Its Influence and Development Under American Rule*, 8 CALIF. L. REV. 67 (1920). For "distrust of the legislature," see comments by BRYCE, *supra* note 188.

325. Address by Bruce W. Sumner to the Commonwealth Club of California, Sept. 15, 1969, in *THE COMMONWEALTH*, Vol. LXIII, at 233.

326. *Id.* at 234.

Sumner,³²⁷ "Relatively few substantive changes were proposed in the operation of the judicial branch, since California's system is envied by most of the nation." The chief reasons for revision were (1) to make a few substantive changes; (2) to eliminate repealed and obsolete provisions; and (3) to delete matters deemed to be legislative in character so as to subject them to legislative control.³²⁸

The following is an outline of the court system established by article VI as revised in 1966:

COURTS OF JUSTICE

Supreme Court—to consist of the Chief Justice and six associate justices; may be convened at any time; to be a court of record.

Courts of Appeal—one, with one or more divisions, for each appellate district; each division to consist of a presiding justice and two or more associate justices; to be courts of record.

Superior Courts—one, with one or more judges, for each county; judge or judges to serve more than one court if Legislature so provides and counties involved approve; to be courts of record.

Municipal Courts—one for each judicial district of more than 40,000 residents; to have one or more judges; to be courts of record.

Justice Courts—one for each judicial district of 40,000 residents or less; to have one or more judges; not to be courts of record.

JUDICIAL OFFICERS

Justices of the Supreme Court—to be elected at large at general elections; to hold office for 12 years.

Justices of Courts of Appeal—to be elected in their districts at general elections; to hold office for 12 years.

327. Sumner, *The California Constitution Revision Commission*, in CONSTITUTION OF THE UNITED STATES * * * CONSTITUTION OF THE STATE OF CALIFORNIA 109, 115 (California Legislature pub. 1969). See Mason, *Constitutional History of California*, in *id.* at 75.

328. See, e.g., *Whittaker v. Superior Court*, 68 Cal. 2d 357, 361, 438 P.2d 358, 362, 66 Cal. Rptr. 710, 714 (1968).

Judges of Superior Courts—to be elected in their counties at general elections; to hold office for 6 years.

Judges of Municipal Courts—to be elected in their districts at general elections; no provision for term of office.

Judges of Justice Courts—to be elected in their districts at general elections; no provision for term of office.

Commissioners—Legislature may provide for appointment by trial courts of record of officers to perform subordinate judicial duties.

OTHER OFFICERS AND RELATED AGENCIES

County Clerk—to be ex officio clerk of superior court of county.

Judicial Council—to consist of the Chief Justice and fourteen other judges, four members of the state bar, and one member of each house of the Legislature.

Commission on Judicial Appointments—to consist of the Chief Justice, Attorney General, and presiding justice of the court of appeal of the affected district.

Commission on Judicial Qualifications—to consist of five judges, two members of the state bar, and two citizens who are not judges or members of the state bar.

State Bar—a public corporation; all persons admitted to practice law to be members, except while judges of courts of record.

SUBJECT-MATTER JURISDICTION

Supreme Court—court and justices to have original jurisdiction in habeas corpus proceedings; court to have original jurisdiction in proceedings for extraordinary relief in nature of mandamus, certiorari, and prohibition; appellate jurisdiction of death-sentence cases; jurisdiction of cases transferred, at its discretion, from courts of appeal.

Courts of Appeal—same original jurisdiction as Supreme Court; appellate jurisdiction of all cases originating in superior courts (except death-sentence cases) and in other causes prescribed by statute; jurisdiction of cases transferred to them by the Supreme Court.

Superior Courts—same original jurisdiction as Supreme Court; original jurisdiction of all cases except those given by statute to other trial courts; appellate jurisdiction of causes prescribed by statute arising in municipal and justice courts.

Municipal Courts—to be prescribed by Legislature.

Justice Courts—to be prescribed by Legislature.

VENUE AND RANGE OF PROCESS

No provisions.

