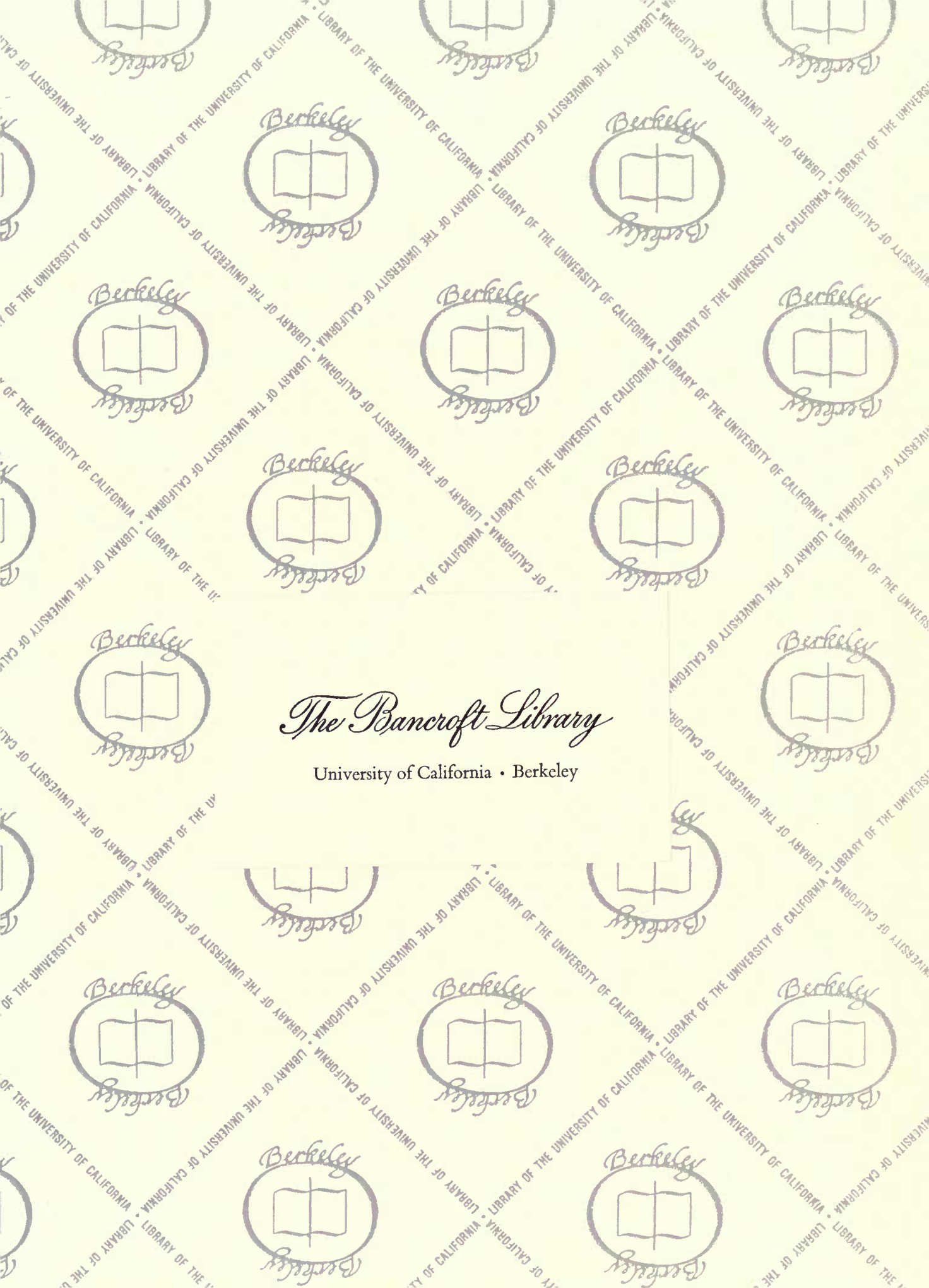

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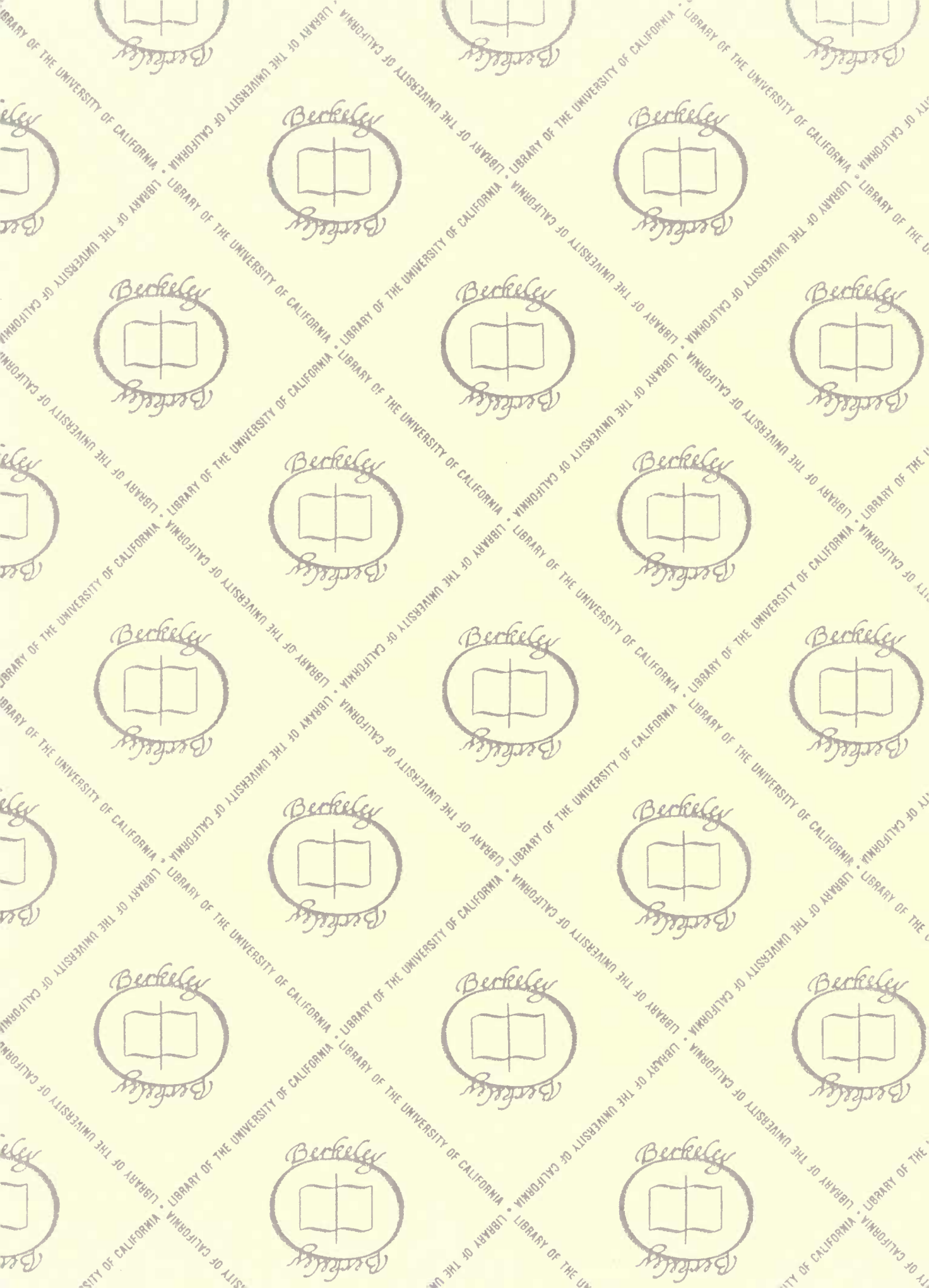
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Northern California U.S. District Court Series

Herman Phleger

OBSERVATIONS ON THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 1900-1940

An Interview Conducted by
Miriam F. Stein in 1980

Copy No. 1

Herman Phleger

January 1953

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Preface

The Historical Society of the United States District Court for the Northern District of California is a non-profit organization established by federal practitioners and judges and is dedicated to preserve and develop the history of this court. The Society's goals are threefold: 1) to marshal the sources for historical study of the District; 2) to initiate and encourage comprehensive and scholarly study of the court; and 3) to develop interpretive programs and exhibits making the fruits of this research accessible and meaningful to the legal community and the general public.

In 1980 this series of oral histories conducted by The Bancroft Library was initiated as an important effort in the furtherance of the Society's objectives. By preserving the personal reminiscences of individuals whose experiences and memory can yield valuable "oral evidence" of the court's history, the Society hopes to enhance and amplify the written record.

In addition to historical study of the District, the Society hopes to promote greater public understanding and appreciation of the role of the federal judiciary. Except for those involved in the legal process, the operation, significance, and impact of federal trial courts remains largely a mystery to most Americans. By focusing on the history and activities of the Northern District, the Society hopes to bridge this gap between the legal and lay world and even encourage other District courts to initiate similar efforts. As the nation nears the 200th anniversary of the ratification of the United States Constitution, it is an appropriate time to raise the level of public understanding by placing the contemporary role of district courts in historical perspective.

Thanks are due to the foresight and generosity of the individuals and organizations whose support make this work possible.

Robert Peckham, Chief Judge
U.S. District Court for the
Northern District of California

San Francisco, California
April, 1981

NORTHERN CALIFORNIA U.S. DISTRICT COURT SERIES

Interviews Completed 1981

Harris, George B., *Memories of San Francisco Legal Practice and State and Federal Courts, 1920s-1960s.* 1981, 224 pages

Phleger, Herman, *Observations on the U.S. District Court for the Northern District of California, 1900-1940.* 1981, 50 pages

Wollenberg, Albert C., Sr., *To Do the Job Well: A Life in Legislative, Judicial, and Community Service.* 1981, 396 pages

INTERVIEW HISTORY

The U.S. District Court for the Northern District of California launched its oral history project for the purpose not only of documenting its own growth and development, but also of recording the history of the legal community and milieu in which it operates. From the beginning it was clear that few attorneys could speak more knowledgeably about the San Francisco bench and bar in the last half century than Herman Phleger, one of the founding partners in the San Francisco law firm of Brobeck, Phleger & Harrison.

