

## A Rare First Edition: J.W. Towner, Orange County's Original Superior Court Judge

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In this inaugural number of the law review of the nascent Chapman University School of Law, it is fitting to reflect on the remarkable life of a pioneer of the legal profession in Orange County.<sup>1</sup> He was a lawyer and a judge; but he was also a teacher, businessman, soldier, itinerant preacher, religious cultist, communist,<sup>2</sup> and advocate and practitioner of free love, among other things. Seemingly, given some of these activities and interests, this man never could have achieved prominence as a founder and leading citizen of the bucolic, close-knit county that was, not so much later, to produce a President of the United States and such benign and celebrated landmarks as the Crystal Cathedral, Knott's Berry Farm, and Disneyland—but he did.

James William Towner was that man. Governor Robert W. Waterman appointed him one of the five members of the Board of Commissioners to form the proposed new County of Orange.<sup>3</sup> It

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<sup>1</sup> A sketch of this article has previously appeared. Thomas F. Crosby, Jr., *Judge not, lest . . .*, 39 ORANGE COUNTY LAWYER, at 12 (Dec. 1997).

<sup>2</sup> The word "communist" was widely used in the 19th century Utopian movement and quite commonly in Towner's correspondence; but it did not then carry the connotation of oppressive dictatorship and state-ownership of the means of production, as was the case after the Soviet Union, China, and other countries attempted implementation of the theories of Marx and Engels. Instead of "communist," for present purposes it is perhaps more accurate to interchange "communard" or "communalist" to indicate membership in a local community run on varying principles of common striving, common ownership, and close social bonds.

<sup>3</sup> A copy of the appointment, dated March 14, 1889, is in the author's files, a courtesy of the owner of the original. A.B. Cauldwell, John Kellom, William McFadden, and R.Q. Wickham were the other commissioners. JAMES SLEEPER, *TURN THE RASCALS OUT!* 107 (Trabuco Canyon 1973) [hereinafter SLEEPER]. They elected Towner to head the Commission at the first meeting on March 22. Leo J. Friis, *Speech to the Orange County Bar* (c. 1960) (available at the Santa Ana Central Public Library, Biography Envelope 38) [hereinafter Friis, *Speech*]. Spencer Olin states, though, that Towner "was appointed by the governor . . . to serve as chairman of the committee that organized Orange County." Spencer

would be severed from Los Angeles County in a June 4, 1889 election, if two-thirds of the local electors so voted. (The final tally was 2,509 to 500 in favor, despite Anaheim, Buena Park, and Fullerton voting heavily against.)<sup>4</sup> Towner was easily elected Orange County's first superior court judge over two opponents in the same year, serving until he retired in January 1897.<sup>5</sup> We revisit that period in his life anon.

Judge Towner was surprisingly adaptable and mobile and a remarkably free spirit for his, or most any, time. One historian labeled him a "[19th] century drifter" whose "abilities were great, his intelligence acute and his capacity for self-renewal enormous."<sup>6</sup> In addition to practicing a number of trades and professions, Towner lived for substantial periods in the East, Midwest, and West. He saw parts of the South, too, during Civil War service.

Towner was born in Willsboro in upstate New York, on August 18, 1823.<sup>7</sup> John Adams and Thomas Jefferson were still alive

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Olin, *Bible Communism and the Origins of Orange County*, CALIFORNIA HISTORY, vol. LVIII, no. 3, at 221 (California Historical Society 1979) [hereinafter Olin]. In this rare instance, however, Olin is wrong. Towner's appointment from the governor carries no such notation; and the official records of the Commission show that it held its organizational meeting on March 22, 1889, at Towner's law office and he was unanimously elected President of the Commission and Wickham was unanimously elected Secretary. (Record of the Proceedings of the Board of Orange County Commissioners, March 22-June 10, 1889, Orange County Archives.)

<sup>4</sup> LEO J. FRIIS, ORANGE COUNTY THROUGH FOUR CENTURIES 97 (Santa Ana 1965) [hereinafter FRIIS]; PAMELA HALLAN-GIBSON, THE BENCH AND THE BAR 27 (Chatsworth 1989) [hereinafter HALLAN-GIBSON]. (Concerning the latter work, see Thomas F. Crosby, Jr., *The Bench and the Bar: A Centennial View of Orange County's Legal History*, 18 WEST. ST. L. REV. 873 (1991).)

The lead story of the June 8, 1889 *Santa Ana Standard* trumpeted, "The Query is Where on Earth [the no] Votes Against it [the division] Came From?" SLEEPER, *supra* note 3, at 104. The answer, as the *Standard* well knew is: The opposition in the north part of the proposed new county was based on a dislike for the designated boundary line with Los Angeles County because it placed Santa Ana in the center of the polity and made it the likely site of the county seat; failed schemes previously put forth in the Legislature drew the line further north. HALLAN-GIBSON, *supra* note 4, at 27. Friis explains, "Realizing that it could not become the county seat, Anaheim led the opposition to county division. Santa Ana was, of course, its energetic advocate . . . . Dan Baker [editor] of the [*Santa Ana*] *Standard* sneeringly remarked, 'Our Anaheim friends reason thus: if we can get the county seat, division is a grand blessing to the county and we favor the County of Orange. If we can't get it, county division is suicidal and ruinous.'" FRIIS, *supra* note 4, at 97. The publisher of the *Fullerton Star*, W. Clarke Hogaboom, replied, "Yes, but our Santa Ana friends reason thus: if we can get division the county seat will be the greatest kind of blessing to us and who cares for the rest of them?" FRIIS at 97, and SLEEPER, *supra* note 3, at 100.

