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Expatriate Domestic Relations Law in Mexican California

DAVID J. LANGUM*

Americans emigrating to California during the mid-1840's were faced with an alien and unfamiliar legal system. Perhaps the most apparent conflict arose in the area of domestic relations. Neither the Mexican government nor the Catholic Church officials were equipped to handle the marriage, separation or divorce of the predominantly Protestant settlers. The emigrants relied upon their common law heritage and on necessity in the formulation of adequate solutions to their new found problems. Professor Langum provides insight into the early development of domestic relations law in California.

INTRODUCTION

In the mid-1840's, large numbers of Americans crossed the continent to migrate to Alta California, then a department of the Republic of Mexico. They brought with them both basic needs and a deeply imbued tradition of social ordering in which the role of law and legal norms was fundamental. The most intimate interaction of these two forces was in the area of domestic relations law and particularly the legal forms of marriage, separation, and divorce.

* A.B., Dartmouth College, 1962; J.D., Stanford University, 1965; M.A. San Jose State University, 1976; Associate Professor of Law, Detroit College of Law. Professor Langum has written extensively in the fields of history and of legal history including, *Californios and the Image of Indolence*, 9 W. HIST. Q. 181 (1978) which won the Herbert Eugene Bolton award from the Western History Association.

In these delicate legal areas the American pioneers were left to develop their own systems. The California priests would perform marriages only if both parties to the union were Catholic; however most American emigrants were Protestant. There were no Protestant ministers in California until the American conquest in 1846. None of the secular Mexican officials, from the governor to the local judge, who was known as the *alcalde*¹, had matrimonial

1. The primary officer of local government in New Spain was the *alcalde*, who executed both executive and judicial functions. While Spain controlled California, the power of the *alcalde* was checked by the *comisionado*, a local representative of the military government and himself a low ranking officer. The office of the *comisionado* terminated with the success of the Mexican Revolution in 1821, leaving the *alcalde* to continue in much the same manner, his powers now unchecked. Theoretically elected by each community, although in practice at times appointed by the California Governor, the *alcalde* enjoyed a venue over both the town from which he was elected or appointed and a large surrounding territory. His judicial subject matter jurisdiction was vague and ill-defined, a condition which was amplified by a lack of law books and the absence of a professional bar. The *alcalde* had no authority over military personnel or clerics. The former were disciplined by their own officers, while the latter were subjected to punishment by their missionary college or an ecclesiastical court, the powers of which were occasionally exercised by a *padre* designated for this purpose, and later, in the years just prior to the American invasion when a bishop was appointed for California, by that official himself. The ecclesiastical jurists had primary jurisdiction in domestic matters. See note 27 and accompanying text, *infra*.

After being informed of a dispute by one of the parties, the *alcalde* verbally summoned the other party and proceedings were generally held orally, with the *alcalde* rendering an immediate decision. Alternatively, each party could bring one or sometimes two friends called *hombres buenos*, who would listen to the evidence together and render opinions concerning the facts to the *alcalde*. There were virtually no substantive standards of law by which to form a judgment based upon findings of facts. A fair summary of California justice is that its administration was personal, tailored to the individual *alcalde* and particular parties, paternalistic, and largely unpredictable. Appeal was made to the Departmental Governor at Monterey.

Significant reforms were made by the Mexican central government through the decrees of March 20, 1837 and May 23, 1837. *Alcaldes* became primarily executive officials and the original judicial power was vested in the Justices of the Peace (very minor criminal matters and civil disputes involving less than \$100) and Courts of the First Instance (unlimited jurisdiction). Elaborate procedural rules were promulgated for the trial courts and appellate Courts of the Second and Third Instances were proclaimed. However, the purely judicial courts of the First, Second, and Third Instances were never actually established in California, due to lack of trained attorneys who could fill the positions. Memorial of Manuel Castañares, California Deputy to the Mexican Congress (September 1, 1844), M. Castañares, *COLLECCIÓN DE DOCUMENTOS RELATIVOS AL DEPARTAMENTO DE CALIFORNIA* (1845), reprinted in *NORTHERN MEXICO ON THE EVE OF THE UNITED STATES INVASION* (Weber ed. 1976). The result in California was confusion, primarily in terminology, most *alcaldes* retaining that title, some calling themselves Justices of the Peace, and others, Courts of the First Instance. By decree of March 2, 1843, *alcaldes* and justices of the peace in California "were empowered to perform the functions of judges of First Instance in those districts in which there were no judges of First Instance." *Mena v. Le Roy*, 1 Cal. 216, 220 (1850).

For information on the *alcalde* system in California, see generally, R. POWELL, *COMPROMISE OF CONFLICTING CLAIMS: A CENTURY OF CALIFORNIA LAW, 1760-1860* 29-30 (1977); Grivas, *Alcalde Rule: The Nature of Local Government in Spanish*

authority. Divorce was unknown, although some slight precedent existed for judicially enforced separation.

The legal and matrimonial needs of the emigrants forced them to develop alternative solutions to their problems. The resolution of the conflict between these desires and the lack of legal forms through which to accomplish them often lead into confusion. The conflict, however, is of great interest because the attempted resolution is descriptive of the pioneers' efforts to apply legal norms of their heritage despite the conflict with a confusing, and alien, legal system. A study of this resolution suggests that the pioneers were able to form a model based on a reasonable understanding of the common law of domestic relations.

This discussion is divided into three parts. The first deals with the emigrants' search for proper authorities to perform marriages. The second part discusses the problems of arranging separations and divorces in a society which did not recognize the legitimacy of those actions. The discussion concludes with a case study of the Bennett women of Santa Clara, whose separation and marriage are in many ways paradigmatic of the problems of expatriate domestic relations law in Mexican California.

I. MARRIAGE

The earliest American emigrants to Mexican California (1822—1846) were primarily unattached males who had come to engage in some branch of the hide and tallow trade or work as retail merchants.² Many of these men married local Californio women after satisfying the requirement of becoming naturalized Mexican citizens and converting to Catholicism.³ The overland migration

and Mexican California, 40 CAL. HIST. SOC'Y Q. 11 (1961); Wilson, *The Alcalde System of California*, 1 Cal. 559 (1852) (printed as an appendix).

2. A classic account of the hide and tallow trade is R. DANA, *TWO YEARS BEFORE THE MAST* (1840). See also, Ogden, *Boston hide droghers along California shores*, 8 CAL. HIST. SOC'Y Q. 289 (1929). For the retail merchant trade see the biography of one of its leading participants, D. WRIGHT, *A YANKEE IN MEXICAN CALIFORNIA ABEL STEARNS: 1798-1848* (1977), and Ogden, *New England Traders in Spanish and Mexican California*, in *GREATER AMERICA: ESSAYS IN HONOR OF HERBERT EUGENE BOLTON* 395 (1945).

3. The procedures for ecclesiastical investigation and instruction prior to conversion and the marriage ceremony were often complex and lengthy but were slightly simplified following the American conquest. Compare WRIGHT, *supra* note 2, at 85-90 (describing an 1841 marriage) with S. JACKSON, *A BRITISH RANCHERO IN OLD CALIFORNIA: THE LIFE AND TIMES OF HENRY DALTON AND THE RANCHO AZUSA* 121 (1977) (describing an 1847 marriage). An English contemporary, resident in

which commenced in 1841 brought a much larger and different class of pioneer. They were unrefined, agriculturally inclined, many had families, and teeming with the emotions of Manifest Destiny, were increasingly impatient with Hispanic institutions.⁴ They came to settle, not to assimilate. It is with these later expatriates that this article is concerned.

Once past the Missouri settlements they were beyond the jurisdiction of formal legal institutions.⁵ Nonetheless, the overland emigrants continued to engage in marriages on the trail, which, in most cases, were solemnized before Protestant ministers.⁶ These ministers, however, did not continue on to California, since they were bound for Oregon. Indeed, until 1846, there were no Protestant religious officials in California.⁷

During the years 1841-1845, approximately 540 adult American

California, suggested that the relaxation in requirements began when the Spanish padres were gradually replaced by Mexican priests. W. GARNER, *LETTERS FROM CALIFORNIA, 1846-1847*, at 170 (Craig ed. 1970). This process began in 1835.

4. Many writers have drawn a distinction between the easily assimilated pre-1841 Americans and the overland immigrants of 1841-1846, who stayed thoroughly American in outlook and mingled but little with the native Californios. J. CAUGHEY, *CALIFORNIA: A REMARKABLE STATE'S LIFE HISTORY* 144 (3d ed. 1970); L. PITT, *THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890*, at 18-19 (1971). The newer American visitors and pioneers tended to be increasingly hostile toward Mexican control of California, anxious for its Americanization, and critical of the Californios as lazy and indolent. K. STARR, *AMERICANS AND THE CALIFORNIA DREAM* 16-21 (1973). However it was not just the Americans who saw the Californios as lazy; so also did all European visitors. Langum, *Californios and the Image of Indolence*, 9 *W. HIST. Q.* 181, 182 (1978).