Mr. Phleger has practiced law in San Francisco since 1915. He served as Associate Director, Legal Division, U.S. Military Government of Germany in 1945 and as Legal Advisor, U.S. Department of State from 1953 to 1956. In an earlier memoir for the Regional Oral History Office, Sixty Years in Law, Public Service, and International Affairs (1979), he described his law practice as well as his government service and his education at the University of California, Berkeley. The memoir found herein focuses on the Northern District Court: The judges, U.S. attorneys, prominent members of the San Francisco bar, the broadening jurisdiction of the court, and leading cases argued before it.

Two interviews were conducted, on October 22 and October 27, 1980, in Mr. Phleger's office at Brobeck, Phleger & Harrison. Prior to the interviews Mr. Phleger consulted relevant documents and directories to refresh his recollections. He carefully reviewed the transcript and made several corrections and additions.

Mr. Phleger's recollections provide valuable overview of and insights into the Northern District Court.

Miriam Stein
Interviewer-Editor

30 March 1981
Regional Oral History Office
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University of California at Berkeley

I BACKGROUND

[Interview 1: October 22, 1980]##

Phleger: I understand I'm being asked by the Historical Society for the United States District Court of the Northern District of California to give an oral history regarding that court. I think that my most valuable contribution would be to reach back as early as I have recollection of matters relating to the court, because memories and records of more recent events are readily available.

I was born in Sacramento, attended the University of California and graduated with an A.B. degree in 1912. After two years at Boalt Hall and one year at Harvard Law School, I finished my formal legal education in June of 1914. After a short vacation in Europe I came to San Francisco and with the help of Dean Orrin Kip McMurray of Boalt Hall I secured a position with Morrison, Dunne & Brobeck as a clerk.

The firm at that time occupied offices in the Crocker Building. When I entered its employ the firm consisted of Alexander F. Morrison, Peter F. Dunne, W. I. Brobeck, and Edward Hohfeld, partners. As clerks there were, besides myself, Frank Schuman, Herbert Clark, Robert L. McWilliams, George Hatfield, and one or two others. Frank Schuman and Herbert Clark and I became partners in the firm in 1920.

Admission to practice in the California courts in those days was by oral examination by the District Courts of Appeal. As I knew the court of appeal judges in the Sacramento district, I went to Sacramento in February 1915, and took the examination. The material for that examination was outlined in a prospectus and consisted largely of textbooks and the California Codes. Included in the textbooks were Blackstone, Lubay's Equity Pleading, then out of print, and some other ancient texts.

The applicants were seated in rows in the courtroom. There were about 50 of us being examined at that time with the judges sitting at their usual places on the bench and questioning

Phleger: the applicants seriatim. When my turn came, the first question was, "What is a tenement?" I was not quite sure but I answered, "That which may be holden," straight out of Blackstone. The next question was, "What is a hereditament?" to which I replied, also straight out of Blackstone, "That which may be inherited."

I was getting a bit worried about my answers when the court asked the next question, which was a question regarding riparian water rights in California. As I had been working on a case involving water rights and underground waters, I took off and after talking about Lux v. Haggin, Katz v. Walkinshaw and other leading California water cases I paused for breath and was told by the presiding judge that there were no further questions. This was the examination and I was fortunate enough to pass.

When I returned to my office in San Francisco I immediately took steps to be admitted to practice before the United States District Court for the northern District of California. Admission to practice in that court for a member of the bar of California was by motion of a member of the bar of the U. S. District Court and so in 1915 on motion I was admitted to practice in that court.

Stein: Who moved your admission?

Phleger: I don't remember. Undoubtedly somebody in the Morrison firm.

II THE FEDERAL JUDICIARY IN CALIFORNIA IN THE WORLD WAR I ERA: AN OVERVIEW

Phleger: The United States courts in California consisted of the judges of the United States Circuit Court of Appeals for the Ninth Circuit which sat in San Francisco, the judges of the District Court for the Northern District of California which sat in San Francisco, and the judge of the District Court for the Southern District of California, who sat in Los Angeles.

The total federal judiciary in California at that time consisted of three circuit judges: William W. Morrow, William M. Gilbert, late of the Portland District Court, and Erskine M. Ross, late of the Los Angeles District Court. There were then only three district judges in California, two judges in the Northern District, William C. Van Fleet and John DeHaven. There was only one judge of the United States District Court for the Southern District of California, Judge Olin Wellborn.

The federal judges in Northern California, being the judges for the Ninth Circuit Court of Appeals and the District Court for the Northern District of California, were an elite group. I recall that at that time, and for a number of years later until the number of district judges grew to a considerable number, all U.S. judges, district and circuit, residents in San Francisco, were automatically made honorary members of the Pacific Union Club. In later years, when the number of judges grew much larger, this provision was dropped. United States Judges were an elite group and much respected and admired by the public generally, as well as by the bar. Most of them wore black frock or cutaway coats as their usual attire both on and off the bench.

Stein: This was out of the courtroom too?

Phleger: Yes, this was the usual daily garb. It should be remembered the United States district judges then on the bench, DeHaven and Van Fleet, had both resigned positions on the Supreme Court of California to take positions as district judges. A number of their successors followed the same route, including Judge Kerrigan. One reason a position on the federal bench was preferred over a

Phleger: position on the state bench was no doubt the fact that federal judges were appointed and served during good behavior, whereas state judges, including those on the Supreme Court, were elected for definite terms and were always facing reelection.

The practice before the federal courts at that time was extremely technical. There was a law side and an equity side and there were so many quirks and turns in the practice that it was considered almost a necessity in a case of importance in the U.S. District Court to retain an expert on federal procedure. As a result, Marshall B. Woodworth, who had once served as clerk of the district court, as well as secretary to Judge Morrow, was frequently retained for the sole purpose of following the procedure to see that no errors were made. For instance, on objections to questions to witnesses and on many motions it was necessary to record in the record an exception to the judge's ruling in order to preserve the right of review.

The clerk of the district court at that time and for some years thereafter was Walter B. Maling, and his deputy was Jack Schaertzer. Both were extremely obliging gentlemen and it was common practice to ask their help and advice when trying cases. They were unfailing in their courtesy and helpfulness.

Stein: Could you give me some examples of some of the very technical rules that had to be followed then?

You mentioned to me once the Petition for Allowance of Writ of Error.

Phleger: One of the technicalities was that in order to be able to raise on appeal the question of the sufficiency of the evidence to sustain a finding of fact it was necessary at the conclusion of the trial in the district court to make a motion for judgment. If this motion was not made the right of appeal on the sufficiency of evidence to sustain a judgment would not lie to the circuit court.

The jurisdiction of the district court was, of course, confined to matters involving federal law, with the exception of diversity cases, of which there were a great many. The right of removal of a diversity case from a state to a federal court was frequently availed of.

I recall one case I had in 1925 when for John MacGregor Grant, a vice president of the Bank of Italy, I filed a suit in the state court against the Banco Russo-Asiatique, a Russian banking corporation. In order to get jurisdiction over the Russian bank, which had no representative in California, I filed

Phleger: suit in the state court against the bank and attached a large deposit in the Crocker Bank belonging to the Russo-Asiatique Bank in transit to China. Relying on the old case of Pennoyer v. Neff, I attached the bank deposit and thus got jurisdiction over the deposit. As a result of this, the Russian bank employed New York counsel who forthwith removed the case from the state court into the federal court.

Stein: On what grounds did they do that?

Phleger: On the grounds of diversity of citizenship. A foreign corporation sued in California in the state courts by a Californian could remove the cause to the federal court. We tried the case in 1924 before Judge Partridge who rendered judgment for the plaintiff. This judgment was affirmed on appeal. Banco Russo-Asiatique v. Dolch, 2 Fed.2d 266 (1925). There were many such cases.

Stein: Are there any other such cases that you were a part of?

Phleger: I had many similar cases. Federal jurisdiction based on the U.S. constitution and statutes such as admiralty counterfeiting, immigration and citizenship, the public domain and so forth, I will mention later.

III ADVENTURES IN MORALISM

The Diggs-Caminetti Case

Phleger: About the time I began practice the federal government embarked upon some adventures in moralism. The first consisted in the enactment of the White Slave Traffic Act, otherwise known as the Mann Act, on June 10, 1910 (36 Statutes 825). There had been a great deal of public agitation against the white slave traffic, particularly the bringing of foreign women into the United States for immoral purposes. The Mann Act provided that the interstate transportation of women for immoral purposes was a criminal act, and while most of us believed that the Act was directed toward commercial traffic for immoral purposes, the courts proceeded to interpret the law to include the transportation of women for immoral purposes even though there was no commercial purpose.

The leading case on this subject was the so-called Diggs and Caminetti case. An indictment was filed in the United States District Court for the Northern District of California charging Diggs and Caminetti, who were young men residing in Sacramento, with a violation of the act because they had taken two of their lady friends from Sacramento, California, to Reno, Nevada, on the railroad for romantic purposes. Diggs was a member of a prominent Sacramento family and later became an architect of considerable note. Caminetti was the son of a former member of Congress, later United States Director of Immigration. I knew both of them in Sacramento so I took particular interest in the case.

The case was tried in the United States District Court in San Francisco before Judge Van Fleet. The jury brought in a verdict of guilty. The attorneys for the defense were Robert T. Devlin, former United States attorney for the Northern District, and Marshall B. Woodworth, also a former U.S. attorney, who, as I have remarked, was frequently employed as an expert on federal court procedure.

Phleger: After the verdict of guilty and sentencing by Judge Van Fleet, the appeal was heard in the circuit court by Gilbert and Ross, circuit judges, and Wolverton, district judge. It is reported in 220 Federal Reporter, p. 545 (April 8, 1915).

After argument, the court affirmed the judgment. Circuit Judge Gilbert and District Judge Wolverton voting to affirm, with Circuit Judge Ross dissenting. Certiorari was then granted and the United States Supreme Court affirmed the judgment in 242 U.S. 470 (December 15, 1917). The majority opinion was by Mr. Justice Day. Mr. Justice McReynolds did not participate, and the chief justice, with two others, dissented.

There was much public discussion at the time over the justice and fairness of the decision. A majority of the public believed that the White Slave Act, for that was its title, was not intended to cover transportation for social or romantic adventures, but was limited to transportation for commercial purposes. Today the whole episode would not have received public notice. So far as I know, there have been no similar cases since that date involving interstate transportation of women for immoral purposes where there was no element of commercial vice involved.