<sup>5</sup> SLEEPER, *supra* note 3, at 111 ("Ultimately Towner was a shoo-in for the office, and pious Orange County had an ex-leader of the famous Oneida [Community] as its first chief magistrate").

<sup>6</sup> Robert S. Fogarty, *Nineteenth Century Utopian*, 16 PACIFIC HISTORIAN, at 70 (Fall 1972) [hereinafter Fogarty].

<sup>7</sup> JAMES W. TOWNER, A GENEALOGY OF THE TOWNER FAMILY 144 (Los Angeles 1910). (This 244-page family history was prepared over many years and apparently published as a vanity book.) SAMUEL ARMOR, ed., HISTORY OF ORANGE COUNTY CALIFORNIA WITH BIO-

then (and both lived a while longer, until they expired on the same day, July 4, 1826). A few months before the judge himself died in 1913 in Santa Ana, Richard Nixon was born in Yorba Linda.

Towner had little formal schooling, only a "single term at the Franklin Academy, in Malone, N.Y.," but in his words, "was early inclined to study and books."<sup>8</sup> He became a teacher at 17, and during summers earned wages variously as a farmhand and sailor on Lake Erie. In 1840, he moved to Cleveland, where he took up theology. Towner tells us nothing else about this near-decade in his life, only that he eventually entered the Universalist ministry in 1849, preaching in the Westfield area of northern Ohio.<sup>9</sup> As we shall see, this incidence of omission would repeat itself later in his vague description of his life in Ohio after the Civil War and the eight or so years he spent in New York before he moved to Santa Ana—and probably for similar reasons, the likelihood being that Towner wished to keep certain of his activities from public scrutiny, activities that would be highly controversial even in these enlightened times.

In 1850, Towner married a 26-year-old Ohioan, Cinderella Sweet; and they would produce two sons and a daughter (Arthur, Frederick, and Lillian).<sup>10</sup> Cinderella died in Santa Ana during her husband's service on the superior court, just three days short of their 44th anniversary.<sup>11</sup>

In his family history, Judge Towner wrote of his antebellum Ohio ministry that he "took the anti-slavery side of the issues then forming on that subject, which caused division in his church, and this, with failing lungs, led him to discontinue . . . public speaking."<sup>12</sup> In 1854, the Towners moved "nearly to the frontier of settlement," Fayette County, Iowa, and he helped build a steam-driven sawmill there.<sup>13</sup>

During his stint in the lumber business, Towner began to read law "for business and political information"<sup>14</sup> and wrote several articles in 1857 for the *Social Revolutionist*, a publication of the Berlin Heights Society, an Ohio communal and free love

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GRAPHICAL SKETCHES 26 (Los Angeles 1911) [hereinafter ARMOR]. (The information in the latter volume, a sort of "Who's Who," appears to have been supplied by Towner himself or his writings—or perhaps his family, given that he turned 88 in 1911.)

<sup>8</sup> TOWNER, *supra* note 7, at 144.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 144-46.

<sup>11</sup> *Id.* at 144.

<sup>12</sup> *Id.* "Mr. Towner was an anti-slavery advocate of the Gerrit Smith type, and cast his first ballot for James G. Birney, the Liberty party candidate for president." ARMOR, *supra* note 7, at 26.

<sup>13</sup> TOWNER, *supra* note 7, at 144.

<sup>14</sup> *Id.*

group.<sup>15</sup> He was admitted to the Iowa Bar in 1859, and practiced in the town of West Union.<sup>16</sup>

When the Civil War began Towner quickly enlisted and was elected Captain of Company F of the 9th Iowa Volunteer Infantry, which was formed in Dubuque in August 1861.<sup>17</sup> In northern Arkansas on March 7, 1862, he lost his left eye to a bullet in the Battle of Pea Ridge<sup>18</sup> (ycept the Battle of Elkhorn Tavern by the Confederacy).<sup>19</sup>

Colonel William Vandever, commander of the Second Brigade of the 4th Division, which included the 9th Iowa and the 25th Missouri, commended Towner in his after-action report: "Lieutenant Tisdale, of Company F, deserves especial mention for his gallantry while in command of the company after the fall of Captain Towner and Lieutenant Neff, both of whom acted with distinguished bravery until disabled by painful wounds."<sup>20</sup>

The Second Brigade, dead-tired after a forced march, was in the midst of the fighting all day on March 7; and Vandever and the 25th Missouri's Colonel John C. Phelps had four horses shot out from under them.<sup>21</sup> Jacob Platt, another officer of Towner's outfit, the 9th Iowa, later wrote, "I charged the battlements of Vicksburg . . . and assisted in driving the Confederates from their almost impregnable position of Missionary Ridge . . . but in all my army experience I did not see any fighting compared with the plain open field conflict that occurred in and around the Elkhorn Tavern on March 7, 1862."<sup>22</sup>

Pea Ridge was the largest battle fought west of the Mississippi. It has been called "perhaps the most decisive of the Civil War in the Trans-Mississippi West . . . a Federal victory, hurling back the Confederacy's last serious threat to Missouri and saving that state for the Union. It came at a time when the North, frustrated by General McClellan's inaction in Virginia, had little else

<sup>15</sup> Fogarty, *supra* note 6, at 70.

