

Regional Oral History Office
The Bancroft Library

University of California
Berkeley, California

Pillsbury, Madison & Sutro Oral History Series

Francis R. Kirkham

SIXTY REWARDING YEARS IN THE PRACTICE OF LAW: 1930-1990

With an Introduction by
James E. O'Brien

Interviews Conducted by
Sarah Sharp and Carole Hicke
1985-1990

Since 1954 the Regional Oral History Office has been interviewing leading participants in or well-placed witnesses to major events in the development of Northern California, the West, and the Nation. Oral history is a modern research technique involving an interviewee and an informed interviewer in spontaneous conversation. The taped record is transcribed, lightly edited for continuity and clarity, and reviewed by the interviewee. The resulting manuscript is typed in final form, indexed, bound with photographs and illustrative materials, and placed in The Bancroft Library at the University of California, Berkeley, and other research collections for scholarly use. Because it is primary material, oral history is not intended to present the final, verified, or complete narrative of events. It is a spoken account, offered by the interviewee in response to questioning, and as such it is reflective, partisan, deeply involved, and irreplaceable.

All uses of this manuscript are covered by a legal agreement between The Regents of the University of California and Francis R. Kirkham dated January 12, 1990. The manuscript is thereby made available for research purposes. All literary rights in the manuscript, including the right to publish, are reserved to The Bancroft Library of the University of California, Berkeley. No part of the manuscript may be quoted for publication without the written permission of the Director of The Bancroft Library of the University of California, Berkeley.

Requests for permission to quote for publication should be addressed to the Regional Oral History Office, 486 Library, University of California, Berkeley 94720, and should include identification of the specific passages to be quoted, anticipated use of the passages, and identification of the user. The legal agreement with Francis R. Kirkham requires that he be notified of the request and allowed thirty days in which to respond.

It is recommended that this oral history be cited as follows:

Francis R. Kirkham, "Sixty Rewarding Years in the Practice of Law: 1930-1990," an oral history conducted 1985-1990 by Carole Hicke and Sarah Sharp, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1994.

Copy no. _____

October 26, 1996

San Francisco Chronicle

OBITUARIES

Francis R. Kirkham

Services will be held today for San Francisco attorney Francis R. Kirkham, the senior surviving partner of the prominent law firm Pillsbury Madison and Sutro. Mr. Kirkham died Tuesday. He was 92.

Mr. Kirkham was born in Utah and earned his undergraduate and law degrees from George Washington University. He served as law clerk to two Supreme Court justices, including former Chief Justice Evan Hughes. He moved to San Francisco to join Pillsbury Madison and Sutro in 1936, and became a partner in the firm in 1940.

From 1960 to 1970, Mr. Kirkham served as general counsel to Standard Oil Company of California, now Chevron Corporation.

During his long career, Mr. Kirkham served on many legal boards and committees. He was the chair of the antitrust section of the American Bar Association, and was one of 16 attorneys named to the National Commission on the Revision of the Federal Appellate System in the 1970s. In 1989, Brigham Young University's J. Reuben Clark Law School founded a professorship in his honor.

Mr. Kirkham is survived by Ellis Shipp Musser, his wife of 67 years; his brother Don and sisters Rose Kimball and Geraldine Monson; sons James and Eugene; daughters Ellis Elizabeth Stillman and Katherine Movius; 13 grandchildren and 12 great-grandchildren.

Services will be held at 1 p.m. at the Golden Gate Ward of the Church of Jesus Christ of Latter-day Saints, 2600 Pacific Avenue, San Francisco. Memorial contributions can be made to the Francis R. Kirkham Chair of Jurisprudence, Brigham Young University, Provo, Utah.

TABLE OF CONTENTS--Francis R. Kirkham

PREFACE	i
INTRODUCTION--by James E. O'Brien	ii
INTERVIEW HISTORY--by Carole Hicke	x
BRIEF BIOGRAPHY	xii
I BIOGRAPHICAL DETAILS	1
Growing up in Utah	1
Law School in Washington, D.C.	5
II THE GREAT DEPRESSION AND THE U.S. SUPREME COURT: CLERKING FOR JUSTICE GEORGE SUTHERLAND AND CHIEF JUSTICE CHARLES EVANS HUGHES	11
III TRANSITION TO PILLSBURY, MADISON & SUTRO	18
Where to Go and What to Do	18
The Section 36 Case	20
First Impressions, 1936	23
The Firm During World War II	27
Recollections: Mr. Alfred, Felix Smith, Marshall Madison, and Gene Prince	32
Notes on Administration	37
Ethics and Expectations	38
IV SAMPLE CASES FROM THE 1930s AND 1940s	40
<u>Erceg v. Fairbanks</u>	40
<u>Perkins v. Benguet</u>	42
Market Street Railway	45
Evaporated Milk Association	48
V GENERAL COUNSEL, STANDARD OIL OF CALIFORNIA, 1960-1970	57
Early Cases	57
Eagle Oil and Refining, 1952, and Basalt Rock	63
A Note on Little Mother Hubbard, 1952	68
The Cartel Case, 1952	69
The Moore Case	76
Assumption of Duties as General Counsel: Taking Over from Marshall Madison	79
"A Lawyer's Lawyer": Eugene Prince	79
Further Comments on Responsibilities as General Counsel	82
Antitrust Counseling	84
VI MORE RECOLLECTIONS OF EARLY DAYS	87
A Few More Stories	87
The Alfred Sutros	95
Mission To England	98
Golden State and the Milk Control Law	101
KySo Merger	108
More than Just Taking Out Goiters: Diversity in Practice	119
INDEX	127

Cataloging information

KIRKHAM, Francis R. (b. 1904)

Corporate attorney

Sixty Rewarding Years in the Practice of Law: 1930-1990, 1994, xii,
130 pp.

Utah background and George Washington law school; clerking for Supreme Court Justices George Sutherland and Charles Evans Hughes; Pillsbury, Madison & Sutro: early partners and work, 1930s and 1940s, firm administration, antitrust cases; general counsel for Chevron Corp. (formerly Standard Oil of California), 1960-1970: antitrust counseling, oil cartel case, merger with Standard Oil of Kentucky.

Introduction by James E. O'Brien, Pillsbury, Madison & Sutro

Interviewed in 1985-1990 by Sarah Sharp and Carole Hicke for the Pillsbury, Madison & Sutro Oral History Series. The Regional Oral History Office, The Bancroft Library, University of California, Berkeley.

