

# Randall B. Kester

SR 1278, Oral History, by Tom B. Stoel

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THE OREGON  
HISTORICAL  
SOCIETY  
FOUNDED 1898

KESTER: Randall B. Kester

TS: Tom B. Stoel

Transcribed by: "in the office of Tom B. Stoel"

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Reviewed by Randall B. Kester, ca. 1995

## Tape 1, Side 1

1992 April 2

TS: This is an oral history interview with Randall B. Kester taken on April 2, 1992 at his office by Tom Stoel as the interviewer.

KESTER: My name is Randall Kester. I was born in Vale, Oregon on October 20, 1916. My father was Bruce Randall Kester, my mother was Mabel Judd Kester. Her maiden name was [Judd]. My father came from Pennsylvania, my mother came from Wisconsin, and they had what I think were interesting early lives, although I don't know an awful lot about the details.

My father grew up in a small rural community in Pennsylvania near the town of what's called Catawissa, Pennsylvania, which I believe is near Scranton, and is in the coal mining area. He was a Quaker. He went to school there, of course, and had odd jobs working in the coal mines. I heard him talk about working on the conveyer belts where they separated the pieces of coal. He learned shorthand while he was young and became a court reporter and eventually was a court reporter in the Philadelphia police department. I suppose that's where he acquired an interest in the law, although I don't really know that, but eventually he went to Washington, D.C., and attended law school at George

Washington University, [graduating in 1909,] and got a job with the General Land Office in Washington, D.C. This was all prior to about 1910.

I should have said I think he was born about [1881], although I'm not real sure of the date, but when he died in 1932, I think they said he was [52] years old, so that it would make it about 1881 when he was born.

Anyway, he was working in the General Land Office in Washington, D.C. and they sent him out to South Dakota when some of the land there was opened for homesteading. He worked out of the General Land Office in Rapid City, South Dakota, during a time when that was still somewhat Indian country. Then they sent him out here to Oregon about 1910. I'm not sure of the exact date, but he worked on the timber fraud cases that were quite a chapter in Oregon history when they were trying to investigate and solve some of the problems of the public land law violations and timber claims. From there he was sent up to eastern Oregon to the town of Vale where he opened the general land office in Vale when land was first opened to homesteading. He met my mother there, whom I will come to in a moment, and they lived in Vale until about 1922, when they moved to the town of Ontario, Oregon.

In the meantime, my mother, who had grown up in Wisconsin – she lived on a farm near the town of Lancaster, Wisconsin, had gone to school there and had gone to Normal School and had become a school teacher. She taught briefly in public schools in Wisconsin and one summer she came to eastern Oregon to visit a friend of hers, a woman named [Effie Laurence?], whose family had a ranch near Ironside Mountain near Vale, and Effie had asked mother. they had been classmates in Normal School together, and Effie asked my mother to come out and visit her one summer, which she did. And while she was there, the local school board asked my mother if she would stay on and be a school teacher in Vale, which she decided to do. So, she taught school in Vale for a year or so, and it was during that time that she met my father, who had come out to Vale for the land office.

After a year or so, and I'm not real sure of the dates, mother was called back to Wisconsin because of the women's suffrage campaign that was then going on in Wisconsin. She had been an active suffragist while she had been in Wisconsin, and the

campaign that she had worked on was heating up to the point they wanted all the help they could get. So, they asked mother if she would come back to help them, which she did. I believe that that campaign was not successful for the women's suffrage movement in Wisconsin. Of course, that was purely on a state basis, because the federal constitutional amendment wasn't adopted until much later.

But anyway, my father followed her back to Wisconsin and they were married there [in 1912] and came back to Oregon and lived in Vale where my father, in the meantime, had left the land office and had gone into law practice. For a time, he was a partner with Judge Davis. The firm name was Davis & Kester. They lived there in Vale until about 1922, when we moved to Ontario.

In the meantime, I had not gone to public school in Vale. Mother having been a school teacher undertook to teach all of us children the first grade or so at home, which she was allowed to do by the local school superintendent. So, when we went to Ontario in 1922, I entered public school for the first time in the second grade. I don't have very many recollections of those days in Ontario, except that we moved to several different places within the town of Ontario, and I entered high school there and went for three years to Ontario High School, and then in 1932 my father died when I was I think 15 years old. Mother and my younger sister and I moved back to Wisconsin to be with some of my mother's family who were still there. My mother's sister was married and living in the town of Bloomington, Wisconsin, and we lived with her that year, the summer of 1932 and the winter and spring of 1933. I finished high school in Bloomington in 1933.

TS: Can you say something about your siblings or other members of the family?

KESTER: I had two sisters. An older sister, Mildred, and a younger sister, Barbara. My older sister Mildred had gone to Willamette University in Salem and she was in Salem when my father died. She dropped out of college at that time and took a job working for Rufus Holman who was then State Treasurer of Oregon. She worked as a secretary in the State

Treasurer's office and later she married Carl Marcy and they went back East. I'll come to them a little more in a moment.

In the meantime, my younger sister Barbara had moved to Wisconsin with mother and me. We drove across the country in an old Studebaker automobile, which was the family car at that time, carrying what amounted to all of our household goods in the car. Barbara then went to Willamette and she also did not completely finish at Willamette, but dropped out to get married to John Laughlin who was a student at Willamette. They moved back to Chicago and she finished at what I believe was the University of Illinois in Champaign, Illinois. She finished there and had a family and later they moved to New York. [Barbara's husband, John Laughlin, was a physicist, doing cancer research, and he later became head of the physics department at Sloan-Kettering Memorial Hospital, in New York City.]

TS: What connection brought your sister to go to Willamette, Randall. Any unusual connection there?

KESTER: I think probably the main influence was a school teacher we had at Ontario, a woman named [Anna Mae McKinley?], who was a Latin teacher and she was very enthusiastic — she had been to Willamette and was very enthusiastic about it. At that time, the two schools that were principally considered by most of those in Ontario who were considering college were Whitman at Walla Walla and Willamette at Salem. I think [Miss McKinley?] largely influenced first Mildred and then me to go to Willamette and so we did.

TS: It wasn't your parents' religious affiliation then

KESTER: No, not at all. I think my mother was pretty much Methodist, although I don't know that she was ever very ardent about it. As I said, my father was a Quaker. When we went to Willamette my older sister Mildred, as I said married Carl Marcy, who was the son of a Methodist minister. Dr. Milton Marcy was a one-time district superintendent for the

Methodist Church here in Oregon. Willamette at that time had a rather strong connection with the Methodist Church so I think we sort of gravitated in that direction, although not by much of a conscious decision. It just sort of happened.

I probably should go back a little bit to high school days...

TS: Why don't you do that?

KESTER: In Ontario, my principal interests I think were outdoor matters, hunting and fishing and things like that. Used to go on a lot of hikes out from town and bicycling trips. Was quite interested in the Boy Scouts and was anxious to become a Boy Scout for a long time before I was old enough. At that time, they didn't have a Cub Scouting program and you had to be 12 years old before you could join the Scouts. When my 12th birthday rolled around I had already passed the tests for the first three ranks in the Boy Scouts so that it was just a matter of waiting until the necessary time expired and that was one of my principal interests for a while. Attended Scout camps at Strawberry Mountain near John Day and then Payette Lakes in Idaho. I was also interested in tinkering with radio. I never became, I never got an amateur's license, but I used to build simple short-wave radio sets for receiving and thought for a while that I might continue that, but didn't.

TS: How would you grade your high school courses? Did they give you a good preparation, do you feel, for college, in Ontario at that time?

KESTER: Well, I guess so. I don't really know that I can pass judgment on them. I had moderately good grades, although not outstanding. At that time, I was not considering law as a profession. In fact, I think if I had had to pick a career at that point, I would have wanted to be a forest ranger, something like that. I was not very strong physically. I did not take part in any athletics in Ontario. I think when I entered high school, I only weighed about 90 pounds and couldn't compete in athletics.

When we got back to Bloomington, Wisconsin, however, which was a much smaller school, and they had just barely enough boys for the different teams, I played basketball and baseball, although not very well. It was in Bloomington, I think, that I first decided to become a lawyer and that was probably the influence of a mathematics teacher, [Mr. Ingebriksen?], whom I liked quite well and who thought I had a logical mind and who suggested that I ought to be a lawyer. We had a few desultory debates in high school in which I participated and enjoyed very much and maybe that tipped the scales for me to want to become a lawyer. When I came to Willamette, I was pretty well decided that that's what I wanted to do and at Willamette I took courses in, largely in, political science and history and sort of a pre-law course.

Let's stop for a minute and let me get my thoughts together.

[Tape stops]

With respect to political affiliations, I think my parents were both Republicans, although I don't recall any particular political discussions around the home. My father became district attorney for Malheur County and served at least one full term as district attorney and then was planning to run for the state legislature when he died in 1932. He would have been on the Republican ticket I believe, but of course never ran because of his death. Politics were never a very big subject around the home. When I got to Willamette, I majored in political science under Dr. Robert Gatke and became senior scholar in his department. He was a very conservative Republican type and probably influenced my own political views more than I realized. I remember when, I guess it was the second term when Franklin Roosevelt was elected, we were, some of his senior students were sitting around the radio in Dr. Gatke's home listening to the returns. It was a rather traumatic experience for Dr. Gatke, I believe.

TS: What are your other memories of Willamette? Can you remember what the costs were in the mid-1930s during the Depression?

KESTER: There were very modest compared to what they are now. I think, if I remember correctly, and I'm not sure, I think it was \$150 per semester, or \$300 for the year tuition. I lived in the fraternity house — what was then the Kappa Gamma Rho fraternity, which was a purely local fraternity, which later became part of Beta Theta Pi. We lived very cheaply in the fraternity house and expenses were rather modest.

I worked at several different jobs while I was at Willamette. When I first went down there, I had a job as janitor in one of the university buildings. My job being to clean up the third floor of Eaton Hall every day, which is several hours. Later I worked in several different restaurants washing dishes and so on. Finally got a job with the Oregon State library, which was considered one of the better jobs available for college students, mostly shelving books and doing errands, for the state library.

TS: Was that paid for by some of the federal programs?

KESTER: No. That was purely a state job. I probably should have mentioned that while I was at Ontario, I had several different jobs. The first one was as an errand boy for the Malheur County library, which consisted mostly of going to the post office every day and getting packages of books that had been shipped out from the state library in Salem and returning by mail books that had been borrowed. I also worked in a grocery store as a stockroom helper and later in delivering groceries from an old Model T truck and occasionally waiting on customers, although that was not really part of my job.

And I worked as a printer's devil on a newspaper in Ontario. The paper was the *Ontario Argus*, which I guess is still in existence. The owner and editor then was George Aiken, who later became budget director for the State of Oregon, but in those days he was a neighbor of ours in Ontario and I worked as a printer's devil for him, which meant cleaning up the shop and melting used linotype slugs to make fresh linotype ingots to go into the linotype machines, which I guess are no longer in use, since they all are computerized

nowadays. [My work on the *Ontario Argus* was written up and published as *Recollections of a Printer's Devil* in the *Oregon Historical Quarterly* for Spring, 1998, Vol. 99, No. 1.]

Then I guess I covered the jobs I held in Salem. I was working at the state library for the rest of my time at Willamette.

TS: Were you an unusually heavy reader of any kind, literature or history books?

KESTER: I used to read a lot, but I can't claim it was much in literature. They were mostly boys' adventure stories and that sort of thing, at least in my younger days. When I got into college, of course, I was introduced to a little more of the literary works, although I can't say that I had any great favorites, but being around books all the time working at the library naturally had an influence.

In fact, when I later got to Columbia Law School, I worked in the Columbia University library in their rare book's division, which was quite a thrill because they had quite a collection of ancient and artistic first editions and so on. [I have written a short essay on my experiences with various libraries. A copy is attached.]

TS: Other than Dr. Gatke, were there other college professors that you were particularly influenced by, or liked?

KESTER: Well, probably the speech professor, Herbert Rahe. I became interested in public speaking and debating and took some courses from him in speech and was on the university debating team all four years that I was there. Took some rather extensive trips representing the University in debating. One year we went to Los Angeles for the annual tournament of the Pacific Forensic League; another year Laurence Morley and I were a team representing Willamette and we took a trip across the country going as far as Maine, where we debated various colleges along the way, ending up in Boudoin, Maine. It was on that debating trip, we stopped in New York and visited briefly with my sister and her husband, Carl Marcy, who were then living in New York. While there, I had an interview



with the dean of the law school at Columbia University and that probably was one of the factors that caused me to go to Columbia Law School eventually. That's probably getting ahead of the story a little bit.

TS: Are there other friends? You mentioned Laurence Morley. Were there other friends or classmates that you'd particularly like to mention with respect to your time at Willamette?

KESTER: Well, I think Laurence was probably my closest friend. Another close friend was James Barnett, who was living in California [and is now deceased]. The three of us were quite close. Jim Barnett was not on the debating team. Laurence and I, being on the debating team, were thrown together quite a bit for that reason. Others who were in the debate squad included a girl named Marjorie Thorne, whom I dated for a while; Constance Smart, who was on the debate team; George McCleod, who is now practicing law in California was another one of our forensic team. He became student body president at Willamette.

TS: Do you remember, what was the size of the graduating class at Willamette at that time?

KESTER: I can't be sure, but I think it was about 150, approximately. Or maybe 160. That number sort of sticks in my mind. When we had our 50th anniversary reunion a few years ago, we had a turnout of something like 30 or 40 people, I believe, which was a pretty fair turnout after that long a period.

TS: Who was the president of Willamette at that time?

KESTER: Well, when I first went there, Dr. Doney, Carl Gregg Doney. That was his last year there. He had quite an illustrious reputation as an educator. Then he was followed by Dr. Bruce Baxter. I believe Baxter was president the remaining three years while I was

there. In fact, I'm pretty sure he was, because when we had our graduation from Willamette Dr. Baxter got one of his friends from California to come up and give the graduation address, commencement address, although I can't remember the man's name.

I did not take part in athletics at Willamette. I did, was in the senior class play there, which I suppose was a part of our forensics department activity. I was senior class president the final semester at Willamette, graduating in 1937. In connection with my last semester at Willamette, they were just starting...

TS: I have to stop, if I may.

**[End of Tape 1, Side 1]**

**Tape 1, Side 2**  
**1992 April 2**

KESTER: If I can pick up, I was getting a little disorganized in my train of thought.

TS: Well, you had just referred to the fact that you were in the senior class play and were also president of your class during your last year, and I think that's where we left off.

KESTER: At that time, Willamette was just starting on a building campaign, and one of the first new buildings was to be a new library. It happened that as senior class president I was asked to turn a shovelful of dirt at the beginning of what was then the new library. Now it's the old library and they have still another new one on top of that. I was interested to see what had happened to the old library that I helped dedicate when I went back there recently.

TS: You know that it's now Smullin Hall.

KESTER: Yes. And they now have a much fancier library in honor of Senator Hatfield. I should mention that during part of the time when I was at Willamette I lived with a family, Luther Cook and his wife Georgia Cook, who were very good friends of mine. Georgia Cook worked at the state library and Luther Cook was a rural mail carrier. I guess we got acquainted because of my working at the state library and we happened to have similar interests. Luther was very much interested in hunting and fishing and hiking. We went on a lot of outdoor trips together. For probably a year or so, I lived at their home. They were very kind to me while I was there. Georgia Cook just died here within the last year or so, but I always regarded as a very good friend. Luther Cook died quite a long time ago.

One of the things I did while I was at Willamette that sticks in my mind was that I took a solo trip into the mountains up to Mt. Jefferson from Salem. I had heard about this beautiful place called Jefferson Park, which is sort of a hanging valley on the north side of Mt. Jefferson, and had read about it and talked to somebody who had been in there and

wanted to see it, so I took a vacation my first summer in Salem and, no pardon me, the second summer in Salem, took the bus up to Breitenbush Hot Springs and had a rather heavy pack and hiked into Jefferson Park, alone and spent approximately a week there by myself and not seeing anybody else, and came out again. It was quite a thrilling experience for me at that time. Since then, I've been back a number of times, but none of them quite had the thrill of the first time I had there by myself.

TS: You spoke of your having an interview with, I believe, you said the dean of Columbia Law School during one of your trips east, visiting your sister. What additional considerations did you, led you to go to Columbia?

KESTER: I should go back, I guess, and pick up one of the threads that I sort of left hanging. My older sister Mildred, as I said, dropped out of Willamette to go to work right after my father died. She was in love with Carl Marcy who was also at Willamette and he went east to Columbia Law School, to Columbia University before he went to law school and was doing graduate work in international relations and eventually got a doctorate in international relations. He also went to law school at Columbia. He and my sister were living in New York when Laurence Morley and I took that debating trip to the east coast. I had — Carl, being at Columbia, had spoken well of it, so I had made some preliminary inquiries about Columbia and had set up an appointment with Dean Smith, that was Young B. Smith, then Dean of Columbia Law School. So when we were back there I got in to see him and was favorably impressed and I guess it was mutual because they got me a scholarship for tuition and part of the cost of a dormitory room, which was maintained during all the time I was in law school, which made it possible, probably I couldn't have managed it otherwise. I also had various jobs when I was at Columbia.