<sup>16</sup> TOWNER, *supra* note 7, at 144.

<sup>17</sup> *Id.*; National Archives, Veterans Records, General Reference Branch (NVRG-P), Wash. D.C.

<sup>18</sup> TOWNER, *supra* note 7, at 145; National Archives, Veterans Records (copies in possession of the author of medical certificates and correspondence between Captain Towner and various senior officers).

<sup>19</sup> CLAIRE N. MOODY, BATTLE OF PEA RIDGE OR ELKHORN TAVERN iii (Little Rock 1956) ("The tavern around which most of the two day's fighting took place got its name from a pair of unusually large elk horns that were placed on the ridge pole of the two-story, wide, double-verandahed building").

<sup>20</sup> Rebellion Records, 47th Cong., 2d Sess. H. Misc. Docs., vol. 6, n.27, at 266-68.

<sup>21</sup> WILLIAM L. SHEA & EARL J. HESS, PEA RIDGE, CIVIL WAR CAMPAIGN IN THE WEST 176 (Chapel Hill & London 1992) [hereinafter SHEA & HESS].

<sup>22</sup> *Id.* at 186. The 9th Iowa, commanded by Lt. Colonel Francis J. Herron, suffered 38 dead, 176 wounded, and four missing in action at Pea Ridge. *Id.* at 173-74, 332 (app. 2).

to cheer about."<sup>23</sup> The battle was a relative rarity also, in that the South had a large advantage in numbers but was short, for once, on inspired leadership. The casualties were great, about 10 percent of the some 26,000 troops involved on both sides, including two Confederate generals, killed.<sup>24</sup>

Captain Towner resumed his command in July and saw action at Chickasaw Bayou, Mississippi on December 30, 1862, and Arkansas Post, Arkansas on January 12, 1863. He resigned his commission in Company F in 1863, with the consent of General Grant, based on an army surgeon's certification that he was in poor health and his right eye had been weakened by the loss of the other.<sup>25</sup> He was discharged from active service in February 1863 at Youngs Point, Louisiana.<sup>26</sup>

Towner received a letter from his men, which is proudly reproduced in his genealogy:

Learning with regret that you are about to leave us, we your old company who have shared with you the hardships of the march, and the dangers of the battlefield, would tender you our warmest regards, and assure you that you will hold a place in our hearts around which will cluster the brightest memories. You have, captain, our prayers and best wishes.<sup>27</sup>

Captain Towner served several more years in the Invalid Corps, a reserve organization, and was discharged in Michigan in 1866.<sup>28</sup> After his military service, he returned to the practice of law, this time in Cleveland.<sup>29</sup> He served as judge of the city crimi-

<sup>23</sup> *Id.* at 270; ALVIN M. JOSEPH, *THE CIVIL WAR IN THE AMERICAN WEST* 322 (New York 1991). Pea Ridge was noteworthy for something else: "Not only had the Confederates used Indians—Cherokees from Indian Territory—against the Northern troops, but the tribesmen, according to the Union commander, Brigadier General Samuel R. Curtis, had scalped, tomahawked, and mutilated the bodies of Federal wounded and dead during and after the fighting . . ." *Id.*; SHEA & HESS, *supra* note 21, at 320 (app. 1). Confederate Brigadier General Albert Pike, who was in charge of the Indians, issued an order prohibiting such practices and sent a copy to the Union lines under a flag of truce. *Id.* at 322-23.

<sup>24</sup> National Park Service, *Pea Ridge: Official Map and Guide* (1994). The Confederate generals were Brigadiers Ben McCulloch and James McIntosh, who replaced McCulloch and was shot 15 minutes later. WEBB GARRISON, *CIVIL WAR CURIOSITIES* 199 (Nashville 1994).

<sup>25</sup> TOWNER, *supra* note 7, at 145; National Archives, Veterans Records (copies in possession of the author). One source states Captain Towner was a "decorated hero" (Olin, *supra* note 3, at 225), but this could not be verified.

<sup>26</sup> Declaration for Pension executed by James W. Towner, June 17, 1912, in Santa Ana. National Archives, Veterans Records (copy in possession of the author).

<sup>27</sup> TOWNER, *supra* note 7, at 145.

<sup>28</sup> Declaration for Pension, *supra* note 26.