PREFACE

The history of Pillsbury, Madison & Sutro extends more than 100 years. Its founder, Evans S. Pillsbury, commenced the practice of law in San Francisco in 1874. In the 1890s, Frank D. Madison, Alfred Sutro, and Mr. Pillsbury's son, Horace, were employed as associates. In 1905, they and Oscar Sutro became his partners under the firm name Pillsbury, Madison & Sutro.

In serving thousands of corporate and individual clients over the years, the firm helped to write much California history. It played a leading role in landmark litigation in the Supreme Court of California and other courts. In its offices, a number of California's largest corporations were incorporated and legal arrangements for numerous major transactions were developed. In addition to its services to business and other clients, the firm has a prominent record of services to the legal profession and to the community, charitable, and other endeavors.

In March 1985, with the firm approaching 400 attorneys situated in multiple offices, the Management Committee approved the funding of an oral history project to be conducted by the Regional Oral History Office of The Bancroft Library of the University of California, Berkeley. The purpose of the project is to supplement documents of historical interest and earlier statements about the firm's history with the recorded memories of those who have helped build the firm during the past fifty years. It is our hope that the project will preserve and enhance the traditional collegiality, respect, and affection among the members of the firm.

George A. Sears
Chairman of the Management Committee

May 1986
San Francisco, California

Pillsbury, Madison & Sutro Oral History Series

John B. Bates, Litigation and Law Firm Management at Pillsbury, Madison & Sutro: 1947-1987, 1988.

Albert J. Brown, Building the Corporate-Securities Practice at Pillsbury, Madison & Sutro: 1942-1987, 1988.

Noel J. Dyer, Lawyer for the Defense: Forty Years Before California Courts and Commissions, 1988.

Harry R. Horrow, A Career in the Practice of Tax Law at Pillsbury, Madison & Sutro, 1988.

Wallace L. Kaapcke, "General Civil Practice" - A Varied and Exciting Life at Pillsbury, Madison & Sutro, 1990.

Francis R. Kirkham, Sixty Rewarding Years in the Practice of Law: 1930-1990, 1994.

Turner H. McBaine, A Career in the Law at Home and Abroad, 1989.

Francis N. Marshall, Looking Back: A Lifetime Among Courts, Commissions, and PM&S Lawyers, 1988.

James E. O'Brien, Odyssey of a Journeyman Lawyer, 1991.

Charles F. Prael, Litigation and the Practice of Labor Law at Pillsbury, Madison & Sutro: 1934-1977, 1986.

John A. Sutro, Sr., A Life in the Law, 1986.

Frank H. Roberts. In Progress

INTRODUCTION--by James E. O'Brien

Few men have come to the profession of law with greater gifts of mind, spirit, and will. Fewer yet have received a more intensive training in the broadest reaches of the law.

None has used those exceptional gifts and experiences with greater skill in achieving a national reputation as a superb advocate, a devoted and compassionate friend and an ardent disciple of the law and legal process.

I hope the introduction that follows will enable his myriad friends to catch a glimpse of how a great lawyer fashioned a memorable career at the Bar.

Mr. Kirkham, now a hearty patriarch of eighty-five, surrounded by children and grandchildren aplenty and still married to his bride of sixty years (Ellis Musser), began his remarkable career over sixty years ago. His life spans the deepest depression in our nation's history, its most threatening war, the turbulence created by the world-wide clash of democracy and communism in a contest for mankind's hearts and souls, the dangers and threats of the nuclear age, and the most rancorous domestic political differences since the Civil War.

His career spans stunning and profound technological changes. In his lifetime he has been witness to the commencement of manned flight, radio, television, space probes and spinning satellites, computers, lasers, instantaneous world-wide communication, and the atomic bomb, all of which have swiftly and inexorably transformed the world in a single century. Not enough? There must be added the accelerating changes in medicine, physics and chemistry; and now the world is on the threshold of changes in human biology that will forever transform the life of man.

These times have tested in war and peace our legal principles and our faith in the guiding truths of our republic, as embodied in the Constitution. Francis Kirkham's life has been an affirmation of the highest principles of legal advocacy and of the enduring strength of the American legal process.

Mr. Kirkham's extraordinary achievements at the bar are a tribute to his brilliance, his legal scholarship, and his exposure to the great legal issues of his time; to his capacity to embrace every branch of the law with confidence and consummate ease and, finally, to his inheritance of a rugged constitution and a pioneer spirit bred in him as a descendent of distinguished forebears. They taught him strong ethical principles, discipline, self-reliance, resourcefulness, and the independent mind and spirit essential to great advocacy. George Keenan has said that our age

is seeing the "sad climax of individualism." Mr. Kirkham's career is a living refutation.

Mr. Kirkham was born in Fillmore, Utah, where his family had settled. Fillmore, once the state capital of Utah, is still a small farming community, but the old statehouse remains and preserves memorabilia of the pioneers who settled in that little town. His grandmother was a Mormon pioneer who crossed the the plain on foot in a "handcart" company. His great grandfather on his father's side was one of the earliest converts in England and came at the time of the start of colonization of the Utah Valley. Both his parents graduated from Brigham Young University, his father did graduate work at Stanford, at the University of Chicago, and took his Ph.D in education at the University of California, Berkeley. Mr. Kirkham was the second of six children, all college graduates.

He inherited and was taught a profound faith in education. His pioneer background gave him a sturdy independence, a sense of responsibility, of individual initiative and energy, of vitality and self-worth. He knew intuitively that an individual spirit and mind can shape the bearing and compass course not only of his own life, but of others.

Mr. Kirkham was swift off the mark. By age twenty he had attended the University of Utah and, for a time, the Utah Agricultural College. Even before sixteen he was running his father's farm, one of the largest irrigated farms in Salt Lake Valley. He had served a summer in the National Guard in the State of Washington, riding the horses that pulled the artillery caissons. He had already declined an appointment to the U.S. Naval Academy at his father's insistence and had spent two years in England as the head of a conference (like a bishop's diocese) covering a large area of the Midlands in England. After two years there and a six-month expedition exploring Europe and the Middle East, he returned to Utah expecting to take up farming again.

Drought and depression changed all that. When his father moved to New York to take an important position, young Kirkham moved to Washington and entered George Washington University to finish his baccalaureate and enter law school in 1927. He was fortunate to find part-time work at the Interstate Commerce Commission and later in the Washington office of a prominent law firm to support himself during his years in law school.