Roscoe Pound, who favored the department system, wrote in 1940:³²⁹

In California, the Supreme Court since 1922 has habitually sat in bank, the reports showing the court sitting in departments only in 1928. The reasons given do not seem convincing,³³⁰ and it is significant that in consequence the court is again over-burdened and propositions to restrict its jurisdiction are being urged [citing Cal. St. B. Proceedings 284-85 (1938)].³³¹

Explaining the ultimate renunciation in 1966 of the Supreme Court department system, Judge Sumner, chairman of the Revision Commission, wrote:

The former Constitution provided for Supreme Court operation in two separate departments to relieve heavy caseloads. With the creation of district courts of appeal in 1904, the department system became obsolete and never was used again. The 1966 revision [of article VI] recognized this fact and deleted this obsolete provision.³³²

Thus, article VI, as revised in 1966, provided that the “[c]oncurrence of 4 judges present at the argument is necessary for a judgment.”³³³

329. R. POUND, *supra* note 149, at 214.

330. In note 1, at 214, Pound stated: “Mr. Justice Preston, California’s Appellate Problems, 6 Cal. State Bar J. 291, 296 (1931), giving as the reason that ‘there seems to be a feeling in the minds of the bar that when cases come up from the district court of appeal they are entitled to be heard in bank, and that the bar would not be satisfied with a department opinion.’ Yet when the matter was submitted to vote of the state bar, a proposition to urge the Supreme Court to ‘hear a substantial number of cases in department’ was carried overwhelmingly—2265 for and 999 against. The Recent Bar Plebiscite, 7 Cal. State Bar J. 270 (1932).”

331. Continuing, Pound writes: “In particular, the practice of sitting in bank rather than in departments has deprived oral argument of real value, and in effect required submission of cases on briefs of counsel. As the authority to sit in departments is not used, propositions are made to abrogate it.” *Id.* at 214. R. POUND, *supra* note 149, at 214.

332. Sumner, *supra* note 327, at 114.

333. CAL. CONST. art. VI, § 2.

Relief of the Supreme Court workload by the use of commissioners was, in effect, denied; for although section 22 of the revised article authorized the Legislature to provide for the appointment "by trial courts of record" of officers such as commissioners to perform subordinate judicial duties, it failed to include a similar provision for the Supreme Court.³³⁴

The 1904 division of appellate business between the Supreme Court and the new courts of appeal³³⁵ necessitated jurisdictional decisions, and was of little or no value in directing "great and important" cases to the Supreme Court and the "ordinary current of cases" to the courts of appeal. Using an elaborate system of transfers, the cases were sorted and heard in the appropriate court. By 1954 "nearly all" direct appeals to the Supreme Court in civil cases were transferred to and heard in the courts of appeal. As revised in 1966, section 11 of article VI provided: "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other cases prescribed by statute." Section 12 provided: "The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another." By these provisions the jurisdictional problems were eliminated, and the Supreme Court was left almost completely free to choose the appeals it wanted to hear.

Whittaker v. Superior Court,³³⁶ a 1968 case, provides a good illustration of the transfer practice. Misdemeanor convictions in a justice court were reviewed by one judge of the superior court. That court had no appellate department because the county had no municipal court.³³⁷ Claiming a denial of due process and equal protection, on the ground that in many other counties similar convictions were reviewed by a three-judge appellate department, the defendants petitioned the court of appeal for a writ of mandamus to compel the superior court to convene a three-judge appellate department to hear the appeals. After issuing an order to show cause, the court of appeal granted the petition.³³⁸ The Supreme Court then transferred the case

334. *Id.* at § 22.

335. CAL. CONST. art. VI, §§ 1, 4 (1904). See text accompanying notes 239-44 *supra*.

336. 68 Cal. 2d 357, 438 P.2d 358, 66 Cal. Rptr. 710 (1968).