<sup>29</sup> Towner handled one reported case that made it to the Ohio Supreme Court. There he represented a client who had been convicted of manslaughter but was issued a general pardon by the governor. The question was whether the scope of the pardon covered the court costs assessed against Towner's client after his conviction. The court held the governor had the power to forgive the costs, but had not done so there. *Libby v. Nicola*, 21 Ohio St. 414 (1871).

nal court.<sup>30</sup> The Towners also took up with the Berlin Heights Society, as they apparently had done at some time before they moved to Iowa.

Whether Berlin Heights was very Utopian *or* very religious is open to dispute, but there is no doubt the community was devoted to free love. One historian puts it this way: "Located in Ohio, fifty miles west of Cleveland, Berlin Heights was a loose grouping of families whose members practiced free love, switching partners as the spirit (or the flesh) moved them. Sex at Berlin Heights had nothing to do with God and was completely unregulated, couples casually changing partners as nature moved them."<sup>31</sup> Another historian added, "Berlin Heights was like a great number of communal settlements in that its origins were obscure, its life short, and its history turbulent."<sup>32</sup>

Towner had long wished to join another group, the Oneida Community, near Syracuse, New York, an impressive and unusual example of the 19th-century Utopian movement. Oneida was a splendid experiment that the greatest Utopians, Plato, Thomas More, and Charles Fourier, might have approved, at least in large part. Spencer Olin, a student of Utopian societies, calls it "the most radical social experiment in American history."<sup>33</sup> The Community was founded in 1848 by Reverend John H. Noyes, "the most successful of all [19th] century Utopian experimenters," and practiced "Bible Communism."<sup>34</sup>

The Community built its social structure around an institution called "complex marriage," which was "Noyes' ingenious solution to the perplexing theological problem of how to reconcile earthly marriage with the need to be both sinless and spiritually committed to God."<sup>35</sup> A shorthand explanation of complex marriage, or pantagamy, is that all the adults were viewed as married to all the others.<sup>36</sup> Their sex lives were dictated by Noyes and his wife and sister, and the members' sleeping arrangements would be frequently rearranged in the individual bedrooms of the Community's large "Mansion House."<sup>37</sup>

The children were raised communally in an adjacent structure, the "Children's House." Noyes, or occasionally a trusted advisor in the later years, undertook the presumably divine duty of

30 TOWNER, *supra* note 7, at 145.

31 SPENCER KLAU, *WITHOUT SIN* 326 (New York 1993) [hereinafter KLAU].

32 Fogarty, *supra* note 6, at 71.

33 Olin, *supra* note 3, at 221.

34 Fogarty, *supra* note 6, at 72; Olin, *supra* note 3, at 221.

35 Olin, *supra* note 3, at 221.

36 Leo J. Friis, *The One-Eyed Captain*, *BIBLIO-CAL NOTES*, II, iv, at 4-5 (So. Cal. Lib. Council for Cal. and Local History, Oct. 1968) [hereinafter cited as Friis, *The One-Eyed Captain*]; Olin, *supra* note 3, at 222.

37 KLAU, *supra* note 31, at 54-67, 167-72, 183-89, 223-31.

initiating the young girls sexually. The teenage boys were eventually allowed to participate, but generally only with the older women.<sup>38</sup>

More than just a free love Berlin Heights-style colony, though, the Community openly practiced eugenics, called “stirpi-culture” at Oneida.<sup>39</sup> The breeding of human beings was a subject that fascinated Noyes. Ordinary love-making in the Community, guided by Noyes, was governed by male continence, the men responsible to avoid ejaculation during intercourse.

Permission of the Community was required to attempt procreation. Olin notes, “The effectiveness of the Oneidans’ practice of [m]ale [c]ontinence is evidenced by the birth of only two children per year to some forty couples of reproductive age.”<sup>40</sup> The reverend’s son, Pierrepoint, wrote, “Of the fifty-four children born in the community between 1869 and 1880 (of which I was one) the parcentage of all but six was planned in advance by a committee. We were not born according to law and were not brought up by our parents.”<sup>41</sup> Whether the careful breeding of the children or the vigorous communal system of raising them in the Children’s House was the key, a Johns Hopkins Medical School doctor reported favorably on the resulting offspring in 1891.<sup>42</sup>

The Community, which grew to some 300 members under Noyes’s leadership, produced its own food and a surplus for market and canned food as well. Oneida was also a leading manufacturer of animal traps, in an era when the demand for them was considerable, and produced silverware and silk, too.<sup>43</sup>

The Community did, of course, operate on socialist principles. No work, regardless of quality, quantity, or difficulty was rewarded more than any other, and all members were equally entitled to their food, clothing, shelter, and other necessities.<sup>44</sup> But it should be remembered that the Community was about much more than the *business* of living: “The members believed . . . they were

<sup>38</sup> *Id.* at 180-81.

<sup>39</sup> The Community also employed a form of group therapy encounter sessions, so-called “Mutual Criticism,” that Olin calls “the central form of governance at Oneida.” Olin, *supra* note 3, at 221. These interminable nightly meetings might more accurately be viewed as Noyes’s instrument of governance. Klaw explains, “As he had made clear to his followers again and again, Noyes was no constitutionalist when it came to the government of Oneida.” Klaw, *supra* note 31, at 246. However, research supports Olin’s observation that “few areas of social concern escaped the attention of the Oneida Community. Its members dealt equally forthrightly and creatively with eugenics . . . , child-care, parent-child relations, sex education, nutrition and dietetic problems, the relationship between mind and body, and ecology.” Olin, *supra* note 3, at 222.