He knew from the moment he entered his first class that he was made for the law and the law was made for him. He had found his element, as the skylark is made for the blue heavens and the dolphin for the blue seas. He said once, "My memories of law school are not of learning to practice as a lawyer. It was learning the law. It was very much an academic experience. I was interested in the law, in the origins of the

law, and did a great deal of studying. I just enjoyed digging into it. I was interested in the law as law, and I don't have any recollection of really having an idea of what I was going to do in practice or working towards practice or anything of that kind. I was just getting to learn what the law was."

Once he had found the law he picked up the pace. He was first in his law school class, a member of the Order of the Coif. He passed the bar examination in the District of Columbia before law school graduation (again winding up No. 1) and was immediately offered the assistant deanship of the law school!

By a stroke of random good fortune, he came to the attention of Justice George Sutherland and, after what proved to be a stiff competitive contest, was chosen to become his law clerk. He began the job of clerk to that great jurist before he was out of law school, working on a part-time basis while he took his final examinations and the bar examination.

Mr. Kirkham has always been reticent to speak of the work of the Court or of its justices, maintaining the great tradition of confidence which properly veils the work of the Court. Even so, the intimacy and warmth of his relationship with Justice Sutherland cannot be hidden. Sutherland had practiced law in Utah, served as a congressman and senator. Elevated to the Court in 1922, Justice Sutherland served until 1938. The year Kirkham arrived at the Court, Chief Justice William H. Taft was succeeded by Charles Evans Hughes, statesman and jurist, who became the eleventh chief justice in 1930.

Mr. Kirkham clerked for Justice Sutherland for a year and a half. He had expected to enter private practice when that clerking ended, but Chief Justice Hughes asked him to remain to serve under him. Kirkham did so for two more years. Hughes, whose prodigious capacity for work is legendary, was the epitome of the Supreme Court judge in appearance -- handsome, austere, aloof, stern (although privately warm and congenial), he ruled the Court like a symphony conductor in time to his baton; according to Justice Felix Frankfurter, serving him was as relaxed as running a marathon.

In their work habits, Kirkham and the chief justice perfectly complemented each other. It is hard to know who had the most influence on the other. Certainly the chief justice met his match in Kirkham when it came to working. On the one hand there was Hughes, a brilliant lawyer with a fabled capacity for work. He had once argued four cases in the Supreme Court within a single week and two more cases within the next three weeks. He had served once before as a justice of the Court, resigning after his first service to run for the presidency of the United States. On the other hand, there was Kirkham, still in his late

twenties, who had vaulted in four short years from Fillmore, Utah, to the highest reaches of legal scholarship. Now he was suddenly exposed to the vast range of cases and controversies that are the daily fare of the Supreme Court. The chief justice and Kirkham were well met in those stirring times for the Court and the country.

Work never ceased for Kirkham. Day and night he researched the law on the questions confronting the Court. He acquired other duties connected with Hughes's administrative role as chief justice. And to cap it all, Kirkham and Reynolds Robertson, who preceded Kirkham as Chief Justice Hughes's clerk, were writing (in their spare time!) a book on the jurisdiction of the Supreme Court which, when published, became the standard legal authority on this arcane subject.

In 1935, when his service with the chief justice came to an end, Kirkham had originally expected to go to a prominent firm in New York. Fate intervened. He and his wife, Ellis, decided that they wanted to live in San Francisco.

Late in 1935, shortly before his departure, he sent a memorandum to the chief justice pointing out that the General Orders and Forms in Bankruptcy had not been revised in thirty years, despite the intervening statutory revisions in the bankruptcy laws and the enormous number of bankruptcy proceedings then pending before the federal courts as a result of the Great Depression. That memorandum, when presented to the full court, resulted in an immediate request that Kirkham remain and undertake the task of revising the General Orders and Forms to reflect the recent changes in the bankruptcy law. This he did, and during the same period he and Robertson completed their book on the jurisdiction of the Supreme Court.

A year or two later, Congress, in the Chandler Act, changed the entire structure of the bankruptcy law. By then Kirkham had begun his practice in San Francisco. Nonetheless, the chief justice, on behalf of the Court, insisted again that Kirkham return to the Court to undertake the heroic task of rewriting the entire General Orders and Forms in Bankruptcy. What followed was a stunning work of legal scholarship which by itself would rank him among the great draftsmen in the law. The revisions of the General Orders and Forms required a study of all the bankruptcy statutes and of the decisions construing them, of congressional reports, of the recommendations of judges, referees, practitioners, of the views of government agencies, such as Treasury, Justice, Securities and Exchange Commission, and Interstate Commerce Commission, of interested organizations, including the National Bankruptcy Conference, whose conferees met with him, and a studious examination and redrafting, line by line, of the General Orders and Forms. His final recommendations, embodied in a 140-page printed report with all of the proposed drafting changes to statutes, rules, orders, and

forms, was adopted unanimously by the Court with appropriate accolades. It remains a piece of work that would have taxed the capacity of the chief justice and of any other member of the Court.

And so it was that this young lawyer with all of his gifts, his rich and extraordinary experience, had begun his private practice of the law with the firm of Pillsbury, Madison & Sutro in San Francisco. Although a young and new associate of the firm, he was immediately immersed in major appellate litigation. The firm, the largest in San Francisco, with a far-flung practice representing corporate and private clients across virtually the entire spectrum of American industry, including banking, energy, distribution, natural resources, shipping, insurance, and communications, was an ideal spot for the intrepid young lawyer. His talents and skill were so quickly recognized that even senior partners soon vied for his help in major cases making their way to the Supreme Court.

His work habits astounded his colleagues and stood traditional office procedure on its head. Soon after his arrival, asked to comment on a draft prepared by an eminent out-of-town lawyer, he redrafted the entire document overnight, keeping a battery of night stenographers at work until early in the morning. After the seismic explosions and eruptions had subsided, his brief survived and led to a victory in the Supreme Court.

Other cases quickly followed. His briefs in Nester Co. v. Western Union (309 U.S. 582 (1940)), in which the Supreme Court reversed the district court and the Court of Appeals of the Ninth Circuit, was a case of paramount importance to the telegraph company which Kirkham represented. Such cases were only the beginning for him of forty years of intensely active practice as a litigator and appellate advocate, while at the same time serving as counsel to major American industrial concerns.