5. They were not, however, beyond the rule of law. Even while on the trail, the emigrants attempted to apply amongst themselves the law remembered from their home states, much in the manner they would continue in California. Several studies have suggested this with regard to property rights and contractual obligations. See Reid, *Knowing the Elephant: Distinguishing Property Rights on the Overland Trail*, 10 *CREIGHTON L. REV.* 640 (1977); Reid, *Binding the Elephant: Contracts and Legal Obligations on the Overland Trail*, 21 *AM. J. LEGAL HIST.* 285 (1977); Reid, *Dividing the Elephant: The Separation of Mess and Joint Stock Property on the Overland Trail*, 28 *HASTINGS L.J.* 73 (1976). There is room for disagreement as to how well the emigrants applied remembered norms and procedures of the criminal law in dealing with disorders and anti-social behavior encountered along the trail. Compare Langum, *Pioneer Justice on the Overland Trails*, 5 *W. HIST. Q.* 421 (1974), with Reid, *Prosecuting the Elephant: Trials and Judicial Behavior on the Overland Trail*, 1977 *B.Y.U. L. REV.* 327 (1977).

6. Several examples are given in M. MATTES, *THE GREAT PLATTE RIVER ROAD: THE COVERED WAGON MAINLINE VIA FORT KEARNY TO FORT LARAMIE* 63 (1969).

7. Z. ENGELHARDT, IV *THE MISSIONS AND MISSIONARIES OF CALIFORNIA* 415 n.7 (1915) (*hereinafter* cited as *THE MISSIONS AND MISSIONARIES*). Apparently the first to arrive, in late 1846, was Adna A. Hecox who, although he engaged in numerous secular occupations, was licensed by the Methodist Episcopal Church. M. HECOX, *CALIFORNIA CARAVAN: THE 1846 OVERLAND TRAIL MEMOIR OF MARGARET M. HECOX* 12-13, 17 (Dillon ed. 1966).

males arrived in California to remain on a permanent basis.⁸ By adjusting the figures for wives and families and discounting for bachelors, it may be roughly estimated that between 2,000 and 2,500 American emigrants settled in California between 1841 and 1845. They were concentrated in the northern portion of the Department, from Sacramento to Yerba Buena (San Francisco), and southward to Monterey.

The Mexican civil authorities in California had no powers to perform marriages and they were not to have any expressly sanctioned right to do so until after the American military government was established in 1846 and the native *alcaldes* had been largely replaced by American personnel. Even then, until the formal cession of California to the United States in 1848 by the Treaty of Guadalupe-Hidalgo, the *alcaldes* were prohibited by the military government from performing marriages when either party was Catholic.⁹ The priests, quite naturally, declined to solemnize mar-

8. H. BANCROFT, IV HISTORY OF CALIFORNIA 279, 341, 399, 453, 587 (1886) (*hereinafter* cited as HISTORY OF CALIFORNIA).

9. A local priest and the administrator of the Diocese of California both made complaint to Colonel Mason, the then military governor, that John Burton, an American *alcalde* of San Jose, had united in marriage an American and a Catholic Mexican woman. Mason, anxious as a military occupier to preserve the status quo and not give the civilian population unnecessary offense, issued a circular order to all *alcaldes* and other civil authorities under date of August 23, 1847, prohibiting them from performing any marriage ceremony when one of the parties was "a member of the Catholic Church in California," a phrase that was ambiguous regarding a union of two Americans one of whom might be Catholic. Neither of the complainants objected to *alcalde* marriage of two Protestants and implicitly condoned the practice, although such ceremonies would not have been possible prior to the American occupation. The priest, Fr. José Real, originally made his complaint directly to Burton by letter of June 8, 1847 so that it may be inferred that *alcalde* and presumably others had assumed matrimonial powers before that date. IV THE MISSIONS AND MISSIONARIES, *supra* note 7, at 597-603. For example, the American *alcalde*, William Ide, married John S. Williams to Maria Louisa Gordon June 17, 1847. IV HISTORY OF CALIFORNIA, *supra* note 8, at 689 and V HISTORY OF CALIFORNIA, at 776.

After California was ceded to the United States, the military government continuing on in default of any other government authorized by Congress, declined to enforce the previous order, thereby permitting civil authorities to marry anyone. This position is clarified in an official letter of H. W. Halleck, Secretary of State for Governor and Brigadier-General Bennett Riley of August 13, 1849:

The order of Governor Mason above referred to was one issued under the laws of war, and before California became a part of the territory of the United States, and it ceased to have any force on the ratification of the treaty of peace. Indeed, it was evidently intended to be only of a temporary character, and to continue only during the military occupation of the country. Neither Governor Mason, nor Governor Riley, has claimed authority to make any new laws for California since the war, that power be-

riges of non-Catholics. Thus, for a significant number of American emigrants there was no expressly authorized official, religious or civil, whom they could request to solemnize their marriages.

Some of the emigrant Americans resorted to common law marriage.¹⁰ This term does not denote an informal liason without any pretense of a marital relationship.¹¹ With the disestablishment of churches in the early nineteenth century, marriage in the United States theoretically had become a civil contract. Common law marriages in which there was an agreement, however informal, to live as husband and wife, were frequent in mid-century America and most state jurisdictions recognized them.¹² Nonetheless, there remained significant religious overtones to marriage among

ing vested in Congress alone; and even Congress is prohibited in the Constitution from making any laws respecting an establishment of religion, or prohibiting the free exercise thereof. The Governor has, therefore, no power either to enforce or to renew the order of Colonel Mason above referred to.

IV THE MISSIONS AND MISSIONARIES, *supra* note 7, at 604-05.

10. Tillatha Catherine Bennett, one of the Bennett women considered in the case study, *infra*, is one example. In an official letter to the Secretary of State dated January 6, 1846, the American consul to California, Thomas O. Larkin, reported that many marriages had occurred in California between United States citizens. "Some of them have taken place by private written contracts (so said)" T. LARKIN, IV THE LARKIN PAPERS: PERSONAL, BUSINESS, AND OFFICIAL CORRESPONDENCE OF THOMAS OLIVER LARKIN, MERCHANT AND UNITED STATES CONSUL IN CALIFORNIA 158 (G. HAMMOND ed.) (1951-1968) (*hereinafter* cited as LARKIN PAPERS).

It should not be inferred that informal marriage was unknown to the Californios. Scandalous and notorious cohabitation was occasionally punished, generally by forceable separation or exile. *See, e.g.*, III HISTORY OF CALIFORNIA, *supra* note 8, at 655 n.4 and IV HISTORY OF CALIFORNIA at 642 n. 21. This was apparently not regarded as a serious offense. In July 1844 the secular Bishop of California became informed that one Californio couple had lived together near the former Mission San Jose for many years and that the union had produced four children. He urged the mission padre to exhort them to marry and offered to dispense with the publication of the banns to accommodate them. It would seem that no success resulted as the Bishop wrote the civil governor, Pío Pico, over a year later in October 1845, complaining that nothing had happened and requesting, it would seem to no avail, that the civil authorities separate the couple. GARCÍA DIEGO, THE WRITINGS OF FRANCISCO GARCÍA DIEGO Y MORENO: OBISPO DE AMBAS CALIFORNIAS 162 and 181 (Weber ed. 1976). Bishop García Diego had experienced a more favorable result in exhorting the previous governor, Manuel Micheltorena, to formalize by marriage his living arrangements with Josefa Fuéntes. In order to avoid embarrassment to the couple, whom the public presumed had been married a long time, the Bishop waived the banns and recorded the marriage in the secret curial records at Santa Barbara, the seat of the diocese, rather than Los Angeles, the place of marriage but a politically more exposed location. *Id.* at 134.

11. There were many of such liasons among the American bachelors, involving casual co-habitation with Indian women, which are not herein considered.

12. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 179-181 (1973). Not all jurisdictions treated informal, consensual marriages as valid. For example in *Grisham v. State*, 10 Tenn. 589 (1831), the court held the legislatively prescribed modes of marriage to be repugnant to and therefore invalidating of what it presumed to be the common law, and informal, marriage.

the overland emigrants;¹³ both those destined for California and those for Oregon, were largely devout.¹⁴ It was probably for these reasons that most of the California expatriates did not choose common law marriage but searched instead for a legitimizing ceremony conducted before someone with at a least color of authority, whether of the local jurisdiction or not.