<sup>40</sup> *Id.*

<sup>41</sup> PIERREPOINT B. NOYES, *MY FATHER’S HOUSE* 215 (New York 1937) quoted in Friis, *The One-Eyed Captain*, *supra* note 36, at 4-5.

<sup>42</sup> Klaw, *supra* note 31, at 210-11.

<sup>43</sup> Olin, *supra* note 3, at 225.

<sup>44</sup> Klaw, *supra* note 31, at 104.

enlisted in a spiritual adventure of high significance, and they wanted the world to know about it."<sup>45</sup>

As early as 1866, then-Captain Towner wrote the following to Reverend Noyes:

I wish to visit you for the purpose of observing the working of communism as illustrated by you. I believe in Christ, and in communism as the legitimate fruit of faith in Him, but I'm not decided whether . . . it is best now to join organized efforts such as yours . . . . I wish to leave the military service, and having no permanent . . . home, I wish before choosing one, to visit and live with you for a while at least, if it be consistent with your view and interests. I believe that myself and my wife are measurably free from the bondage of the marriage spirit; she has worn the short dress most of the time since our marriage . . . .<sup>46</sup>

Whatever the phrase "the short dress" meant,<sup>47</sup> acceptance of the Towners was not then consistent with the "view and interests" of Reverend Noyes; and the couple was put off for a number of years. Noyes regarded the Berlin Heights Society as licentious and unsavory,<sup>48</sup> although he did strike up a friendship by correspondence with Towner.<sup>49</sup> Finally, though, Cinderella and the judge were accepted after Towner repented and praised the Oneida Community and Bible Communism in an 1873 letter. He wrote that he had accepted "the idea that only as a means of glorifying God is [sexual] intercourse permissible, [and] I have come to hate and abominate even the virtues, as well as the vices, if I may so speak, of my former sexual life of passional indulgence, as of the devil himself."<sup>50</sup>

With the move to Oneida, Towner's family history turns decidedly vague again, just as it did concerning the pre-and post-Civil War years in Cleveland. The following is all the judge reports of his intimate involvement over most of a decade with the astonishing social experiment at the Oneida Community: "In 1874 [I] went to New York, and being engaged in important patent and other cases, spent the next eight years in that State and Con-

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<sup>45</sup> *Id.* at 295.

<sup>46</sup> Fogarty, *supra* note 6, at 73.

<sup>47</sup> The usually knowledgeable Leo J. Friis could only comment, "I don't know what that means; maybe you do." Friis, *Speech*, *supra* note 3, at 24.

<sup>48</sup> Klaw, *supra* note 31, at 194; Olin, *supra* note 3, at 225.

<sup>49</sup> Friis, *The One-Eyed Captain*, *supra* note 36, at 6. Friis explains,

In 1867 the [C]ommunity was in difficulty. It had accepted into membership a young man called Charles Guiteau who later withdrew from the group and demanded \$9,000 for labor performed in the [C]ommunity over a six year period. Hearing of the problem, Towner wrote a letter to Noyes advising him to let the court settle the matter, assuring him that there were ample judicial precedents to support his [Noyes's] view. Guiteau's claim fizzled out. He gained notoriety in later years as the assassin of President Garfield.

*Id.*; see Fogarty, *supra* note 6, at 73.

<sup>50</sup> Fogarty, *supra* note 6, at 73.

necticut, chiefly in [this] profession; and in September, 1882, moved to Santa Ana . . . .”<sup>51</sup>

The truth is the Towners and 11 others from the old Berlin Heights experiment joined the Oneida Community. They paid \$14,000 to expedite the approval of their memberships.<sup>52</sup> Towner initially contributed to the Community with his business and legal knowledge, as he had done previously by mail; but he was eventually to form part of the first strong clique in opposition to Noyes’s leadership, “The Townerites.”<sup>53</sup> And his “role in the destruction of the [Community] was not a minor one as he became the leader of a major group of dissidents.”<sup>54</sup> It has been alleged with considerable corroboration that Towner was, at bottom, disgruntled by the closed system of initiating the young ladies and dictating who slept with whom.<sup>55</sup>

Noyes could not tolerate dissent, though. After more than 30 years of building his unique religious Utopia into at least a lasting economic success, he fled north, never to return. His motivation may not have been just the bickering within, however. The ever-present possibility of prosecution for adultery and statutory rape may also have contributed to Noyes’s decision to adopt Canadian exile.<sup>56</sup>

The institution of complex marriage was abandoned (even before Noyes’s departure because of the internal difficulties posed by the dissidents), and the communal business was reorganized into a corporation that has endured to this day as the world’s leading manufacturer of silverware and as a producer of a variety of other consumer products.<sup>57</sup> Monogamous marriages became the rule. Some were performed by Towner. The former socialist members were issued shares and became employees of a capitalist enterprise.<sup>58</sup>

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<sup>51</sup> TOWNER, *supra* note 7, at 145-46. Towner did handle some patent matters. One such case involved the Community’s infringement of a patent dealing with “the process of manufacturing silver-plated spoons and forks, from homogeneous steel.” *Wallace v. Noyes and others*, 13 F. 172 (Cir. Ct., D. Conn. 1882). The court’s opinion demonstrated a remarkable judicial understanding of the art of manufacturing silverware, and the Community lost.