United States antitrust laws had become moribund during the heyday of New Deal legislation. After the decisions of the Supreme Court holding much of the New Deal legislation unconstitutional, the Anti-Trust Division of the U.S. Justice Department under Thurmond Arnold launched a nationwide campaign for vigorous enforcement of the antitrust laws. That campaign began in San Francisco with a series of grand jury investigations designed to signal the sudden switch from criminal prosecutions to enforce mandatory price-fixing under the National Recovery Act to a revival of traditional antitrust principles.

The tactics of the government raised grave constitutional issues. Pillsbury, Madison & Sutro, with its wide representation of business and industry in San Francisco, was immediately retained by companies under investigation. Kirkham became quickly involved in litigation in the

Ninth Circuit Court of Appeals and the Supreme Court of the United States, arguing the constitutional limitations on the scope of grand jury subpoenas and the appealability of orders refusing to limit or quash them, and defending the rights of witnesses and potential defendants in grand jury proceedings.

His experience in the antitrust field grew by leaps and bounds and during some years became a major part of his practice. He was to handle a number of major merger investigations, such as Alexander & Baldwin's acquisition of Matson Steamship, FMC's acquisition of American Viscose, and antitrust cases involving the electronics industry, the evaporated milk industry, the trucking industry, chemical and fabric industries, heavy equipment industries, the shipping industry, the food industry, the sugar industry, the steel industry, the hardware industry, the fire extinguisher industry -- a panorama of endless diversity.

Against all odds, he persuaded the antitrust division to permit the merger of Standard Oil Company of Kentucky and Standard Oil of California. He won the subsequent litigation in the Supreme Court between the Standard of New Jersey and Standard of Kentucky which confirmed the rights of Kentucky to use the name "Standard" in the Southeastern United States.

Having served on the Attorney General's National Committee to Study the Antitrust Laws from 1953 to 1955, in 1961 Kirkham became chairman of the Antitrust Section of the American Bar Association. Over the years, antitrust was only one part of a practice of enormous variety.

In the state and federal courts, he was involved in litigation involving telephone company rate-making, accelerated depreciation and division of revenues, in tax litigation involving the depletion allowance, wartime excess profits taxes, post exchange sales, the allocation formula of the Alaska income tax, the taxability of sales by states on goods being exported from the United States, the validity of restrictions on bonded indebtedness, demurrage charges by railroads in Nevada, trademark infringement cases, false advertising, contract and patent cases in the semiconductor and aerotech industries, the rights of airlines to use facilities at airports, the legality of bank credit cards, the power of the president to modify rates of duty under the Trade Agreement Act, water conditioning devices, price control, and even litigation regarding the Alaska Unemployment Compensation Act. Copies of his briefs in trial courts and appellate courts are found in orderly rows and serried ranks on the bookshelves in his office. They are a testament to the breadth and power of his advocacy.

In 1972, in his last argument before the Supreme Court, he won a victory of paramount importance to the administration of the antitrust laws. There the Supreme Court held, against all the probabilities, that

a state of the United States does not have standing to sue parens patriae under the federal antitrust laws on behalf of the citizens of its state.

For ten years beginning in 1960, Mr. Kirkham acted as general counsel of Standard Oil Company of California (now Chevron Corporation) with ultimate responsibility for the legal advice rendered to one of the world's largest industrial concerns operating in over one hundred countries through myriad subsidiaries and affiliates. Even so, he remained as active as ever in major litigation. Although he supervised the work of other lawyers throughout the world, he continued to be personally involved in major cases outside the energy industry.

In 1970, Mr. Kirkham was the recipient of the National Alumni Achievement Award at George Washington University. In 1976, the University of Utah bestowed upon him the Alumni Merit Honor Award, a distinction which his father had earlier received and one which his younger brother, Don Kirkham, one of the world's greatest physicists, was later to receive.

It is difficult to conceive that a single lawyer can have achieved so much in one lifetime. But he has, thanks to a rare combination of qualities: a strong constitution, boundless energy and vitality, resourcefulness, the will and tenacity to master his profession ("to work in the law"). It is his training in the Supreme Court which gave him early confidence in his capacity to deal with any issue that involved the law. Few lawyers can match the quality of his writing: clear and simple, plain and compelling, seemingly effortless. A tall, handsome figure, dignified, courteous, with a warm, confident personality, a quick and easy smile, a resonant voice -- he is a formidable courtroom adversary. He has made friends of his adversaries, many of whom were the first (even after losing) to compliment him for the quality of his advocacy.

In 1973 Mr. Kirkham served on the National Commission on the revision of the Federal Court Appellate System. No one at the table came better prepared to give counsel.

Such an account as this, with its emphasis on the law and legal process, fails to speak adequately of his love of life, of nature, of the good earth, of song and laughter, of his myriad friends. It neglects his beautiful family, his gentleness and compassion, his everlasting modesty.

* * * * *

Now a senior statesman in his firm, he looks back on a life in the law that has done credit to his exceptional talents and his pioneer spirit. It is a career that honors the tradition and heritage of those great justices of the Supreme Court whose example shaped his life as a lawyer and made of him the law's most passionate and reverent servant.

James E. O'Brien
Pillsbury, Madison & Sutro

January 1990

INTERVIEW HISTORY--by Carole Hicke

Francis R. Kirkham was interviewed as part of the series of oral histories being done with twelve advisory partners at Pillsbury, Madison & Sutro.

Mr. Kirkham's career has been filled with events that attest to his brilliance and devotion to the law and to Pillsbury, Madison & Sutro. As he himself once said in a speech, "Law in its truest sense is a learned profession. It is the very expression of man's moral achievement, the measure of his civilization."

Ranging from clerking for two U.S. Supreme Court justices to acting as general counsel for Chevron Corporation--then Standard Oil of California--Mr. Kirkham's career is studded with precedent-making solutions to legal problems that have made a strong impact on the legal history of the United States.

In his oral history, Mr. Kirkham discusses some of the highlights of his career. His warmth and delightful sense of humor become apparent in the anecdotes he relates to illustrate some of the human aspects of legal practice. Talking about several of the many landmark cases he handled, Mr. Kirkham adds the human dimension--what it was like to stay up all night preparing a brief, and the difficulties of coast-to-coast travel in the days before the jet airplane.

As both a business counsellor and a litigator and appellate lawyer, Mr. Kirkham has always taken great pleasure in the diversity of his practice. "A lawyer's life is the opposite of repetitive," he explains, enumerating storms in the Gulf of Alaska, the California milk industry, the state of California arguing with the federal government over taxation of gasoline on military installations, gold mining in Alaska, and much more.