In 1843, a successful American merchant resident in Monterey was appointed as United States Consul to the port of Monterey initially, and subsequently, to all of present-day California. This new Consul, Thomas Oliver Larkin, anticipated the probability that an increasing number of American emigrants would call upon him to perform marriages while at the same time he entertained serious doubt as to his authority to perform this rite. Accordingly, he wrote the Secretary of State for clarification on April 11, 1844:

There have arrived in California several Citizens of the United States by land with their Families. I expect the number to increase yearly. . . . I look for application from some of these new Settlers to proform [*sic*] the ceremony of matrimony between them, and beg leave to ask from you if I can preform [*sic*] it legally.

Correct and prompt information on this subject is of the most importance to many young Americans who may come to California to settle and want to marry on their arrival. I speak were [*sic*] both parties are Americans.¹⁵

Time passed but no instructions arrived and on August 18, 1844, Larkin again requested instructions. He analogized his situation to that of an American consul on shipboard, wherein he believed a consul could validly perform marriages.¹⁶ A full year passed

13. Chancellor Kent allowed that although "consent of the parties is all that is required" for a valid marriage, nevertheless the participation of a clergyman is a "very becoming practice." J. KENT, II COMMENTARIES ON AMERICAN LAW 86-87 (2d ed. 1832).

14. A leading historian of the overland trail writes:

Religion played a large role in the Great Migration, for the majority of pilgrims were devout churchgoers Whether to observe the Sabbath or not was a perennial issue among the emigrants The Sabbath was observed widely on the Plains, but in most cases not with the rigidity expected by those who took the Bible literally.

M. MATES, *supra* note 6, at 74-75.

15. II LARKIN PAPERS, *supra* note 10, at 92-93.

16. The undersigned would again call the attention of his Government to the marriages that are taking place among American and English emigrants in California who have come here by land from the U.S. . . . As our countrymen are flocking into California from home more of these marriages may take place which among families of property in the future generations may cause perplexities before unknown to our laws. It has been allowed that consuls can perform the ceremony of marriage between their

with no response when Larkin, no doubt yielding to the pressures of an extreme case, married one couple from Missouri on August 24, 1845.¹⁷ His defensiveness over his authority is revealed by his tardiness in informing the State Department of his action. He sent a letter over four months later in which he mentioned that during the nuptial rites he had flown the American flag outside the consular house, no doubt for greater solemnity. In this letter, he reminded the Secretary that he had "repeatedly asked for information from the Department on these subjects."¹⁸

The eventual reply by the Secretary of State to Larkin's queries was surprising in two respects. First, that it came at all, and in a letter dated July 14, 1846, well over two years from the original request. Secondly, its contents were unexpected. Relying on the writings of Chancellor Kent, the Secretary informed Larkin that there "is no law in existence which authorises Consuls of the United States to perform the marriage ceremony. The contract of matrimony is local in its nature and the manner in which it shall be entered into is regulated by the laws of the place."¹⁹

Larkin's counterpart, James Alexander Forbes, the British vice-consul, was also solemnizing at least a few marriages. By uniting Protestants and Catholics, however, he invoked the ire of the California Bishop, Garcia Diego, who vigorously protested to the California Governor, Pio Pico, that consular authorities:

[c]annot, without violating ecclesiastical and civil laws, authorize marriages between a Catholic and a Protestant. Even if the Catholic party be a non-resident, he remains bound by church law. . . . For this reason, I strongly urge you to take action so that in the future, none of the consuls or vice-consuls in this area will dare to perform a marriage between. . . a Protestant and a Catholic. . . .

Although two Protestants may validly marry before the consul of their nation, and though such a union can be authorized aboard one of his ships

countrymen in any port of the world if on board an American ship, as the ship in the harbour is as much under the jurisdiction of the U.S. as the City of Washington. It is therefore of much importance to many Americans in California and will be of more to their children to know if they can be married in their consular house.

Larkin to Secretary of State, II LARKIN PAPERS, *supra* note 10, at 206.

17. Larkin to Moses Yale Beach, III LARKIN PAPERS, *supra* note 10, at 372.

18. Larkin to Secretary of State, IV LARKIN PAPERS, *supra* note 10, at 158.

19. Secretary of State to Larkin, V LARKIN PAPERS, *supra* note 10, at 135.

Larkin had requested information as to his authority to act in the consular house and had assumed that a consul on an American ship would have matrimonial powers. The response, going beyond what was sought, to the effect that consuls had no authority to marry, with no exceptions indicated, must have startled Larkin. His own marriage in 1833 was performed by John Coffin Jones, Consular Agent to the Sandwich Islands (Hawaii) on board an American ship within the roadstead of Santa Barbara, California. IV HISTORY OF CALIFORNIA, *supra* note 8, at 706. American consuls were empowered to perform marriages by Act of June 22, 1860, Pub. L. No. 36-179, § 31, 12 Stat. 72.

even that should be done privately. . . .²⁰

Although the native Californio alcaldes would not perform marriages, one alcalde, simply by force of will, enlarged his jurisdiction and assumed such powers. John Sutter, who received a large land grant in 1841 clustered around the present city of Sacramento in the interior valley, was appointed as the local military representative of the government and also an alcalde. Sutter quickly established a nearly feudal fiefdom, and almost as quickly, without any apparent thought or concern over its illegality, began to marry those who requested his services.²¹

His establishment, an armed fort surrounded by various ranching, farming and other economic operations, was in the direct path of the overland trail from the east. His matrimonial offices were eagerly sought by incoming emigrants as well as by Americans already in his employ in his various enterprises. For example, during the period of December, 1845 through March, 1846, an active period, a total of seven marriages were performed at Sutter's Fort, apparently all involving Americans.²²

Many letters were written by the American consul to the State Department,²³ in which Larkin reported Sutter's activities involving the marriage of Americans and gave his opinion that such marriages were illegal. Larkin was increasingly disturbed by Sutter's actions because some of the couples he united had thereafter separated, and were casting doubts on the validity of the marriages. Further, he was concerned about future disputes between a putative spouse or children of such marriages and persons who would otherwise be heirs of a decedent. Larkin wrote directly to Sutter on January 20, 1846, outlining his views and the difficulties the marriages might entail. Sutter, however, did not feel moved by pressure from either the American consul or California authorities. As a native of Switzerland and a naturalized

20. Letter to Governor Pío Pico, January 9, 1846. GARCÍA DIEGO, *supra* note 10, at 183-84.

21. Sutter dictated his reminiscences to the historian Hubert Howe Bancroft in 1876. Portions are quoted in the introduction to the published *NEW HELVETIA DIARY*, a daily diary of occurrences at Sutter's Fort, September 1845-December 1846 and May 1847-May 1848. For the portion of Sutter's reminiscences relevant to marriage see J. SUTTER, *NEW HELVETIA DIARY* xi (1939). A contemporary American observer confirmed that Sutter was performing marriages as early as 1841. C. WILKES, *NARRATIVE OF THE UNITED STATES EXPLORING EXPEDITION DURING THE YEARS 1838, 1839, 1840, 1841, 1842*, at 178 (1856).

22. J. SUTTER, *supra* note 21.

23. See notes 15-16, 18 and accompanying text *supra*.

citizen of Mexico, his armaments, together with his considerable distance from the settled areas of California, gave him virtual immunity from local governmental control. Thus he continued marrying all who presented themselves.

More controversy developed when he began marrying couples of which one party was Catholic. Bishop García Diego learned of these developments at the end of 1845. Padre Real had separated two such couples married by Sutter who had moved to the Santa Clara area; they were eventually required to remarry in the Church. The Bishop requested the governor to "reprimand and punish severely the insolence of Sutter, who as a subject of the Mexican Republic and within her territory, exercises only that authority derived from governmental or military sources."²⁴ The reply from Governor Pío Pico is interesting in that it expresses surprise at the illegal marriages of "persons of a different religion."²⁵ No objection was made regarding Sutter's lack of authority as alcalde to perform marriages.