<sup>52</sup> Fogarty, *supra* note 6, at 74.

<sup>53</sup> Olin, *supra* note 3, at 225. The Community may already have been drifting toward the “Breakup,” as it was called, when Towner arrived. Fogarty says that “[b]y 1874 the [C]ommunity had split into warring factions over the management of the experiment as the young clashed with the old, the scientists with the millennialists. Because of his legal background and past service to the [C]ommunity, Towner was initially welcomed by the leaders. But it soon developed that some of the dissidents in the [C]ommunity saw in Towner a man of vital and magnetic influence.” Fogarty, *supra* note 6, at 73-74.

<sup>54</sup> Fogarty, *supra* note 6, at 74.

<sup>55</sup> Klaw, *supra* note 31, at 237-238.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 290.

<sup>58</sup> Fogarty, *supra* note 6, at 74.

Towner lost a decisive "showdown vote in 1880,"<sup>59</sup> concerning the make-up of the administrative council, by a count of 105 of the departed Noyes's loyalists to 49 Townerites.<sup>60</sup> And he, too, departed, relocating with his family and a number of followers to Santa Ana.<sup>61</sup> Olin explains that the move was no haphazard operation: "[S]everal contingents of Townerites departed Oneida for Southern California in 1881 and 1882. They settled in the small frontier town of Santa Ana which had population of approximately 1,200 people . . . ."<sup>62</sup> The lessons of the past were not lost: "By combining their limited financial resources, as they had done for so many years, the former Oneidans were able to raise \$26,200 for purchasing a substantial block of land soon after their arrival in Santa Ana."<sup>63</sup> They bought a 458-acre tract, including what is now most of the land beneath the Santa Ana Civic Center, and then divided it among the partners. Resales were usually for small sums among Townerites, but for market value to others.<sup>64</sup>

What their new community knew of the Townerites and whether they imported any of the Oneida practices to Orange County are questions lacking satisfactory answers. To be sure the

59 Friis, *The One-Eyed Captain*, *supra* note 36, at 7.

60 KLaw, *supra* note 31, at 264.

61 According to Olin, *supra* note 3, at 232 n.17,

Oneida Community migrants to Southern California in the 1880s (most lived in Santa Ana, while others resided in Los Angeles and Riverside) included:

George D. Allen	Isabelle B. Inslee
Lillian (Towner) Allen	Frederick A. Marks
Jared Allen (b.1884)	Martha J. (Hawley) Marks
Rodney Allen (b. 1890)	Allan Van Velzer (son of
Harley Hamilton	Martha Marks)
Harriet Mallory Hatch	Emerson J. Marks
Julius Hawley	Ernest Marks (b. 1887)
Sarah Mallory Hawley	Edwin S. Nash
Roswell Hawley	Martha (Towner) Reeve Nash
Ida Blood Hawley	Evan Rupert Nash
Alfred Hawley	D. Edson Smith
Elizabeth Mallory Hawley	Stella Worden Smith
Ralph Hawley	Eugene Deming Smith
Arline Hawley	Henrietta Sweet
Otto Hawley	James W. Towner
John P. Hutchins	Cinderella Sweet Towner
Fanny Parker Hutchins	Arthur Towner
Mary Blood Parker Hutchins	Augusta Hamilton Towner
Ellen F. Hutchins	Esther (Abbott-Hamilton) Towner
Ransom Reid, Jr. (son of	Heber Frederick Towner (b. 1882)
Ellen F. Hutchins)	Rutherford Towner
Edward P. Inslee	Xarifa Towner

James Towner had several sisters, two of whom were part of the Berlin Heights group. Martha went with him to Oneida, where she married Gaylord W. Reeve and, later Edwin S. Nash (with whom she came to Santa Ana). Maria stayed at Berlin Heights and married John Parker Lasley with whom she moved to Santa Ana in 1887. They were accompanied by their five children: Emerson James, Chloe Frances, John Towner, Everett Parker, and Mary Elizabeth.

62 *Id.* at 225.

63 *Id.* at 226.

64 *Id.* at 228-29.

locals were suspicious, at the outset at least. The *Santa Ana Weekly Standard* reported on June 9, 1882, on newly arrived “‘anti-religious’ elements in the community.”<sup>65</sup> The editorial writer was clearly on to something: “‘It is difficult to figure this thing out—whether it is another “Oneida Community” business or a “Mormon outfit.” At any rate it will be a good idea for parents to keep their eyes on their daughters and husbands on their weak wives . . . .’”<sup>66</sup>

Other authors are convinced that the public remained completely ignorant of the background of their new neighbors.<sup>67</sup> Noting that the Oneida Community had become a national symbol for free love, Olin observes, “Under such circumstances, the Townerites would have been foolish to flaunt their deviant ways at the same time that they were trying to integrate themselves in a new environment.”<sup>68</sup> County historian Jim Sleeper states the locals did not know of the judge’s socialist past.<sup>69</sup> Maybe, but that was surely the least of it. As Olin suggests, if knowledge had been widespread of the “goings-on” between the ladies and gents at Berlin Heights and Oneida, the new arrivals would have hardly accomplished the successes they did, of which Towner is but one example.<sup>70</sup>

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<sup>65</sup> *Id.* at 226.