Offering descriptions of the firm in the 1930s when he first went to work for Mr. Alfred Sutro, Mr. Kirkham recalls that "Mr. Alfred" cautioned him not to work for anyone else. But Frank Madison and other partners occasionally called on Mr. Kirkham's expertise, particularly in dealing with the U.S. Supreme Court. So for a while, Kirkham "bootlegged" jobs for other members of the firm in his "spare" time. His characterizations of some of the early partners add new aspects to their personalities.

Francis Kirkham received the Alumni Achievement Award from George Washington University in 1970, and in 1989 the J. Reuben Clark Law School of Brigham Young created the Francis R. Kirkham Professorship in Law. In March 1990, the entire partnership of PM&S honored this outstanding

lawyer at a gala dinner. To the laudatory speeches and warm tributes, Mr. Kirkham responded, "It is given to few to look back on a lifetime and say, 'Mine have been the greenest pastures.' By the greatest good fortune, this has been my lot. If I could do it all over again, I would not change it."

Interviews with Mr. Kirkham took place on December 4, 1985, February 7 and 11, March 11, 1986 by Dr. Sarah Sharp. The oral history was completed in interviews conducted by Carole Hicke on March 8, 1987, June 3, 1987, February 7, 1988, and February 16, 1990. The sessions took place in his Pillsbury, Madison & Sutro office located in San Francisco's financial district. On the walls hang inscribed pictures of U.S. Supreme Court Justices George Sutherland and Charles Evans Hughes, along with photos of early PM&S partners and one of Abraham Lincoln. At right angles to Kirkham's regular desk is a large, roll-top desk. He uses both.

After the tapes were transcribed, Mr. Kirkham made extensive emendations to the transcript and selected photographs for illustration.

Various interruptions related to Mr. Kirkham's health and other commitments resulted in delays during the interviewing, reviewing, and approval phases so that what began as almost the first in the Pillsbury, Madison & Sutro series has become the next to last to be completed.

We are most appreciative of the introduction written by James E. O'Brien which offers an elegant perspective on the eminent career of Francis R. Kirkham.

Carole Hicke
Project Director

August 1994
Regional Oral History Office
The Bancroft Library
University of California, Berkeley

BIOGRAPHICAL INFORMATION

Your full name Francis Robison Kirkham

Date of birth August 23, 1904 Birthplace Fillmore, Utah

Father's full name Francis Washington Kirkham Birthplace Kelhi, Utah

Occupation Educator

Mother's full name Martha Algina Robison Birthplace Fillmore, Utah

Occupation Mother and homemaker

Family

Spouse Ellis Shipp Mueser

Children James Francis, Ellis Elizabeth, Katherine, Eugene Robert

Where did you grow up? Utah

Education University of Utah, Utah Agricultural College,

George Washington University

Areas of expertise litigation and general corporate law

Special interests or activities horse back riding, farming,

travel

I BIOGRAPHICAL DETAILS

[Date of Interview: December 4, 1985]

Growing up in Utah

Sharp: When we talked when we first met, you mentioned that you had grown up in Utah and that you had been born in Fillmore. I thought we might start talking a little bit about Fillmore, about the area where you grew up.

Kirkham: Well, this isn't a history of me, it's a history of the firm. If you were writing a history of Francis Kirkham, you'd want to go back there, but that doesn't have anything to do with the firm.

Sharp: Well, it has to do with who you are, what kind of life you brought to the law firm.

Kirkham: Well, I can summarize a little. My mother's family was from Fillmore, Utah. Her mother, whose ancestors came from England, was an early Mormon pioneer who crossed the plains as a child in a handcart company. Her father, whose ancestors also came from England before the American Revolution, was among the earliest Mormon pioneers. My father's grandfather was among the first Mormon converts in England. He came over within a few years after the first colonization of the Salt Lake Valley in 1847 and settled in Lehi, about twenty miles south of Salt Lake City. He brought his four sons, the oldest of whom was my grandfather.

My mother and father met at the Brigham Young University when they were both students there--which is one of the great functions of BYU [laughs]: to make these Mormon marriages.

Dad took his A.B. at the University of Michigan and his law degree from the University of Utah. He did graduate work at Stanford and Chicago, and took his Ph.D. at the University of California, Berkeley. His field was education. He taught at the

BYU in Provo, Utah, when I was an infant. He later became state director of education for Utah, and superintendent of the Granite School District, the largest school district in Utah.

In the meantime, however, he fussed around with all kinds of odds and ends, dabbling in mining stock and going up and down in that. Later on he bought and sold and owned large farms. He never was a farmer; I farmed, he bought and sold. But he was quite an extraordinary person, really.

Sharp: What kind of influence would you say he was on you?

Kirkham: Well, the principal influence was, I guess, to get an education. All six of us--Dad's children--graduated from college; all three of his sons and all three of his sons-in-law have doctor's degrees. My oldest brother is one of the world's most distinguished physicists.

Yes, I think Dad's influence was towards getting an education. And, of course, I had a very strong religious influence from a strong Mormon family. All the members of the family were prominent in the faith, and that was a very sound education in ethics, if you want to call it that.

Dad also insisted that all of us children have a musical education--he, himself, had gone to the old Brigham Young Academy music room at 6:00 each morning before the fires were lighted to practice the piano. He used to tell us how, in the winter, he bundled up in sweaters, stocking cap, and mufflers and kept breathing on his fingers to keep them warm. My oldest and youngest sisters and I studied the piano. I played the trumpet and tuba in my high school band. It was something to lug the old tuba around when we marched down Main Street before the school games.

My two brothers became accomplished musicians--the youngest organized a dance band in high school with which he earned a little money--he played the trumpet. The oldest, who played the clarinet, graduated from the McCune School of Music and did some composing as well as playing. Both brothers played with the Salt Lake City Municipal Band in its Sunday concerts and also, later on, played in the symphony orchestra at Columbia University.

Sharp: What about your mother? Did she work outside the home?

Kirkham: No, Mother had six children, so that was work enough. As a matter of fact, I think the hardest (and certainly the most important) work a woman has is being a mother. She was a

wonderful mother. She died when she was sixty-one, heart attack. She devoted herself to her children and to her home.

Sharp: Which child were you, in the middle?

Kirkham: I was second. I had a sister older and two brothers and two sisters younger. Three boys and three girls.

Sharp: Did you have aunts and uncles and grandparents nearby?