Stein: The U.S. attorney was quoted in the press as having charged that the two men were "indicted for a hideous crime which has ruined two girls and shocked the moral sense of the people of California," and further that "the girls were taken from cultured homes, bullied and frightened into going to a foreign state and were ruined and debauched."

Phleger: This is an example of the oratory of the prosecuting attorney in his argument to the jury. I knew the girls and the men involved and they were ordinary people and I don't think this was the only trip they took for similar purposes. In fact, the record shows that the interstate transportation was simply by chance. The parties had decided to leave town for a few days and the first train to come along on which they could take a trip happened to cross the state line to Reno. They had contemplated going to Fresno but there was no convenient train so they went to Reno and got entangled with the federal statute.

Stein: How exactly did they get entangled? Who actually filed a complaint?

Phleger: In those days there was a great deal of gossip about immoral conduct between unmarried persons, and when it was learned that Diggs was married, there was considerable indignation aroused by the lurid publicity given the affair.

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Phleger: In any event, this case is a good illustration of how public indignation can be worked up over social conduct which, in the long run, ceases to have any permanent significance.

Stein: That case was also controversial because U.S. Attorney John McNab resigned, in part over that case. Do you recall that?

Phleger: I recall that John L. McNab, who had been U.S. attorney for about two years, resigned. I do not know the particulars but I, too, have heard that it had to do with his reluctance to prosecute this particular charge. John McNab, of course, was a prominent San Francisco attorney and had a distinguished career in law after he retired as United States attorney. His brother, Gavin McNab, was a prominent lawyer also. As was often the case in those days, Gavin was a Democrat and John was a Republican. Both frequently held public retainers.

Stein: My understanding was that the reason for McNab's displeasure and why he resigned was that pressure was put on him by the Department of Justice to postpone the case because Caminetti's father had just been made head of the Immigration Department and his services were needed immediately in Washington. However, he wanted to attend the trial of his son, so the Department of Justice asked that the trial be postponed for several months to allow the father to attend. McNab felt that this was undue political influence.

Phleger: That may very well be the case. I do know that McNab resigned in protest over the way the case was being handled.

Prohibition

Phleger: Another adventure of the government in moralistic realms which greatly enlarged the jurisdiction of the court was the passage of the 18th Amendment, and the Volstead Act in 1919. The 18th Amendment became law in January 1919 and was repealed by the 21st Amendment in 1933, shortly after Franklin Roosevelt was elected president. In the interim the federal courts, including the Northern District of California, were deluged with cases involving violations of the Volstead Act. Calendars were crowded with cases and some strange ones came to trial.

Judge Louderback is reported to have sentenced a student at the University of California to six months in jail for drinking from a one pint bottle of whiskey at a football game. Representative Arthur Elston of Berkeley told me at the time that he was

Phleger: importuned constantly by applicants for positions as federal prohibition agents. One of the applicants told him that it was an extremely desirable position because a federal Volstead agent could make more money in a shorter time than in any other occupation that he knew of.

One of the strangest cases was that of Sidney Ehrman. Mr. Ehrman was a distinguished member of the San Francisco bar and as we all recall lived to be a hundred years of age. When his daughter, Esther, made her debut, during Prohibition, the Ehrmans decided to give a coming out ball for her at the St. Francis Hotel. I was the attorney for the hotel at that time and Mr. Ehrman arranged to lease the ballroom and the appurtenant areas in the St. Francis Hotel so that he could say that the party was being given on premises on which he had the sole right of occupation. The champagne and other liquor for the party was brought to the hotel from Mr. Ehrman's own cellar so there was no question of it having been illegally purchased. The party was a magnificent one and created a great deal of newspaper interest, following which Mr. Ehrman was arrested and convicted for violating the Volstead Act, but fortunately was given a nominal fine.

Stein: You mean that even the fact that he had leased the ballroom did not protect him?

Phleger: No, it certainly did not.

Stein: Had he consulted legal advice beforehand?

Phleger: He was an eminent lawyer himself. He didn't have to consult anybody. I assume he thought that his endeavor to comply with the law would gain him absolution, but it did not.

Another instance that I recall was a men's party given in a downtown restaurant by Samuel F. B. Morse and a few of his compatriots, where alcoholic beverages were consumed in considerable quantity. Morse was arrested and convicted of violating the Volstead Act.

However, as time went on the penalties became more and more moderate where no commercialism was involved. The heavy penalties were reserved for smugglers and for others who were engaged in the commercial making, sale, or transportation of liquor. Indeed, everybody, including most members of the bar, learned how to make bathtub gin and other hard liquor. In later years it was frequently remarked that liquor was better and cheaper during Prohibition than after the Prohibition amendment had been repealed.

Stein: Do you recall wine bricks? It was dried wine.

Phleger: The Act, as I recall it, provided that up to 100 gallons of wine could be made by any householder for his own use without violating the law, and as a result quantities of California grapes were shipped East where they were used as the raw material for wine making. Indeed, in the Ann Arbor case*, which I had during that period, the record showed that some 30,000 carloads of grapes a year were shipped East during Prohibition to provide the raw material for homemade wine. The wineries in California mostly went out of business, but some continued manufacturing sacramental wine, which under the statute was exempt from the operation of the act. Some of the wineries like the Christian Brothers and others were able to exist during the entire Prohibition era.

Stein: Quite a bar must have grown up in San Francisco to handle these cases.

Phleger: Many lawyers were engaged in defending these cases and quite a few specialists developed in this field. Indeed, the calendars of the courts were filled with Prohibition cases and the practice was very lucrative for those who specialized in it.

Stein: Do you recall who some of the attorneys were who specialized in it?

Phleger: No I don't recall their names but there were certainly a lot who did.

Stein: In terms of enforcement of Prohibition, I also gather that San Francisco didn't have the world's best reputation. The district attorney was Matthew Brady and his record was often contrasted to Earl Warren's in Alameda County. Warren was very good at enforcing or assisting in the enforcement of the Prohibition laws, whereas Brady was not.

Phleger: I doubt that there were many state prosecutions. The Volstead Act was a federal statute and Brady was district attorney of the City of San Francisco. I think that the active prosecution of all these cases was a federal matter and the cases ended up in the federal district court.

Stein: Did you know much about the work of the Wickersham Commission and Mabel Walker Willebrandt's report?

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*Ann Arbor Railroad, et al. v. U.S., 281 U.S. 658 (1930).

Phleger: Yes, this commission was appointed by President Hoover and reported that Prohibition was a "Noble Experiment." However, the attempt to enforce the Volstead Act created great contempt for the law and as time progressed there was more and more evasion and violation, until finally President Roosevelt was wise enough to recommend repeal. I think the 21st Amendment was proposed and ratified in only nine months.

As I pointed out, President Hoover appointed a commission to examine the operation of the Prohibition amendment, and the recommendation of the commission was that the amendment not be repealed. However, when Franklin Roosevelt ran for president against Hoover, he advocated repeal and the 21st Amendment repealing Prohibition was enacted immediately following his election.

Stein: Did that require a special election in California or a convention to ratify the amendment?

Phleger: My recollection isn't clear on that except that I do know that the necessary two-thirds of the states ratified the amendment of repeal in a very short period.

Stein: I also wondered about how the Prohibition agents themselves were recruited. You mentioned earlier the technicality of practicing in the federal courts. Were the agents well enough trained in the preparation of evidence?

Phleger: There was no problem of recruiting federal agents. The applicants for jobs as federal agents were many and there was a great deal of corruption that went on. The trials usually were rather perfunctory in non-commercial violations. By the time the defendants got before a federal judge they usually had concluded that pleading guilty was the better course and the sentences after guilty pleas were usually rather light. The prosecutions of those who violated the act for commercial purposes, on the other hand, were sometimes vigorously contested, but the usual practice was to plea bargain and get out with as light a sentence as possible.

IV U.S. ATTORNEYS IN THE NORTHERN DISTRICT, 1901-1933

Phleger: I was fortunate in knowing a number of the United States attorneys who served during that time. I knew Marshall D. Woodworth, who was the United States attorney from 1901 to 1905. He had been assistant clerk of the district court in 1880 and had been private secretary to Judge Morrow.

Stein: Do you know what his education had been?

Phleger: I do not know. He was an able practitioner in the federal court and as I have mentioned was frequently retained for the sole purpose of advising on matters of procedure in cases pending before that court.

Robert T. Devlin was the United States attorney from 1905 until 1912. I knew him well because he lived in Sacramento and his home was two blocks from our home. He was attorney for Diggs and Caminetti in that case and frequently appeared in San Francisco in the state and federal courts in important litigation. He was a scholar and wrote two law books which were accepted as standard authority: Devlin on Deeds and Devlin on the Treaty Power. The latter probably was a result of his research at the time of the litigation over Chinese language schools in San Francisco.

Stein: What was that controversy about?

Phleger: The question of whether or not it was legal to have public schools teaching in the Chinese language.

Stein: How was that resolved at the time?

Phleger: We made a treaty with China which permitted foreign language schools and as a result of that I have no doubt that Robert T. Devlin became an expert on the treaty power.

John L. McNab, whom you've mentioned, was the United States attorney from 1912 to 1913, and resigned over a controversy in the Diggs-Caminetti case.

Stein: Do you know anything about the background of those two men, Devlin and McNab?

Phleger: The McNabs were born and brought up in Ukiah, but both of them came to San Francisco and both were prominent lawyers. Gavin McNab was the attorney for Fatty Arbuckle in the famous Arbuckle case.* He had a partner by the name of Nat Schmulowitz, who was an able lawyer and gained fame as a collector of humorous literature.

Stein: Had they gone to law school?

Phleger: I'm sure they had but I don't know. Schmulowitz was a graduate of the University of California.

John W. Preston was United States attorney from 1913 to 1918. He was born, I believe, in the East but came to California early in his career, I think to Northern California. He was an able attorney and I recall an interesting experience with him. In the early 1920s I went to Yreka, Siskiyou County, to assist Peter F. Dunne in the trial of a case for the California Oregon Power Company for which we were attorneys. Preston as attorney for a local citizen named Borgnis brought suit against the power company for a large sum. Borgnis had gone fishing with a steel rod and in crossing the right of way of the power company his pole came in contact with a high tension power wire which had fallen to some eight feet above the ground because of a broken insulator. The steel rod carried the electric current down to Borgnis and badly burned his legs so they had to be amputated. Borgnis claimed that it was negligent for the power company not to have repaired the insulator. It developed that the insulator had broken just that morning and the power line was on a right of way that belonged to the power company and Borgnis had not asked for permission to cross it.