<sup>66</sup> *Id.*

<sup>67</sup> Fogarty, *supra* note 6, at 74; Friis, *The One-Eyed Captain*, *supra* note 36, at 7. Friis related this interesting anecdote:

[W]hen Towner arrived in Santa Ana, he turned his back on the past. He made no mention of the beacon chapters of his past life. Apparently he was successful in keeping them well hidden from his new neighbors and friends. I once asked James A. McFadden . . . if he knew that Towner was once a member of the Oneida Community. Yes, he said, he did. He said he learned it from a small boy who had come with his family to Santa Ana along with Towner, and this boy had become his playmate and he told him many things about the Oneida Community. [¶] I then asked Mr. McFadden if he thought that the people of Santa Ana knew of Towner’s past, and after some thought he said, ‘Come to think of it, I don’t believe they did.’

Friis, *Speech*, *supra* note 3, at 26.

<sup>68</sup> Olin, *supra* note 3, at 226.

<sup>69</sup> SLEEPER, *supra* note 3, at 111.

<sup>70</sup> Olin states,

[O]ther former Oneida colleagues actively worked in politics, the Unitarian Church, agriculture, citrus farming, ranching, and commerce. Alfred E. Hawley, Edwin S. Nash, and D. Edson Smith played prominent roles in Socialist Party politics in Orange County in the early twentieth century. When Hawley became head of the Party, the county central committee met regularly in his retail store. D. Edson Smith and Arthur Towner, James Towner’s son, joined the Pomological and Agricultural Society of Orange County and in the late 1880s published an article in the *Rural Californian* entitled ‘How to Make a Living from Ten Acres.’ Smith himself farmed nine acres of deciduous fruits on the outskirts of Santa Ana. In addition, Harley Hamilton, the half-brother of Augusta Hamilton Towner, served as musical director of the Los Angeles Symphony Orchestra for nearly twenty years from 1894 to 1913, and Ransom Reid, Jr., born in Oneida in 1865, was responsible for establishing the city’s water and sewer system and served as Santa Ana Water Superintendent from 1900 to 1920.

Throughout their lives, the Townerites in California remained loyal to each other, and relations between them and the Oneida Community continued for many

As to the question of the expatriates' life-style in their new community, Olin concludes,

It seems unlikely that the Townerites would have completely abandoned the social and sexual behavior they practiced so long at Berlin Heights and at Oneida. Highly principled, not frivolous, people, they were well accustomed to criticism from 'conventional' society. Towner, in particular, had adamantly argued during the final months of the Oneida Community that Complex Marriage should be continued even in the face of virulent public attacks. [¶] Nevertheless, these practices, even if continued in Santa Ana, were never publically espoused.<sup>71</sup>

When Towner's genealogy resumes after the omission of the Berlin Heights and Oneida experiences, he merely lists these Santa Ana events: his practice of law, election as the new county's first superior court judge, and marriage to Emily Van Scotten of Denver, Colorado in 1894, fewer than six months after Cinderella's death.<sup>72</sup> Judge Towner had also been the first City Attorney of Santa Ana;<sup>73</sup> and Leo J. Friis reports:

[I]t should be pointed out that Judge Towner is remembered as a good jurist. A.W. Rutan of Santa Ana, who was admitted to the bar in the first decade of the new century, stated, "I knew Judge Towner after his retirement and I have talked to attorneys who appeared before him when he was on the bench. I never heard anything against him, which indicates that he must have been a pretty good judge. I have, of course, heard the story that occasionally a lawyer, disgruntled upon losing a suit before him, would [s]ay, 'what can you expect? He's only got one eye. He can't see but one side of the case!'"<sup>74</sup>

Another local historian, Charles Swanner, had this to say of him:

Our first Superior Court Judge was J.W. Towner, who was elected when the County was formed in 1889. Prior to being

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years. Indeed, they were often referred to affectionately at Oneida as 'the California Colony.' Through extensive landholdings, intermarriage, and common social, political, agricultural, commercial, and religious activities, if not through group living and publically-espoused pantagamy, the Townerites' former communal ties persisted in the Far West.

Olin, *supra* note 3, at 229-30.

<sup>71</sup> Olin, *supra* note 3, at 226.

<sup>72</sup> TOWNER, *supra* note 7, at 146.

<sup>73</sup> Towner maintained a private practice. In one case the California Supreme Court rejected his client's appeal of the probate court's denial of a motion to continue the hearing on final distribution of an estate. *In re Oxhart's Estate*, 78 Cal. 109, 20 P. 367 (1889). In another the court upheld his client's judgment obtained after service by publication. *Perkins v. Wakeham*, 86 Cal. 580, 25 P. 753 (1890).