On the eve of the American conquest, a pattern was beginning to emerge regarding marriages of American expatriates. Some simply engaged in a consensual common law marriage, a practice which was generally a valid alternative to formal ceremonial marriage in the communities from which they came. The majority, however, favored a stronger, more legitimizing, ceremony and in the absence of Protestant ministers, sought the services of the American consul. Yet most were content with the alcalde. The only articulated objection of the government appeared to be centered around the Church's concern for its exclusive authority where either party was Catholic. Even before the American invasion several long time residents of American origin had become local alcaldes. The two-tier pattern, alcaldes having authority to marry where both parties were non-Catholics and the Church having exclusive jurisdiction where either party was Catholic, appeared to be well established before the American conquest established it as official policy.²⁶

II. SEPARATIONS AND DIVORCE

Divorce as modernly conceived, was unknown to Catholic Cali-

24. GARCÍA DIEGO, *supra* note 10, at 183.

25. IV THE MISSIONS AND MISSIONARIES, *supra* note 7, at 415-16 n.9.

26. For example, William Sturgis Hinckley, an American, was elected and served as Alcalde of Yerba Buena (San Francisco) for the year 1844. See Gilbert, *Mexican Alcaldes of San Francisco, 1835-1846*, 2 J. W. 245, 250-53 (1963). Jacob Leese, a native of Ohio, was Alcalde of Sonoma in 1844-1845. IV HISTORY OF CALIFORNIA, *supra* note 8, at 710. For American policy after the conquest see note 9 and accompanying text, *supra*.

fornia. The first bishop sent to California, Francisco Garcia Diego y Moreno, arrived at the end of December, 1841. Among his other duties, he functioned rather systematically as an ecclesiastical court. That court had jurisdiction over annulments, a process by which putative spouses were returned to the status of single persons. The civil alcalde courts had jurisdiction over ordinary civil disputes between husband and wife, including any need for protection from abusive husbands, and could also grant judicial separations from bed and board, *a mensa et thoro*, which did not entitle either spouse to re-marry. The exact division point of jurisdiction between ecclesiastical and civil courts is not clear, a fact which should be of no surprise since it was unclear to the persons involved at that time.²⁷

27. Matters are even more unclear prior to the arrival of Bishop Garcia Diego. Some alcaldes seem to have granted separations and others automatically referred the parties in every matrimonial dispute to the church authorities, then represented by a Franciscan padre.

For example, in 1831 in the San Diego District, an alcalde granted a man a separation from his wife on account of her excessive gambling with no apparent consideration of the role of the church, whereas in 1835 a padre in Monterey acting as ecclesiastical judge ordered a temporary separation and only afterward informed the alcalde of his actions. III HISTORY OF CALIFORNIA, *supra* note 8, at 618 n.11 (1831 incident); Letter, Padre José María Suarez del Real to David Spence, August 22, 1835, in Gomez, DOCUMENTOS PARA LA HISTORIA DE CALIFORNIA 1785-1850, on file with the Bancroft Library, Berkeley, California (1835 incident).

After his arrival, the Bishop maintained a large official correspondence with priests, alcaldes, and other officials concerning specific marital disputes. These letters present a somewhat amorphous picture of the two jurisdictions' activities. The scope of jurisdiction must be judged by what actually occurred in California rather than by the Mexican civil or church canonical laws, as California realities were not often coincident with legalism received from the distant Mexican capital.

García Diego made it clear in several official letters that matters of simple disagreement between spouses or situations wherein the wife sought protection from a husband's oppression or abuse, actual or threatened, were matters for the courts of first instance or alcaldes. "[M]utual disagreements and complaints between married people fall outside the competence of an ecclesiastical court . . ." GARCÍA DIEGO, *supra* note 10, at 132 (April 17, 1843). "I would ask you [civil court in Yerba Buena] to give Señora Juana Briones whatever protection she needs by adopting measures to free her from the cruel and unjust oppression, about which she complains, by forcing [her husband] to obey the dictates of your court." *Id.* at 161 (July 14, 1844). For communications in a similar vein see GARCÍA DIEGO, *supra* note 10, at 136, 144, 165, 167-68.

An ambiguity exists in that the Bishop occasionally employed language which could be interpreted as an assertion that *all* separations were within the province of the ecclesiastical court: "[T]he case should be of such gravity and importance, the proof so evident and convincing that the ecclesiastical authority can decide about a separation without fear of contravening the divine precepts which unite those legitimately married." *Id.* at 144. "[T]he union of married persons is of divine law and . . . even bishops cannot allow a divorce without grave and extraordi-

When the *alcaldes* assumed jurisdiction over judicial separations they would commence proceedings by ordering the wife to reside with her father or at some house that was regarded as honorable, pending investigation and the setting of support. During this period, friends and the informal representatives of the parties, *hombres buenos*, would attempt to reconcile the couple, such

nary proof." *Id.* at 165. However in these particular controversies, the Bishop determined that ordinary domestic disagreements were presented and remanded the disputes to the civil authorities. Therefore his remarks are much in the nature of *dicta*, not necessary to the resolution of the matters before him.

An examination of two cases in detail tends to support the conclusion that the *alcaldes* or courts of the first instance had authority to grant separations, *a mensa et thoro*. In early 1842 Casilda Sepúlveda sued her husband, Teodoro Trujillo, for a divorce in the local court of Los Angeles. The judge assumed jurisdiction and issued a decree which nullified the marriage. García Diego vigorously protested the proceedings, declared them null and void, and asserted that if the woman "has solid grounds for doubting the validity of her marriage," she should present herself before the ecclesiastical court. In a sweeping and apparently definitive statement of that court's jurisdiction he asserted that "Judging the validity or nullity of a marriage, investigating the motives whereby one may opt for a permanent or temporary separation, and whatever else may be reduced to these two principles, I repeat, is absolutely reserved to the ecclesiastical domain." *Id.* at 121 (May 3, 1842). Again, it would appear that the position taken is that all separations are a matter for the ecclesiastical court. The plaintiff thereafter brought her complaint before the ecclesiastical court which ultimately issued a decree of matrimonial nullity because the marriage had been forced upon her. *Id.* at 124 (August 22, 1842). In other words the case was far from an ordinary separation as it involved the very *validity* of the marriage and sought as its relief the determination of the plaintiff's single status.

In contrast, on March 18, 1842, about the same time as the Sepúlveda matter, María Guadalupe Castillo filed suit in the civil court in Monterey for a separation from her husband, a naturalized Englishman named Edward Watson, on the ground of frequent ill treatment. The judge ordered a temporary separation and imposed a modest support order on the husband. H. BANCROFT, CALIFORNIA PASTORAL 314-15 (1888). [*hereinafter* cited as CALIFORNIA PASTORAL]. The Bishop was informed of the matter by a zealous local priest. Although García Diego seemed to feel that the civil court would force the husband both to behave himself and live with his wife, he nonetheless made it clear that the case "does not, in any way, belong to this court" and that a proper example of a matter within the ecclesiastical court's jurisdiction would be a case "dealing with the validity or nullity of a purported matrimonial bond." In fact the letter intimates that the Bishop was irritated that the matter was referred to him at all. GARCÍA DIEGO, *supra* note 10, at 127-28 (December 1, 1842).

All of the cases in which the Bishop found occasion to assert a claim for his court's jurisdiction over separations either involved matters which he found in reality to be ordinary disputes and declined to act or, in contrast, a matter in which he assumed jurisdiction and granted an actual annulment of the marriage. In the only civilly ordered separation about which he wrote and which did not involve a direct attack on the validity of the marriage itself, he declined jurisdiction to act. It would seem that exclusive jurisdiction over separations from bed and board was not claimed by the ecclesiastical court, vague expressions to the contrary notwithstanding, and that the civil authorities were free to proceed therewith. The situation was sufficiently confused, however, that many *alcaldes* and judges of the first instance routinely referred domestic matters to the bishop for his resolution of the jurisdictional question.

efforts being frequently successful.²⁸

This procedure had little attraction to American women who desired to separate from their husbands. Not only was the process slow and cumbersome, but American women took exception to being ordered about so summarily by the *alcalde* and being confined in a "safe house." One young American emigrant, Susan Biggerton, who was abandoned by her stepfather upon their arrival in California, married William Lewis, an Englishman, at Sutter's Fort. She apparently relied upon her suitor's representations that he was wealthy and had a good farm and many cattle in Yerba Buena. After a short while the couple traveled to Yerba Buena, where she discovered that he was, in fact, impoverished and that his inducements were all false. She immediately left him and stayed temporarily with an American couple. Unfortunately, Lewis was not willing to give her up and enlisted the aid of a friend and the local *alcalde* to institute proceedings to investigate the status of the marriage. The friend was merely the husband's *hombre bueno*. Thus he and the *alcalde*, following customary California procedure, but in a manner that was obviously deeply resented by the young lady, "came and told me I must leave the house I am now in and go to one they may think fit to find me, and if I do not go to morrow [*sic*] they will take me by force."²⁹ Writing to William Leidesdorff, the American Vice Consul stationed in Yerba Buena, she begged to

28. Some examples, all drawn from the Monterey district: (1) On February 19, 1842, María Ana Gonzalez appeared before the *alcalde* to obtain a separation from her husband, Jose M. Castañares. The parties appeared personally with their *hombres buenos*. Agreement had been reached regarding the separation and alimony, but in addition to confirming these items the judge also ordered the wife to live at the house of her father. On December 7, 1842 the parties and *hombres buenos* appeared before the court to announce a reconciliation and request annulment of the earlier proceedings. (2) On March 18, 1842, María Guadalupe Castillo asked for a separation on grounds of cruelty. She and her English husband, Edward Watson, both appeared with *hombres buenos*. The judge set support for her and her child and ordered the wife to live at the home of her *hombre bueno* and his wife. CALIFORNIA PASTORAL, *supra* note 27, at 314-16. (3) Another Englishman was in marital trouble in Monterey in 1842. María Francisca Butrón sued her husband, William Garner, for separation on November 10. The *alcalde* ordered a week's time in order to allow the parties' *hombres buenos* to effect a reconciliation, which efforts were successful. W. GARNER, *supra* note 3, at 30 (introduction by editor). The fact that there were so many separations in the same district and over the same year is apparently fortuitous. In any event, it does not reflect the general rate of marital breakups throughout Mexican California, which was far lower.