When we got to Yreka we were shown as the number one item of interest, the sign of the Yreka Bakery. It was pointed out that Yreka Bakery reads the same way forwards and backwards. Indeed, it is one of the few word combinations in common use that have that peculiar quality.

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*A sensational sex scandal and murder case, tried in the 1920s, involving Hollywood comedian Fatty Arbuckle.

Phleger: The trial was before a jury and Borgnis was carried in each day clinging to a man's back and seated where he could be observed by the jury. At the end of a rather long trial the jury decided in favor of the power company. The case went up on appeal and is reported in 84 California Appeals 465 (1927) where the judgment of the trial court was affirmed. A petition for hearing in the Supreme Court was denied with a notation that John W. Preston, then an associate justice of the Supreme Court, did not participate in the decision.

I remember the case well because it was a liberal education to watch Dunne and Preston in action. I remember coming down on the night train, after the jury's verdict, with Mr. Preston and having him express his extreme disappointment in the loss of the case. He told me that this was the first jury case that he had ever lost and he couldn't understand why the jury would come to this decision.

I think probably today it would be difficult to get a jury to decide a case of this kind in favor of a power company. I believe the fact that the plaintiff was using a steel fishing rod had something to do with the attitude of the jury, because the locals did not believe in steel fishing rods. There was a great prejudice among fishermen about steel rods in those days. They were not used very often.

Mrs. Annette A. Adams was United States attorney from 1918 to 1920. She was born in Plumas County and was a graduate of the University of California and its law school. She was assistant United States attorney from 1914 to 1918. Later she was an assistant United States attorney general from 1920 to 1921 and after private practice was appointed presiding justice of the District Court of Appeal for the Third District in California and served from 1942 to 1943. Later, after retirement from the court, she practiced for a number of years in Los Angeles.

I knew her quite well. She was much admired by her contemporary male attorneys for her competence and professionalism. She was a no-nonsense lawyer and was highly respected. When one hears about the difficulty of a woman practicing law, because of male prejudice, the record of Annette Adams stands out because I believe she was one of the first women United States attorneys and one of the first woman judges in the United States. She earned everyone's respect.

Stein: She must have also been one of the few women attorneys. Were there very many women practicing law then?

Phleger: No, she was one of the first.

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Stein: Was she married?

Phleger: Yes, she was, but I never met Mr. Adams.

George J. Hatfield was United States attorney from 1925 to 1933. I had known him when he was a clerk, like myself, at Morrison, Dunne & Brobeck in 1916. He was a graduate of Stanford and Stanford Law School and was an able man. On leaving the Morrison firm he joined with a fellow clerk in Morrison's office, Robert M. McWilliams, and they practiced together for a number of years. McWilliams later became a superior judge in San Francisco County and had a distinguished career.

Stein: In the case of somebody like Hatfield, and for that matter all these others, what was the process by which they were appointed?

Phleger: I suppose that lawyers qualified to be United States attorney sought the post for the experience and the opportunity to perhaps rise to be a federal judge or some other public office. Hatfield later became a California state senator and later lieutenant governor so his service as U.S. attorney was a step in a distinguished political career. I recall that when he was in the Morrison office he had a close friend, I. M. Peckham, who had been at Stanford with him. I think he must be a relative of Judge Peckham, but I do not know just what the relation is.

Stein: Could it be father and son?

Phleger: No. I looked up Judge Robert Peckham, and he is a son of a Robert Peckham, and this is I. M. Peckham. He served as assistant to Hatfield, when Hatfield was U.S. attorney, from 1929 to '32 and later was for a short time U.S. attorney as a successor to Hatfield.

Stein: Were your recommendations ever asked on some of these gentlemen whom you knew, or were recommendations solicited from the legal community when their names came up in nomination?

Phleger: I'm sure that that's so but I don't recall that I was ever asked about recommendations for U.S. attorney, although I probably was. They were selected in those days as they are today.

V DISTRICT JUDGES IN THE NORTHERN DISTRICT, 1891-1961

Phleger: With respect to the district judges, I knew most of them who served during my time in San Francisco. The one I knew probably best of all was Judge William W. Morrow, who was United States district judge for the Northern District of California from 1891 to 1897. In 1897 he was appointed on the circuit court and served until his death in 1927 at the age of 84. He was a handsome man, over six feet tall with white hair and a large white moustache. He always wore a black frock coat. After his retirement as an active judge on the court of appeals I used to see him frequently sitting on a bench in Union Square. He lived in the St. Francis Hotel for many years and as I was attorney for the hotel I saw him frequently. He was always affable and interested in what was going on and sometimes when I would pass him in Union Square he would ask me to sit down and tell him about all of the gossip of bench and bar.

His daughter married Admiral Fechteler of the United States Navy, and their son, William Fechteler, whom I knew well, became chief of naval operations of the United States Navy during the Eisenhower administration.

Morrow had a distinguished career. He served three terms in Congress before he was appointed to the U.S. District Court, and for many years was a trustee of the Carnegie Foundation in Washington.

John Jefferson DeHaven was district judge from 1897 to 1913. Previous to that he had served one term in Congress, had also served as a superior court judge and was on the supreme court from 1891 to '95. He was an example of the fact that many of the U.S. district judges had previously served on the California Supreme Court.

William Carey Van Fleet was United States district judge from 1907 until his death in 1923. He had served on the California Supreme Court from 1894 to 1899, previous to which he had been a judge of the superior court in Sacramento County. He usually

Phleger: wore a black frock coat both on and off the bench. He lived in a fine residence in Pacific Heights and had three children, Carey Van Fleet, Alan Van Fleet, and a daughter, Julia.

I was invited to dinner at his house on a few occasions when I was just beginning to practice and remember him telling of an experience when he was a member of the State Board of Prison Directors. He had risen late and got to a meeting of the prison directors at San Quentin without having had an opportunity to shave. He apologized to the warden when he arrived at the prison for not having shaved, at which the warden said that the prison had a well equipped barber shop and it would take just a minute to give him a shave. After he had settled in the barber chair with a large Negro prisoner stropping the razor, he looked up at the barber and remarked that the barber had a familiar look, to which the barber replied, "Yes sir, judge, you're the one that sentenced me to 15 years here."

Stein: But he survived the shave nonetheless.

Phleger: He survived the shave.

Judge Maurice Dooling served on the district court from 1913 to 1924. He had been the judge of the superior court of San Benito County from 1897 to 1913. He had a fine reputation as a judge. He had one son, Maurice Dooling, Jr., who was a graduate of Stanford. He was eventually a judge of the California District Court of Appeal.

John S. Partridge succeeded Judge Van Fleet on Judge Van Fleet's death and served until 1926. He had had no previous judicial experience but was a highly regarded San Francisco practitioner, being a partner in Mastick & Partridge. He always wore a gray cutaway suit.

Judge Frank H. Kerrigan served as a judge of the United States District Court from 1924 to 1935, having previously been a judge of the San Francisco Superior Court, 1900-1907, a judge on the District Court of Appeal, 1907-1922, and a judge of the Supreme Court of California from 1922 to 1924. He was highly respected and served during the Prohibition period, handling many of the Prohibition cases.

Judge A. F. St. Sure was appointed by President Coolidge and served as a judge of the district court from 1925 to 1949.

Stein: He was the father of J. Paul St. Sure, wasn't he?

Phleger: He was the father of J. Paul St. Sure, who practiced for many years and specialized in labor matters, being a frequent arbitrator of waterfront controversies.

Harold Louderback, after service on the superior court in San Francisco, was appointed to the United States District Court in 1928 and served until 1941. He also served during the Prohibition period.

He was the subject of a great deal of controversy and public comment, largely because of charges that he showed favoritism in the appointment of United States receivers and their attorneys. Before the new Bankruptcy Act went into effect the usual course of the bankruptcy of a substantial bankrupt was through receivership proceedings. This involved the appointment of a receiver who had to have an attorney and in many cases the fees were substantial. There was such a public outcry because of charges of favoritism that the House of Represenatives appointed a committee to investigate. Fiorello La Guardia, later Mayor of New York, was chairman of the committee which held hearings in San Francisco. As a result of these hearings the committee filed a report recommending proceedings for impeachment. The House of Representatives then commenced impeachment proceedings and an impeachment trial was commenced before the United States Senate. Louderback was represented by Walter H. Linforth and James M. Hanley of San Francisco, who were able and experienced lawyers. As a result of a long trial in the Senate, which tied up proceedings there for a considerable period, the matter was put to a vote and the necessary two-thirds vote to impeach was not obtained and as a result Louderback was acquitted.

This impeachment trial demonstrated how cumbersome impeachment proceedings are. The Senate was tied up for such a long period that following this trial the Senate and the House were very reluctant to commence impeachment proceedings. So far as I recall, this was the last proceeding for the impeachment of a federal judge. Disciplinary matters have been handled in many different ways, but impeachment has rarely been resorted to.

The other federal judges in more recent times are well known and I will not comment on them. During the earlier days, particularly after the Franklin D. Roosevelt election and the New Deal legislative program was enacted, there was considerable congestion in the district court, as a result of which judges from other district courts were invited to sit in San Francisco. Two of them who sat here frequently, I remember particularly, Judge George Bourquin of Montana and Judge James Alger Fee of Portland, who was later elevated to the Circuit Court of Appeals.

Phleger: Judge Bourquin was a fine-looking man and a no-nonsense judge. When you started a case before him he would tell you how long you should take and he would frequently try in one day a case that the attorneys had contemplated would take several days.

He was particularly irate over some of the New Deal laws, such as the National Recovery Act and also the Harrison Narcotics Act. Under the Harrison Act many defendants who should have been charged with selling narcotics were charged with selling narcotics without a federal license and were convicted on this count. Judge Bourquin thought this was a subterfuge, just like indicting an income tax evader for income tax fraud when he should have been tried for some much more serious crime, like Al Capone who went to Alcatraz for income tax fraud rather than for the many other major crimes he had committed. The reputation of Judge Bourquin in these matters was well known and whenever he sat in San Francisco defendants who knew his views on these particular laws would crowd in to get their cases set before him, knowing what his attitude would be.

Stein: Didn't he also rail against other New Deal legislation?