One of the jobs I had, which was very interesting, was in an undergraduate course in what they called contemporary civilization. The Columbia College undergraduates all had to take the course in contemporary civilization, which included field trips to a number of places in New York City which were, supposedly, of educational interest and they

needed older students, graduate students mostly, to conduct these trips. I got to be one of the guides for some of these trips. We visited lots of interesting places, like the City Morgue, Bellevue Hospital, long lines division of the telephone company, the power stations, fire department – a lot of the places around New York that I would never have seen otherwise, I got to see as a guide for the undergraduates, and I probably got more interest and enjoyment out of it than they did, because for them it was a requirement, for me I was enjoying it.

In law school, I participated in the moot court competition. My grades were not good enough for Law Review, but the next bracket below the Law Review was the moot court team and I was on that each year for the three years I was in law school. In our final year we won the moot court competition, my teammates and I. I suppose that was related to the fact that I had had a lot of experience in debating and public speaking while in college.

TS: How large was the entering class at Columbia at that time? Do you remember roughly?

KESTER: I can't exactly, but I think it was about 150 in the entering class. I don't know how many, probably around 100 in the graduating class.

TS: Were you one of the few from the west coast?

KESTER: Yes. At that time, Columbia was making a deliberate effort to become more of a national school than it had been. Previously it had been, most of its students had been from the east coast and they were desperately trying to diversify and become more of an attraction for students from all over the country. I suppose you could say in that respect that I was a beneficiary of an affirmative action program. I never knew for sure to what extent that entered into it, but it probably had something to do with it. At Columbia, we had social groups which we called moot courts. They were, well, pardon me, that's not quite an accurate statement. We had a branch of the legal fraternity Phi Delta Phi. It happens that

the particular group that was in Phi Delta Phi when I was there were mostly from outside of New York City. There were other fraternities and moot court groups that were either Jewish or from City College or from Harvard or other places that tended to gravitate together. The particular one I happened to be in had mostly people from around the country, which was sort of a natural grouping together of people who were a long ways from home.

TS: Did you find your education at Willamette fitted you as well as most of your classmates for the rigors of law school?

KESTER: Well, I think so. As I said, I was not in the top brackets scholastically speaking, but I always attributed that partly to the fact that I was working outside, although that might have been merely an excuse, but I never had what I'd call real difficulties with the law school. Some of the courses that I took were seminars. In fact, one of them, I remember, in my last year I took a seminar in trade regulation from Milton Handler, who had quite a reputation as an expert on antitrust matters and so on. As a part of that course, he had me write a paper on the War Industries Board from the First World War. This was about the time when things were heating up in Europe and there was a possibility that this country might become involved in a war, although not acutely at that time.

But, anyway, we studied in this seminar on trade regulation the activities of the War Industries Board in World War I, and I wrote a paper on it. Professor Handler suggested that I see if I could get it published and it happened to be timely enough so that the *American Political Science Review* accepted it for publication<sup>1</sup> and so, I was in print before I got out of law school, which I got a certain satisfaction out of. Then when we did get into the war, why, some of the things that I had discussed in that paper had rather timely application.

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<sup>1</sup> The mentioned article was published in the *American Political Science Review*, August, 1940, Vol. xxxiv, No. 4.

TS: What was the political climate at Columbia Law School? This is still in the Depression and also at a time when there was a good deal of debate about America's role in connection with the war.

KESTER: Well, this was between 1937 and 1940. I graduated in 1940. I'd say that things were relatively quiet compared to what they later became, along in the 1960s. I think there were some riotous times at Columbia that seemed strange to me as I read about them because things like that had not been going on when I was there. I think most of us then were too busy trying to handle the law school courses and make a living and find a job to become too stirred up about world events. It may have been a parochial view, but I don't recall that there was very much political activism around the campus at that time.

TS: Were there other professors besides Handler that you regarded as particularly influential?

KESTER: Yes. I was much impressed by Karl Llewellyn who taught contracts. I took several courses from him, including a seminar where we met in his apartment, sat around munching Dutchess County apples while we talked about business and contract matters. Llewellyn had a very unique approach to both the law and his manner of teaching it, which I found very impressive. He later left Columbia and I've forgotten where he went from then on, but he had quite a reputation at the time.

Walter Gellhorn was on the faculty then. He taught administrative law in our first-year class, which was kind of a beginning course in constitutional law, but he had a very good way of introducing us to the subject of public law, administrative law. Having a hard time thinking of the names of some of the other professors.

Professor Michael taught evidence. He had a novel approach to the law of evidence. He reduced everything down to mathematical formulae, which were represented by Greek symbols representing propositions which would prove other propositions, and he'd diagram them on the board like they were mathematical equations,

which struck most of us as being academically interesting but not very practical use in the courtroom.

TS: Was there much emphasis on preparation for trial work at Columbia?

KESTER: I'd say no. I think they did not, well there were some good courses in practice. The name of the, I can't think of the name of the professor right now, later went on to the Court of Appeals for the 2nd Circuit, who was...

TS: Medina?

[Tape stops]

KESTER: We had good courses in practice and procedure, but, except for that one professor, most of what we had was more geared to the scholar, rather than the practical trial lawyer. I guess they assumed that if you went into trial work, you'd learn all that after you got out of law school anyway.

TS: Were most of your classmates looking forward to active practice, rather than using their law in some other area?

KESTER: Well, I think most of us were just looking for any kind of a job we could get. The customary routine was that in your second-year law school you would make rounds of most of the downtown law firms, Wall Street firms, who had a regular program of interviewing students, principally from the Ivy League schools, Columbia, Harvard, Yale, and so on and I went the rounds of interviewing some of those firms, but was never at all interested in staying in New York. I guess I was too much of a country boy wanting to get back to the west.



A number of us thought we might get a job with the F.B.I., and we all took the examinations. I got a pass and got a rating, but never then applied for the job, but several of my classmates went to work for the Federal Bureau of Investigation. My own feeling was that I wanted to come back to the west coast.

One of the summers, it was my second summer there, I came back to Portland and interviewed several firms; the Hart, Spencer firm and the Dey, Hampson, Nelson firm and the Maguire, Shields & Morrison firm, all I remember well. Also went with another fellow up to Seattle and interviewed at Bogle & Gates and some of the other firms there who I don't now remember the names of.

TS: Probably Todd, Holman...

KESTER: And Sprague; then there was sort of an admiralty firm, I've forgotten the name. Hayden, Merritt, Summers & Busey. Of those interviews, Bob Maguire came the closest to offering me a job. I followed up on that and eventually when I finished law school and came out, I got a job with Maguire, Shields & Morrison.

TS: That job was not definitely yours until you came back to Portland?

KESTER: Well, I think it was sort of implied, but not explicit, if I could put it that way, I think Mr. Maguire sort of let me know that I could probably come to work there, but they hadn't made any definite promise until I came back after graduation.

TS: Did you go to work before you passed the Bar exam?

KESTER: Yes. I started to work, well I guess it would have been in June of 1940 and then took a leave of probably three or four weeks to study for the Bar exam which was given in probably in July or August. During that time, I went to Salem and several of us who were studying for the Bar exam lived together in a rented house and we spent the days

reviewing the courses and talking about legal questions in preparation for the Bar exam. In those days they did not have a Bar review course such as is customary nowadays.

TS: Were those largely Willamette, Oregon graduates that you studied with?

KESTER: Yes. One of them was Laurence Morley, whom I've mentioned. One of them was Mervin Brink, whose is now practicing out at Hillsboro. One of them was Ty Gillespie, who later became counsel for Dow Chemical back in Michigan. Those were the ones I remember now, but I think we had more, probably five or six altogether.

TS: So, you spent perhaps three to four weeks in intensive study before the Bar rather than taking a Bar review course?

KESTER: I think that's a fair description. The word intensive might be stretching it a little bit. There was a little relaxation along with it. We did study, and I guess we all passed. Then I came back to work for the Maguire, Shields & Morrison firm. My recollection is that up until the time I took the Bar exam I was getting \$50 a month. After I got word that I passed the Bar exam, I was raised to \$75 a month, which at that time was considered pretty good, because I guess some law school graduates didn't get paid anything, but just worked for the experience.

TS: You were still single and living in Portland then.

KESTER: I was still single. At that time my mother was living in Portland. I probably should go back a little bit, pick up another unfinished thread. My mother had been admitted to the Bar. I don't know the date of it, but it would have been in the 1920s sometime. She always said that the reason she studied law was she wanted to find out what my father was talking about. She took a correspondence course in law from the Blackstone Institute in Chicago and we still may have around some of the books she used at that time. She

took and passed the Oregon Bar exam and I remember that later on when I got to Salem, to Willamette, the then Clerk of the Supreme Court, Arthur Benson, whom I got rather well acquainted with, used to tell me that when my mother was in taking the Bar exam in the old Capitol Building, that I was playing on the lawn of the Capitol Building with somebody, and Arthur would look after me a little bit for her.

Anyway, she had then been admitted to the Bar but had never practiced law. She, as sort of a hobby, became licensed to sell life insurance for the Equitable Life Assurance Company. When my father died in 1932, she made that her career. Prior to that time, it had only been a hobby, occasional work, but she then took it up much more seriously and made a living at it. As I said, we went to Wisconsin in the summer of 1932, but came back in the summer of 1933. My mother took an apartment in Portland and started as a life insurance underwriter. While I was at Willamette she lived in an apartment in Portland and my younger [sister] Barbara lived with her and went to Washington High School here in Portland.

When I finished law school and came back in the spring of 1940, I lived with my mother until that fall and in October 1940 I married my wife, Rachael Kester, who had been a Bloomington High School friend. We met back there and, in fact, had been together in the senior class play in high school. In my trips back and forth across the country

TS: I think I'm at the end of this tape.

**[End of Tape 1, Side 2]**

**Tape 2, Side 1**  
**1992 April 2**

TS: You were talking about your first months in practice in Portland and of your marriage to Rachael.

KESTER: Yeah. We had been friends in Wisconsin and during the years when I was in law school at Columbia, I used to go back and forth across the country a few times and I usually stopped and visited Rachael and her family in Wisconsin. The last time through, in the summer of 1940, why we decided to get married, which we did that fall. I probably should back up a little bit.

A significant experience in my law school days was when Rachael Woodhouse, my future wife, visited us in New York during the Christmas holidays of 1939 to 1940. Rachael and her aunt, Norma Henderson, were on a trip which included New York, and they stayed a short time with Mildred and Carl in their apartment. Rachael and I visited Times Square on New Year's Eve, but the crowd was so large and oppressive that we couldn't stand to wait for the ball to drop at midnight, and we left early.

In my first summer in New York when I was at Columbia Law School, I had a job at being a tutor for a couple of children whose family lived out in New Jersey. They were well-to-do and they had a tutor for the two young boys. I was more of a nursemaid really than a tutor, but anyway it was my job to take care of these two kids during the summer. As part of that we went up to Maine and spent a month in a little town of Sorrento, Maine, which is near Bar Harbor. My job was to look after these two boys, which was quite a treat for me, both seeing how the other side of the world lived and not having very strenuous duties to perform.

Then the second summer at Willamette, at New York, rather, I came back to Salem and, besides making the rounds of the law firms for interviews, I had a number of outdoor experiences. My friend Luther Cook and his son and another friend of mine, Bob Graham, who was in law school with me at Columbia, and I took a hiking trip down through the

Three Sisters Wilderness Area where we were backpacking for several days. That was quite an interesting experience. Also, Bob Graham and I made a climb on Mt. Hood that summer. I had been up Mt. Hood twice before when I had been at Willamette, but certainly had not had any real mountaineering experience, but with the brashness of youth we decided to try it ourselves, so the two of us went up and climbed Mt. Hood without the proper equipment that we should have had, but not really knowing much better.

TS: What time of year was that, Randall?

KESTER: It was in the summertime, that would have been 1939, I guess. I should have mentioned Bob Graham was also from Ontario, Oregon. He was a year ahead of me in high school and also in law school. He had gone to Whitman College and ended up back at Columbia Law School as I did, but he was a year ahead of me. When he got out of law school he went with the firm of Bogle & Gates in Seattle, so when I was interviewing in Seattle, he was one of my contacts there.

TS: Had you had much contact with him in law school, having both come from Ontario.

KESTER: Yes. We both belonged to the same fraternity and we saw a good deal of each other, although he was in a – the stratification of the first, second and third year students in law school was such that I didn't mix with the class ahead of me as much as my own class, but we saw quite a bit of each other. Bob died not so long ago.

I should go back. While I was there, my sister Mildred and her husband, Carl Marcy, were at Columbia when I was. Mildred had dropped out of Willamette to work after my father died and she finished college at Barnard College in New York, which was affiliated with Columbia. Carl took his graduate degrees at Columbia and went to law school and then he got a job – well, first he taught as an instructor at Columbia and then he got a job with the State Department in Washington, D.C. They moved to Washington this was after I left New York. Carl was in some branch of the State Department, I can't remember now

just what it was, but then he later switched and went to work for the Senate Foreign Relations Committee and stayed there for many years and eventually became Chief of Staff for the Senate Foreign Relations Committee.

He did a lot of traveling around the world on various diplomatic assignments and for one year Carl and Mildred had a grant for a trip visiting all around the world for the Crane Foundation, which subsidized their trip so that he could write some personal comments about the condition of the world as he saw it. Carl became quite well known because of his work as Chief of Staff for the Senate Foreign Relations Committee. He died there just a year or so ago. They lived down in the Washington area from then on. After they retired, they moved to a place near Annapolis on Chesapeake Bay, where they did a lot of boating. Carl was an enthusiastic boater. In the meantime, Mildred had worked for the U.S. Information Service, which was, I believe, also a branch of the State Department. She was in charge of women's activities for the US Information Service, which included [entertaining] foreign visitors and arranging programs for visiting dignitaries and so on. She's still living near Annapolis now, after Carl died.

TS: They were living in New York during the time – all the time you were in law school?

KESTER: Yes. They were in New York and I naturally spent a lot of time with them, since I was otherwise alone in the big city. As I mentioned, Carl was quite interested in boating and at one point, I think it was in my first year in law school, Carl had a little money and was interested in buying a boat, so he and I spent our spare time combing the boatyards during the winter and he eventually found an old sailboat, a Friendship sloop, which hadn't been in the water for a long time, but had a distinguished history, I guess. He bought it, and we spent a lot of time fixing it up and getting it put in the water the next spring. We both learned to sail by just going out onto the Hudson River [Laughs] and hoisting the sail. It was quite interesting. But, anyway, he had a great succession of different boats since then. I got interested in boating as a result of that and later on had several boats of my own after we came out here.

When I graduated from law school, another fellow named John Babbage, who is now practicing law down in California, and I drove out together. John had a little bit of money and bought a car, and since he was from California, there would have been a rather substantial use tax on the purchase of the car, but Oregon didn't have a sales or use tax, so we bought the car and put it in my name so that it was my car as we drove across the country. It was a Packard convertible, which was quite a sporty car in those days. It had belonged to a little old lady who only drove it on Sundays, so it was in pretty good shape, and we had a great time driving across the country in the spring of 1940. When we got here, John took the car on to California and we transferred the title to him, it being mostly his money in it. Let's see. [I've since learned that John recently died.]

TS: Well, we had a little diversion from your beginning work at Maguire's office and then getting married in the fall. No reason why you shouldn't divert as new things come to you, but we can go back to that point if you'd like.

KESTER: Well, I think that's probably a logical place to go. The firm then was Robert Maguire, Roy Shields and Bill Morrison and Don Grant and Ed Butler and Arthur Spencer [and Hugh Biggs]. Robert Maguire had been deputy district attorney in Multnomah County and had practiced in Medford and then had come back to Portland and practiced with Judge Winter in the old firm of Winter & Maguire. Roy Shields had practiced in Salem. He'd come from eastern Washington, grown up in the wheat country of eastern Washington, worked in the wheat fields there and also in the wheat fields up around Condon in eastern Oregon. He came to Willamette and had gone to college and law school at Willamette at a time when it didn't amount to very much. I don't remember the dates right now, but it would have been somewhere around 1910 that he graduated from Willamette. See that thing I just gave you about Roy Shields I think it might have his...

[Tape stops]

TS: You're speaking now about Roy Shields.

KESTER: Roy Shields was born in 1883 in Harrington, Washington. He was orphaned in childhood and worked on farms and so on while he finished school. He came to Salem and finished Willamette Law School in 1910. Then he practiced law in Salem and was an assistant attorney general for a while under I.H. Van Winkle and later became attorney for the Union Pacific RR and came to Portland as an assistant general solicitor for the Union Pacific. At that time, the Union Pacific had a branch of its law department in Portland and the general solicitor was in charge of the law department for the Northwest, including Oregon, Washington and part of Idaho. When Roy came as assistant general solicitor, Arthur Spencer was the general solicitor. Later on, Mr. Spencer went on to Omaha, Nebraska as vice president and general counsel for Union Pacific. At that time, Roy became general solicitor in Portland and had charge of the entire Union Pacific law department in the Northwest.