Kirkham: Oh, yes, we had strong family ties. We lived next door to my mother's brother, who was a doctor; so we got free medical treatment. And our grandmother, Mother's mother, used to stay with us from time to time. She was a widow, and she spent part of her time with each of her children. We all greeted her with great joy every time she'd come stay with us.

We moved to Salt Lake City when I was five, I guess.

Sharp: You mentioned to me something about a stock judging contest you were in.

Kirkham: Well, I was going to be a farmer. Dad had one of the largest irrigated farms in Utah. It was a beautiful farm right in the Salt Lake Valley, between seven hundred and eight hundred acres. It's all homes and suburbs now. It was only fourteen miles from Salt Lake.

Anyway, it was a large farm, a large operation. I went to the Utah Agricultural College after I spent two years at the University of Utah. While I was there I was on the national stock judging team, representing the college.

I came back and did run the farm for a couple of years. Then farming went to hell in a hand basket. There were droughts, the water canal dried up, and in any event Dad never farmed. He was then offered a place as director of National Child Welfare Association in New York, and he and the family went back to New York. I went to law school.

Sharp: Did they remain in New York the rest of their lives?

Kirkham: No, they were there for five or six years--both my brothers went to Columbia University while they were there--and then they came back to Utah. Dad came back and then was superintendent of Granite School District. He held a number of prominent posts in connection with education. He was on President Herbert Hoover's Child Welfare Commission and so on. Later on in life he could

not resist buying back some of his old farms, and they turned out to be quite valuable when he died.

Sharp: You mentioned to me that at some point you had it in mind to go to Annapolis, and your father had a different idea.

Kirkham: Well, my friend, Ashby Badger, who later became president of the Utah Oil Refining Company, wanted to go to Annapolis [U.S. Naval Academy]. I did too, so we applied for our appointments and we got them. Then Dad wouldn't let me go. He decided he didn't want me to be a naval officer, or maybe he didn't want me to come into contact with those foreign, outside influences, I don't know. [laughs]

Sharp: Why did you want to go to begin with?

Kirkham: Well, I don't know. Ashby's older brother, Carlos, who was also my close friend, had gone to Annapolis. It was kind of glamorous, I guess, to see him come home in his midshipman's uniform, and we'd found out a lot about the school from him. It offers, after all, an outstanding education, and it was something to get the appointment. I don't know why I did, but I did.

Sharp: How did you find out that you had gotten the appointment? Was it a letter?

Kirkham: Oh, no, you get it from your congressman. I've forgotten who the congressman was. There were two appointments, and Ab and I got them.

Sharp: Did they call you up?

Kirkham: Yes, you applied, and--Carl Badger handled it, largely. He was my friend's father, and he was a good friend of mine. It was through his influence that I later studied law, actually.

Sharp: So you eventually went to George Washington University.

Kirkham: Then I went to George Washington, yes.

Sharp: How did you pick that college?

Kirkham: Well, my friend Carl Badger, who was a lawyer in Salt Lake--Badger, Rich & Rich--had studied law at George Washington University. He said, "If you want to study law, you ought to go to Washington, D.C. That's where law is made, that's where things are happening, that's where you'll get a better idea than you will in some Ivy League place." And it turned out that way.

I got to know Washington, D.C. very well, and all of the angles of government. It turned out to be a good choice, and I was very pleased with the choice, always have been.

Sharp: You mentioned to me that you had done some debating.

Kirkham: I debated at the University of Utah. My debate coach was Herbert Maw, who was later governor of Utah. Later, when I completed my work for an A.B. degree at George Washington University, I judged a number of debates, including one with a team from Cambridge University, England. I also received the Davis Prize for winning the university's public speaking contest.

Law School in Washington, D.C.

Sharp: Once you got to Washington and were taking the requisite course work to finish up that baccalaureate degree, were you tempted to get into something else or was the law definitely--

Kirkham: No, the law. From the very first time I walked into a law class, the law was just exactly as though I'd been made for it or it had been made for me. There wasn't an hour that I didn't enjoy law school and working in the law.

Sharp: What was the student body like at the law school?

Kirkham: It was a very serious student body. Many of them, as I was, were working part-time. I worked part-time with the Washington office of the Cravath firm,¹ helping to earn my way--in fact, earning my way--and, incidentally, supplementing my learning of the law.

Sharp: In some of the Eastern law schools in the earlier part of the twentieth century, I understand that instructors often didn't really have offices, that they had desks in the library and that you might go and see the faculty there.

Kirkham: Our professors had offices. I got to know all the professors. [chuckles] I don't know, I sometimes think there's sort of an art about getting grades. The first thing you have to do is to get the highest grades on the first exams. Then you sort of get yourself noticed, and you study like hell--if you're interested, and I was interested, I was very interested.

¹Cravath, Swaine & Moore of New York City.

Then you get to know your professors. I knew my professors, got invited to their homes and so on. It was an active relationship.

Sharp: Were there one or two that you particularly liked?

Kirkham: Yes, there were two, probably, that I particularly liked. One was S. Chesterfield Oppenheim, who was just a youngster then, not much older than I, who has had quite a brilliant career since and was co-chairman of the Attorney General's National Committee to Study the Antitrust Laws. I was a member of that committee. And there was a professor named Hector Spaulding.

Sharp: Why was it that you liked them more?

Kirkham: Well, they were more stimulating and opened their homes to me and later to Ellis and me-- [opens file and reads from Christmas card] "Seasons greetings with all good wishes for the year ahead, Peg and Oppie": that's Oppenheim. Then Peg writes (Oppie's getting older), "Oppie never forgets his deep affection of decades for Ellis and his pride in the distinguished career in law of the Czar, who is revered by the senior bar contemporaries in antitrust and for a spectrum of supertalents as a trial attorney. [laughs] Peg vividly recalls with great pleasure our reunion in San Francisco. Oppie is grateful for all of Czar's inspirations." Well, you know, that's a close, warm relationship.

Oppie was the author of a law note in the University of Michigan Law Review on jury trial that I brought to [Justice George] Sutherland's attention. Sutherland was so impressed with this article, which was very useful to him in writing his great opinion in the Scottsboro case,¹ that he said he'd like very much to meet the young man who wrote it. So I got hold of Oppie and brought him up and introduced him to the justice.

Sharp: It sounds like it would have been a very stimulating friendship.