Phleger: He certainly did. But the ones that he was particularly irate about and on which he wrote long opinions was the NRA --

Stein: He kept trying to repeal that.

Phleger: He couldn't repeal it but he was a constant critic of it and he also was very critical of the Harrison Narcotics Act. He was an able judge but a stern and arbitrary sort of a person.

He had a son, Mitchell Bourquin, who practiced for many years in San Francisco and was an able attorney. During World War II Bourquin was appointed to represent the United States in many condemnation cases and I recall trying a condemnation case against him where I represented the University of California before Judge St. Sure and a jury. A parcel of land desired by the government for the Alameda Naval Air Base belonged to the University of California, and the condemnation proceeding was handled for the government by Bourquin.

Stein: I want to ask you a question or two about the judges. Nowadays a new district judge can go to the New Judges Seminars and there are bench books that are prepared for him, but back in those early days, particularly when there were so few district judges, how did they know what to do when they first assumed their seat on the court?

Phleger: As I pointed out, practically all of them had previous judicial experience in the state courts and many of them on the state Supreme Court. The idiosyncracies of federal practice they soon learned and they always had the clerks and other court attendants to render assistance. The U.S. district judges whom I have mentioned were all extremely able. They had been judges before with the exception of Partridge and St. Sure, both of whom had had years of experience as practitioners.

Stein: I know that in more recent years one of the ways that district judges had familiarized themselves with federal procedure, particularly judges who have not had very broad legal experience, has been to ask the attorneys themselves for help. I wonder if any of these early district judges --

Phleger: In my experience I've never heard a federal judge ask any attorney for help.

Stein: I'd read this in a study of what is referred to as the socialization of U.S. district judges and the point made was that there were two ways this happened. One was that the judge could ask the attorneys in the case to write out a brief that would outline the points of law and the other would be that the judges consulted attorneys who were expert on the specific subject needing elucidation.

Phleger: In those days they didn't have pre-trial conferences, as they do now, and I never saw a federal judge ask an attorney for suggestions as to how he should perform the duties of his office. Quite the contrary.

The last judge that I'll mention whom I knew well was Louis E. Goodman. He also had had no previous judicial experience. He served from 1942 until his death in 1961, having been appointed by Franklin D. Roosevelt. He was an able practitioner before his appointment. He was a graduate of the University of California in the class of 1913 and of Hastings Law School in the class of 1915. I knew him quite well, both in college and when he was practicing before his appointment to the bench.

He was an able debater. When he was in college he was a member of the University of California Debating Team, of which I was also a member. In 1911, the team consisted of myself, Tracy Kitridge and Louis Goodman, and we debated against Stanford University at Stanford on November 3, 1911. Curiously, the debate was on the question: resolved: that judges should be exempt from recall, California having the affirmative and Stanford the negative. The judges decided the debate in our favor, that is, that judges should be exempt from recall. The fact is that at

Phleger: that time there was a great agitation for the recall of judges and California judges were made subject to recall, but federal judges were not. Theodore Roosevelt, to stem the agitation, made a rather strange suggestion, namely that judges should not be subject to recall but judicial decisions should be subject to recall, which didn't make much sense.

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VI CASES: SOME EXAMPLES

Western Pacific Railroad Corporation v. Western Pacific Railroad Company

Phleger: One interesting case I tried before Judge Goodman was Western Pacific Railroad Corporation v. The Western Pacific Railroad Company. This was a suit by a bankrupt railroad holding company against its reorganized subsidiary to recover more than $17 million in taxes which the subsidiary saved by filing consolidated income tax returns with its bankrupt parent which it controlled. This permitted it to offset its tax liability of millions against a $70 million loss by its bankrupt parent. The trial court, Judge Goodman, held for the defendant, reported in 85 Federal Supplement 868 (1949) on the ground that the subsidiary was merely following past practice.

On appeal the Court of Appeals affirmed two judges to one, (197 Federal 2d 994)(1952), and in a series of decisions denied a petition for rehearing and a petition for a rehearing en banc. The rules had shortly before been amended providing for hearings en banc by the circuit courts of appeals because of the growing number of judges on the courts of appeals.

When the petition for a rehearing en banc was filed, the petition was struck from the files on the ground that there was no authority in law for a litigant to file such a petition (197 F.2d 994, 1012, 1013)(1952).

The United States Supreme Court then granted certiorari and reversed on the ground that the court of appeals had erred in failing to consider the petition for hearing en banc (345 U.S. 247)(1952). Mr. Justice Jackson filed an opinion declaring that the court should consider the case on the merits and should decide in favor of the plaintiff on the ground of unjust enrichment. In passing, he wrote, "the case before us . . . is so unique that it is without precedent and is likely to be without progeny."

Phleger: He urged that the case be reversed and remanded to the district court "for findings in accordance with this sketchily stated doctrine of unjust enrichment."

On remand the Court of Appeals en banc referred the petition for hearing en banc to the original three judge court (205 F.2d 374)(1953), which denied the petition for a hearing en banc and denied the plaintiff's claim on unjust enrichment (206 F.2d 495). Thus this long litigation ended with the denial by the Supreme Court of a new petition for certiorari. The case established the rules for hearings en banc in the Court of Appeals. On the merits it is possible that if the case were litigated today the plaintiff's claim might succeed. See 65 Harvard Law Review, 1256 (May 1952).

This case elicited much interest and many witnesses and experts were called as witnesses. Among the witnesses called was an ex-president of the American Bar Association who lived in Washington, George Maurice Morris. He was presented by the defendants as a witness to testify on the practice regarding consolidated income tax returns. When the witness was presented to Judge Goodman and his background and experience were recited and we objected to the admission of his testimony on the ground that it was not pertinent, Judge Goodman took occasion to remark that he didn't see why one had to send to Washington to get an expert on income taxes to come out to San Francisco to testify because there were many able members of the bar in San Francisco who could have provided the same testimony. He added that he was not impressed simply because the prospective witness was past president of the American Bar Association. This is one of the few instances in which I have seen Judge Goodman act in this particular way. It was obvious that he wanted to take a dig at the practice of bringing expert witnesses in from a distance on the theory that they knew more than local experts.

Industrial Association v. United States

Phleger: Another interesting case that I had in the District Court for the Northern District of California was Industrial Association v. United States, 268 U.S. 64 (1925). San Francisco was the scene of much labor trouble from 1910 on, particularly in the building trades. Strikes were frequent and often accompanied by violence. The construction industry was particularly the object of union organization and the closed shop was rigidly enforced. The employers were not slow to organize for their own protection and formed the Industrial Association. When the Industrial Association established a permit system under which no building materials would be sold without a permit issued by the association, and no

Phleger: permit would be issued to any contractor who operated a closed union shop, the United States was induced to file suit in the federal court charging the association with unlawful restraint of trade under the Sherman Act.

The case was tried before Judge Dooling, Industrial Association being represented by Max Kuhl, a prominent San Francisco attorney. Judgement was rendered in favor of the United States, 293 Federal Reporter 925 (1923) and the association was ordered to dissolve.

Max Kuhl then passed away and I was asked to take his place and conduct the appeal in the United States Supreme Court. The appeal, of course, in an antitrust suit brought by the United States in a district court is directly to the Supreme Court, where this case was heard and, after argument, reversed, Industrial Association v. United States, 268 U.S. 64 (1925).

Stein: You argued that case in Washington?

Phleger: I argued the case for the defendant in the Supreme Court and had the experience of arguing before the court in its then chamber, which was the old United States Senate Chamber in the capitol. The accoustics were perfect. I remember that on the left side of the chamber a wood fire was burning in a fireplace. There were only seats for about 60 people in the courtroom. In addition to the justices the court personnel consisted of a marshal, a clerk, an assistant clerk, a crier, a doorkeeper and a few pages. The justices did most of their work at their homes. I remember calling on Justice Butler and on Justice Holmes at their homes on occasion where tea was served. The justices had secretaries but I do not think that the judges had clerks, with the exception of the chief justice, quite in contrast with the present situation where every judge has two or three clerks and where, I am told, there are eighty employees in the security force alone.

Stein: Did the district judges then have clerks?

Phleger: No, not according to my recollection. Certainly in the earlier days none of the district judges had clerks. They did have secretaries, however, just as Judge Morrow had as secretary, Marshall Woodworth, who later became United States attorney.

VII THE NORTHERN DISTRICT COURT IN ACTION

Location

Stein: Where did the district court in San Francisco carry on its business in those days?

Phleger: The district court during the time that I was active had its chambers in the post office building at Seventh and Mission and sat there until it moved to the new court building on Golden Gate Avenue. The courtrooms were beautiful, large rooms with fine accoustics and sometimes were used for other purposes, such as a hearing by a committee of the United States Senate or the House of Representatives. I remember that the arbitration hearings before the National Longshoremen's Board appointed by President Roosevelt which settled the Pacific Coast longshoremen's strike in 1934 were held in the chambers of the United States District Court commencing on September 25, 1934.

Rules of Practice##

[Interview 2: October 27, 1980]

Stein: I think it might be interesting for you to enlarge on your statement that practice and procedure in the district court was highly technical and complex.

Phleger: The complicated and archaic rules of practice in the United States District Courts to which I have referred were the subject of continuous criticism until the Congress in 1938 empowered the United States Supreme Court to adopt a complete system of practice, unencumbered by any legislative restrictions and circumscribed only by constitutional limitations, such as requiring a jury trial of issues at law and a recognition of equity jurisprudence.

The Supreme Court appointed an advisory committee to assist it in formulating these rules. After much work of preparation, years in fact, by the committee and by the Supreme Court, new

Phleger: rules of practice and procedure were adopted and made effective on September 16, 1938. Judge Warren Olney, Jr. of San Francisco was a member of the committee that advised the Supreme Court on the preparation and formulation of these rules, which were patterned in many respects on those developed in California and other western states.

Judge Olney was a distinguished member of the San Francisco bar. He was a partner in McCutcheon, Olney & Willard and was appointed an associate justice of the Supreme Court of California and served on it for three years. After he had returned to practice with his firm he was appointed to serve on the advisory committee on federal practice and served the balance of his life on the various boards that advised the Supreme Court on rules of practice in the federal courts.

Judge Olney had a lawyer son, Warren Olney III, who, after practice in California, was appointed assistant attorney general of the United States in charge of the Criminal Division, and later in 1958 was appointed the first Director of Administration of the United States Courts by Chief Justice Earl Warren.