337. See *id.* at 360 n.2, 438 P.2d at 362 n.2, 66 Cal. Rptr. at 714 n.2.

338. *Id.* at 360, 438 P.2d at 361, 66 Cal. Rptr. at 713.

to itself and, after a hearing in bank, discharged the order to show cause, and denied the petition.³³⁹ Referring to the decision of the court of appeal, Justice Sullivan stated:

In view of the far-reaching effect of this decision, and of the necessity that the issues involved be determined by the higher courts at the earliest possible opportunity, we transferred the matter to this court on our own motion and without waiting for the decision to become final as to the Court of Appeal. (See Cal. Const., art. VI, § 12; 1967 Judicial Council Report 77; Witkin, *New Rules on Appeal, Part IV, Hearing and Determination of Appeal* (1944) 17 So. Cal. L. Rev. 232, 267-268.)³⁴⁰

Prior to 1966 the civil appeals filed in the Supreme Court averaged about 270 per year.³⁴¹ It has been stated that elimination of these filings will not affect the workload of the court, since "[e]ven prior to the 1966 change in the Constitution the court followed a policy of transferring to the Courts of Appeal all causes appealed directly to it, except death penalty cases, cases of public importance, emergency matters, and cases involving questions similar to those in other pending litigation. Appeals which the Supreme Court would have previously retained under this policy will in most instances now come before the court by petition for hearing or by transfer on the court's own motion."³⁴²

As revised in 1966, article VI of the constitution provided, "If the governing body of each affected county concurs, the Legislature may provide that one or more judges serve more than one superior court."³⁴³ Noting that the 1966 revision continued the requirement of a superior court in each county, the chairman of the Constitution Revision Commission stated that deletion of the requirement of at least one judge in each county "provides financial savings to small counties that do not need the full-time services of a superior court judge and which prefer to share a judge with other counties."³⁴⁴

It is interesting to note that a similar deletion was proposed in the Constitutional Convention of 1878-1879.³⁴⁵ Delegates at that convention who were familiar with the old district court system had vigorously protested the proposed deletion, pointing out the need of having a

339. *Id.* at 372, 438 P.2d at 370, 66 Cal. Rptr. at 722.

340. *Id.* at 360, 438 P.2d at 361-62, 66 Cal. Rptr. at 713-14.

341. JUDICIAL COUNCIL OF CALIFORNIA, 1969 REPORT TO THE GOVERNOR AND THE LEGISLATURE 119.

342. *Id.* at 120.

343. CAL. CONST. art. VI, § 4.

344. Sumner, *supra* note 327, at 114.

345. See text accompanying note 188 *supra*.

superior court judge, especially to act as probate judge, present in the county at all times. They had regarded the efficient transaction of the court's business as more important than the saving of expense. The proposal was defeated 70 to 45.³⁴⁶

In addition to the 1966 changes to article VI mentioned above, Judge Sumner, chairman of the Constitution Revision Commission, calls attention to changes made in 1966 with respect to the qualifications, election and control of judges.³⁴⁷ He summarizes two of these changes as follows:

Five years admission to practice law in this state was required by the former Constitution for eligibility to a judgeship in any court of record. To encourage placement of experienced men as judges, the 1966 revision increased the admission requirements to 10 years for future judges of the superior and appellate courts.

The former Constitution provided that the names of incumbent judges of the superior court in counties of 700,000 population or more need not appear on the election ballot if no one ran against them or petitioned to have the name appear. This system met with widespread approval and the 1966 revision allowed the Legislature to extend it to any trial court in the state without regard to population.³⁴⁸

As revised in 1966, article VI of the constitution declared that "superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition; . . . original jurisdiction in all causes except those given by statute to other trial courts; . . . appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties."³⁴⁹ The causes "given by statute to other trial courts" were not specified, but were to be found in the statutes which had fully developed the jurisdiction of the municipal and justice courts beginning in 1949.³⁵⁰

XI. Summary and Comment

At various times during their distinguished careers, both Roscoe Pound and Arthur T. Vanderbilt expressed their individual views on modern court organizations. Vanderbilt, after pointing out that "multiplicity of courts" is characteristic of "an immature system of law,"

346. 1 CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 134, at 976.