When Roy Shields and Bob Maguire first got together, which was about 1934, they decided to form their own firm and at that time the Union Pacific permitted its in-house counsel to have outside law practice, so Roy was able to have outside practice of his own. When Bob Maguire joined him, Bob became also an assistant general solicitor for the Union Pacific, as well as having his own practice. After about a year, they were joined by Bill Morrison, who became quite a well-known trial lawyer in the Portland area, and he also was listed as an assistant general solicitor for Union Pacific, so the firm has always had a very close relationship with the Union Pacific Railroad. Initially, Maguire's office, I believe, was in the Public Service Building and then over in what was then called the Porter Building or the Wells Fargo Building, which became part of the U.S. National Bank Building.

Then they moved to the Pittock Block and were in the Pittock Block for at least 50 years after that. The firm, Maguire, Shields & Morrison, did a lot of litigation, lot of insurance defense work and, of course, the railroad defense work and personal injury cases. As Mr. Shields' duties with the railroad became heavier, he had less time to devote to general



practice with the firm, so he became less active in the firm's affairs, but always continued a very close relationship.

TS: What kind of a practice did Maguire bring to the original partnership?

KESTER: Well, Maguire had a very varied practice. He had had a lot of experience in the Multnomah County District Attorneys' office, so he had some criminal defense work. In fact, I remember hearing him talk about defending some of the Chinese Tong wars that they had in the early days here in Portland. He defended, had some patent cases that I recall. He had at least a couple of prominent bankruptcy cases that I recall. He served as a Master in Chancery for the federal court and I remember him talking about the case of the Iowa, which was a ship that sank off the mouth of the Columbia River in a big storm that resulted in a lot of litigation. He was the special Master assigned to hear that case. He had I'd say quite a general practice.

Bill Morrison's work was mostly insurance defense work. When I started with the firm in 1940, I did the usual things a young lawyer always did, running errands, serving papers, arguing motions, looking up legal points for the senior partners, writing memoranda on legal questions.

TS: Don Grant and was this Arthur Spencer, Jr. or associates at the time you joined the firm?

KESTER: Yes, Arthur Spencer, Jr. was the son of Arthur Spencer, who was the general solicitor and then vice president of the Union Pacific. He was in the firm. He did mostly trial work. Don Grant was, Morrison used to always say of him that he was the best lawyer in the firm and the poorest businessman, so he quit law and went into business. He had a general practice and then later went to San Francisco with Guy F. Atkinson Construction Company and became general counsel for that company and later retired still on some sort of an emeritus basis with that company. [He recently died.]

Ed Butler, who was in the firm when I came, had at one time been a secretary for the Union Pacific. In those days the railroad operating officers had male secretaries because they had to travel around a lot. They traveled on business cars, and the secretary had to go with the boss and be with him at all times and Ed Butler had been a secretary for one of the railroad operating officers. He later went to law school and joined the firm. When the war came along, Ed Butler went into the Navy and afterwards did not come back to the firm, but instead went to Eugene where he practiced with Judge Lawrence Harris and later became the senior partner in that firm.

Arthur Spencer left to go with the, I believe, the Oregon Mutual Savings Bank and was house counsel for them. He died at a fairly young age. Don Grant, I've already mentioned.

Hugh Biggs was there, I should back up a little bit, also to pick up a thread there. Hugh Biggs had come from Malheur County, where I had grown up. His father, Dalton Biggs, was a circuit judge in Malheur County. His [uncle], Alan Biggs, later became a circuit judge in Malheur County. In the days, at the time my father died, well, let me back up a bit. Hugh Biggs had gone to the University of Oregon and University of Oregon Law School and had become Dean of Men at the University of Oregon. Then he had been with the U.S. Attorney's office in Portland. In the early 1930s, Hugh had gone back to Ontario and had gone into practice with Alan Biggs.

At the time my father was there – in fact Alan Biggs' office was right across the hall from my father's law office – when my father died in 1932, Alan Biggs took over my father's practice, what was left of it, and he and Hugh Biggs wound up a number of things that had been my father's before his death. Then later on Hugh came on down to Portland [and after serving as District Attorney for Malheur County and as Assistant U.S. Attorney] then joined the Maguire Shields & Morrison firm. So, he was a person that I knew in that firm before I started to work there. I should have mentioned that earlier.

But, anyway, when the war came along, World War II, Bill Morrison went in the Army – he had been in World War I and he was given a commission in World War II, and left. This would have been about 1943, approximately, and about the same time Hugh Biggs was

offered a position by Charlie Hart at the firm of Hart, Spencer, McCulloch & Rockwood. I believe that was the name then, is that right?

TS: I think it was [Gary], Hart, Spencer and McCulloch

KESTER: Okay. Anyway, Hugh left to go with Charlie Hart and as I mentioned Ed Butler went into the Navy and that left us pretty much a skeleton crew at the Maguire, Shields & Morrison firm. I didn't have to go in the Army, I was in various draft classifications from 3 to 4F to 1 and when the war finally ended, I was 1A, but was never called, so I didn't have to go. I'd applied for commissions in both the Army and the Navy, but they both turned me down because my eyes were defective, although later on they were taking people with eyes no better than mine. But, anyway, at the time I applied, they didn't take me. So, I was there and I ended up doing most of the trial work when the other people were gone.

TS: Were you thrown into a good deal of heavy trial work at a very early age, then?

KESTER: It seemed to me like it. Of course, it was wonderful experience for me and looking back at it, it was probably a great boon. At the time I thought I was somewhat picked on, having to – I was trying several cases a month and many times without much opportunity to prepare. In fact, later on, after Bill Morrison came back, which would have been 1945 or thereabouts, Bill had a drinking problem and wasn't always responsible, so it happened frequently that the Clerk of the Court would call up some morning wanting to know where Bill Morrison was because he was supposed to be trying a case there and he hadn't shown up. So, I'd have to grab the file and go up and start picking a jury while I was reading through the file for the first time, which is not a very good way to try a case, but you get a lot of experience in a short, short time.

TS: Did your income progress rapidly because of this responsibility, or a little more slowly than you would like?

KESTER: Not very rapidly. As I recall the — well I remember when I was promoted from \$75 a month to \$100 a month, which was quite a jump. But, at the time, in 1943, when the firm was being stripped down with everybody leaving, I remember Bob Maguire called us in, those of us who were left and said that hereafter we were going to have to all assume more responsibilities and as a result he was going to divide the firm income among us, although we weren't formally made partners. He told us he'd share what income there was, all this on a percentage basis. In kind of a de facto way, we became partners, although not legally perhaps.

TS: Was the management of the firm pretty much left to Maguire, or were there other arrangements that took care of the management?

KESTER: At that time, Bob Maguire was the manager. He was the only senior partner left. Roy Shields couldn't spend very much time on the firm matters because of the railroad work and with Morrison and Biggs gone, Maguire was the only senior left, so naturally he ran the office, but Bob wasn't very much of a manager. He left a lot of details to his secretary, which turned out to be a mistake. Marian Huggins was his secretary and sort of office manager responding to Bob. It turned out that she embezzled some money from us, which was never recovered. It was probably attributable to the fact that nobody was exercising very close supervision. After people started coming back about 1945, Bob Maguire was appointed one of the judges of the Nuremberg War Crimes trials over in Germany. He left and was gone for a little over a year.

TS: Can you tell us a little more about that? Did Bob have some connections? Did he apply for the job? Do you know what the background of his appointment was?

KESTER: I don't know much. Judge Brand, who was on the Oregon Supreme Court was selected as one of the judges for the War Crimes trials and I believe it was Judge

Brand who recommended that Bob Maguire be offered such a position. I think Bob went over about the time Judge Brand came back. I'm not sure whether their terms overlapped or not. But I think that's how Bob was first –

Anyway, Bob was gone for about a year and a half or so at Nuremberg and when he came back, he, I guess, didn't want to get back directly into the hurly-burly of law practice so he ran for the Supreme Court. He ran against Walter Tooze for the Oregon Supreme Court and was not successful. Walter Tooze beat him, so Bob came back to the firm and continued practice, although I'd say from then on Bob didn't have as much interest in the day-to-day law practice as he had had previously.

TS: Who ran the firm when Bob was gone?

KESTER: Well, I think by then Ralph Bailey was with us. He had come about the time Hugh Biggs left. Ralph had been an attorney with the State Tax Commission and I think it was Don Grant who got Ralph to come in our office in the first place. Then Don left, of course, but Ralph was there and Ralph became one of the named partners. For a while the firm name was Maguire, Shields, Morrison & Biggs and then it was Maguire, Shields, Morrison & Bailey, and I think while Bob was gone probably Ralph Bailey was the most responsible for the firm operation. His practice was mostly limited to tax matters. I think when he first came, he was thrown into handling of a personal injury case, got badly burned and didn't like it at all and said he was never going to do that again. So, from then on, he was an office lawyer.

TS: Going back to your beginning in practice, you spoke of doing the legwork for the firm and serving papers and filing papers and that sort of thing. Can you tell us a little more about how young lawyers were used in those days?

**[End of Tape 2, Side 1]  
[Tape 2, Side 2 BLANK]**

**Tape 3, Side 1**  
**1992 April 9**

TS: Randall, you can take up where we left off a week ago, when we were talking about the role of a young lawyer in a Portland law firm in 1940 and the duties and training you received.

KESTER: If you don't mind, I'd like to go back and make a correction or two in our previous discussion. In reviewing what I think I said before, I may have made a couple mistakes. I'd like to clarify those first.

I think I originally said that Hugh Biggs came back to Ontario, his old home town, after he had been U.S. Attorney in Portland, but in reviewing the matter, I think that the sequence was that he came to Ontario in about 1932 or 33, following the death of my father in 1932. My father had been district attorney for Malheur County and Hugh was appointed to fill that vacancy and served as district attorney in Malheur County. After a year or so then he was asked to come to Portland to be an assistant United States attorney, which I think is a sequence more accurately stated than I previously said it.

TS: We'll see that that's inserted at the proper place.

KESTER: Another thing, I remember I was at a loss for a name when you asked me once about law school, and how much practical training we had aside from the purely academic. I said that it was mostly academic, with the exception of a course on New York procedure, and I couldn't then think of the name of the professor, although he was very distinguished. I was embarrassed that I couldn't remember it, but it was Harold Medina, who later became a federal judge and was on the 2nd Circuit at the time he retired. He did teach a course in New York practice, which was a very down-to-earth, practical course, although dealing principally with New York practice, which wasn't a great deal of help to one coming out to the sticks to practice in Portland.

TS: I think that Medina was also the trial judge in the Alger Hiss trials in New York after World War II, 1947 or 1948.

KESTER: That's right. I remember reading about that with a great deal of interest because of his having been a professor. He was a very colorful professor, and apparently, he ran the Hiss trial with a rather firm hand, which was necessary because they were trying every possible way to upset him. I guess he said in interviews later that he was convinced they were trying to cause him to have a heart attack during the trial, but he survived it and became a very distinguished judge.

I think I made one other mistake, at least one other. In recounting my own family history, I think I referred to my mother's maiden name as Patterson, which was her mother's name, and my mother's maiden name was Judd. I wouldn't want that to be incorrect. Along the same line, I mentioned my father had been a court reporter in his younger days. He learned shorthand in a school that was no longer used, called the Pitman method of shorthand, which was an older style, unlike the Gregg shorthand that was a completely different system. It turned out that he kept a lot of his office notes and books in his own shorthand which was legible only to himself, so when we were trying to close up his affairs and settle his estate, a lot of the critical information was in a shorthand nobody could read [Laughs], which was unfortunate. By coincidence, Bob Maguire, who later became my senior partner, also took shorthand and he used the Pitman school of shorthand, which was the same one my father used, although that was too late to do us any good.

Then I think I wanted to fill in a bit about my days at Willamette University. One of the things I failed to mention that was probably outstanding in memory was the fire which burned the old Capitol Building in Salem, which was while I was a student there. I think it was in 1935, and I remember we were having a fraternity meeting in the evening after dinner when the fire alarms started. Word got around that the state capitol building was on fire and we all of course disbanded and ran up the street to watch the fire, which was very spectacular.

One of our classmates, unfortunately, was killed in that fire. He happened to be close to one of the walls that fell and he was struck by a falling object from the cornice of the Capitol building and died, which naturally put quite a damper on our enthusiasm about the fire.

Of course, the fire was quite an event in Oregon history. Many of the state papers were destroyed. A lot of them were carried around the city by the winds created by the fire. They were finding bits of charred documents all over the city for several days afterward. The old state house had a copper dome, and when it fell in, when the fire got to it, it made a very bright, greenish flame and was very spectacular. The copper that had been used in the dome, a lot of the scraps of it were made into souvenirs that were sold around Salem such as a souvenir ashtray made from the copper dome of the old state house. Of course, this all led to the building of the new Capitol building, the present capitol building, which is no longer very new. It's been remodeled since then, but I thought I ought to put in that little bit of local color. [I wrote about the Capitol fire, which was published as a Letter to the Editor of the *Oregon State Bar Bulletin* for August/September, 2002, Vol.62, No. 10, copy attached.]

[Tape stops]

Now to go back to your question about what a young lawyer was expected to do in the 1940s – As I think I mentioned earlier, my duties included serving and filing papers at the courthouse. Of course, that meant being in and out of other lawyers' offices. We didn't have the privilege of serving by mail in those days, except in limited circumstances, so most of our pleadings and motions and so on were served by hand. I had occasion to be in and out of other lawyers' offices quite a lot and to the courthouse. I guess that's the way most lawyers first learned their way around the courthouse, where to file papers and so on. Then, one of the things that I had to do was to argue motions. In those days, when you were served with a complaint and needed time in which to answer, it was customary practice to file a motion to strike something from the complaint. There was usually



something in the complaint that was subject to being stricken, although not of very great significance. But it was customary practice to file a motion in order to make an appearance.

Some of those motions would be waived and the answering pleading was filed. But some of them had to be argued and it fell to the lot of the junior lawyers to go up and argue those motions. And that's the way you got a lot of experience in arguing legal points to the judge. That way, of course, you became acquainted with the other lawyers in the community. Also, one of the things a young lawyer had to do was answer the call calendar for trial assignments, both in the state and the federal court.

In the federal court, they had the practice at that time of calling the entire docket every Monday morning, usually starting at 10:00. This was Judge Fee's practice. Later on the other judges did not follow it as strictly as he did, but he would call substantially all the cases on the court's docket and expect you to be there to explain the status of the case. He would have a call calendar and then there would be a motion calendar and a pretrial conference calendar all set for Monday morning. So, it became necessary for many lawyers to attend.

On a Monday morning in federal court sometimes you'd find 100 lawyers waiting around for their case to be called, merely to report that there was nothing to report, or some minor development, which enabled the judge to keep track of the status of the case and put some pressure on the attorneys if he felt it necessary. But there was an awful lot of attorneys' time wasted sitting around the courtroom waiting for the cases to be called. The local legal newspaper, the *Daily Journal of Commerce*, customarily printed the calendars for the Monday morning edition. Everybody would have a copy of the paper and they would sit following the calendars the court called. There would be a great rustling of newspapers as everybody followed the progress of the calendar as it was called by the Clerk. [I described the practice in Federal Court in more detail in an article entitled "That was Then and This is Now" in the U.S. District Court of Oregon Historical Society's newsletter *Benchmarks* for May, 1995, Vol. Vol. x, no. 1, copy attached.]

Maybe I'd better stop and gather my thoughts. You asked about training and tutelage and I think I would have to say that there wasn't much. You sort of learned by

doing. Sometimes I would carry the briefcase for one of the seniors, Bob Maguire or Bill Morrison, while they were trying a case, but usually most of the cases did not warrant more than one lawyer at a time, so we were not encouraged to tag along just for the pleasure of sitting listening to somebody else try a case. When the time came that we felt ready to try a case, usually we were given the supposedly simple ones or the ones not involving very much money so that if we lost it wouldn't be too great a blow, and you learned largely by sink or swim. That wasn't always the case.

I remember several times being with either Bob Maguire or Bill Morrison in some case of considerable significance, and learned a lot from just watching how they did things, although sometimes it might be a little informal. I remember one time I was with Bob Maguire on a case involving fishing rights on the Columbia River, and one of the witnesses was [Mr. Veazie?], who was at that time on the State Fish Commission and one of the experts on the Oregon law on fishing rights, and the other side had called him as a witness to testify as an expert on what certain portions of the Oregon law on fishing rights meant, and [Mr. Veazie?] was stating his opinion of what the law was, and I remember tugging on Bob Maguire's coat tails and saying, he can't do that, that's expressing a legal conclusion, he shouldn't be allowed to testify that as a witness. Bob shushed me and said, never mind, I want to hear what he says. So sometimes the naiveté of a young lawyer not realizing the practical significance of everything might come into play.