Of course during all of these years the practice and procedure of the court was modified from time to time by congressional statutes. Often a statute would be adopted to cover a particular form of action, as for instance the statute of January 26, 1906, 34 Statutes 589, 28 U.S. Code 2325, which provided for the establishment of three-judge courts to review and set aside orders of the Interstate Commerce Commission with a direct appeal to the Supreme Court. Proceedings of this character were in the district court, but because of their importance three judges sat. The practice was for a district judge to call to his assistance either two circuit or district judges.

I had one interesting case which involved this statute. In 1927, a group of 50 railroads filed suit in the United States District Court of the Northern District of California to set aside and annul an order of the Interstate Commerce Commission which reduced transcontinental fruit rates by approximately $30 million a year, citing as its authority the passage by Congress of the so-called Hoch-Smith Resolution. This case came to be known as the Deciduous Fruit Transcontinental Rate Case. I was retained by the railroads to conduct this litigation, which proceeded before a three-judge court with Judge St. Sure acting as the presiding officer and another district judge and a judge of the Court of Appeals.

After trial, the district court dismissed the action and entered judgment for the defendant, whereupon an appeal was taken to the United States Supreme Court as permitted by the statute.

Phleger: There, after argument, the court ordered a reargument and after reargument the court unanimously held in favor of the plaintiff and restored the original rates, thereby increasing the revenue of the railroads by about $30 million a year. The rates in question were so-called deciduous fruit blanket rates covering the transportation of deciduous fruit between Calfornia and eastern points, almost all under refrigeration. In the year in which the suit was filed there were over 90,000 cars which went east under this rate.

Interestingly enough, the effect of Prohibition was evident in the character of the deciduous fruit that was being transported because following the Prohibition amendment in 1930, the number of cars of grapes increased dramatically, the increase during the succeeding ten years being something like 10,000 cars a year. This covered the California grapes that easterners, mostly residents of New York, were buying in order to make the 100 gallons of wine a year permitted under the Prohibition statute.

VIII JURISDICTION OF THE DISTRICT COURT

Original Jurisdiction Broadens

Phleger: When I commenced practice in 1915, there was but one district court in the Northern District, with two judges sitting in San Francisco. Two judges were adequate to handle all the business of the court. Now in the same geographical area there are three districts -- with 14 active judges sitting.

The reasons for this great increase in the business of the federal court are principally two -- the growth in population and business and commerce in the area, but even more to the enlarged jurisdiction of the court, which has increased with the growth of federal power and jurisdiction.

Some of this has been due to extensions in federal jurisdiction due to constitutional amendments such as the 16th Amendment authorizing federal income taxes and the 18th Amendment (Prohibition), but the major reason has been the steadily increasing power of the federal government due mainly to the ever more liberal judicial interpretation of the scope of federal powers granted by the Constitution and the enactment of federal statutes in the enlarged area. Witness the ever-increasing interpretation of the scope of interstate commerce, furnishing the basis of wage and hour, labor, and a host of other legislation; likewise, the broadened interpretation of the welfare and equal protection of the laws provisions of the Constitution. And so it has gone, so that no activity or phase of life seems to be beyond the reach of federal power.

Admiralty

Phleger: Before World War I, the court was crowded with admiralty cases. It was before the days of trucking and of airplanes and many communities which originated freight were not reached by railroads.

Phleger: For instance, I recall a case I had in Weaverville, Trinity County, in the early '20s. To get there I had to go by train to Redding, and from Redding by stage to Weaverville, the county seat of Trinity County. It was in November and as we sat around the wood stove in the hotel in the evenings, I got acquainted with a number of jurors who had been called in a murder trial which was to start when our case was finished. One of the prospective jurors told me that he lived in the western part of Trinity County about 50 miles from Weaverville, but that since the winter had set in and the mountains were covered by snow, in order to get to Weaverville, he had to go to Eureka, take a steam schooner from Eureka to San Francisco, take a train from San Francisco to Redding and a stage in to Weaverville, a total of several hundred miles instead of the 50 miles in a direct route.

This is only an example of how dependent California was on water transportation. There were literally hundreds of steam schooners transporting lumber up and down the coast because many of the lumber mills were situated in areas where there was no transportation except by water. In addition, a great deal of the passenger traffic up and down the coast and between California's principal cities was by water.

At one time, I recall, there was operating between San Francisco and Los Angeles the S.S. Yale and S. S. Harvard which made the trip overnight, and the Great Northern and Northern Pacific operating overnight between Seattle, Portland and San Francisco. They were very fast ships which carried the bulk of the passengers. In addition, there were numerous coastal steamship companies which carried passengers and traffic between Pacific coast ports.

In 1915, the Panama Canal was opened and a large water traffic grew up between the east and west coasts through the canal, supplanting a traffic which had existed before then through the Straits of Magellan or over the Isthmus of Tehuantepec. Of course, at the same time, there was heavy traffic between the Pacific coast and the Orient, much of it by Japanese ships. The Bay abounded in water traffic of every description, ferry boats, daily boats to Sacramento, Stockton and Vallejo, and hundreds of sailing scows carrying hay, lumber, coal, and other commodities.

There was a large admiralty bar in San Francisco at that time, which included many distinguished lawyers. Among the most prominent was Ira Campbell of the McCutcheon firm, who later went to New York and became a leader in the admiralty bar there as a partner in Kirlin, Campbell & Keating. He was succeeded when he left by Farnham Griffiths.

Phleger: Andros & Hengstler were proctors in admiralty with a large practice. Van Ness & Denman, particularly William Denman, who later became chairman of the United States Shipping Board during World War I, and later a judge of the United States Circuit Court of Appeals, had a large admiralty practice, as also did Ira Lillick and a number of others. As water transportation decreased, admiralty practice diminished so that what was once probably the largest single field of practice in the United States District Court is now small in comparison to others.

Stein: What were some of the issues that arose most frequently in admiralty cases?

Phleger: Admiralty cases included general cargo matters, general average insurance claims, strandings, collisions, fires, personal injuries, and other casualties. The steam schooners that operated in those days were rather small and built of wood. Most of the captains were Scandinavians, usually Swedes, and the rumor was that the only navigational aid they employed was a good sense of hearing. This enabled them in fog and foul weather to locate the headlands by the bark of the dogs that lived in the houses on the headlands. Very often in going over the bars at Eureka and Coos Bay and other ports, the steam schooners would bump their bottoms on the bars.

Stein: Did proctors in admiralty practice any other kind of law or did they specialize in that area only?

Phleger: No. Andros & Hengstler I think didn't do anything other than practice admiralty. Most of the large firms had partners who specialized in admiralty and it was then as it is now a rather specialized practice. The vocabulary was difficult for one who has not had special training. Indeed in those days the law schools had courses in admiralty and I doubt now whether any of our law schools have courses in admiralty.

Stein: I think nowadays it's not a separate part of the law as it was for so many years. It used to be a separate branch of law, didn't it?

Phleger: Yes, it still is, but the amount of business has diminished greatly. For instance, at Brobeck, Phleger & Harrison we have two lawyers who practice almost exclusively admiralty law.

Stein: My understanding was that in 1966 in the federal district court the admiralty side was merged with the civil actions.

Phleger: That's true, but still the trial of an admiralty case which might involve a collision or a stranding -- that sort of action requires specialized skills and knowledge which the ordinary practitioner doesn't possess.

Stein: Would admiralty law also get into the area of labor relations with the seamen?

Phleger: The jurisdiction of admiralty in seamen's cases was expanded by various statutes and particularly by the conviction of Mr. Justice Black that no seaman ever filed a personal injury suit which was not meritorious, but labor relations with seamen's unions were dealt with under the usual labor relations laws.

Bankruptcy

Phleger: Bankruptcy, of course, is one of the original constitutional jurisdictions of the United States courts. In fact, no bankruptcy can be effective that is not the result of a bankruptcy proceeding in the federal court. During the depression and at various other times the scope of bankruptcy has been extended; for instance, during the depression statutes were enacted which permitted public corporations including municipalities to go through bankruptcy. Many irrigation and reclamation districts in California went through the wringer in the depression days and have survived because the bankruptcy permitted them to reduce or cancel their debts.

Trademarks and Copyrights

Phleger: Another area peculiarly within the jurisdiction of the district courts is that of patents, trademarks, and copyrights. The extension of copyright and patent rights by statutes and international treaties, and the growth of advertising has greatly increased the litigation in these fields in the district courts. The extension of the copyright protection to photographs has made this a subject of litigation.

I recall a suit I had in the 1930s which is of some interest. The magazine Look was first published in the 1930s, I forget the exact date. After one of the early issues came out, I was retained by Look to defend a suit that had been filed in the district court by a Dean Swift asking for damages running up to several million dollars. The suit alleged that Swift owned seven photographs of Father Damien, the leper priest of Molokai, which he had copyrighted; that they were published by Look without his permission, that one million copies of this issue of Look had been printed and sold, therefore there were seven times one million

Phleger: violations of the Copyright Act and that since the statutory penalty for copyright infringement was one dollar per copy, he was entitled to $7 million in damages.

On investigation I found that I knew Dean Swift, who had been in college with me, that his father had been Father Damien's physician on Molokai, that when Father Damien died Dr. Swift had taken these seven photographs which were the only photographs extant of Father Damien and of his funeral. The photographs were of great public interest and their publication in an early issue of Look was considered to be an important publishing scoop.

I found that Swift had in fact copyrighted the photographs, which had been given to him by his father, but that he had loaned them to a friend who was a reporter on the Examiner and who had passed them on to Look. I never got further than these facts and I do not speculate as to what really happened, but after considerable negotiation I was able to settle the case for $2,500, which was certainly a cheap settlement of a large claim.

I found, too, in this field that statutory penalties provided in numerous federal statutes were excessive. At or about this time a client, General Mills, which sold birdseed grown in the San Joaquin Valley, was charged by the federal drug officials with having violated one of the federal drug statutes because its birdseed contained marijuana.

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Phleger: Upon investigation it developed that each packet of birdseed had enough marijuana in it to come within the prohibition of the statute, making its sale a criminal act. The penalty per sale was something like one thousand dollars and as over 600,000 packages had been sold during the previous year there was a gigantic penalty due. There was no basis for challenging the presence of the marijuana, which had come from hemp growing in the fields from which the birdseed was harvested. However, we were able to negotiate a settlement for a minimum penalty by agreeing to go out of the birdseed business. I suppose the birds sang beautifully with the marijuana to help along the song. But it shows that just as in the case of photographic copyright, statutory penalties are sometimes excessive.