347. Sumner, *supra* note 327, at 115.

348. *Id.*

349. CAL. CONST. art. VI, §§ 10-11.

350. See text accompanying notes 292-313 *supra*.

stated that "all the courts any American state really needs" are three: a general trial court with statewide jurisdiction of every kind of case; a local court for the trial of minor cases; and an appellate tribunal to review questions of law.³⁵¹ Noting that very few of our states have achieved "this ideal of the three-court system," Vanderbilt observed that "the degree to which they have progressed in this direction is one measure of their judicial civilization."³⁵² He did recognize, however, that intermediate courts of appeal must be provided as needed in the larger states.³⁵³ Pound, on the other hand, thought "[i]t should be possible for the supreme court to sit in divisions if necessary for the prompt dispatch of business."³⁵⁴ Regional or local appellate terms of the superior court should be provided making unnecessary "intermediate appellate tribunals of any sort."

As indicated by these opinions, progress in court development is from the complex to the simple; from the multiple to the unitary. At the beginning of California's court history the tendency was to solve problems by adding new courts.³⁵⁵ By 1878 there were "no less than eleven grades of courts."³⁵⁶ The first great step towards "judicial civilization" was taken when the Constitution of 1879 provided that a superior court be established in each county in the place of district, county, and probate courts.³⁵⁷ The second great step was taken in 1950 when "six separate and distinct types of inferior courts, totaling 767 in num-

351. Vanderbilt, *Brief for a Better Court System*, N.Y. Times, May 5, 1957, § 6 (Magazine) at 9.

352. *Id.* at 67.

353. *Id.* at 9.

354. Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 225, 227 (1940).

355. The Drafting Committee of the Constitutional Convention of 1849 proposed the establishment of a unified Superior Court of four judges, each to try cases on circuit; three to sit as an appellate court to review the judgments of the fourth. See text accompanying note 14 *supra*. This was the same as provided for the frontier territories of the United States, but was rejected by the convention which favored separate supreme and district courts. Judicial power was vested in a supreme court, district courts, county courts, and justices of the peace. The Legislature, authorized to establish inferior courts, increased the number of types of courts from four to nine in the California Court Act of 1851, outlined in text following note 67 *supra*.

356. Waymire, *Our Judicial System*, 1 PAC. COAST L.J. 367 (1878). Before listing the "eleven different grades of courts," Waymire wrote: "In devising a plan of a judicial system, no care should be spared to make it as simple as possible, and at the same time to make it capable of meeting the wants of the people promptly. . . . In this state we have come far short of it. Our system is both complicated and inefficient." *Id.* at 369. Waymire proposed, "For the district, county, probate, and criminal courts, substitute municipal courts—one for each county or city and county capable of expansion into as many branches as may be necessary." *Id.* at 370.

357. See CAL. CONST. art. VI, § 6 (1879). See text accompanying note 188 *supra*.

ber, created and governed under varied constitutional, statutory and charter provisions," were replaced by two statewide types of local courts—municipal courts and justice courts.³⁵⁸

When the first step was taken, intermediate appellate courts were rejected in favor of the plan of having the Supreme Court sit in departments. When this plan failed, intermediate appellate courts became necessary.

The superior courts established in 1879 were statewide in the sense that their process extended to all parts of the State. The plan of having only one superior court in the State with branches in the several counties was not considered. As originally constituted, the superior courts were to be always open for business, and each judge of a multi-judge court was authorized to hold the court alone. The latter provision made it possible to take care of increasing judicial business by adding judges instead of establishing additional courts. The present writer has no way of knowing whether California's court system "is envied by most of the nation,"³⁵⁹ but does conclude that California is far advanced in "judicial civilization."

358. See text accompanying notes 280-91 *supra*.

359. Sumner, *supra* note 327, at 14.