I suppose talking of people, I should refer a little bit to my senior partners, Bob Maguire and Roy Shields particularly, who were certainly, if I were to say who were most influential in my own development, those two would be high on the list, and another one would be Hall Lusk, who was on the Supreme Court for many years. Another one would be Judge Fee, a Chief Judge in the federal court before whom I practiced for quite a while.

But going back a little bit, Bob Maguire was a very charismatic sort of a person, he had a very sparkling manner about him and when he was in the courtroom, he usually was the center of attention just because he attracted attention by his dynamic personality. He was an excellent trial lawyer and very alert and quick witted. Roy Shields on the other hand was a very shy, self-effacing, modest sort of a person, and a great scholar. Probably among

the people that I have known, I would say that Roy Shields and Hall Lusk were the two most outstanding legal scholars that I have ever known and I was much influenced by their approach to the jurisprudence of law practice. Roy had been an active trial lawyer in Salem and very successful as a trial lawyer. He had a very down to earth commonsense approach to things which I am sure appealed a lot to the juries which were more or less, Marion County then was quite a rural county and most of the jurors were probably farmers, and Roy had grown up on a farm and he undoubtedly found a lot of common ground. After he came to Portland, Roy didn't try cases so much because he was mostly in the office doing work for the Union Pacific Railroad Company, but occasionally he would go to court, principally to argue a legal question and, when he did, his arguments were always extremely cogent and usually very brief and to the point.

I mentioned Hall Lusk with whom I served on the Supreme Court later on, and he was another great legal scholar — and had been I'm sure one of the outstanding judges in all of Oregon's history. He had a classical education and his scholarship was not only in the law but in many other fields. Sometimes that would work its way into the opinions that he wrote. As I say, I think Hall Lusk and Roy Shields were probably the two greatest legal scholars that I have known.

TS: When you talk of Roy Shields, do you think that he came naturally by a scholarly turn of mind and obviously he came from a farm background as you say, and he went to Willamette Law School, but do you think he spent a good deal of time reading to acquire this scholarly turn of mind, or was it something that was kind of inbred in him?

KESTER: Well, a great deal of it must have been kind of instinctive, because I'm sure he didn't have time to do a great deal of outside reading. He was always a very hard worker, and when he was working on a case or a legal proposition, he would dig to the bottom of the matter, but I don't think there was much in his background that would have brought that about. I think it was largely his own doing from working on particular problems as they came along.

He had a knack for going to the heart of a problem and I remember him saying a number of times that when you're trying to research a legal question to early on decide how you think it ought to be decided and you could almost always find law to support a result that you thought was just or correct and should be reached, and he was a great one for digging around and finding novel approaches to questions of law that might not otherwise be simple. I think probably Roy was more of a legal scholar than Bob Maguire was. Maguire was very bright and intelligent and learned in the law, but he had a tendency to rely more on instinct and quick wit and trial ability rather than having a full background on a particular problem, whereas Roy would always get to the very bottom and have all the authorities on the subject on every side.

[Tape stops]

We were talking about cases that come to mind as having been of some significance during my earlier years in the practice, and one of the cases that was mentioned was a will contest of Maria Jackson, of the family that had the *Oregon Journal* at one time. I don't remember the details now, although much of it appears in the published opinion in the *Federal Supplement Report* (153 F. Supp. 104). There was a case brought to challenge the dispositions under the will of Maria Jackson against the U.S. National Bank as trustee or executor of the estate. For some reason, our office was involved in the defense of it, and Roy Shields took the position that the federal court had no jurisdiction over a will contest, this was a matter solely for the state probate courts, and he wrote a very scholarly and extensive brief discussing the history of probate jurisdiction in the state courts. The case was tried before a visiting judge from California who accepted the theory that Roy had put forth in that brief and ultimately held that the federal court had no jurisdiction because it was a will contest, although the plaintiffs attempted to use other theories in saying that it was something other than a will contest. But I am reminded of it because of the very extensive and scholarly brief that Roy was a principal author of.

There are many other cases that come to mind. Our office became involved in the Malheur Lake litigation over in Eastern Oregon in Harney County. The Malheur Lake had been set aside by a federal decree as a wildlife refuge and there were condemnation cases where the government was seeking to acquire the lake bed for use in this wildlife refuge. This goes back to a much earlier time when there was litigation over who owned the title to the bed of the lakes and that revolved on the question of whether it was navigable or not navigable at the time Oregon became a state.

If I remember correctly how it went, if the lake was navigable at the time Oregon became a state, then title went to the state, whereas if it was not navigable, then it remained with the United States and was patented out to the various homesteaders who took up claims around the edge of the lake, who would then own the title to the bed of the lake out to some hypothetical center point. Well, there was a lot of litigation over that, which we were not involved in, but we did become involved when the government tried to—.

Pardon me, I should have gone back and said the ultimate conclusion of that, in the case that went to the United States Supreme Court, in the United States against Oregon, determined that the lake was not navigable at the time of the admission of the state (295 U.S. 1) and therefore it was patented to the adjoining owners and then when the government wanted to acquire the land for the wildlife refuge, they had to condemn the land from the adjacent owners.

Well, in the meantime, there was a bank in Burns, the Harney County National Bank, and the cashier of the bank was a fellow named Ed Brown, and for a good many years he had been systematically looting the bank and ultimately embezzled something around half a million dollars from the bank, much of which he had used in buying racehorses and ranch properties, some of which turned out to be this lake bed land around the margin and into the center of the lake. When his embezzlement was discovered, Ed Brown committed suicide. He shot himself when the bank examiner walked in unexpectedly one day. Then the Federal Deposit Insurance Corporation took over the bank, ultimately sold it I believe to the United States National Bank as a branch. When they first took it over and liquidated,

they were trying to recover the money that Ed Brown had stolen from the bank and to do so they filed suit to impress a constructive trust on whatever property they could find that had been purchased with the stolen money.

At that time, we represented the Federal Deposit Insurance Corporation and were involved in the litigation in the federal court over the proceeds of the condemnations to which the Federal Deposit Insurance Corporation claimed a trust. Judge Fee traveled over to Burns numerous times in connection with this litigation and held court in Burns and at one time he even went around and personally walked over a good bit of the boundary of the lake to satisfy himself as to whether this was navigable or not navigable. This relates back to the earlier issues. One of the early things that I was involved with in the firm was to represent the firm in these proceedings over in Harney County federal court, so I spent a good many days in Burns with Judge Fee holding court on these cases.

Another case that was of some significance when I first started was the so-called Montgomery Ward case, which the Union Pacific Railroad was involved in with all the other railroads and a good many truck lines. Montgomery Ward had been subject to a labor dispute and had a strike on its hands, and as a part of the tactics in the strike, the striking employees of Montgomery Ward put pickets on the roads and railroad tracks serving the Wards plant.<sup>2</sup>

TS: That's the end of this Tape 3, Side 1, interview with Randall B. Kester taken by Tom Stoel on April 9, 1992.

**[End of Tape 3, Side 1]**

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<sup>2</sup> See extended discussion of Montgomery Ward case at p. 51, *infra*. It was described in more detail in an article of mine in *Benchmarks*, for Spring, 1989, Vol. V, no. 2, copy attached, and also in *The First Duty, a History of the U.S. District Court of Oregon* (1993), pp 181-183.

### Addendum to Tape 3

*In the transcript there is a gap in chronology between Tape 3, Side 1 and Tape 3, Side 2.*

*The following is designed to fill that gap:*

KESTER: While serving as an associate in the firm of Maguire, Shields & Morrison, I worked on a number of cases for the Union Pacific Railroad, and as a result acquired some familiarity with railroad operations. Especially during the time when Bill Morrison was in the Army in World War II, and after Hugh Biggs left for the Hart firm, I had responsibility for the firm for most of the railroad cases. At one point Fred Betz, who was a long-time member of Roy Shields' staff, and who did most of the contract work, took a 9-months' leave of absence for round-the-world traveling; and while he was gone, I was assigned to do his work, and for that purpose was temporarily put on the Union Pacific payroll. Consequently, I learned something about aspects of railroad law other than defending damage cases.

In December, 1956, there was a vacancy on the Oregon Supreme Court, caused by the death of Justice Walter L. Tooze (who had defeated Robert F. Maguire for that position in 1950, after Maguire returned from serving in the Nuremberg War Crimes trials). I was then president of the Multnomah Bar Association; and in performing the duties of that office I telephoned Hugh Barzee, who was then counsel to Governor Elmo Smith, and offered the services of the Bar Association Committee on Judicial Selection in recommending a successor for appointment to fill the vacancy.

Barzee responding by asking "Why don't we submit your name?" There was only one reasonable answer to that question; so, in due course I was appointed to the Oregon Supreme Court, effective January 3, 1957.

It would serve no useful purpose to recount the various cases in which I participated while on the Supreme Court, as they are in the published reports. In the oral interview I did mention some of the individual justices. However, there were some other events that deserve mention.

In the summer of 1957, there was a two-week Seminar for Appellate Judges, held at New York University Law School, in New York City. Justice William McAllister, who had been appointed to the Supreme Court in 1956, and I were sent to attend that seminar. It consisted of about two dozen appellate judges from around the country; and the program was directed mostly at the technique of opinion writing, with some time devoted to court administration. It was an interesting and valuable experience.

While on the Supreme Court, I served on the state Judicial Council, and also on the Legislative Interim Committee on Judicial Administration. The Interim Committee retained Geoffrey C. Hazard, Jr., as its Executive Secretary. In later years Hazard became a well-known law professor, a nationally recognized expert on legal ethics, and he served for several years as Director of the American Law Institute.

Among other things, the Interim Committee was charged with investigating the feasibility of instituting a system of intermediate appellate courts. The committee's report, submitted to the 1959 Legislative Assembly, recommended against an intermediate appellate court at that time, although it recognized that such a step might become necessary in the future. Ten years later that time had come, and the Court of Appeals was established. (Or. L. 1969, Ch. 198, codified as ORS 2.510).

I served on the Oregon Supreme Court until March 1, 1958. On that date Roy Shields retired from the position of General Solicitor for Union Pacific Railroad in the Northwest; and he recommended me to succeed him. Although I enjoyed the work on the court, and would have been content to remain there indefinitely (subject to re-election), the railroad position was too good an offer to refuse. At that time a Justice's salary was only \$15,000 per year, and we had three daughters to raise, one of whom required heavy medical expenses. In the circumstances the choice was easy.

So I resigned from the Oregon Supreme Court, accepted the position of General Solicitor for the Union Pacific, and resumed partnership with my old firm, which then became known as Maguire, Shields, Morrison, Bailey & Kester. The dual relationship with the firm and the railroad was a continuation of the same relationship that Roy Shields had,



and like him, my time was so occupied with railroad work that I had little opportunity to work on the firm's cases.

As General Solicitor I had charge of all Union Pacific legal matters in Oregon, Washington and Northern Idaho, generally known as the Northwestern District. This included supervision of litigation, for which we had the retained firms of Lane, Powell, Moss & Miller in Seattle and Hamblen, Gilbert & Brooke in Spokane, as well as the Maguire firm in Portland; contract and property matters; commerce and regulatory matters, although system-wide matters were handled by the Omaha office; legislative matters, for which we had the Oregon and Washington Railroad Associations; and service on the Boards of Directors of various subsidiary and affiliated companies. In addition, the District General Manager, the Property Manager, the Traffic Manager, and the General Solicitor served as an informal policy committee to make recommendations to the executives in Omaha. Later on, when there was a resident vice president in Portland, he also was a part of that committee.

On January 1, 1979, I became Senior Counsel for Union Pacific, and L. James Bergmann, who had been on my staff, was named General Solicitor. I retired from the Union Pacific on December 31, 1980, and resumed full-time practice with the firm, which was then known as Cosgrave, Kester, Crowe, Gidley & Lagesen.

Some of the cases that I worked on are discussed in the oral interview, but some others should be mentioned. For example, the Fred Meyer litigation occupied much of my time for nearly a year. My involvement with that case was summarized in an intra-office memorandum dated November 26, 1990, and a copy is attached.

Another was the litigation over the defaulted bond issue of the Washington Public Power Supply System (WPPSS, commonly referred to as "Whoops"). WPPSS was a municipal corporation established under Washington law in 1957. Its purpose was to serve as a construction and financing vehicle for electric power plants that were beyond the capability of a single utility. Initially its agenda consisted primarily of hydro-electric projects, but in the late 1960s it planned several nuclear power plants, which would be financed by revenue bonds. At least one of the plants was completed, but for various reasons, probably

including a smaller than anticipated demand and a general disillusionment with nuclear power, it was unable to obtain financing, and most of the projects were never completed. There was default in payment of the bonds, which was widely publicized as the largest municipal bond default in history, and it triggered a flood of litigation, not only against WPPSS, but also against a number of municipalities.

Our office was not directly involved in the litigation, but I was asked to render opinions on a number of insurance questions, both as to coverage and duty to defend. Since the critical events covered a considerable period of time, there were also questions of "stacking" of policies, and of allocation and contribution between insurers. [The cases were eventually settled, and the settlement was approved in *Class Plaintiffs v. City of Seattle, et al*, 955 F2d 1268 (CA 9, 1992).]

**Tape 3, Side 2**  
**1992 April 14**

TS: This is a tape of an oral interview with Randall B. Kester taken by Tom Stoel on April 14, 1992. You were going to make some comment about participation in community affairs, but you may have other items you wanted to cover.

KESTER: I think it's a good point to mention the Union Pacific Foundation, which for a time was quite prominent in Portland charitable functions. This all started with a lawsuit over in Utah which is the state of incorporation of the Union Pacific Railroad, and the railroad wanted to make some charitable contributions but had some doubt as to whether under its Articles of Incorporation it was authorized to do so, so it was arranged for some shareholders to bring a lawsuit against the Union Pacific in Utah challenging its right to make charitable donations of what amounted to being the shareholders money. That was progressed through and finally the Utah Supreme Court held that it was authorized, was permitted, so the Union Pacific then established a foundation and periodically appropriated money to the Union Pacific Foundation to be used for charitable purposes.

TS: About what year was this, do you think?

KESTER: Well, this would have been probably in the early 1950s because one of the first things that I had to do when I came with the railroad in 1958 was to arrange for the first series of contributions in Oregon from the Union Pacific Foundation. At that time Walter Rouse was Vice President and General Counsel of the Union Pacific in Omaha. He was the one who had appointed me to the position, and after the case was decided, holding that the company was authorized to make charitable contributions, then the management turned to Mr. Rouse and said, all right, this is a legal problem, you take it from here and set it up and arrange for the contributions to be made. So Mr. Rouse called me as the local counsel in the Northwest and asked me to set up the first round of gifts, which I did largely

on my own because nobody else in the company at that time was much concerned with such things, so largely out of my own acquaintance with the community I arranged for a series of donations to use up our quota for that year. We started the practice of holding a gathering.

At first, they were luncheon meetings, but later on they weren't always luncheons, but at the gathering we would have representatives from the recipients, and then we would have a representative of the company present the checks to the United Way or the colleges or the hospitals or whatever they were. This was an occasion of course for some publicity, which was no doubt part of the reason in back of it, though not entirely. This started the program and then later on we followed the practice of getting recommendations from all of our local officers in order to be sure that we were giving a representative group of donations and not limited to the Portland area but all up and down the system, up in Eastern Oregon and in Washington, for example.

Later on, when [Mr. Burnett?] came out as Vice President, he sort of took charge of that aspect of things, and arranged for recommendations from the local officers which were submitted to the Board of the Union Pacific Foundation in New York. For a time, they would send out from New York somebody representing the Foundation who would actually make the presentations. I'm trying to think of the name of the person right now, [Arthur Gray] it escaped from me at the moment. That was an interesting experience, and somewhat different from the usual. run of legal matters that I had to work with.

I am reminded of another episode that was quite interesting. The Union Pacific and the Southern Pacific jointly acquired the Portland Traction Company which was then owned by a company which was largely Charlie Bowen in San Francisco. We had a rather protracted negotiating experience where the Southern Pacific attorneys and the Union Pacific attorneys would meet with Charlie Bowen in San Francisco<sup>3</sup> to negotiate the acquisition of the Portland Traction Company. It fell to my lot to be the principal negotiator and contract-drafter in the acquisition of the Portland Traction Company by the Union

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<sup>3</sup> The background of the acquisition of Portland Traction Co. by the Union Pacific and Southern Pacific is discussed in Kester's article in *Benchmarks* for Spring, 1999, entitled "The Resurrection of Portland's Streetcars," copy attached.

Pacific and Southern Pacific. For that purpose I had to go to San Francisco quite frequently to meet with, usually it was Herb Waterman was the Southern Pacific attorney then, and Charlie Bowen, who was the seller, and we arranged for the acquisition of the traction company and then a series of contracts between the Union Pacific and the Southern Pacific to determine which company would operate over which part of the line and how it would be integrated into the system.