Kirkham: As to Professor Spaulding--well, perhaps I shouldn't tell this story, but it shows the basis for our long and close friendship. Soon after I came to California, Professor Spaulding visited San Francisco and asked me to handle an ancillary proceeding for an estate of which he was executor. It was an unplanned visit and I was away from the city when he arrived. Gene Prince saw him and was good enough to entertain him at luncheon in my absence.

¹Powell v. Alabama, 287 U.S. 45 (1932).

When I returned, Gene told me about his visit and added that my former professor had related a story to him that he had been happy to pass on to the members of the firm at the most recent firm luncheon. He said Professor Spaulding told him that when he read my final exam paper in Personal Property he leaned back in his chair and thought, "I can't give a 100 percent grade to an essay paper. It just isn't done. Under our system of grading, 85 is an A grade. I guess I'll mark it 98." And, Spaulding added, "I did, and it's the highest grade I've ever given on an examination paper."

Spaulding had never told me that story, and I was pleased that he had told it to one of the partners of the firm with which I was just starting my practice.

Sharp: When you were in law school and working, did you have time for any other kinds of interests? Or was the law--

Kirkham: Well, I didn't have any interests that were of significance. I had the ordinary interests of a young man, chasing around and having a good time. My cousin, Myron Anderson, went with me to Washington. He was recruited by Georgetown in the days of Lou Little's great football teams. He was a great big Swede and played football out there. He had a good voice, and we used to do a lot of singing and fooling around. Nothing of significance.

Sharp: You were married at the university?

Kirkham: Well, not yet. I went back in '27; I was married in '29.

Sharp: Was your wife from Salt Lake?

Kirkham: Yes, she was from Salt Lake.

Sharp: And had you known her before you left?

Kirkham: Yes, I not only knew her, but was violently, hopelessly, completely in love with her before I left. [laughs] She was just a little, curly-headed kid--just turned seventeen.

When I went East we had pledged each other undying affection--although I don't know whether she knew what that meant by that time, but I certainly did. She went to the University of Utah for a year, and then she went to Mills College in Oakland. Then I grabbed her and made her marry me.

Sharp: When she came to Washington did she work then?

Kirkham: Well, she finished at George Washington University. She had not yet taken her A.B. degree. She got her A.B. and I got my LL.B. the same year. Then she did some work. She was business manager--she was very smart--of the magazine that was put out by the National Academy of Sciences. She worked for the academy for a time, and I think that's the only work she did outside.

Later, when I worked with [Chief Justice] Charles Evans Hughes, I was working day and night, constantly, and Sutherland the same. So I was home very little. After Ellis graduated, we decided it would be a good idea if she did some interesting postgraduate work to occupy all of the time she had to spend alone. So she went to the Sorbonne in Paris.

After she arrived in Paris the next thing I knew I got a letter from Nice saying she had gone to the Sorbonne, it was a very dismal piece of cement, and it didn't appeal to her. [laughing] She had met some friends and had gone with them to Nice. The next I heard she had gone to St. Moritz for skiing and then decided to take a trip instead of going back to school. She met her old art teacher from the university and they went to Egypt and Palestine together and so on. Finally came home, educated by travel instead of by the Sorbonne.

Sharp: Sounds like a wonderful time.

Kirkham: Oh, it was a wonderful time.

Sharp: How long was she gone?

Kirkham: Oh, nearly six months, I guess. Her mother worried that the marriage was going to break up and went over and brought her home. Which wasn't true at all.

Sharp: Sometimes parents' perceptions of what happens with their children are not quite right.

Kirkham: No, no. After Ellis returned to Washington she again became restless--living with a husband who was never home--and decided to follow her grandmother's footsteps and become a doctor. Her grandmother--Dr. Ellis R. Shipp--was one of the first women doctors in the West. She graduated from the Women's College of Medicine in Philadelphia in 1876, had a distinguished career, and was elected to Utah's Hall of Fame. Ellis returned to graduate work in college and completed all of her pre-med requirements in one year. She entered medical school and finished her first year--with honors of course. Just as she was well on her way to an independent profession, I accepted employment in San Francisco. She was happy with our choice, but has always had a

buried regret that she was not able to get her doctorate and practice in the field of pediatrics.

Sharp: I have a question about being in law school, and it has to do with skills or aptitudes that you might have learned in law school that you think might have really helped you once you became a lawyer. I don't mean the details of the law, but learning how to be a lawyer.

Kirkham: I don't know about learning how to be a lawyer. We had moot court and we had briefing, that sort of thing. But my memories of law school are not of learning to practice as a lawyer. It was learning law. It was very much an academic experience. I was interested in the law, in the origins of law, and did a great deal of studying. I graduated first in my class. I just enjoyed digging into it.

I was interested in law as law, and I don't have any recollection of really having an idea of what I was going to do in practice, or working toward practice, or anything of that kind. I was just studying to learn what the law was.

Sharp: Did you assume that you would practice?

Kirkham: Oh, yes, I assumed that I would practice.

Sharp: You didn't want to go into teaching or into government?

Kirkham: Well, I played around with the thought of teaching, yes, and was offered the job of assistant dean of the law school when I graduated. But I turned it down.

Later, when I was completing my clerkship with Chief Justice Hughes, I interviewed Dean [Roscoe] Pound at Harvard with the thought of going there to get an S.J.D. degree, which might or might not have led to teaching. We had an interesting talk and he offered me a fellowship at the law school. However, after talking to Jack Sutro and considering his very positive views, I decided to come down from the heights and get into the practice.

I never had any desire to get into government, never. I've been offered one or two positions, including Chief Justice Hughes asking me to take on the job as the first director of the Administrative Office of the United States Courts. The chief justice also told me that if I would take on the job of getting the administrative office started, he would "use such influence as he had" [smiling] to get me an appointment to the United States Court of Appeals for the District of Columbia.

That was kind of tempting to me at the time. That was after I'd been with the firm only for a couple of years. I was still quite young, thirty-two or -three years old. It would have been an interesting and challenging job. Of course, it paid a lot more money than the firm was paying me.

I talked to Felix Smith about it. I didn't talk to anybody else. Felix made a characteristic comment. He said, "Well, that's a very attractive offer. I look around me and I don't see many sons of partners," and he turned around and walked out.

Sharp: So you kind of wondered?

Kirkham: So, I kind of wondered, yes, and turned it down.

**II THE GREAT DEPRESSION AND THE U.S. SUPREME COURT: CLERKING
FOR JUSTICE GEORGE SUTHERLAND AND CHIEF JUSTICE CHARLES
EVANS HUGHES**

Sharp: Let's talk about the years with the United States Supreme Court. I think you should start by saying how you got the appointment.