Antitrust

Phleger: The business of the court in antitrust matters has expanded immensely since before World War I, not only by amendment of the Sherman Act, the enactment of the Anderson-Clayton Act and others,

Phleger: but also due to the increase in interstate trade and commerce and the diligence and activity of the Department of Justice. When Thurman Arnold was assistant United States attorney from 1938 to 1942, before he became a judge of the Court of Appeals of the District of Columbia, he decided that he could get better results by indicting the defendants for criminal violations of the act rather than by filing civil suits. This worked in many cases, for defendants were usually willing to trade a consent judgment in a civil suit for a dismissal of criminal indictment.

We had two cases that illustrate this: one against the Pacific Coast Borax Company "Twenty Mule Team", and other companies in that business, and another against the Dried Fruit Association and its members. In both cases all of the defendants were indicted for criminal violation of the Sherman Act but after long negotiations the indictments were dismissed in return for agreed consent decrees in civil suits. I remember the indignation of some of the prominent citizens who were thus indicted when they had to go up to the district court and be fingerprinted and photographed. It was a rough way to conduct what was in effect a civil proceeding, but it was the common practice during the years in which Thurman Arnold was assistant attorney general in charge of antitrust matters.

Stein: I have heard it said, in regard to antitrust cases, that this was an area where the judges had more room to make law, rather than simply interpret it, because the law itself was so vaguely worded. Was that your feeling as an attorney?

Phleger: The usual course of an antitrust suit was to try and ascertain what the government's case was first and then to wade through mountains of evidence to find out whether the charges had any real foundation. Often it was found that there was little substance to the charges, but the consequences of an unfavorable decision would be so serious, and the preparation for the trial and the trial itself would intefere so greatly with the business that any reasonable consent decree was better than engaging in a long, expensive and uncertain criminal trial. Antitrust cases are now often so complicated that it is proposed that they should be decided by a judge rather than a jury, but I don't know how they're going to get out of the provision in the Constitution that the trial of all crimes shall be by jury.

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Stein: Were there lawyers in San Francisco then who specialized in antitrust cases?

Phleger: The time I'm talking about goes way back and there were really no antitrust specialists at that time. The specialists like Joe Alioto came later. As a matter of interest, Alioto started in our

Phleger: office and received his first training from Maurice Harrison, but after being with us for a comparatively short time he went to Washington and took a position with the attorney general's Antitrust Division where he gained a great deal of experience in the antitrust field. Of course today there is a large bar that specializes in antitrust matters. Litigation in this field has been greatly promoted by the use of class suits and the activities of public interest lawyers.

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Navigation

Phleger: Navigation has been one of the primary jurisdictions of the district court and there have been many interesting cases in that field. In 1927 the Carquinez Bridge was built, that being the first of a number of bay bridges. It was completed and opened without any provision being made for fenders for the protection of the principal pier in mid-channel. As we represented the Matson Navigation Company, whose sugar ships passed the bridge just before landing at the refinery at Crockett, and as the navigation of these large ships through the rapidly flowing waters of Carquinez Straits, past an unprotected bridge pier, was very dangerous, we decided to bring suit to compel adequate protection for the pier.

We filed suit in the district court and Judge St. Sure presided at the trial which was interesting because there was considerable testimony about the strength of the pier and of the bridge and of the foundations of the bridge. I remember that Charles Derleth, who was head of the engineering department at the University of California, testified at length.

Showing how helpful a judge can be in settling a controversy, the suit ended up by Judge St. Sure granting us an injunction that required the bridge owners to provide adequate permanent fenders for the bridge pier and as that was a work of considerable, indeed monumental, size, requiring time and money, he agreed as a temporary expedient to let the bridge company anchor four schooners around the pier as a protection until an adequate permanent fender could be built, which required months.

Mining and the Public Domain

Phleger: Another area which was active in the early days of this century was that dealing with the public domain. Inasmuch as most mining was done on the public domain, litigation involving mines came before the district court. There was an active and experienced bar in the mining field led by Judge Curtis Lindley, who wrote Lindley on Mines, which was the leading textbook, and whose partner was William Colby, one of the early presidents of the Sierra Club.

Since those early days, when most of the mining litigation had to do with underground mines following veins, the field has been enlarged in later years by litigation involving thermal power plants on public or former public domain, such as The Geysers in Sonoma County. Now almost one million kilowatts of electric power are being generated with the steam from underground sources in that area. This is the largest development of this kind in the world.

Stein: Was this early mining law concerned at all with the protection of the land or in some way regulating the techniques of mining?

Phleger: Suits to protect the environment were unknown. As the mines were on public land and the claims extended not vertically to the center of the earth, but followed veins which slanted off in various directions, there was a great deal of litigation over the ownership of the veins. You could not determine the owner by an inspection of the surface. Ownership was determined by evidence as to where the veins went below the surface. There was a great deal of litigation. Most of the vein mines have now been closed because of costs or because the ore petered out. Open pit mining is an entirely different matter, where you own an area on the surface and you know where your property lines are and dig down within them. In the old mining days with the lode mining, litigation was frequent.

Immigration and Naturalization

Stein: In our preliminary session you mentioned immigration and naturalization as an area in which the district court has jurisdiction.

Phleger: That is correct and of course there was a great deal of litigation with the Chinese, first, then the Japanese and, of course, latterly the Mexicans. I recall some years ago, and I guess the situation

Phleger: is just as bad now, seeing from time to time in the district court thirty or forty prisoners who had been picked up the previous week coming up on a charge of illegal entry and hearing the judge order the whole flock deported, only to swim back across the Rio Grande at the first opportunity. I don't know, but I think that a good part of the illegal immigration, particularly from Mexico, is such that it's almost impossible to handle with ordinary judicial process.

Stein: Who were some of the attorneys who were particularly prominent in handling immigration and naturalization cases?

Phleger: There has always been an active bar here handling immigration and naturalization cases, but it is very specialized and I do not know any large firm that engaged in it. There are a number of fine lawyers who have specialized in this field and the ordinary lawyer would not consider himself competent to handle a case in this field. It has been our practice whenever one of these matters arises to turn it over to an experienced man who had specialized in this field. I used to know a lot of their names. They're not big firms. The laws and regulations are constantly changing and one must be a real expert in this field to give adequate service.

Stein: Do you recall any particular cases that are worth mentioning?

Phleger: No I don't. Most of the cases are of individuals and involve either defending a person in a deportation proceeding or working out a right of immigration. It's a technical field, according to my experience.

Stein: I remember that in the oral history that we did previously, you mentioned briefly a case with your own household help, a Chinese couple.* Was that in the courts here?

Phleger: Yes, the indictment of my cook took place here and it was so involved that I did not even attempt to handle it myself but got a specialist who soon worked the matter out and the case was dismissed. I wouldn't pretend to be able to handle such a case.

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*See Herman Phleger, "Sixty Years in Law, Public Service and International Affairs," an oral history conducted in 1977, Regional Oral History Office, University of California, Berkeley, p. 284.

Tax Law

Phleger: The income tax field is a similar field. It is highly technical. When the income tax law was first passed I did a good deal of income tax work, which was highly rewarding.

On one occasion I spent six months in Washington, following World War I, working out a consolidated corporation's return which saved a large amount of taxes. I was able to convince the Department of Internal Revenue that John D. and A. B. Spreckels were entitled to consolidate the returns of a national bank, a state bank, the Oceanic Steamship Company, the Western Sugar Refining Company, and three Hawaiian sugar plantations, in none of which did the Spreckels own more than 80 percent of the stock. As the basis for filing a consolidated return in those days was actual control, I was able to accomplish this result by proving that John D. Spreckels was such a dominating factor that if he owned 40 percent of a company he certainly controlled it. The department finally agreed with that and permitted the consolidation. However, the statute was changed soon after that and the only test was whether there was an 80 percent or higher stock ownership. But I wouldn't pretend today to file or make up my own income tax return.

Diversity of Citizenship

Stein: You also mentioned diversity of citizenship cases. What types of diversity cases most frequently came before the court?

Phleger: Cases that came before the court were cases in which residents of California were suing nonresidents and vice versa. Foreign corporations and citizens, by and large, preferred to have their cases ajudicated by the federal courts rather than by state courts on the theory that the resident would be favored in some way if the case were decided in a state court where he was resident and the nonresident would not get a square deal. In fact that probably is the reason for the diversity provision, that the litigant who is a nonresident can be insured of a square deal if he could get his case into the federal courts.

Stein: Were there any cases that stand out in your recollections?

Phleger: There is a wealth of litigation based on diversity of citizenship; corporations are so large now and so many of them operate in many states that in most cases a nonresident corporation that wants to can get its case into the federal court.

Stein: Do you remember any specific cases?

Phleger: No, none that I think would be of interest.

IX LAWYERS AND LAW FIRMS

Phleger: I'd like to mention a few of the practitioners before World War I who practiced in the federal court. The trial lawyers that I recall particularly who were outstanding were Garret McEnerney, Theodore Roche, Bert Schlesinger, Walter Linforth, and Gavin McNab. There were, of course, many others but these men were all outstanding.

Stein: Gavin McNab's brother had been a U.S. attorney, hadn't he?

Phleger: Yes, Gavin McNab, I think, probably had more cases but John McNab was also a good attorney and very active. Before World War I there were a number of large firms in San Francisco. I might name some of them.

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Phleger: Among the large firms were Morrison, Dunne & Brobeck; Pillsbury, Madison & Sutro; McCutchen, Olney & Willard; Chickering, Thomas & Gregory; Heller, Powers & Ehrman; Goodfellow, Eells, Moore & Orrick, -- all of these still exist although with new partners and with altered firm names. There are some of these old firms where there are descendants of the original partners still members of the firm, such as John Sutro in Pillsbury's, the Chickerings in the Chickering firm, and Crawford Greene in the McCutchen firm. However, in a number of cases there is no current partner who is related to the original partners before the first World War.