One aspect of this that was kind of interesting was the fact that neither the Union Pacific nor the Southern Pacific wanted to have any part of the passenger operations of the Portland Traction Company. They only wanted the freight operations. The passenger operations had had a rather checkered history. The streetcars and city buses here in Portland had been the subject of several lawsuits with the State Public Utility Commissioner, and the trunk line railroads didn't want to have any part of that, so part of our negotiation was to be sure that we were free of any obligation so far as the city passenger service was concerned.

Just as an illustration of the type of problems – the traction company had originally had streetcar lines which served Portland and part of them came across the Hawthorne Bridge. At one point the city wanted to get rid of the streetcar lines and they forbade the operation of the streetcar lines on one of the downtown streets, and the county, which operated the Hawthorne Bridge, forbade the operation of the streetcars across the Hawthorne Bridge, which pretty well put an end to the streetcar service and forced the traction company into using buses instead of streetcars.

Of course, many years later when the so-called light rail trend developed, the successor to the traction company on the passenger service has gone back to what are essentially the old streetcars that the city and the county tried so hard to get rid of at one time.

Anyway, this was a chapter that the trunk line railroads did not want to get involved with, so we negotiated only for the freight lines and expressly excluded the passenger service.

TS: When that occurred, was that the time when what I will call the inter-urban service out past Waverley Country Club to Milwaukie ceased to provide passenger service?

KESTER: I think it was about that same period. I am fuzzy on my dates. There used to be an inter-urban line to Oregon City that went through Waverley Golf Course and after the passenger service was terminated, Waverley took over what had been the right-of-way of the tracks through there, which effectively severed the line so it could never be reinstated again, at least economically.

There was a lot of interest shown from time to time in reinstating that line, but it was always faced with the problem that it could no longer go through Waverley because that part of the property had been sold to Waverley, so they couldn't have a continuous line without trying to condemn it which would have been very expensive, going through a fancy golf course.

TS: That was part of my recollection. I can remember how pleased Waverley was when they finally avoided having the inter-urban traffic going through their golf course. I couldn't remember whether that was the same era that you're talking about now, but undoubtedly it was.

KESTER: There are quite a few reported decisions in the Oregon Supreme Court reports involving the controversy between the traction company and the State Public Utility Commissioner. I think Howard Morgan was Commissioner for most of that time, and several of the cases were by him or against him, and at one point I think the Commissioner had ordered the company to reinstitute passenger service and the company have refused to do so, and there was an enforcement proceeding brought to enforce the order of the Public Utility Commissioner, and it involved some very interesting legal theories as to whether, if an administrative order was unconstitutional or violative of due process, whether you could refuse to obey it or whether you had to obey it and take the consequences and then try to reverse it after the violation, and I think the Supreme Court

came out with some decisions that were not entirely consistent on the point, but I don't have those very well in mind at the moment. It was an interesting chapter of Oregon jurisprudence anyway.

**[End of Tape 3, Side 2]**

**Tape 4, Side 1**  
**1992 April 14**

TS: This is an oral interview of Randall B. Kester taken by Tom Stoel on April 14, 1992.

KESTER: I think we were just starting to talk about the Montgomery Ward case. That was a case that resulted from a labor dispute that Montgomery Ward had here in Portland. Its employees were on strike and set up picket lines on the railroad spur tracks which served the Wards plant and also the surrounding streets and the various common carriers that served the plant, the railroads and truck lines, were not able to serve the plant during the strike because of violence and threats of violence, so that the train crews and truck drivers refused to go through the picket lines. Montgomery Ward brought a suit against all of the railroads and many truck lines, alleging failure to carry out their common carrier duties to provide service. The carriers of course defended, claiming that they were unable to because of the refusal of their crews to go through the picket lines. The case involved many thousands of shipments and Judge Fee at an early stage ruled that each shipment had to be treated separately so it meant that the case was very voluminous and required very extensive preparation and pretrial discovery proceedings.

Judge Fee at an early stage ordered the attorneys involved to spend full time working on the case just as if they were in court on a court pretrial conference, but he excused them to work in their own offices instead of an actual courtroom so the attorneys were in effect sequestered and under court order to work on substantially nothing else during the time they were preparing this case. It went on for several years and naturally imposed quite a burden on the lawyers involved but as a result they developed stipulations on most of the facts which resulted in a pretrial order that was thousands of pages and a couple of feet thick when it was stacked up on a table. As a result, they narrowed the issues for trial down to a very small scope and the actual trial took only a few days instead of several months as had been predicted.



I should say that ultimately Judge Fee held that the carriers were liable but he found damages in such a modest amount that nobody could afford to appeal the case, which was probably what he had in mind in fixing the damages. (128 F. Supp. 475, 520.)

The reason I became involved in it was while this was going on, the National Labor Board held a hearing on the question of whether or not the strike was a result of unfair labor practices on the part of Montgomery Ward and the National Labor Relations Board hearing was being held in the Federal Courthouse just about the time I started to practice. The carriers knew what was coming, so they wanted to have an observer in the courtroom to hear the N.L.R.B. proceedings, but they didn't want to be too conspicuous about it, so they sent me up figuring that nobody would know who I was and I could sit there and listen to the proceedings and report back and be inconspicuous about it. So, I did, and that was my first introduction to the Montgomery Ward case.

Subsequently, when the case against the carriers came on and Mr. Shields was involved, along with attorneys for the other railroads and the truck lines, they used our office library, the Union Pacific office library, as the conference room where most of this work was being carried on, so I was very much aware of the progress of the case and of course Roy told us about it as time went so, so we felt like we were part of it even though Mr. Shields actually handled the actual preparation of the case.

TS: Who represented the plaintiff Montgomery Ward in that case?

KESTER: Stewart Ball, as I recall, out from Chicago. I have forgotten the name of his firm, but he was attorney for Montgomery Ward and he had a retinue of several other lawyers with him, and about that time Wards was having all sorts of other problems. I remember there was something in the news about the chief officer being carried out of his office when there was a takeover of the business pursuant to a court order of some kind. I don't remember the details of that.

TS: I do recall the picture of Sewall Avery being carried out of his office, I think because he refused to agree to some orders of a wartime board, either setting wages or prohibiting certain practices, something of that kind.

KESTER: I think that's right.

Another sidelight of the case – at that time Arno Denecke, who later became a justice of the Oregon Supreme Court, was on the staff of the Montgomery Ward attorneys in Chicago, and he came out here at some point, participating in the early stages of this, and I remember him telling me that one time his car was vandalized where it was parked out by the Montgomery Ward plant, because he was identified as being on the management side. Later on, Arno Denecke practiced law in Portland with the firm that later became what's now the Schwabe firm, and then Arno was on the Oregon Supreme Court.

Another case that I recall as being of some significance that I was involved in was the Japanese exclusion case during World War II, the Yasui case.<sup>4</sup> When the President had issued an Executive Order under which the Commanding General of the West Coast directed that all persons of Japanese ancestry be removed from the coastal areas and put in what amounted to concentration camps in the interior, and there was a collateral order that involved a curfew. I guess that was before the exclusion order.

Anyway, Minoru Yasui was a young Japanese-American lawyer who felt strongly that the exclusion was unconstitutional and to make a test case he deliberately violated the order and had himself arrested and was ultimately charged with violation of the exclusion order. That case came to trial before Judge Fee in the federal court at Portland, and Judge Fee sensed that this would be a cause célèbre for one reason or another, and he appointed a committee of Portland lawyers to be amici curiae and supposedly give the court the benefit of their advice as to what ought to happen.

It happened that I was one of those that was named on the committee of lawyers as amici curiae. I think perhaps I am the only one now living of that group. Judge Solomon,

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<sup>4</sup> The Japanese Exclusion cases, and particularly *U.S. v. Yasui*, were the subject of articles by Thomas Stoel in *Benchmarks* for Fall, 1988 and Winter, 1988, Vols. IV, No. 3 and V, no. 1., and also by Randall Kester in *The First Duty*, pp 186–190

Gus Solomon, was one of them, and several others – I don't now recall who they all were. The case attracted considerable attention and of course eventually went to the Supreme Court of the United States.

In the trial court, Judge Fee held that the order excluding all persons of Japanese ancestry would have been unconstitutional as applied to citizens, but would be valid as applied to enemy aliens. I think on the first point, the unconstitutionality, that the amici curiae felt the same way and thought that would be end of the matter, because Mr. Yasui was an American citizen.

But Judge Fee then surprised everybody by holding that he was not in fact a citizen, that he had given up his citizenship because of some circumstances in his own background, and that he was therefore an alien and he held that Yasui was in violation of the order and imposed a sentence, found him guilty. (48 F. Supp. 40.)

Ultimately, it went to the Supreme Court of the United States, which said that it didn't make any difference, that the order was valid whether it applied to citizens or aliens, and therefore sustained the conviction but, as I recall, remanded it to give the judge permission to correct that part of his opinion that held that the order would have been unconstitutional as applied to citizens. (320 U.S. 115.)

Of course, eventually this case, along with several cases of the same general nature, resulted in a retraction by the federal government, an apology, and admission that the whole proceedings were wrongly motivated and the Congress appropriated some money to pay a rather nominal indemnity to the people or the descendants of the people who had been interned. My participation as amicus curiae was very minor, because the other lawyers who were on the committee were much older and more established, and I was really just a beginner at the time and didn't exert much of an influence on the group, as far as I can recall.

[Tape stops]

KESTER: I guess continuing along the same vein about different cases that seemed of interest at the time, I was involved in what we referred to as the "hop" cases, which involved the crops of hops grown in the Willamette Valley. I think it was in the year 1945. The hop raising in Oregon had been one of the agricultural staples for a long time, particularly in the Willamette Valley area, and there was a long series of cases in the Oregon Supreme Court dealing with controversies over the sale of the hop crops.

The typical pattern was that the hop buyers who were largely representatives of eastern merchants would come out to Oregon in the early season and make contracts with the hop growers to buy their crops at harvest time. Then the buyers would advance money so the farmers would have funds with which to raise the crops and do the necessary cultivation and eventually harvest them and deliver them and have them dried and then delivered to the buyers at the end of the season. If the market happened to go down, of course the hop buyers would try to get out of the contracts, which would usually state a price, and if the market went up, then of course the buyers would be anxious to take the crop, so that the litigation over the duty of the buyers to take the hops at the end of the season was a frequent source of litigation here in Oregon.

In 1945, the hop crop was poor because of mildew because the climatic conditions caused the crop to have more mildew than usual and many of the hop buyers tried to get out of taking the crop on the ground that the hops did not measure up to the standard of quality that the contract required. Mr. Shields had been attorney for many of these hop farmers in his days at Salem, and there had been a lull in this sort of litigation. There hadn't been any problems for a number of years, but when the 1945 crop resulted in many buyers trying to get out of their contracts, many of the farmers came to Roy Shields to help them out. Roy was so occupied with the railroad matters at that time that he couldn't handle it personally, so he asked me to handle it, which I did, and along with Bill Dougherty, who at that time was an associate in the firm, we brought actions or, in several cases, defended actions, where the buyers were suing to get out of the contracts or the growers were suing to enforce the contracts.

There was a series of, I think, four of these cases that came to trial before Judge McColloch in the federal court. They were rather novel because the ultimate question was whether the crops met the standard of quality that the contract required.

The practice was that the crop would be sampled by the buyer taking a sample from each bale of hops. A sample was a chunk of compressed hops about a foot square. Then they would analyze the samples, both chemically and by smelling them, and an experienced grower or buyer presumably could tell what was a good hop just by looking at it and smelling it. They would rumple some of the leaves between their hands and smell it and say, those are good hops or those are not good hops.

Well, representing the crops of that year we had several thousand of these hop samples that became exhibits in the federal court cases and in the trial of the case the various experts were called as witnesses and they would take the samples and they would look at them and rub them and smell them and they would testify that these hops were either good or bad depending on which side they were on. The clerk's office for a number of months was swamped with these hops samples that they had to have custody of and which had a rather pungent odor, and the clerks and their secretaries became quite upset because of this flood of hop samples that were crowding them out of their office space.

Ultimately, Judge McColloch held in favor of the growers on all the cases and they were appealed to the Ninth Circuit which affirmed Judge McColloch and so the growers were vindicated that year. (186 F.2d 849, 858, 862.) They were very pleased with the result and when the season was over and the [cases] were over and the decisions were finally in, they held a community celebration down at this town of Mount Angel in the Willamette Valley and Roy Shields and Bill Dougherty and I were the honored guests at this community celebration where they had a great barbecue and speeches and all, and we were feted as having saved the hop farmers that year. Of course, that was a good deal exaggerated, but anyway it was rather pleasant to have the community grateful for the work that went on.

Another case that involved agriculture was we had a client named Clay Barr who was a farmer who had a contract to operate a farm down in Northern Nevada. I have forgotten just what year it was, but there was a drought that year so that the grain – it was

a grain crop, and they were suffering for lack of water. The owner claimed that our client, who was hired to operate it, hadn't done a good job of running the ranch and that they had lost the crop because of his poor farming practices. Through a succession of assignments, the plaintiff's side was in the hands of Pete Tonkoff, who was an attorney up in Yakima, Washington. Mr. Tonkoff had an ownership interest in the plaintiff's claim for negligent management of the farm. He was handling the case as an attorney and was himself the named plaintiff.

[Tapes stops]

I started to talk about the Tonkoff against Barr, which was a case that involved a claim of poor farming practices on the part of our client. In the course of trying the case, I had to go down to visit the ranch down in Northern Nevada. We took depositions down in Las Vegas of some people who had an interest in the ranch. I remember traveling down there with Pete Tonkoff who was the plaintiff and plaintiff's attorney. It was rather interesting to be traveling with him in the casinos of Las Vegas. He was quite a gambler and I was much impressed, being at that time a very impecunious young lawyer, much impressed by the way that Pete Tonkoff would throw hundred-dollar bills out on the crap table and not seem to care much whether he won or lost.

Anyway, in that case also, Judge McColloch found in favor of the farmer and that was ultimately affirmed by the Ninth Circuit. Judge McColloch had a great deal of sympathy for the farmers' side of things, which I am sure had something to do with his decision.<sup>5</sup>

TS: He had practiced in Klamath Falls for quite a number of years before he became a federal judge, I recall.

KESTER: That's right, and also Judge McColloch was very unhappy about the government's role in some of the wartime litigation – the Oil Pollution Act litigation and

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<sup>5</sup> *Tonkoff v. Barr*, 245 F2d 742 (CA 9, 1957)

various other government cases involving the wartime regulations. Judge McColloch held that most of them were unconstitutional and he refused to enforce them and he generally made things miserable for the U.S. attorneys that had to try to represent the government in those cases. He was very sympathetic to the underdog. [Some of Judge McColloch's decisions on the war-time economic regulation are cited and discussed in *The First Duty*, p. 193]

[Another interesting case that came before Judge McColloch was a selective service case from Klamath Falls. In Klamath Falls there had been a confrontation between the American Legion and some draft resisters, particularly members of the Jehovah's Witnesses. Shortly thereafter the local draft board re-classified one of the Jehovah's Witnesses, who refused the call, and he was prosecuted in Federal Court. I was assigned to defend him, and we attempted to assert as a defense that the draft board had discriminated against him because of his religion. Judge McColloch excluded the testimony [which was later held to be a correct ruling in *Falbo v. U.S.* 320 U.S. 549 (1944)], but he suggested that we apply for a writ of habeas corpus. While I was trying to learn how to prepare such an application, the government dismissed the case, apparently anticipating that Judge McColloch would grant the writ.]

Another case that comes to mind was one of the aluminum fume cases. This was after World War II. Of course, during World War II the aluminum industry sprang up in the Portland area because of the availability of electric power. There were aluminum plants in Vancouver and The Dalles and Troutdale, and the chemistry of it was that in the process of making aluminum there were fluorides carried out from the plant and deposited on the fields nearby the plant and when the cattle grazed on the pastures that had been coated with aluminum fluorides, it made the cattle sick and they lost production and eventually became sick and died. There was a lot of litigation over the aluminum plants.<sup>6</sup> Most of it was against the Reynolds plant in Troutdale.

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<sup>6</sup> Some of the aluminum fume cases are cited and discussed in *The First Duty*, at page 200.

We had one of the cases for the plaintiff, involving Fairview Farms, which was a large dairy operation quite near the Reynolds plant at Troutdale. The owner of Fairview Farms was a man named Charlie Eckleman. He had originally been a client of Allan Hart but because of Allan's connection with Bonneville Power Administration and indirectly with the aluminum industry as a customer of Bonneville Power, he was faced with a conflict of interest, so he couldn't handle it, so Charlie Eckleman came to Bob Maguire to represent Fairview Farms in that litigation. I worked with Maguire and some of the other people in the office who worked on the cases were Bill Dougherty and Al Hampson.