29. Letter, Biggerton to Leidesdorff, December 31, 1845. IV LARKIN PAPERS, *supra* note 10, at 136.

ask your interference, and wish to know what I have committed that I am to reside where those people think fit to Send me, and being a perfect Stranger in this place and having a great dislike to the idea of living in a Spanish house as a Prisoner I hope you will advise me and assist me with your Protection.³⁰

As American women would not willingly follow this procedure, separations of Americans were generally informal, with requests for intervention from the local authorities being limited to protection from harassment and breaches of the peace.

Not all couples desiring to separate, however, had only separation in mind. Some wished to marry other partners and sought a divorce absolute. As yet, divorce laws had not formed a clear pattern in the United States. Although there was a trend towards judicially granted divorces under general statutes requiring findings of fault or grounds, a number of states still limited divorce to legislative bills, rarely passed, and then only on an individual basis.³¹ A desire for divorce absolute presented a real problem to the American emigrants as neither the legislative body nor the courts of Catholic California could grant such a decree. Indeed even after the American conquest, the *alcaldes*, still operating under Mexican law, could not grant actual divorce,³² although they began doing so in the period following the formal cession of California in 1848 and before the institution of state government.³³

30. *Id.* Apparently they had been married by Sutter on December 21, 1845, just some seven or eight days before the separation. An entry in the NEW HELVETIA DIARY for that date records " - Wm Lewis and Miss [no name indicated] were married -" J. SUTTER, *supra* note 21.

It is not clear how the matter was resolved. See generally, note 36 *infra*. The Vice Consul immediately wrote the *alcalde's* administrative supervisor, the prefect, pointing out the circumstances, suggesting that the young lady would be more comfortable staying with Americans since she spoke no Spanish, and offering to be responsible for her appearance at any court proceedings. The prefect responded the next day, somewhat officiously stating that everyone in California ought to be aware of and respect the local laws. The close of the letter was "God and the Law," rather than the usual Mexican expression, "God and Liberty." Letters, Leidesdorff to Guerrero, January 1, 1846 (misdated 1845 in MS); Guerrero to Leidesdorff, January 2, 1846, IV LARKIN PAPERS *supra* note 10, at 148-49.

The Consul himself offered no help. Larkin merely bemoaned the evil consequences of Sutter's nuptial activities and cautioned his subordinate that he "can be at no Government expence in regard to the Woman who you have boarded out . . ." Letter, Larkin to Leidesdorff, January 20, 1846, IV LARKIN PAPERS, *supra* note 10, at 170-71.

31. L. FRIEDMAN, *supra* note 12, at 181-84.

32. On December 8, 1847 the military governor, Colonel Mason, wrote that neither he nor the *alcaldes* had power to grant a divorce. CALIFORNIA PASTORAL, *supra* note 27, at 314.

33. The Constitution of 1849, adopted in October 1849, provided that "no contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect." CAL. CONST. 1849, art. XI, § 12 (emphasis supplied). Although an early act of the first legislature declared marriage a civil contract, (Laws 1850, c. 140, effective April 22, 1850) no statute of divorce was enacted until the following year (Laws 1851, c. 20, effective March 25,

Therefore, there was no agency of the Mexican government nor any official of the American government³⁴ from whom the emigrants could request a divorce. Consistent with the prevailing American viewpoint of marriage as a civil contract, the emigrants might have formed groups of arbitrators, appointed amongst themselves, to determine and declare marital dissolution and division of property. Although this was done in some localities, there is no evidence Americans took this step in California.³⁵

1851). However, the alcaldes, or courts of the first instance, had begun granting divorces, while operating under Mexican law, but after the formal cession of California in 1848 by the Treaty of Guadalupe-Hidalgo. This practice was approved by the California Supreme Court:

By the Mexican law . . . marriage lawfully contracted in the face of the Catholic church . . . is elevated to the rank of a sacrament and cannot be dissolved by the civil tribunals. On the other hand, the union of a man and woman, in the character of husband and wife, without the sanction of the church, when both of them belong to the class of the *unfaithful*, is considered as a *mere civil contract*. . . .

There is nothing in this case showing that either of the parties belonged to the privileged class of the *faithful*, or that their nuptials were celebrated with the rites of the Catholic church. Their union, therefore, not having attained the sanctity of a sacrament, should be regarded as a civil contract, and as such, like other contracts, it comes within the legitimate sphere of the ordinary jurisdiction of courts of First Instance. Harman v. Harman, 1 Cal. 215, 215-16 (1850) (emphasis in original).

34. The American military governor was asked and declined to grant a divorce.

See note 32 *supra*. In the period before the invasion, Larkin, as American Consul, had likewise been so requested. In the fall of 1844 a young emigrant wife, Rebecca Fowler, separated from her husband, William. The husband wrote Larkin a long letter asking for his help, declaring he had done nothing to harm his wife, that she had been enticed away by an evil sister, and that he desired a reconciliation. Larkin wrote very kind letters to both, urging each to be circumspect in their conduct and to treat the other with kindness and affection. Letters, William Fowler to Larkin, December 4, 1844; Larkin to William Fowler, December 24, 1844; Larkin to Rebecca Fowler, December 24, 1844; II LARKIN PAPERS, *supra* note 10, at 305-06, 334-35, 336. It was to no avail. The husband next wrote Larkin on February 12, 1845, asking whether, as consul, he could grant a divorce and if so, to please do so as he wished to return to the United States in the spring. Undoubtedly aware of the growing grounds for divorce, Fowler again emphasized his own good behavior, asserting that it was solely his wife's conduct which had led to the problem. Larkin responded that he could be of no assistance. Divorce, he explained, was within the province of the separate states, each of which had different procedures and different grounds. From the correspondence "and from hearsay," he doubted there were sufficient grounds for any jurisdiction, but he suggested that Mrs. Fowler might prepare a detailed affidavit as to why the divorce was needed and if the husband were to return to the east, perhaps he could obtain a divorce with the aid of such affidavit. Letters, William Fowler to Larkin, February 12, 1845; Larkin to William Fowler, March 16, 1845; III LARKIN PAPERS, *supra* note 10, at 39-40, 68-69.

35. Expatriates on occasion did do this very thing when local courts were non-existent or inadequate. An American traveler noted this interesting phenomenon in Tahiti in his diary entry of February 12, 1839: "Yesterday there was a meeting

An alternative course of action was available to the courageous of the American expatriates. In keeping with their imported eastern notions of marriage as a civil contract, they believed they could simply *rescind* that contract. That several of them chose this procedure³⁶ illustrates the fact that the American emigrants could creatively apply the concepts of the transplanted law, even in the absence of their home state's procedures.

III. THE BENNETT WOMEN: A CASE STUDY

The Bennett family had been living in Yerba Buena (soon

of a number of the foreigners here who constituted themselves judges in a case of crim con, and they decided that the proof against the wife was good and sufficient and consequently that Capt. Wm. Henry should be considered as divorced." F. ATHERTON, *THE CALIFORNIA DIARY OF FAXON DEAN ATHERTON, 1836-1839*, at 130 (1964). "Crim con" refers to a criminal conversation, the tortious aspect of adultery.

Another occurrence failed to materialize. Apparently no one asked Sutter to issue a divorce, or at least there is no record of such an occurrence. In fact, his diary only notes one separation, that of Sebastian Keyser, which lasted from July 25, 1847 to September 6, of the same year. J. SUTTER, *supra* note 21. Probably Sutter would have regarded divorce as clearly beyond his powers as a Mexican alcalde. The Fowler couple, divorced while residing at Sutter's Fort (New Helvetia) is not referred to in the diary. See note 34, *supra* and note 36, *infra*. Perhaps the couple had informally asked Sutter for a divorce and were turned down.

36. The Fowler couple referred to in note 34, *supra*, considered themselves divorced after learning that Larkin could do nothing further. With his letter to Larkin of February 12, 1845, Fowler had enclosed a certificate of his wife, of same date, in part as follows:

This is to certify that I Rebecca Fowler, the lawful wife of William Fowler, have by my own free act left his "bed and board", and do not consider myself longer under his care and protection and do not longer acknowledge his control over me as a husband.