A number of the larger firms have entirely disappeared, such as Lilienthal, McKinstry & Haber; Sullivan, Sullivan & Theo J. Roche; and Campbell, Drew & McKenzie. There were a number of smaller firms or individual lawyers who were outstanding, such as Garret McErnerny, whom I have mentioned, Charles S. Wheeler, Judge M. C. Sloss, Judge Slack, William Denman, Walter Linforth and William Cannon.

Stein: When you say large law firms, how large is large?

Phleger: A large law firm before 1917 probably did not have more than 15 lawyers in all and many of them were smaller than that. The large firms today are several times larger than that and are departmentalized and composed of specialists. Before 1917 most of the practitioners were good trial lawyers and while they might be specialists in one or two fields, they were, in general, able to completely handle any matter of litigation except criminal. Today, there are few lawyers who would feel competent to handle every case that might be brought up over the entire spectrum because the field has become so large and the practice so specialized.

X REFLECTIONS ON THE JUDICIAL ROLE

Stein: One of the things we're after in this project is a picture of how the court functioned and you've already shed a lot of valuable light on how it functioned in this period prior to World War I and right after World War I. One of the things we're trying to get at is the role of the judge and the attorney in the courtroom. I know a lot has been written recently on the extent to which a judge should or should not comment on the evidence or direct the jury, direct questions himself, and I wonder what your feelings were about that from your experience with the court back in these early days.

Phleger: The judges are individuals with diverse characters and methods and manners. Some are arbitrary, some are polite and considerate. Some take little part in the proceedings and consider themselves as presiding over an adversary proceeding; others are very active. I would contrast Judge Bourquin of Montana as one who immediately took charge of any case that was being tried before him, with others who were careful not to interfere.

The same thing is found in appellate courts. I've had cases which were decided by judges on points that had never been urged or argued before them by the parties, but which they raised themselves after the case was submitted. They were always searching out new points and sometimes they were wrong and their errors had to be corrected on appeal or rehearing.

Stein: Do you recall any examples of that?

Phleger: No, I wouldn't care to specify any mistakes. Some judges are extremely courteous and considerate, others get increasingly arbitrary and dictatorial.

I remember being in a court in Oakland one time years ago where the attorney presenting the matter had been a superior court judge himself previously. He was berated by the judge hearing the case and I recall his rising and saying, "Judge, it looks a lot different to me from down here now than it did when I was sitting up where you are." He had learned his lesson. By and large the more experienced the judge, the more tolerant he is.

Phleger: I remember Judge Roche, later a United States District Court judge but who at the time was superior court judge in the criminal department in San Francisco. I was quite young then and was attending an evening dinner of the Commonwealth Club with Mr. Morrison. Seated at our table was Judge Roche and one or two other attorneys. In the course of the discussion, Judge Roche remarked that whenever a defendant came before him in a criminal case he assumed that he had committed the offense because if he were really innocent his case would never get up to the superior court. He said that in his experience the prosecuting attorneys and the court officials were so anxious to protect the defendant's rights so that if he finally got up to a trial before the criminal division of the superior court he was probably guilty. I must say I agree with Judge Roche. I think that courts and attorneys are anxious not to prosecute innocent people and that there has to be some unusual circumstances that bring an innocent man to trial in a superior court for a serious offense.

Stein: Getting back to what the judges themselves did in the courtroom, you say that in the early days it varied by the personality of the judge, but do you think, generally speaking, that judges play a more active role now than they did then, or has there been any change along those lines?

Phleger: I don't want to generalize, but I think by and large that in the days when judges faced election periodically, they tended to be more courteous than if they were sure of their tenure or of their continued position on the bench, but that's simply human nature. Judges are human, after all, and no matter how good their intentions, being human they sometimes get irritated at the stupidity of counsel or witnesses who appear before them, but by and large they do a very good job. I have seen some very arbitrary judges and I have seen some very courteous and considerate judges. It varies with the individual and I don't think there's any set pattern.

Stein: In recent years political scientists have attempted to find patterns in how judges reach decisions on the basis of what political party the president belonged to who appointed them, or what kind of education they had or what kind of legal and political experience they had before they went on the bench.

Phleger: There isn't any doubt that certain judicial qualities should be possessed by anyone who is called upon to perform a judicial function. That is, fairness, competence, knowledge, and a desire to do justice. A judge who decides cases on the basis of fireside equities and who substitutes his own idea of justice for the law is committing a grievous error because in so doing he is making our government a government of man and not of law.

Phleger: There is a story that when Judge Learned Hand left Mr. Justice Holmes at the Supreme Court for a conference he said, "Goodbye, do justice," to which Holmes replied, "That is not my job. My job is to play the game according to the rules." The law doesn't necessarily reach a result that we would all agree is justice; what we seek is not justice, but justice under law. The inscription above the portal of the Supreme Court is "Justice under law."

Stein: Do you think that the early federal court judges here were more concerned with Holmes' position or with Hand's?

Phleger: That depends on the individual. It varies over the years. I think by and large the judges want to do what is right, but I think some are more inclined than others to have their own idea of what justice is and the desire to do it rather than to follow the law. Books have been written on the subject; one of the best is by Mr. Justice Cardozo, The Nature of the Judicial Process.

Stein: Since you knew some of the judges, like Judge Morrow and Judge Van Fleet and Judge St. Sure, I thought you might want to comment on what you thought their philosophies were along these lines.

Phleger: I wouldn't want to. I think they all exercised their powers with honesty and competency. On occasion I did not agree with their conclusions, but the appellate courts usually did. I would never want to be a judge myself because I have an irresistible tendency to take sides in any controversy. I am an advocate and not a judge and I think there are people who are so constituted that they should not be judges. I've never aspired to a judicial position because I don't think I'd be qualified.

Stein: I think that Judge Wyzanski in one of the essays in the book I showed you last week mentioned his difficulty when he first ascended to the bench in becoming a dispassionate observer on the bench rather than taking sides, because his natural tendency was to leap in and be an advocate for one side or the other.

Phleger: I heard an interesting story along these lines. I knew the individuals. There was a lawyer who was a stutterer, so much so that it was difficult for him to try a case. On one occasion in Los Angeles when it was evident that the stutterer was incapable of proceeding, the judge told the stutterer to sit down, that he would complete the case for him to which the stutterer replied, "Well, judge, if you want to handle it, that's fine with me, I hope you win the case."

Stein: One other thing I want to ask you about is pre-trial conferences.

Phleger: In our day, when I was really active, we didn't have them. Now you can spend your life in pre-trial conferences, but the processes of law are constantly changing and I would assume overall that progress is being made.

Stein: Well, you have been most helpful in shedding light on the U.S. District Court in San Francisco and the judges and attorneys associated with the court. Thank you.

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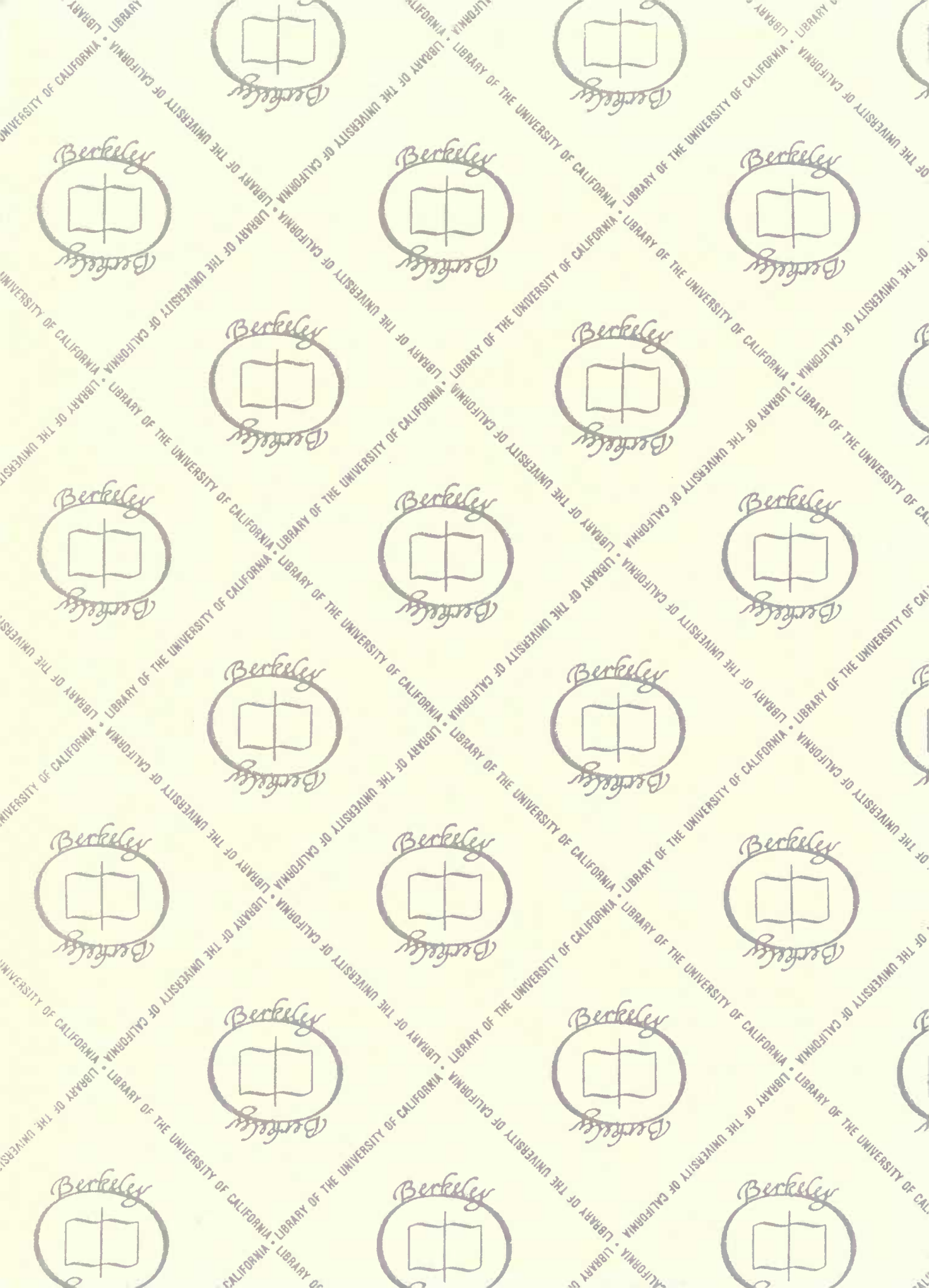
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