Our case was eventually settled but not until we had gone through a lot of pre-trial discovery – actually had started the trial on I believe before the case was actually settled. There were a number of other cases, by other plaintiff's that went to trial and some of them were ultimately appealed and are in the – [emotionally] in the Oregon reports, although some of them are federal cases, but ours never got into the published report because we settled the case. We got a fairly substantial settlement.

[In the oral interview, I said that the Fairview Farms case was settled before trial. This statement was incorrect, probably because the case came on for trial before Judge William East, after I had been appointed to the Supreme Court, and I therefore had no recollection of that part of the story. The case was tried by Bob Maguire and Al Hampson, and it continued for 41 trial days. Judge East segregated the issues of liability and damages, and on liability he held in favor of Fairview Farms and against Reynolds Metals on the theory of trespass; and he left open the amount of damages for later determination. *Fairview Farms Inc. v. Reynolds Metals Co.*, 176 F. Supp. 178 (D.C. Or., 1959). It was apparently after that decision that the case was settled.] Reynolds at that time was represented by Fred Yerke of the firm which is now the Miller, Nash firm, and Fred of course died tragically here a few years ago in an automobile accident.

Another case that I recall that was of considerable interest was *Howell* against *Deady*.<sup>7</sup> This resulted from the will of Lucy Deady, who was the widow of Judge Deady of

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<sup>7</sup> Judge Fee rendered three separate opinions in *Howell v. Deady*, 48 F. Supp.104 D.C. Or. 1939), 48 F. Supp. 116 (D.C.Or. 1941). 48 F.Supp. 123 (D.C.Or. 1941). They are discussed in *The First Duty*, at p. 203-4.



the early Territorial federal court here in Oregon. Judge Deady was the federal judge here for a long time, and a very prominent figure in Oregon's history. His widow had left a will which disposed of a piece of downtown Portland property. The will had used some language, I'm a little fuzzy now on the details, but as I recall, it used the expression if one of the beneficiaries died without issue then a certain disposition would be made of the property and the question came up as to what was meant by the term dying without issue, which goes back into early English common law. There was a lot of old case law with respect to differing interpretations of that phrase.

The case came before Judge Fee. We represented the defendant I believe it was, and Nick Jaureguy represented the plaintiff. We argued at length over the meaning of this rather abstruse phrase. Judge Fee eventually held in our favor and the case was appealed to the Ninth Circuit. It was going to be the first case that I had ever argued in the Ninth Circuit Court of Appeals. I made what I thought was a brilliant argument and then the client settled the case before we had a decision from the Court of Appeals, so I never found out whether it was right or wrong, which was kind of a disappointment.

Anyway, it was one of the few cases where the federal courts would get involved in the construction of a will. I mentioned earlier the Jackson will case, where the court held that the federal court had no jurisdiction over a will contest. In this case, I believe it was brought on the basis of diversity of citizenship jurisdiction, and it just involved the interpretation of the will, and there was no question of jurisdiction on this one.

I don't know how far to go with this discussion of particular cases, but one group of particular cases comes to mind that was quite interesting, involving school textbooks and so on, involving the separation of church and state problem.

**[End of Tape 4, Side 1]**

**Tape 4, Side 2****1992 April 14**

KESTER: I was starting to talk about the school textbook cases. I believe it was in 1941 the Legislature in Oregon passed the law that gave free textbooks to students of all schools whether public or private, so long as they were standard schools, met certain specifications. Of course, this implicated the question of whether parochial schools were entitled to textbooks at public expense. A group first filed a referendum seeking to refer the 1941 statute to a vote of the people. We were asked to challenge the ballot title which was on the referendum seeking to repeal that statute. I believe we were brought into it at the request of the Catholic Diocese here. Leo Smith, who had at one time been an associate with Bob Maguire and was a very good friend of the firm, was a strong Catholic and assisted the archdiocese in many ways, and I suppose it was he who brought us into the case. He got Bob Maguire, and Bob Maguire in turn got me to work on the case. We filed an objection to the ballot title claiming that the ballot title was misleading because it would have unduly prejudiced the voters against the act that they wanted to repeal.

We filed an appeal in the Supreme Court of Oregon and were successful in that the Supreme Court rewrote the ballot title to largely eliminate the matter that we had objected to. The court for some reason did not write an opinion on the matter. It just rewrote the title and certified the new title, but never published an opinion. I was always a little disappointed, because that was the first case, I ever handled in the State Supreme Court and they didn't publish an opinion on it. Anyway, I believe the referendum failed, so the law continued on the books and the parochial schools were allowed the use of the textbooks.

After several years, a suit was brought challenging that. It was brought in Oregon City, in Clackamas County, by a group suing as taxpayers, objecting to the use of public funds for the purchase of textbooks that would be used by students of parochial schools. I believe the case was named Dickman against the school district at Oregon City. We were brought in to defend that case. Actually, there was an intervenor. The case was brought against the school district and I think Paul Biggs, who was a brother of Hugh Biggs and

who practiced in Oregon City, was the attorney for the school district, but there were some intervenors who again I suppose were representing the Catholic Church although it didn't appear that way on the record. We were brought in as attorneys for the intervenors to defend the free textbooks. We handled the matter. It ultimately got to the State Supreme Court.

I believe it was Justice O'Connell who wrote the opinion which held that the state law violated the state constitution. We were somewhat taken aback because in handling the matter, both in the trial court and the Supreme Court, we had relied largely on federal cases interpreting the federal provision on freedom of religion, and there were some pretty strong United States Supreme Court cases sustaining our position at that time that this was permissible. But Justice O'Connell chose to go first to the state constitution, which of course is proper constitutional procedure, and he held that the state constitution was more restrictive than the federal and, even though this would have been valid under the federal constitution, it was not valid under the state constitution. So, we lost that case. [*Dickman v. School District*, 232 Or. 238 366 P2d 533 (1962).]

One of the cases that we were relying on in the textbook case was a case from New York, which I believe was *Zorach against Clauson*, which involved released time, not free textbooks, but a state statute which allowed students to be excused from public school to attend parochial school for religious reasons. That had been I believe sustained by the New York Court of Appeals, and it was on certiorari to the Supreme Court of the United States. A number of states filed briefs as amicus curiae supporting the New York statute. I believe George Neuner was then the Oregon Attorney General and we were asked to prepare and file a brief with George Neuner on behalf of the State of Oregon, which we did, and it was Roy Shields largely who was the guiding spirit in the writing of that brief. The Supreme Court of the United States eventually sustained the New York statute, so we happened to be on the right side of that one (343 U.S. 306), even though we were on the wrong side of the Oregon case.

[Tape stops]

Another case that comes to mind, although I don't remember the details of it very well, it was just before World War II, involving construction of airplanes out at Bernard's Airport out in Beaverton, which is now the Beaverton Mall, but at one stage it was an airport, when it was largely open space out there. There was a group of young pilots who were experimenting with building their own airplanes. They had developed a sort of a basket framework made out of plywood that they thought had a great future for small privately owned airplanes. The structure had the advantage that it was kind of flexible, and if it crashed it might bend but it wouldn't necessarily collapse. They were building these plywood basket-frame airplanes on an experimental basis and about that time the war came along and the federal government cracked down on flying because of the possible security problems, I guess.

Anyway, the regulation at that time was that in order to get a license for a home-built aircraft, you had to pass a crash worthy test which meant that you had to build one and crash it and see how well it held up before they would let you build one that would actually be used. Most of these pilots were not rich enough to be able to build a plane just for the purpose of crashing it to see how well it held up, and they wanted to challenge this federal regulation. They came to Don Grant, who was an attorney at that time in our office.

We represented, I think it was called the Oregon Pilots Association, which brought a lawsuit challenging the federal regulation which required this additional building and crashing an airplane before getting a license to fly. Then just about that time the war came long and with the increased security risk and most of the pilots were taken into the service anyway, so the case just sort of disappeared and never went anywhere. But it raised some interesting questions on the scope of federal regulation. Of course, at that time federal regulation wasn't as pervasive as it was now, so no telling what the result would have been had the case actually proceeded.

Another case that was of interest in our practice because we represented a lot of insurance companies and had a lot of insurance defense work was a case involving an interpretation of an insurance policy in a situation where there were more than one policy

involved with provisions for excess coverage that were inconsistent with each other. I represented the Oregon Automobile Insurance Company against the U.S. Fidelity and Guaranty Company in a case where there were two insurance policies, both potentially applicable to the accident, but each having an excess clause which made it excess over the other one, so that the two policies were mutually exclusive if you applied them literally. This resulted in an opinion in the federal court.

I believe it was Judge Solomon at that time who held that since the two policies were mutually exclusive, he would not give effect to either one but would require the two to prorate on the basis of their applicable policy limits. That was later followed by the Oregon Supreme Court in what became known as the Lamb Weston case and gave rise to what has been generally referred to in the trade as the Lamb Weston rule requiring two insurance policies to prorate when, by their own terms, each would have been excess over the other. That has apparently been a minority rule around the country so that many insurance companies now have entered into an agreement between themselves to bring about a contrary result. That all started with the case of Oregon Auto against U.S. F&G. (195 F.2d 958.)

I think that maybe it's enough with this reminiscence on...

[Tape stops]

One of the things that you have asked me about is recollections of other lawyers in the earlier days, particular ones that might have been colorful characters and of course, there were a lot of them at that time. Bill Lord is one that we all think of. He was the son of the former Governor of the state. He had a great plaintiff's practice bringing personal injury cases for – many of them injured workers or automobile cases. He probably had the greatest volume of personal injury cases at that time We were defending for a number of insurance companies at that time, we had a lot of litigation with Bill Lord and I used to have to go to his office to serve papers. He always had a waiting room full of hangers on. His practice was to help support the injured plaintiff's while they were off work by doling out

living money from time to time and they would hang around waiting for their hand-outs. A lot of them with nothing else to do except pass the time. The room was always full of people for that reason or other reasons. It was quite an experience to go to his office.

For a time, he was a partner with Arthur Moulton, who was another colorful plaintiff's lawyer. I had occasion to try a few cases against Arthur Moulton, both railroad and automobile cases. He had a very dignified somewhat pompous attitude in court. I think I got a little advantage at times for being young and not experienced and probably the jury felt sorry for me up against a white-haired distinguished person like Arthur Moulton was.

Another one that comes to mind was Arthur Prague, who had a speech impediment and used to play it up before a jury and I think deliberately emphasizing his stuttering. The jury would be hanging on his every word waiting for the next word to come out. He had very good results as a plaintiff's lawyer.

Another one, a defense lawyer who made the most of his appearance was [Frank Sin?] who was an older lawyer and used to put on the appearance of being bumbling, inarticulate and unable to do things right. But actually, he was an extremely shrewd and skillful trial lawyer. It was all part of an act to get the juries sympathy which it did. He would come to court with his papers wrapped in a piece of brown wrapping paper instead on in a brief case. He would stumble over cuspidor's and generally act like he didn't know what he was doing, but he had excellent results, and was one of the best trial lawyers of the time. For a while he was a partner with [Lou Reckon?] who was also a very skillful trial lawyer. Who didn't maintain the act, I think [Frank Sin?] did.

Another one that comes to mind was Leo Levenson, who was very scholarly and skillful appellate lawyer. Leo was one of the best legal scholars in the community at the time. I wouldn't put him in the class with Roy Sheilds or Hall Lusk, but he was certainly was an excellent legal scholar and he handled a lot of appeals for other people. He did very well as an appellate lawyer.

I used to do a lot of the appellate work for the firm myself and had pretty fair results on the appeal of cases, that I'm sure stood me in good stead when I actually became an appellate judge. Maybe I ought to mention that, I think I covered enough of the early days.

In 1956, I was president of the Multnomah Bar Association, and Justice Walter Tooze, who was on the supreme court at the time, died in December if I recall of 1956. As President of the Multnomah Bar it fell to me to write to the governor and offer the services of the Multnomah Bar if he wanted a committee to make recommendations. I remember that after sending that letter I got a phone call from Hugh Barzee who was then council to the governor who was Elmo Smith at the time. Hugh Barzee called and said that he had the letter that I had written, and said would you be interested in that? Of course, I was dumb founded, and said of course, I would. Then he said that he would get back to me and within a day or so I was offered the position on the state Supreme court. So, I accepted it and severed my relationship with the firm and went to Salem. they told me that perhaps I was the youngest judge to have served on the State Supreme Court. I'm not sure that was correct, but that's what some people said.

TS: What was your age then? Let's see 41, 40?

KESTER: Well, in 1956, I'd be 40. I suspect that there might have been younger ones certainly when Ted Goodwin went on, he went on at a younger age, but he went on later on. Of course, it was a great step for a young lawyer and I was pleased and very happy about it. Unfortunately, they didn't pay very much at the time. As I recall the pay was \$13,500 a year, which I thought I could get by on, but I had three children, I'm hoping would go to college. Later it turned out that one of our daughters had serious problems and it became much more expensive than I can afford so I didn't stay. In March of 1958, when Roy Shields retired as general solicitor of Union Pacific. I was offered the position to follow him as general solicitor, I accepted that and resigned from the Oregon Supreme Court as of March 1, 1958.

TS: Who was the Chief Justice at that time?

KESTER: Well, let's see, Bill Perry was Chief part of the time, I'm not certain, but I can check that out very quickly. But the Chief position sort of rotated in those days. I think during most of the time I was there I think Bill Perry was the Chief Justice.

A lot of people have asked me why I left and how I'd liked it and all that, my standard answer is that I liked it very well and wouldn't have been bad to stay if they just would have paid me enough that would allow me to meet my family obligation. But when this other job opened up it was an offer that I couldn't refuse.

The experience on the State Supreme Court was of course, extremely interesting and valuable. I was allowed to attend a seminar for appellate judges, held back in New York University Law School. that first summer Bill McCallister, who was also a new Justice at that time and I were sent to that seminar it was very stimulating to be with other appellate judges from around the country. As I recall, Warren Berger, who later became Chief Justice of the Supreme Court of the United States, was on the faculty of the seminar at that time. That was interesting. He was then a federal district Judge I believe. I also served on the interim committee on judicial administration. About that time the legislature was considering a general revision of the court structure. The interim committee was created with both legislators and lawyers and judges. I believe Gunther Krause was the chairman of the overall committee. I was made chairman of a sub-committee on the appellate courts. We gave rather intensive consideration into the possibility in setting up intermediate appellate court at that time. Finally came to the conclusions that it was not warranted. So, we recommended against having an intermediate appellate court. But later on, of course, the time came when an intermediate court was felt necessary so it was created. Our executive secretary at that time was Geoff Hazard. who I believe had been with your office?

TS: He had been, yes.

KESTER: Who now went from there into teaching and later ended up Dean of the Yale Law School and now I think he is the director of the American Law Institute, isn't he?



TS: I think he is still at Yale Law School, but he may also be doing work for the American Law Institute and at Yale currently. He comes as the national expert on legal ethics as you may have read. He's published one or two books in that field and is referred to constantly as chief authority in that area.

KESTER: Yes, that's right

TS: He was Columbia Law School

KESTER: I think it's time to take a break.

TS: I'm sorry to say I do have to...

KESTER: That's alright

**[End of Tape 4, Side 2]**

**Tape 5, Side 1**  
**1992 April 14**

TS: This is tape five side one interview with Randall B. Kester, by Tom Stoel on April 14, 1992.

KESTER: I will assume for the time being that we can incorporate by reference the written history of our firm so that I don't have to repeat that or try to re-dictate it. [I have prepared a brief outline of the history of our firm, which is a summary of portions of a longer work that we hope to publish someday. A copy is enclosed, which could be filed with the transcript. The longer work contains some detail about a number of cases we handled that were of some significance, which are not included in the outline,] but thinking about it after our last interview, there is at least one other case that I think was of some interest prior to the time that I went on the Supreme Court.

That was the case of *State ex rel Madden v. Crawford*, which came out of the effort of the courts and the legislature to relieve a backlog of trial work that the circuit courts had. The legislature passed a law allowing the Supreme Court to designate as judges pro tem some of the sitting circuit judges, but there was considerable doubt as to the propriety of that because of the state constitutional provision about electing judges to the office to which they were to serve. So, everybody wanted a test case brought to see whether the pro tem act was constitutional. Roy Shields was asked to bring the case and he had me working with him on it and we filed a *quo warranto* proceeding, which was rather novel. It's not a customary writ, but it was recognized in the state constitution, so we filed a *quo warranto* case to challenge the right of Judge Crawford to sit as a pro tem judge on the Supreme Court. Gunther Krause represented the state in defending the case, although it was a *State ex rel* case — we brought it in the name of the state, but Gunther was defending the legislative act and the State Bar had Charlie Spackman as an amicus curia to represent the views of the Bar. To make a long story short, the Supreme Court eventually held that the act providing for pro tem judges was unconstitutional, so that resulted then in a

constitutional amendment, which allowed the use of pro tem judges on the Supreme Court. That case appears in 207 Or. 76.