<sup>74</sup> Friis, *The One-Eyed Captain*, *supra* note 36, at 4, 7-8 (quoting a conversation with Rutan). James B. Tucker, a Utah Superior Court Judge, joined Rutan in 1936 to form Orange County's best known home-grown law firm, Rutan and Tucker. HALLAN-GIBSON, *supra* note 4, at 80.

elected Judge he had practiced law in Santa Ana for several years. Judge Towner presided at one of the most interesting and important cases ever tried in Orange County. That was the case of *Bathgate versus Irvine* [126 C. 135 (1899)]. The Supreme Court in its decision held that an upper riparian owner could not take water from a stream and conduct it to non-riparian land to the damage of the lower riparian owners. The decision involved a point of water law in California that had not theretofore been ruled upon and the case has been affirmed and referred to with approval by many subsequent decisions.<sup>75</sup>

Towner's local judicial career commenced with trials in his Fourth Street law office and later in the old Santa Ana City Hall.<sup>76</sup> In addition to the *Bathgate* case, he presided over the Orange County Superior Court's first jury trial.<sup>77</sup> The jury acquitted an accused horse thief.<sup>78</sup> One of the last lynchings in California also occurred on Towner's watch in 1892 (from a telegraph pole at the northeast corner of Fourth and Sycamore in Santa Ana), but he was vacationing in San Diego County at the time.<sup>79</sup>

Towner's most colorful and probably most poignant case was that of Modesta Avila, Orange County's first convicted felon. She died in San Quentin after serving two years of the three imposed by the judge. Her alleged crime was obstructing and delaying a train in San Juan Capistrano with her Monday morning washing,<sup>80</sup> or a railroad tie perhaps—accounts vary.

Avila was angry with the California Central Railway, a Santa Fe subsidiary. The train was noisy, dirty, disturbed her laying chickens; and the railway refused to compensate her for crossing land she had inherited. Although it is claimed she told the stationmaster of her action and the obstruction was removed before the train arrived, she was charged anyway. The jury deadlocked 6-6 after the first trial; but by the time of the second, the rumor

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<sup>75</sup> CHARLES D. SWANNER, *FIFTY YEARS A BARRISTER IN ORANGE COUNTY* 19 (Santa Ana 1965); James Irvine, Jr., owner of the Irvine Ranch, was the defendant. Friis explains that in 1893, he "built a dam across the Santiago Creek at a place where the creek flowed through his land. He diverted the water from the stream to land situated beyond the natural watershed of the creek. This diversion was, of course, highly detrimental to the riparian owners below the dam and greatly affected the residents of El Modena and the members of the Serrano and Carpenter Water Companies. Two hundred seventy-five persons brought suit to enjoin Irvine from diverting water out of the watershed." FRIIS, *supra* note 4, at 28. Towner issued a limited injunction prohibiting the use of the diverted water for irrigation purposes, and the California Supreme Court upheld and broadened the injunction to prohibit the watering of livestock as well. *Id.*

<sup>76</sup> SLEEPER, *supra* note 3, at 123-24.

<sup>77</sup> In the California Supreme Court reports spanning his judicial career, Towner was affirmed about two dozen times and reversed a little more than half that number, respectable numbers for a busy trial judge.

<sup>78</sup> SLEEPER, *supra* note 3, at 129.

<sup>79</sup> *Id.* at 205-7.

<sup>80</sup> *Id.* at 150.

was about that the single lady was a pregnant prostitute. She was convicted on retrial.<sup>81</sup>

The *Evening Standard* made light of her demise: "Modesta, a well known favorite of the Santa Ana boys, died in the penitentiary this week at San Quentin. She had served two years of her time and was getting along finely when she was stricken down in the prime of her usefulness. Those who are without sin throw the first stone."<sup>82</sup>

Judge Towner died in 1913, age 90, of prostate cancer and was the subject of a laudatory front page send-off by the *Santa Ana Evening Blade*.<sup>83</sup> After a life filled with enough off-beat religious and sexual activities to fill a novel or two, there was no mention that Orange County's first superior court judge had ever practiced Bible Communism or free love or been a part of a grand social experiment.<sup>84</sup> Maybe the newspaper was also ignorant of or had forgotten those facts, or maybe the press was kinder and gentler in those days.<sup>85</sup>

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<sup>81</sup> HALLAN-GIBSON, *supra* note 4, at 30.

<sup>82</sup> SLEEPER, *supra* note 3, at 150.

<sup>83</sup> Fogarty, *supra* note 6, at 74, quoting the *Blade*: "he had 'engaged in important patent and other cases' [in New York]."

<sup>84</sup> Towner himself never forgot. He directed that his ashes be buried at the Oneida Community, and that is where they are. (Conversation with Helene "Nina" Towner, the family historian and the judge's great-great-granddaughter. Feb. 17, 1998.)

<sup>85</sup> Fogarty puts it this way: "Towner's neighbors in Santa Ana never knew of his past activities as the move from central New York to southern California was enough to bury old sins." Fogarty, *supra* note 6, at 74. Well, maybe.