Although the certificate went on to recite a consent to a "legal divorce" to dissolve "the contract of Marriage which at this time exists between us," the couple later acted as though the certificate was sufficient. III LARKIN PAPERS, *supra* note 10, at 40-41. Rebecca took her maiden name of Kelsey and on December 28, 1845, was married by Sutter to another emigrant, Grove C. Cook. J. SUTTER, *supra* note 21.

In December, 1846, John H. Brown married Hetty C. Pell. They soon separated, and in April, 1847, he advertised her leaving in the San Francisco newspaper. Regarding this as sufficient, he re-married. II HISTORY OF CALIFORNIA, *supra* note 8, at 733. She desired the divorce as well and in fact was the woman to whom Governor Mason had written that he had no power to grant divorces. See note 32 *supra*. Apparently, she also quickly re-married. See IV HISTORY OF CALIFORNIA, *supra* note 8, at 771.

Susan Biggerton has been discussed before as the young lady who was fraudulently induced to marry William Lewis. See notes 29 and 30 and accompanying text, *supra*. Apparently she decided the fraud was sufficient that she could unilaterally rescind the marriage contract, as she was probably the same Mrs. Lewis that was married by Sutter to Perry McCoon on February 5, 1846, just one month following her difficulty with the alcalde of Yerba Buena. J. SUTTER, *supra* note 21. Unfortunately, she died four months later. Identification of Mrs. Lewis as the former Susan Biggerton is not certain but is most probable after examination of other candidates. See IV HISTORY OF CALIFORNIA, *supra* note 8, at 712-13.

renamed San Francisco) for a little over two years³⁷ when, in June of 1845, Mary Bennett separated from her husband, Vardamon. Illiterate in her native English tongue, there is no evidence that Mary had even a speaking command of Spanish. She was an alien living in a foreign land, separated from her own family in Georgia by thousands of miles and months of time, and living in a society and culture which condemned not only divorce and separation in particular, but feminine independence in general. With her were four children, who were still quite young: Samantha, age 5; Julia, 7; Mansel, 9; and Mary Ann or Amanda, 14. One older son, Winston, had already gone out on his own, but three other children remained at home: Catherine, 21; Dennis, 20; and Jack, 18, who were old enough to be of real help.³⁸

As was usual with American expatriates, Mary Bennett declined to seek the aid of the local *alcalde* to formalize her separation or to seek a support order. Instead, she looked about for a realistic means of supporting herself, selecting the area surrounding Mission Santa Clara as a suitable location. She made inquiry of the priest in charge of the mission to see if she and her family might be allowed to live in one of the mission buildings and if he might be disposed to recommend to the government that she be granted a parcel of land out of the mission's holdings. In this approach she was aided by a Californio woman, Silvelia Pacheco de Cole, who was sympathetic to her plight. The good Señora simply "went to the priest — the curate of the mission, and told him that Mrs. Bennett wanted a piece of land there, and he told me that he would give her a piece of land anywhere that she wanted it."³⁹ This simple request was all that was necessary to begin procedures leading to an eventual land grant.

Armed with that promise, Mrs. Bennett was now ready to for-

37. The Bennett family moved from Arkansas to Oregon in 1842 and in the following year moved to Sutter's Fort. Later, in December of 1843, they moved to Yerba Buena. San Jose Pioneer, May 26, 1877 at 1. These memoirs were written by the eldest son of the Bennett family, Winston.

38. Ages are adjusted or approximated and for the younger children are based on ages reported in the 1850 census. A. BOWMAN, INDEX TO THE 1850 CENSUS OF THE STATE OF CALIFORNIA 438 (1972). For Dennis and Jack ages are based upon the San Francisco *padrón*, or census, of 1844, cited in II HISTORY OF CALIFORNIA, *supra* note 8, at 716. For Catherine's 1824 birthdate see Santa Cruz Riptide, October 19, 1950, at 42, cols. 1-2.

39. Deposition of Silvelia Pacheco de Cole. Records, Fed. Dist. Ct. (N.D. Cal.), Land Case No. 361, on file with Bancroft Library, Berkeley, California. Mary S. Bennett, Claimant.

malize her desire for separation. She traveled to Monterey, then the capital of California, and appeared before the American Consul. She presented the following petition, undoubtedly drafted by Larkin after his conference with Mrs. Bennett (with original spelling and punctuation retained):

Monterrey, June 6th 1845

Sir

Your Petitioner Mary Bennett a native of Georgia in the United States of America would represent to you as Consul of her country that she has for one year or more been living in California with a family of eight children and that her Husband Vardamon Bennett the Father of said children has entirely neglected her and Family, refuses to support and maintain them, and takes from them by force their daily earnings and even their clothes leaving her and said children destitute of living.

Your petitioner therefore begs of you to take some measures, that she may be protected from her husband in her person and the persons of her children that she may be enabled to live separate from said Vardamon Bennett and support herself and family free from molestation on his part relieving her said Husband from all care charge or protection hereafter of herself and children.

Your petitioner requests further of you that you would represent her case to the Alcalde of the Pueblo of Sn. José and Santa Clara that he may take the proper measures for her protection from he [*sic*] Husband as she is in fear of her person and life from words and threats that he continually uses toward her.

Witness George Kinloch

Mr. Thomas O. Larkin
United States Consul for California⁴⁰

her
Mary X Bennett
mark

It is difficult to speculate about Bennett's real motives for the separation. Certainly it was not her husband's improvidence and rough treatment.⁴¹ These baseless allegations should be seen merely as Larkin's idea (or perhaps Mary Bennett's) of "grounds"

40. III LARKIN PAPERS, *supra* note 10, at 223-24.

41. Mary Bennett was six feet in height and grossly obese. She was described by one observer who saw her in 1846 as having "amazonian proportions". E. BRYANT, *WHAT I SAW IN CALIFORNIA* 298 (1936) (1st ed. Philadelphia 1848). She thoroughly enjoyed a fracas and engaged in many. She was the instigator of a near riotous water fight in Yerba Buena in 1843. W. DAVIS, *SEVENTY-FIVE YEARS IN CALIFORNIA* 197 (1929) (1st ed. as *SIXTY YEARS IN CALIFORNIA* (San Francisco 1889)). During a minor skirmish outside the Santa Clara Mission during the brief Californio insurrection which followed the American conquest, Mrs. Bennett was closely observed by a female American emigrant. On that occasion Mrs. Bennett seemed anxious to take part in the fight.

She waltzed back and forth in front of the Mission yelling orders to the men at the top of her voice. Growing more excited she ran forward and grabbing up a large bone lying in the yard, rushed up to a man who had refused to fight, saying that he had no gun. Stopping squarely in front of the startled fellow she thrust the bone into his hands and shouted 'take that, you puppy, and go out there and bat the brains out of some Mexican or I'll use it on you.'

M. HECOX, *supra* note 7, at 54. On another earlier occasion in 1842, Mrs. Bennett personally participated in repelling an Indian raid on the group with which the family traveled to California from Oregon. Her son noticed his mother "in the

for a separation or divorce. As such it reflected an awareness of the then growing trend in American law of general divorce laws based on fault, or legally recognized grounds, a trend which was a compromise between conflicting positions of sparsely granted legislative bills of divorce and freely available consensual divorce.⁴² The petition was a means of legitimizing her status as well as a practical effort to allow Larkin to request protection on her behalf from the local authorities.

That same day Larkin wrote the alcalde of San Jose, whose jurisdiction included the Santa Clara Mission. He recited the allegation that Vardamon Bennett had refused to support his family for over one year and advised that Mrs. Bennett wished to separate and live within the alcalde's jurisdiction in order that "she may be enabled to maintain herself and children, which she says she can not do while her Husband is allowed to molist [*sic*] and deprive her of her earnings." He closed with a request for the alcalde's cooperation, anticipating the possibility that the husband might harass the wife or cause a disturbance. Officially invoking the protection of local authorities for American citizens, he hoped that if necessary, the judge might "see that Justice is administered [*sic*] towards the parties."⁴³

The separation was not to be peaceable. Acting in a manner familiar to every divorce attorney, both Vardamon and Mary immediately attempted to lay hands on all liquid or moveable assets and to harass the other through the manipulation of their children. In one particular instance, Vardamon precipitously took seven horses which were in the care of the emancipated, 23 year old son, Winston. When Mary sought out the Consul, she brought Winston with her for the purpose of filing his own petition alleging the theft by force of *his* horses by his own father. Again on June 6, 1845, Larkin wrote to the alcalde of Yerba Buena asking

thickest of the fight. She said she couldn't stand it to be in under shelter while her boys were out liable to be killed." See *supra* note 37.