There were other cases that were of interest, but probably not worth taking up tape on. You asked me once about different judges before whom I'd appeared and what my impressions were of them. Over some 50 years, 52 years, it's a little hard to recall all of them. Some of the ones that stick in my mind in the Circuit Court for Multnomah County were Charles Redding, who was presiding judge of the Circuit Court for quite a while; Jim Crawford, Frank Lonergan, Martin Hopkins, Alfred Dobson and later Gene Oppenheimer and Paul Harris, all of whom had considerable experience on the Circuit Court. Gene Oppenheimer and Paul Harris, particularly, had been strong trial lawyers before they went on the circuit bench. Gene Oppenheimer mostly on the defense of cases and Paul Harris mostly on the plaintiffs' side.

On the Supreme Court, the ones that stick in my mind most significantly were Hall Lusk, whom I mentioned previously, who in my judgment was one of the greatest legal scholars we've ever had around here. George Rossman, who had a penchant for writing very long, detailed opinions, particularly on factual matters. It was almost in some ways a joke amongst the other judges that when Judge Rossman got hold of a case, he would wrestle around with the facts so much that the opinion would go on for page after page with sometimes facts that were interesting but not particularly necessary to the decision. Judge Jim Brand was another one that had definite characteristics. He had a tendency to write a treatise on whatever subject it happened to be and instead of sticking solely to the precise point of the case he would endeavor to lay out all the law on the subject, even some that wasn't necessary to the decision. So sometimes his opinions involved dictum that later other cases then had to distinguish away. Notwithstanding all their idiosyncrasies, the Supreme Court when I was there was a very cordial and collegial bunch and worked closely and very well together. There were not very many dissenting opinions.

One of the opinions that I wrote that was more of a dissent, although it was actually a concurrence in the result was in an insurance case called *Comer v. World Insurance [Co.]*, 212 Or. 105, 318 P2d 916 (1957), overruled in *Bunn v. Monarch Life Ins. Co.*, 257 Or. 409,

478 P2d 363 (1971).] where I differed rather drastically with Judge Rossman on the interpretation of a part of the insurance statutes. We both came to the same conclusion, but for quite different reasons. Ultimately the legislature amended the law to adopt the version which I was advocating in my concurring opinion in that case.

On the federal court, the judges that I appeared before mostly were Judge Fee, who was presiding judge for most of that time, and Judge Claude McCulloch and Gus Solomon. Judge Fee, I had great respect for. He was a very stern martinet in the courtroom, but he was a very kindly person off the bench, and I got to be rather well acquainted with him and had a great deal of friendly feeling for him in addition to respect as a judge.

Judge Fee's daughter, Louise, was at Whitman College with my friend Bob Graham, whom I mentioned earlier, and they were dating each other for a while. One summer I remember that Bob and Louise and my wife and I took a vacation trip along the Washington coast, at the conclusion of which we met in Judge Fee's home and had dinner with him and his then wife, who was Judge Fee's first wife who died later. We had a very pleasant evening visiting with Judge Fee and I got to like him very well.

He was also quite a scholar and had a tendency to want to research every point down to the very earliest beginnings. For example, his opinion in the Yasui case that we mentioned earlier went to great lengths to delve into the history of the executive power and the military power and he wrote pretty much the last word on the subject, although the Supreme Court of the U.S. avoided it all by holding that Judge Fee then made much of his discussion irrelevant by holding that Yasui had forfeited his citizenship. But he was a great judge and later went on to Ninth Circuit.

TS: Was Fee also a Columbia law graduate?

KESTER: Yes, Fee was a Columbia graduate. He had been in the First World War; in fact, he was an aviator in the first world war and many people thought that his stern manner of running his courtroom was in some way influenced by his military background. Whether

that was true or not, I don't know, but he did have — he struck fear into the hearts of many people who weren't accustomed to appearing in his court.

Judge McCulloch, whom I mentioned, had been a lawyer up in eastern Oregon, in Baker, I believe, and then down in Klamath Falls. He was a great one for sympathizing with the underdog in any particular case. I've mentioned some of the cases I had before him where he held in favor of the farmers on disputed questions of fact and, while I think the decisions were entirely correct, they may have been influenced by his sympathy for the poor farmers against the big eastern financier. Judge McCulloch didn't care for the government's position in many of the cases that came before him during World War II, particularly cases such as enforcement of Oil Pollution Act. regulations, which Judge McCulloch thought were unconstitutional, particularly when they provided that the only appeal from actions of the O.P.A. had to go to Washington, D.C., before a special appeals court set up for that purpose, but which was out of the reach of most ordinary people. So, Judge McCulloch felt that this was an unjustified hardship on the public, and wherever he had a chance he seemed to hold against the government.<sup>8</sup>

In fact, he made life pretty tough for the O.P.A. attorneys because he insisted that the government had to appear in his court through the United States attorney. He wouldn't recognize the attorneys for the Office of Price Administration, and he required that each time they came into court they have a deputy United State attorney with them, which, of course, was quite a burden on the US attorney's office, because the volume of litigation involving the O.P.A. regulations was very great.

Judge Solomon came on the court with a controversial background. He had been a strong civil rights lawyer in his private practice and some people accused him of being a communist and tried to defeat his nomination on that ground. But he also had a lot of support from other Portland lawyers, some of whom went back to Washington to testify in his favor. I believe Lloyd Davies was one of those.

TS: That's right.

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<sup>8</sup> See page 57, supra.

KESTER: And, of course, he was confirmed and served probably longer than any other district judge, certainly in this district, before he retired and died somewhat recently. By coincidence, it just happened that after he was appointed to the bench, I had tried the first case before him that he tried when he went on the federal bench. It was a railroad case involving an indemnity agreement, involving the Bridal Veil Lumber Company. The Union Pacific had sued the Bridal Veil Lumber Company for indemnity under a contract to recover an amount that the UP had paid to settle a personal injury case. Judge Solomon remarked during one of the recesses that this was the first case that he tried when he went on the bench. He had a little difficulty with instructing the jury and eventually we reversed the decision and the decision of the Court of Appeals in that case became somewhat of a landmark on that particular subject. [*Union Pacific R.R. v. Bridal Veil Lumber Co.*, 219 F2d 825 (CA 9, 1952).] Let me stop and get my wits together again.

[Tape stops]

You asked me about handling appellate work in the office. I think I would say that during my early years of practice that I did most of the appellate work for our firm. Up until the time I went on the Supreme Court I had pretty fair success with appeals and enjoyed the work. Many times, cases that were tried by other lawyers in the firm came to me to handle on appeal. In addition to the fact that when I was trying cases myself that resulted in appeals, I usually handled those appeals also. So, I had quite a good deal of appellate experience before going on the Supreme Court, which I am sure helped me with the work on the Supreme Court.

And then after leaving the Supreme Court when I went with Union Pacific Railroad there were several cases in which I at least had a hand in the writing of the briefs or arguing the case on appeal. After I retired from the Union Pacific Railroad and went back with the firm, then I handled substantially all the appellate work for a couple of years. That would have been along about 1981-82, until Tom Brown joined the firm. Tom had been a clerk for

one of the Court of Appeals judges and had quite a knack for appellate work, and since he came, he's been doing most of the appellate work.

I guess I'd better change horses here.

[Tape stops]

We were talking about handling the appellate work for the firm. When I say doing the appellate work, I generally refer to both writing the briefs and arguing the appeal. Mostly the person who writes the brief also argues the case on appeal. I think I was saying that after I retired from the Union Pacific and came back with the firm, I handled substantially all of the appellate work for the firm for the first couple of years, late 1981 and 82. Then Tom Brown joined the firm and he had been a very able appellate lawyer and has been doing most of it since he came. I probably should back up a little bit, without being able to be entirely chronological and talk about some of the other activities that I was involved in besides the straight practice of law.

I served on quite a few Bar committees. One year I was treasurer of the state bar. That was at the time when the treasurer was not customarily a member of the Board of Governors, but was sort of an honorary position with no real duties because the executive director of the Bar actually handled all the books, but the treasurer had to sign checks every now and then, so I served as treasurer one year. But I was on a number of committees and helped start the continuing legal education program for the state bar, which was really fathered by Herb Hardy.

Right after World War II or when World War II was winding down, it was felt that the returning lawyers who had been in the service should have some opportunity to catch up on what had happened while they were gone, so the Multnomah Bar sponsored a series of refresher courses. At the time I was teaching at the Northwestern College of Law in downtown Portland, when it was purely a night law school, before it became part of Lewis & Clark College. I was teaching two subjects, real property and insurance at the time and when the program of refresher courses started, Herb Hardy was chairman of the group

and he got me to give some lectures on the law of real property. That was the sort of the beginning of the Continuing Legal Education program which was later taken over by the Oregon State Bar. I believe in the fall of 1949 we had the first of the Continuing Legal Education programs at the state bar convention.<sup>9</sup> I believe you, Tom, gave a talk at that time on something to do with taxes.

TS: I think that's right. I think Ralph Bailey appeared with me.

KESTER: And Bob Leedy gave a talk on law office management and there were some others. Judge Crawford gave a talk on procedure and I talked on wrongful death cases. The program was very well received and so the following spring the state bar put on another session of purely C.L.E. programs, without a state bar convention along with it. And then again that fall, and since then the state bar has had continuing legal education programs twice a year continuously and it has gotten into quite a publication program of publishing books to go along with the talks, which had become very useful to the state bar lawyers. I was chairman of the C.L.E. committee for a couple of years. In fact, I guess I was on the committee until I went on the Supreme Court. I also was on several other bar committees.

One of those that was most interesting was the constitutional revision committee. There was a proposal to substantially rewrite the Oregon constitution and a commission had proposed a new constitution which was to be voted on by the people. The state bar appointed a committee to analyze the proposed constitution making a report comparing it with the old one and offering comments on it. Walter Evans and I were co-chairmen of that committee. We produced a rather extensive report, don't know that it was of much use to the public, which voted down the proposed revision anyway, but at least it's on the shelf for anybody that might want to refer to it at any time. I was on the committees on procedure and practice and judicial administration and federal courts.

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<sup>9</sup> The beginning of the Oregon State Bar Continuing Legal Education program was the subject of an article I wrote for the Litigation Journal, of the OSB Litigation Section, Vol. II, No. 4, copy attached.



I should mention that while I was on the continuing legal education committee, we put on a program entitled "A Day in the Federal Court." It was intended to be a description of what typically happened on a Monday morning in federal court when Judge Fee would call the calendar and have the attorneys present reporting on the status of the cases and having motion arguments and pretrial conferences and so on. We put together a script with a number of illustrative examples of what happens. Judge Fee liked it so well that he had us put in on again at the Ninth Circuit Judicial Conference and again at the National Judicial Conference, which was held over at Yellowstone Park. We also put it on at the Interstate Bar Conference, conference of representatives from the western bar associations. It got quite a bit of notoriety. There was some humor in it, but mostly it was a serious attempt to describe federal practice to lawyers who were not particularly familiar with it.

I also was a delegate to the Ninth Circuit Judicial Conference and attended that for a number of years and for a while was chairman of the lawyers' committee of the Ninth Circuit Judicial Conference, which was given the opportunity to put on a part of the program each year to supposedly point out to the federal judges some of what the lawyers who practiced in the federal courts were thinking about federal procedure. Some of the things we got involved in were the debate about whether complaints should state a cause of action, which had been taken out by the federal rules that were adopted in 1936 and various other subjects that were controversial over quite a period of time. Later on, Manley Strayer, I believe, was chairman of that group and he carried on for quite a while.

Then I was involved in the Chamber of Commerce. While I was with the Union Pacific Railroad, I was sort of a local spokesman for the Union Pacific and I suppose it was for that reason that I was put on the Board of Directors of the Chamber of Commerce and served as attorney for the Chamber for several years and finally was on the board and became president of the Chamber and the following year Chairman of the Board. That was a rather novel experience for me, because I hadn't really taken much part in the business activities of the community prior to that time, but naturally had to do as an officer of the Chamber.

I also got involved in City Club work and served two different times on the Board of the City Club and the second time became vice president and then president. As vice president, I was in charge of the research board, which had responsibility of supervising the research projects of the City Club. As president, I had to preside over the weekly meetings of the City Club, which I found very interesting and am still quite interested in the City Club activities, although I don't take as much part in them as I used to.

I also served on a number of other boards, such as the United Good Neighbors, which was the predecessor of the present United Way. I was on the board of the Oregon Symphony for I think six years and on the board of the Oregon Museum of Science and Industry and on the board what was then called the Portland Zoological Society, which I guess is out of business now, sort of followed by the Friends of the Washington Park Zoo.

That got started because in 1969, I believe it was, we had the centennial of Oregon's, correction, 1959, the centennial of Oregon's admission to the union and Portland wanted to put on a celebration so they had an exposition out in North Portland.

At the time I was with the Union Pacific Railroad and we were approached to help in financing the construction of a small-scale railroad at the fairgrounds for this state centennial celebration. It was a subject of some controversy within the railroad industry, because the railroads had not been very active in public relations work before that, but largely through the efforts of Jack Jones, who was then the manager of the Terminal Company, which was owned by the Trunk Line Railroads, Jack Jones was a very enthusiastic supporter of the idea of building a model railroad and with a lot of volunteer help from his staff at the Terminal Company, the railroads finally agreed to put up some money, with which they were able to build the model railroad out at North Portland.

After the centennial exhibition was over with, that railroad was moved up to the zoo up in Washington Park and reinstalled up there and became a part of the zoo operation. I guess it was probably for that reason that I was put on the board of the zoological society, which was then the civilian support arm for the city zoo. The zoological society actually had the contract to operate the zoo. Later on, the city actually took over the operation of the zoo and eventually became part of Metro. For a while I served on the board of the

zoological society, which was involved in the operation of the zoo, as well as the railroad that was a part of it.

[I was also involved in the beginning of what later became the World Forestry Center. Some of the lumber industry wanted to start a center to showcase the lumber industry, and since they were major shippers on the railroads, they approached the railroads for a donation. The railroads at that time were not greatly involved in civic activities, although the Union Pacific Foundation, which I mentioned earlier, was a start in that direction. The matter was referred to me, since I was ex-officio chairman of the Oregon Railroad Association, although that organization was largely for legislative purposes. It took some persuasion, but eventually the railroads made a contribution to help the project get started, and the center later expanded its mission to more than just good will for the lumber industry.]

[While on the subject of civic activities, I should mention that I served on the Board of Trustees for Willamette University for, I think, 21 years, and during that time was also Willamette's representative on the Board of Oregon Independent Colleges Foundation, which coordinated certain fund-raising activities and distribution for the private colleges in Oregon. In 1987, in connection with the 50th anniversary of our college class, I was given the Willamette Alumni Citation. In 1991 I received the Multnomah Bar Association Professionalism Award; and in 1992 I received the Distinguished Service Award of the Public Utility Section of the Oregon State Bar.]

I suppose I should mention some of my outdoor activities.

TS: I think that would be good.

KESTER: I had always been interested in the outdoors and mountains and rivers and nature study and so on. I got started mountain climbing with the Mazamas, which is a mountaineering organization, and held various committee positions there and finally became president of the Mazamas. Also, about the same time I was active in the Mt. Hood Ski Patrol and became president of the Mt. Hood Ski Patrol and a member of the National

Ski Patrol. This was during the period of World War II and most of the skiers and mountain climbers had gone into the service. As I mentioned earlier, I didn't go into the service, was one of those left behind. Since many of the best skiers were gone, some of us who were not as good technically as skiers were pressed into service to do some of the work that may have been beyond our real abilities as skiers, but we managed to carry on anyway.

Out of that experience came the Mountain Rescue Council. There had been various attempts to centralize the rescue activities of climbing parties that got into trouble. Initially there was what they called a Central Mountain Rescue Committee, which was made up of representatives of the different outdoor clubs, the Mazamas, and the Trails Club and so on. But it had no continuous organization and after an experience on Mt. Jefferson when a climber was killed, his family put up a little money to help start a more formal organization to handle mountain rescue activities.

[I also earned the Mazamas' 16-peak climbing award, for climbing the principal Cascade peaks, their 15-point leadership award, for having led a certain number of climbs, and I received the Parker Cup which was for outstanding service to the club. I was also invited to and did join the Wy'east Climbers, which is a small, and somewhat exclusive, club of experienced mountaineers.]

**[End of Tape 5, Side 1]**

**Tape 5, Side 2****1992 April 14**

KESTER: We were just talking about the formation of the mountain rescue council. The family of the climber who had been killed on Mt. Jefferson in a climbing accident put up some money for the purpose of helping to fund an organization to take charge of rescue activities and I was involved in that organization along with several others, Hank Lewis, Jim Simmons, John Biewiener, Dick Pooley and others and we formed the Mountain Rescue and Safety Council of Oregon, which was set up to coordinate and assist in rescues in the mountain areas. It paralleled a similar organization in the state of Washington, Mountain Rescue Association I believed they called theirs, and for a number of years this operated pretty well with lists of experienced people who could be called on when it was necessary to mount a rescue attempt. Later on, that organization was merged into another organization which still operates, and which is currently called on by the Forest Service and the county sheriffs when they need experienced mountain climbers to conduct rescue activities.

TS: Was that the Morley boy, that family? I recall that.

KESTER: Yes. More recently I have been involved in the Pacific Crest Trail Conference, which is a volunteer organization intended to support the improvement and maintenance of the Pacific Crest Trail, which is a high mountain trail extending from Canada to Mexico generally along the crest of the Cascade Mountains and the Sierra Mountains in California, not on the actual summits, but generally along about timberline or above. It's about a 2,400-mile-long trail and a number of people have hiked the trail continuously from end to end. I've never hiked it all, but I have done quite a few parts of it in different backpacking trips. I'm still on the board of that organization. I've been active in various other outdoor activities like the Nature Conservancy and the Audubon Society and Wilderness Society and others.

[While on the subject of outdoor activities, I should mention a few experiences during my law school days in New York. I missed the outdoors that had been an important part of my life in Oregon, and whenever possible I tried to get away from the city. I was surprised to find that it was relatively easy to get out. One of my favorites was to cross the Hudson River to New Jersey and hike in the Palisades Interstate Park. Once I went to the Bear Mountain State Park, which is south of the Catskill Mountains, on an Easter weekend and camped overnight, sleeping in a cave when it was cold enough that my sleeping bag froze to the rocks. During the spring break in 1939, Carl Marcy and I took a three-day hike on a portion of the Long Trail in the Green Mountains of Vermont. As I recall we took the train to Manchester and came out near Bennington.]

[One Christmas vacation my friend Alonzo [Lonnie] Kight, with whom I became acquainted because in some of our classes we were seated alphabetically, invited me to go on a skiing trip to Lake Placid, which of course was famous as a winter resort. This was my first attempt at skiing, and I didn't have proper equipment, but I enjoyed it immensely, and no doubt it inspired me to take up skiing when I got back to Oregon. The high point of my outdoor experiences in that period was a three-day trip on the Appalachian Trail through the Presidential Range of the White Mountains in New Hampshire. It was during spring break in 1940, my last year in law school, and the weather was cold and stormy. I took the bus to Gorham, New Hampshire, and hiked about 5 miles to the trail head, and then hiked south toward Mt. Washington. The trail was mostly deep in snow, but some blazes and cairns were visible. The A.M.C. hut at Mt. Madison was closed for the winter, but I found shelter from the blizzard in a woodshed for the night. The next day I climbed Mt. Jefferson (far easier than the Mt. Jefferson in Oregon), and hiked over and past Mt. Washington. The hut at Lakes of the Clouds was closed, but I camped out in the open, and fortunately the storm abated. The next day I came out at Crawford Notch and took the bus back to New York City.]

Several years ago, I was asked to become chairman of an effort that was called Globe Scope. I think it was about 1985, 1986, along in there somewhere, which put on a national meeting here in Portland intended to try to promote the concept of sustainable

development, which may be an oxymoron, but it was an attempt to get more harmony in the battle between the environmentalists on the one hand and the developers on the other hand, it seeming obvious to us that both points of view had to be reconciled somehow, so this meeting in Portland was largely for the purpose of trying to bring some harmony into the discourse.

We were not very successful in that objective, but we did get a lot of people together, and it started a program which was later adopted by Global [Tomorrow], which is an organization based in Washington, D.C., and which has put on several more of these meetings in subsequent years and may even have had an indirect relationship to the environmental conference that is going to be held in Brazil this year under the sponsorship of the United Nations. At least, it was a part of the growing effort to get the ecology minded people into sync with the developers and try to remove some of the bitterness that has been evident in that controversy.

Let's take a break here for a minute.

[Tape stops]

You had asked me about my experiences with the Union Pacific Railroad. Just to go back and pick it up, in 1958 I resigned from the Oregon Supreme Court and accepted the appointment as general solicitor for the Union Pacific Railroad in the northwest, which meant that I had charge of the law department for Oregon, Washington and part of Idaho. In that capacity, I was an officer and director of a number of subsidiary companies of the railroad, including the Portland Terminal Railroad, which was jointly owned by the Union Pacific, Southern Pacific and Northern Pacific. This was before the Northern Pacific became part of the Burlington Northern combination.

I was vice president and on the board of the Mt. Hood Railroad, which was later sold. It was a small line which goes up through the fruit-growing country of the Hood River Valley up to the lumber companies, up around Parkdale on the north side of Mt. Hood. I

was an officer and director of the Longview Switching Company, which operated the railroad switching around Longview, Washington, which was a joint operation of several of the trunk line railroads.

I was an officer and director of the Camas Prairie Railroad, which was a line running up the Snake River from a point in eastern Washington up to Lewiston, Idaho, which was involved in quite a longstanding negotiation with the Army Corps of Engineers, which was building a number of dams on the Snake River, which flooded out some of the original line of the Camas Prairie and required the construction of a new railroad line to take its place.

I was an officer and director of the Delta Alaska Terminal Company, which was a company which was based in Vancouver, Canada and which had a car-carrying ship, which ran rail cars from Canadian points up to Alaska and back. It was jointly owned by several of the railroads. The Union Pacific had a fairly small interest in that.

I was also an officer and director of the Deschutes Railroad Company, which had a track running along the Deschutes River in eastern Oregon, which in part was a joint — part of the track was jointly used by the Union Pacific and the Great Northern and Northern Pacific, which became the Burlington Northern. Also, the Yakima Valley Transportation Company, which was a short line in Yakima, Washington which served the fruit packing industries around Yakima.

All of these subsidiaries involved merely attending meetings and preparing minutes, I was secretary for some of them, helping to respond to the legal questions that might come up, which were usually handled by a committee of lawyers from the different railroads that were involved.

At that time, the Union Pacific had a staff of in-house lawyers in Portland. At times I think we had as many as five lawyers, full time lawyers, working for the railroad in addition to the firm, which was doing the litigation. We handled a lot of contract matters for the railroad, including negotiations with the state highway commissions. For example, on the Banfield Freeway, when the Oregon State Highway Department widened the freeway parallel to the Union Pacific Railroad up Sullivan's Gulch in east Portland, we had a very extensive negotiation so as to be able to get the additional highway area on part of what



was otherwise railroad right-of-way. It involved a lot of construction contracts and transfers of property, but that was the type of thing that we handled.

To a certain extent we handled commerce matters, meaning rate cases before the state utility commissions and sometimes before the Interstate Commerce Commission.<sup>10</sup> For example, one time I got involved in the controversy over the Peninsula Terminal Company, which was an independent railroad originally serving the stockyards out in North Portland, and when the Port of Portland began developing the Rivergate industrial complex out in north Portland, they wanted to use the Peninsula Terminal Railroad line as a means of access to the Rivergate complex. Well, the Peninsula Terminal line wasn't very well suited to that purpose. It hadn't been laid out so that it would have been efficient for that, but it became the focal point of a controversy.

The Union Pacific and the Spokane, Portland, Seattle Railroad, which was a jointly owned subsidiary of the Great Northern and the Northern Pacific, made an agreement to purchase the Peninsula Terminal Company, and the Southern Pacific, which at that time did not serve north Portland, wanted in on the deal, and the Union Pacific and the SP&S opposed the Southern Pacific's entry into Rivergate, and that resulted in a proceeding before the Interstate Commerce Commission, which eventually went to the United States Supreme Court. In fact, it was my only appearance before the United States Supreme Court, and then I didn't get to make an oral argument because Fritz Kahn who was the attorney for the Interstate Commerce Commission took all the time on his argument. The Supreme Court of the United States ultimately held against our position and reversed the Interstate Commerce Commission, in effect ordering them to allow the Southern Pacific into the Rivergate area, which then of course was negotiated out and ultimately contracts were developed which provided for all the railroads to have access to the area. But that was merely a sample of the kind of work that we sometimes got involved in with the Union Pacific.

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<sup>10</sup> *Port of Portland v. United States*, et al., 334 I.C.C., revsd. 408 U.S. 811, 92 S.Ct. 2513, 33 L.Ed2d 723 (1972).

One of the first things that happened to me when I took this job on March 1, 1958, within a few days after that we had a big accident out in the Albina yards where a big retaining wall which supported Greeley Avenue above the Albina Railroad yards, the retaining wall fell down. It was still in the process of construction; it wasn't quite completed and there was a lot of finger pointing as to whose fault it was that this big retaining wall fell down. We eventually brought a lawsuit against the contractor to try to establish the blame for the structural weakness of this retaining wall. As with most cases, it was eventually settled, but it was kind of a harsh introduction to the world of railroads.

Then shortly afterwards there was another experience that was rather traumatic. We had a derailment up at Olympia, Washington, where a cut of cars that had been at the Olympic Brewing Company somehow got loose and coasted downhill into the city of Olympia, jumped the tracks and went across one of the streets and smashed into a restaurant in downtown Olympia causing some injuries. I've forgotten if there were any deaths involved, I don't believe so, but a great deal of damage and this, of course, resulted in a lot of litigation and a joint investigation by the Interstate Commerce Commission, which then had jurisdiction over railroad safety matters, and the Washington Utilities Commission and that was one of my first introductions to an administrative proceeding involving the railroads.

We had a lot of legislative problems. The railroads, it seems like, were always the subject of some legislative efforts for one reason or another. Many of them involved railroad labor against management. As general solicitor for the Union Pacific, I was ex officio chairman of the Oregon Railroad Association, which consisted of the lawyers from each of the other railroad lines. We employed a lobbying organization to represent the railroads at the legislature. We also had a similar organization in the state of Washington, and I was on the board of the Washington Railroad Association, although the chairman line there was usually Northern Pacific, and the Washington Railroad Association also had a staff of lobbyists to handle that legislature.

Here in Oregon, one of the memorable experiences with the legislature involved the repeal of the so-called full crew laws. Back in the early days, probably 1913 or

thereabouts, the legislatures of many states had passed laws requiring a certain number of workers on each railroad crew. In some cases, six people, in some cases five people. This was mostly an effort by the railroad unions and initially may have had some relationship to safety in that a number of people were probably necessary for safe operation of the trains. But with the changes in technology it became possible to operate the trains safely with a much smaller crew, and the railroads started a campaign to try to diminish the size of crews, first by eliminating the firemen, who no longer had anything much to do on the diesel locomotives, and then by eliminating one of the required brakemen. This, of course, precipitated an all-out war with the railroad labor unions that were trying to preserve the jobs.

For several sessions in the legislatures both in Oregon and Washington and many other states, this was a real battle. Eventually we succeeded in repealing the crew laws in both Oregon and Washington. Then after repeal the unions tried in subsequent sessions to reinstate the crew laws under one guise or another. It was always a source of a great deal of controversy. Eventually the Oregon legislature passed a caboose law requiring an occupied caboose on certain trains, which was a means of getting at — indirectly requiring additional people on the crews.

This extended up to fairly recent years, and just within the last two or three years the railroads of Oregon brought a lawsuit in federal court challenging the constitutionality of the caboose law on the ground that the whole subject of railroad safety had been preempted by the federal government with passage of the federal Railroad Safety Act, which was passed at the same time as the Occupational Safety & Health Act on a national basis. We claimed that this invalidated any state attempts to regulate rail safety and Judge Fry in the federal court here held in favor of the railroads, granted a summary judgment, which the unions then appealed to the 9th Circuit.

The nominal parties' defendant were the State Public Utility Commissioners, but the railroad unions had intervened, and while the PUC did not appeal, the unions did. While that appeal was pending the Public Utility Commission withdrew the regulations which it had adopted under the state law and this made the proceeding moot. So, the Court of

Appeals dismissed the appeal and remanded it to the District Court directing it to dismiss the case as being moot since the regulations had been superseded. This was perhaps an example of where all the Oregon railroads worked together in matters of common interest.

Another such case involved the state regulatory fee. In both Oregon and Washington, the state utilities commission levied a fee annually on the railroads to pay for the activities of the utilities commission in relation to the railroad regulation. That fee was set each year by the commission within certain limits prescribed by the legislature. At some point when the congress passed the so-called Staggers Act, or the Railroad Regulation Revitalization Act, so-called 4R Act, it had a provision in it which prohibited discriminatory taxation against the railroads and largely on the ground of federal preemption the railroads sued to invalidate the state regulatory fee.

Judge Panner initially held in favor of the railroads, holding that the fee as then levied was unconstitutional, but he was reversed by the 9th Circuit. In the meantime, the railroads had been working with the Public Utility Commission trying to resolve the problem and the legislature had passed a statute changing the method of determining the regulatory fee, and we eventually came to an agreement with the Commission on the administration of the new statute, and for that reason the decision of the 9th Circuit was avoided and a new basis was agreed upon, which the legislature then adopted in a subsequent session. This is just one of many instances where the railroads were faced with a state regulation which was superseded by some kind of federal regulation.

[Another controversy over regulatory fees developed in the State of Washington. In their annual audit of the Washington regulatory account for 1977 the railroads discovered that the state had charged to the regulatory fee account the amounts that the state had paid in settlement or for defense expenses of several crossing accident cases in which the state was a defendant. In each case there had been allegations that the state had been negligent with respect to the crossing. The railroads sued for mandamus, contending that the state's payments were not part of the cost of supervising and regulating the railroads, as permitted by statute, and that if the payments were charged to the fee account, the railroads would be paying for the state's own negligence. The Washington Supreme Court

held in favor of the railroads, and granted the writ. *State of Wash. ex rel Burlington Northern, et al v. Washington Utilities and Transportation Comm.*, 93 Wn2d 398, 609 P2d 1375 (1980). I wrote some of the briefs and participated in the argument.]

We didn't always have occasion to work together, however, and I am reminded of one case that we brought where the Union Pacific went it alone. When Multnomah County assessed the non-operating properties of the railroad at 117 percent of actual value, having the theory that they were entitled to do that, we brought a case that was largely handled by Sam Stewart, although I worked on the brief. Sam Stewart had been an attorney for the state tax commission and had come to work for the Union Pacific in my department, and we worked together on a number of cases. On this one, we got the state supreme court to hold that this attempt to assess our properties at 117 percent of market value was unconstitutional under the Oregon constitution, and so that resulted in a change in the assessment method that was applied to the centrally assessed companies that were assessed by the state tax commission instead of by the local county tax assessor.

[Tape stops]

You had asked me about the management structure of the Union Pacific Railroad during the time I was acquainted with it. To go back a little ways into the 1930s and earlier, the railroad lines that were part of the Union Pacific system here were owned by a company known as the Oregon Washington Railroad & Navigation Company, which leased the use of its lines to the Union Pacific system, but I think in about 1936 it was actually taken into, merged into the Union Pacific, but the local officers of the OWR&N always felt somewhat independent of the centralized management of the Union Pacific system which was out of Omaha, Nebraska. Within the system, the OWR&N was always looked on as sort of separate and autonomous, even though it was technically a part of the system.

There was always a feeling of independence here that set it aside a little bit from other parts of the system. They had a general manager here, which was, generally speaking, the chief operating officer for the northwest district and then a superintendent

of the Oregon operations and terminal superintendents and various other administrative positions, and along in the 1950s, and I can't put an exact date on it, the company put a resident vice president in Portland. The first one holding that position was Ambrose Seitz who had been a vice president at Omaha. I think some people had the feeling that he was likely to succeed to the presidency of the system and as a result of some internal politics and manipulation, he was sent out to Portland to sort of get him out of the line of succession.

TS: Exiled.

KESTER: Sort of exiled to Portland. That was just gossip and I probably shouldn't repeat it. I don't know it to be true, but it was the local gossip anyway. Mr. Seitz was a very personable, very popular person. He took part in a lot of civic activities, was on the, was one of the Rose Festival judges when he first came in and various other things. He eventually retired and for a while there was no one in that position.

Then Howard Burnett was made a vice president in Portland. He certainly did not come with any idea of being exiled to Portland. He had been vice president of labor relations in Omaha and one of the very responsible officers of the company, and he was vice president here in Portland and was on the board of the Chamber of Commerce and held various other civic positions. When he retired that position was not filled. I guess it was not a regular line position of the organization.

A little later the company went through a restructuring process, which involved a lot of [centralization]. They no longer had a general manager in Portland. The highest operating officer here was a superintendent. Many of the functions were taken to the Salt Lake office and in the law department many of the functions were taken back to Omaha. Eventually the Portland law department of the Union Pacific was abolished completely and all of the legal activities, aside from litigation, which had to be handled locally, were taken either to the Salt Lake office or the Omaha office. I guess I'm getting a little ahead on the pure chronology.

Our office had been in the Pittock block since the 1930s up until about 1983. [The transcript of the tapes ends with mention of the firm's move from the Pittock Block in 1983. At that time we moved to the 1515 Building, at 1515 S.W. 5th Ave, in Portland. Subsequent history of the firm is sketched in the outline which is mentioned in item \_\_\_\_\_ above, so I will not repeat it.]

**[End of Tape 5, Side 2]**

**[End of Interview]**