An American merchant residing in Yerba Buena contemporaneously with the Bennetts knew the family and succinctly described Mary as "unmistakably the head of the family, —a large, powerful woman, uncultivated, but well-meaning and very industrious. Her word was law, and her husband stood in becoming awe of her." See W. DAVIS, *supra* at 195.

In short, it does not seem probable that Mary Bennett's husband forceably took the daily earnings or clothes from such a woman, as she alleged in her petition.

42. L. FRIEDMAN, *supra* note 12, at 184.

43. Letter, Larkin to Antonio Maria Pico, June 6, 1845. III LARKIN PAPERS, *supra* note 10, at 225-26.

the judge to investigate and adjudicate the alleged theft of the horses, a matter that was clearly within the alcalde's jurisdiction.⁴⁴ The results of the trial, as well as what is known of Mary's character⁴⁵, clearly show the overreaching nature of her representation to Larkin. When the alcalde summoned both father and son together, Winston testified that the horses had been given to him by the father and admitted that the purpose was for the "service and common benefit of the family." The alcalde determined and reported to Larkin that not only was the violent stealing of the horses falsely imputed to Vardamon, but so also "the rest that is [asserted] in your writing with respect to his ignoring of his obligations to his family." Reasoning that since the gift of the horses was for the maintenance of the family, the alcalde determined that Vardamon had the right to revoke and invalidate the gift in light of the scandalous gossip and "in view of the reproachable conduct with which his wife and children have conducted themselves (as is public and notorious) and as his ingrateful sons have abandoned him." Referring to the entire Bennett matter as one of the most scandalous happenings of Yerba Buena, the alcalde concluded that Vardamon Bennett's reclamation of the horses was proper and that "they remain taken by right."⁴⁶ The decision, as a whole, reflects a curious blend of an overstatement of facts by Mary and Winston, mixed with a cultural reaction to Mary's antics and forcefulness.

That Winston, on reflection, must have felt himself his mother's pawn in the parental battle is suggested by the total silence of his memoirs concerning this affair. Vardamon soon made a counter-attack upon Mary in his efforts to obtain custody of the children, a process initiated by his own application to the American Consul. Larkin once again wrote the Yerba Buena alcalde, in an apparent oversight of the earlier events and his own letters of the same month.

Monterey, June 25th, 1845

Sir

Mr. Bennet a Citizen of the United States has applyed [*sic*] to me for advice respecting his taking charge of his own children in preferance [*sic*] to their being with their Mother.

I have only to say, that by the Laws of the United States, I consider that the Father of minor children should have the care of them when there is no dispute, but he is willing and able to provide for them in a proper manner.

44. Letter, Larkin to Alcalde of Yerba Buena, June 6, 1845. III LARKIN PAPERS, *supra* note 10, at 226.

45. See note 41 *supra*.

46. Letter, Alcalde of Yerba Buena to Larkin, May 12, 1845. III LARKIN PAPERS, *supra* note 10, at 182-83. (Translation by author.)

In witness whereof I give this for the government of those whom it may concern. I am Sir with the highest respect, your most obdt. servt.
Thomas O. Larkin

Alcalde of Yerba Buena⁴⁷

In retrospect, one can only imagine the threats and inducements being offered by both Mary and Vardamon to their children. Children can react to such pressures, and by mid-summer of 1845, the oldest daughter, Catherine, was alienated from both her mother and father. To escape from her parents she was to enter into a relationship with Issac Graham which, within five years, was itself to end in tragedy.

Isaac Graham had been engaged as a trapper and mountain man for many years before settling in California in 1833. In California he was constantly embroiled in revolutions, rowdiness, and other disturbances. The historian Bancroft describes him as a "leading spirit among a crowd of turbulent and reckless men, himself as wild and unprincipled as the worst . . ." ⁴⁸ The beginnings of the Graham romance can be dated accurately because a July 11th letter from Santa Cruz recites Catherine's desire to live with the Larkins in Monterey. She did not become involved with Graham until three weeks later.⁴⁹ By September, Catherine and Graham were living together in a common law marriage. In doing so, they were following a pattern of marriage then common to Americans back east in the United States. Interestingly, they did not simply enter into a consensual relationship by agreement but attempted to solemnize their status by a *reading* of the marriage ceremony, the essential facts of which were then recited by the following simple document, witnessed by two fellow loggers and ranchmen of the Santa Cruz Mountains:

Marriage in the year 1845. Isaac Graham, of Santa Cruz, and Catherine Bennet[t], of San Francisco, were married at Lyant [Zayante], by banns, this 26th day of September, in the year of 1845, by one who was requested to ready the ceremony, Henry Ford. This marriage was solemnized between us, Isaac Graham, Catharine Bennet[t]. In presence of William

47. Letter, Larkin to Alcalde of Yerba Buena, June 25, 1845. III LARKIN PAPERS, *supra* note 10, at 248.

48. IV HISTORY OF CALIFORNIA, *supra* note 8, at 7.

49. On August 2 and 3, 1845, Graham had a house guest named James Clyman, an old fur trapper and mountain man who had recently guided a party from Oregon. Clyman, one of the few mountain men who was literate, kept a daily diary. For those two days he recorded, in a style reminiscent of James Fenimore Cooper, that "[I]f report be correct the hardy vetrian is fast softning down and he is about to cast away the deathly rifle and the unerring tomahawk for the soft smiles of a female companion to nurrish him in his old age." Clyman, *James Clyman: His Diaries and Reminiscences*, 5 CAL. HIST. SOC'Y Q. 133-34 (1926).

The news was soon to reach Catherine's mother Mary, and anger at Vardamon was at least partially replaced with outrage at such an improper affair. Again, the long suffering American Consul was pressed into service and by November, had written to the Santa Cruz Justice of the Peace,⁵¹ José Antonio Bolcoff. Larkin's letter is quite interesting as a reflection of his layman's understanding of law, and perhaps that of other consuls of the time. Although as a young man he had briefly served as a justice of the peace, he had received no formal legal training and his most extensive practical experience in legal matters was as a merchant dealing with commercial law and in his role as consul. Even in that latter role, however, Larkin's consular activity primarily involved seaman and admiralty matters and his experience in domestic matters was limited.⁵² Yet he grasped a sophisticated issue: the validity of the Graham marriage was not to be judged by whether a common law marriage would be valid if contracted in the United States; rather, its invalidity in the United States would result because of its invalidity under the Mexican law of California, the place where it was performed.⁵³ In other words

50. *Graham v. Bennet[t]*, 2 Cal. 503 (1852). This case is but one of the numerous lawsuits to subsequently arise between Isaac and Catherine. See note 57 *infra*. In this case Catherine sought damages from Graham for assault and the abduction of their children, following her own previous removal of them to Oregon. This placed in issue the question whether the children were legitimate. The court held that they were even though the marriage itself was void because Graham had a wife still living in Tennessee. In dicta the court suggested that had there been no such disability, the marriage would have been valid. See note 53 *infra*.

51. This is the same office as that of the alcalde. See note 1 *supra*.

52. For an examination of Larkin's consular practice see Kelsey, *The United States Consulate in California*, 2 PUBLICATIONS ACAD. PAC. COAST HIST. 161 (1910). Originally from Massachusetts, Larkin had lived for several years as a young man in North Carolina. There, he was appointed to serve as a local justice of the peace. Nonetheless, it does not appear he had received any legal training or handled matters involving choice of law problems. See generally, R. PARKER, CHAPTERS IN THE EARLY LIFE OF THOMAS OLIVER LARKIN (1939).

53. This is not inconsistent with Larkin's hope that he might be authorized to marry Americans within the consulate; and his rationale for that claimed authority was that the consular house was an extraterritorial extension of American soil. See note 16 *supra*. When he married Catherine Bennett, Graham already had a wife living in Tennessee. The California Supreme Court suggested in dicta that but for that disability, this common law marriage would be valid, with no discussion of the fact that it was contracted before the change of flag and under Mexican law.

Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it takes place between parties able to contract, an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding.

The ceremony, therefore, which took place between the plaintiff and defendant, as shown by the complaint, was sufficient to constitute them man and wife, if there had been no legal disability.

American law would look to the law of the place of celebration to determine the marriage's validity.

Consulate of the United States
Monterey California November 19, 1845

Sir

I am informed that Mr Isaac Graham and Catherine Bennett both citizens of the United States of North America are living together as married people, without being legally married, and as this cannot be permitted according to the laws of this [*i.e.*, California] country and their children (in case they have any) are illegitimate according to the laws of thier [*sic*] country, [*i.e.*, United States], unless their parents are married by a competent authority, you will confer a favor on the undersigned by causing an immediate separation of these two people without any excuse from either party, and in case that Mr Graham cannot on account of sickness, present himself with Catherine Bennett at this consulate, do me the favour to remove her from the house of Mr Graham, and send her to her parents or place her in some respectable family for the present. Hoping you will by attending to this confer a favor on Your Most Obedient Servant

Thomas O. Larkin

To the Justice of peace at Santa Cruz⁵⁴

Bolcoff, recalling the obstreperous character of Graham and the frustrations of dealing with him did little more than interview Graham, not having the heart to tangle with him further. His report back to Larkin was prompt.

The 1st Tribunal of Justice, Santa Cruz
[December 4, 1845]

I have received your Note dated 20th of last past, wherein you recommend this Tribunal about the marriage or separation of Mr. Isaac Graham and Catharine Bennett, and that the cited Graham presents himself to this Tribunal under my charge, that both should present themselves to the Consulate under your charge. Graham said that they were well married and that he would not separate from the side of Bennett, that he would lose a thousand lives before he would give her up, and that Mr. Parrott and other Gentlemen having approved of his Marriage, that nobody could force a separation from Bennett, and that he could not present himself before you account of his infirmities.

You well know the character of Graham. He never likes to obey any authority; I leave it to your judgement. I would have taken from his side Bennett, but to avoid scandal, and I tell you that he talks much against whoever it may be. I say this in contestation of your official letter. God and Liberty, Santa Cruz, December 4th, 1845.

José Bolcoff

To the Consul of the United States of America
Don Tomas O. Larkin⁵⁵

Consequently, as far as Larkin was concerned, the matter died.

Graham v. Bennet[t], 2 Cal. 503, 506 (1852).

54. Letter, Larkin to José Antonio Bolcoff, November 19, 1845. IV LARKIN PAPERS, *supra* note 10, at 101-02.

55. Letter, Bolcoff to Larkin, December 4, 1845. IV LARKIN PAPERS, *supra* note 10, at 115-16.

Before many months had passed, even Mary Bennett became reconciled to the marriage. Perhaps it was the birth of a baby girl, Matilda Jane, which helped. As the first child of American parents in the Santa Cruz area, born appropriately on July 4, 1846,⁵⁶ her birth gave Mary Bennett her first grandchild. Unfortunately, the child was soon to be the center of the first contested child custody proceedings before the California Supreme Court involving internecine family strife, and ultimately, a killing.⁵⁷

By the time of Catherine's marriage it was clear that Mary and Vardamon would manage their separation without further disturbance or breach of the peace. Nevertheless, both faced significant legal problems regarding future acquisitions of property. Their response suggests a working familiarity with the common law rules regarding property owned or acquired during marriage. They conducted their property transactions, as best they could, on the assumption they were operating within the common law. For example, in 1847 Vardamon decided to purchase some lots in the newly founded town of Benicia, then a popular investment. As he was still married to Mary, she would have acquired dower rights in that property. He did the only thing reasonably practicable under the circumstances—hiding the asset by taking title in the name of an agent.⁵⁸

Mary Bennett had even more to concern herself with, for not only would he gain rights of curtesy (a life estate following her death) in any of her real property, but more importantly, he could claim common law rights to manage and control his wife's property during the existence of the marriage.⁵⁹ How then could Mary

56. D. NUNIS, *THE TRIALS OF ISAAC GRAHAM* 64 (1967).

57. In 1850, Graham's son, by his previous Tennessee marriage, came out to visit and gave Graham the startling news that his former wife was still alive. Catherine departed with the child and a significant amount of gold, then returned, allegedly by Graham's forceful abduction. A massive amount of litigation ensued. During the bitterness, Dennis Bennett, one of Mary's sons, was killed by one of Graham's sons. A resulting charge of murder was not settled until 1888. For materials on this entire maelstrom of discord. See note 56, *supra*.

58. When purchasing his Benicia property in 1847, Vardamon dealt with Josiah Belden, one of the agents of Larkin who was a principal in the development. Belden wrote to Larkin on September 2, 1847: "Mr. Bennet[t] does not want the lots placed to his name, but says he is going to Benicia to select others." Larkin obliged by letter to Belden dated September 9: "As Mr. Bennett goes to Benicia and will probably select lots for himself I have made out the deed of the lot formerly in his name in that of yours and which you will find enclosed." VI LARKIN PAPERS, *supra* note 10, at 306, 327.

59. A succinct statement of the then applicable law, with allowance for some minor exceptions, was given by Chief Justice Zephaniah Swift of Connecticut in 1818:

The husband, by marriage, acquires a right to the use of the real estate of his wife, during her life; and if they have a child born alive, then, if he survives, during his life, as tenant by the curtesy. He acquires an absolute

use the land that the local priest would recommend that the Mexican government grant her with assurance that Vardamon would not show up and demand its control? In her efforts to hide this asset she also did the only practicable act under the circumstances and also demonstrated her familiarity with the remembered common law rules of the eastern states. At first she applied for her land grant in her maiden name and then, thinking better of that, she forged her son Winston's name to naturalization and grant petitions, in his absence and apparently without his consultation. Title to the grant was taken in his name, but with the understanding that it was her own property.⁶⁰ The problem of title to the land grant was raised by Larkin himself in a letter to Padre Real, the local priest at Santa Clara. He thanked the padre for his generosity and assistance in helping Mary and her children settle near the Santa Clara Mission, but as to the proposed land grant he advised that: "should you be willing to serve Mrs Bennet[t] as mentioned—and it would be doing a great favor on a poor woman who unaided by her Husband has a large Family to support—that it would be better that any property the family may receive through your kindness should be given in the name of the eldest son Winstin [*sic*], which may prevent the Hus-

right to her chattels real, and may dispose of them. . . . He acquires an absolute property in her chattels personal in possession. . . . As to the property of the wife accruing during coverture, the same rule is applicable

Griswold v. Penniman, 2 Conn. 564, 565-66 (1818).

60. See generally, Records, Fed. Dist. Ct. (N.D. Cal.), Land Case No. 361, on file with Bancroft Library, Berkeley, California. Mary S. Bennett, Claimant.

The petitions for naturalization and for the land grant itself were dated September 4, 1845. At that time Winston was working for Graham at Zayante in the Felton area and probably did not sign any petition in San Jose, which is the place of execution shown on the petitions. A resident of Santa Clara in 1845 later testified in the land claims litigation that Mrs. Bennett had procured Winston's naturalization without his knowledge or consent and that he had heard Winston so say. Deposition of George W. Bolling. Land Case No. 361, Mary S. Bennett, Claimant, *supra*. In his own memoirs Winston says nothing about his naturalization as a Mexican nor about any land grant. San Jose Pioneer, May 26, 1877 and June 2, 1877, at page 1 (both editions). On April 22, 1854, nine years later, during the time of the proceedings before the Land Claims Commission, a deed was recorded in the Recorder's Office of Santa Clara County from Winston Bennett (under the hispanized form of Narciso in which the petitions had been made) to his mother, Mary Bennett. The deed described the lands received under the grants (two separate parcels), recited a nominal consideration, and acknowledged that the lands to which title was being transferred, "have been heretofore in the use and occupancy of my mother the said party of the second part." Book G of Deeds, page 310 *et seq.*, Official Records of Santa Clara County.

band of Mrs Bennet[t] coming forward and claiming it, as it is said he refused to support his Family."⁶¹ Subsequently, these precautions proved needless. Only a few years later, in 1849, Vardamon suffered an untimely death, and Mary Bennett was left a widow.

CONCLUSION

The American emigrants of the mid-1840's did not assimilate into Californio society and did not embrace the legal norms or procedures of California's fledgling legal system. However, particularly in the realm of domestic relations, their perceived legal needs continued.

In efforts to meet those needs, *i.e.*, authority to marry, protection of persons and property upon separation, and divorce absolute to permit remarriage, the emigrants did not operate in a legal vacuum or state of nature. Instead, they did their best to order their present circumstances in a manner harmonious with the remembered law of the eastern and midwestern states from which they had come.

Thus emerged a type of sub rosa legal system, operating upon the emigrants' actions concurrently with the restraints and commands of the official procedures and norms of the jurisdiction. The case of Mary Bennett was merely one instance of adapting the old processes. There have been other examples of this adaptation. Several emigrant groups, most notably the Chinese, have attempted to retain traditional methods of dispute resolution and legal ordering while, ostensibly, conforming to the legal systems of their host countries.

The partial accommodation reached between emigrant needs and Californio remedies was unstable; moreover, no serious effort was made to harmonize these needs and the substantive law and procedures of the *alcaldes*, presumably because most Americans in California, filled with their notions of Manifest Destiny, saw rapid American annexation as inevitable.

In the meantime, the tensions, albeit unresolved, created by the reliance of the American expatriates upon their own legal devices affords a view of the impressive extent to which the American layman was aware of and could creatively apply the law as remembered from their former homes within an alien environment.

61. Letter, Larkin to Padre José María Real, June 6, 1845, III LARKIN PAPERS, *supra* note 10, at 225.