Kirkham: Well, yes, that was interesting, I guess. Justice Sutherland's law clerk, Allan Gray, was leaving him, and he was looking around for a law clerk to replace him. These things just happen so by chance; you sometimes wonder what's handling your destiny. Bill Allison was a friend of mine. He was the deputy clerk of the Supreme Court, and remained so until he retired. His grandfather had been a law partner of Justice Sutherland: Sutherland, Van Cott and Allison, an old Salt Lake City firm.

Sutherland happened to see Allison's name on some Court paper, and he asked to see him. So Bill went up to meet Justice Sutherland and Sutherland asked him if he was related to his former partner. He said yes, he was a grandson, so they had a pleasant little chat reminiscing. It just happened that Sutherland mentioned something about the fact that he was going to make a new appointment of a law clerk, and Bill was loyal enough to say, "You know, if you want someone from Utah, you've got somebody burning up the law school at GW if you're looking for a good scholar." Sutherland said he'd be interested.

So there were a couple of boys, one very nice fellow I knew from Columbia, two or three other candidates who were being considered. Sutherland had interviewed them and I think he'd just about made up his mind to select the boy from Columbia over a boy from Michigan. Anyway, I went up to interview him and apparently he liked me enough to put me in the running, and then he came down to two of us. He gave each of us several sets of the briefs and records in cases in the Supreme Court and asked us to prepare memoranda for him. In any event, as a result of the interviews and the memoranda, Justice Sutherland called me and

said he'd selected me as his law clerk. I remember I worked all night at the law school library on those darn volumes and the cases they cited. When I got home Ellis was frantic. She thought I had been in an accident and left her a widow at age twenty.

Sharp: Now this was 1930, correct?

Kirkham: Yes, this was '30. I had not yet graduated from law school, and this was quite unusual, because ordinarily the justices don't take law clerks until after they have graduated. But through this series of circumstances he selected me over the graduates, one of whom was clerking for a court of appeals judge at the time. Then I made a deal, with Justice Sutherland's consent, to have Allan Gray stay on. So while I was studying for my law school finals and for the bar, I started working part-time for Justice Sutherland.

I took the bar examination in the middle of my last year of law school before I graduated (they let you do that then), and just when I'd had my appointment with Sutherland. They didn't give out the exam's results, but the chairman of the Board of Bar Examiners was a friend of Justice Sutherland and Sutherland called me into his office one day and said, "Well, don't disclose that I've told you, but I've just been told you passed the bar examination with the highest grade of the 480 students that took it." [laughs] So that was a good break with Sutherland. Got me off on the right track.

Sharp: Once you started, then, as his law clerk, what were your responsibilities?

Kirkham: Well, mostly the certiorari and the appeals that came up in vast quantities to the justices. Those were sent directly to the law clerks and I went through those and prepared statements on each one of them, analyzed them and recommended the action the court should take. That was two men's work every week. And then working on the opinions.

Justice Sutherland and Justice Hughes wrote their opinions. I've heard that some justices' law clerks in more recent years have done a lot of the original writing on opinions. But for Hughes and Sutherland, my work was really working on research and notes. For instance, in the Minnesota Mortgage Moratorium case¹

¹Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934).

that you referred to, there's a large section in Justice Sutherland's dissenting opinion that has the historical background of all the cases dealing with the contract clause, and all of that was my work.

In the Scottsboro case, there was a lot of digging back--it was interesting, too, because we had remarkable facilities for research. In the Scottsboro case, the question was whether the guarantee of due process included the right to counsel in a capital case. You were faced with the fact that at common law, criminals couldn't have a lawyer, let alone did they have to be supplied with one. So it was a question of going back through the ancient common law and seeing what happened to that rule as far as the American colonies and prerevolutionary days were concerned. It was very interesting, and you can see in Sutherland's opinion in that case some of the footnotes go way back into the colonial days and the earliest writings. This was all available to me in the Library of Congress, you know, no place else. All you had to do was just ask and you had all the research facilities in the world.

One of the things that I first noticed when practicing, when I came out here, was the fact that I did not have a library, a whole law library, right at my fingertips. In my office for the chief justice, I had on the walls of my office, two stories high, for my use alone, the Federal Reports, the U.S. Reports, the West Publishing decisions of all the states, and numerous texts and digests. I just had to reach out and pick them off the shelf.

Sharp: That would make your work better.

Kirkham: That would make the work better and also facilitate research, you know. If you have to go a long way to get something, you may settle for a substitute.

Sharp: What was the work atmosphere like?

Kirkham: Well, the work atmosphere with Sutherland was a very close personal relationship. I mean, he was an extraordinarily wonderful person to be with and work with. A warm nature, very brilliant scholar, extremely appreciative. You know, you'd just do anything and he'd overpraise you for it and that'd make you work your tail off to do something better.

I remember one time he'd asked me to see if I could find some authority in support of a certain statement in his opinion, and I searched and I searched. I couldn't find anything. I finally went back to him and said, "Mr. Justice, I just can't find anything. Your statement is right, it should be the law, I

just can't find the case that says that it is." He looked up and smiled, picked up his pen, signed his opinion and said, "Well, it is now." [laughing]

When I was with Hughes, I had my own office in the Capitol and he didn't ever move into the Capitol, he had his office in his home. But we had a very close relationship.

I remember his daughter, Mrs. [Elizabeth Hughes] Gossett. She was a wonderful girl. I saw her again not long before she died [in 1981]. She was the president of the Supreme Court Historical Society that I've served on since it was formed. She and Bill Gossett, her husband, came out here to a meeting of the American Bar Association. In any event, when I greeted her she said, "Oh, here's Kirk, my father's favorite law clerk." So I sort of cherish that little statement.

Sharp: I wanted to ask you just a few questions about Chief Justice Hughes. Then I thought we might talk about two of these decisions.

I was reading an oral history that had been done with Justice Felix Frankfurter. It was done by Columbia University in the '60s, and he was talking about Chief Justice Hughes. His ideas about Hughes were probably very different from what your idea would be. He talked a little bit about the atmosphere around the Court and he said that being on the bench with Hughes was as relaxed as running a marathon. He said Hughes was very time-conscious and very work-conscious, getting every spare minute used. He was very formal in the way the court conducted its work and itself.¹

Kirkham: That's true.

Did I give you a copy of a talk I gave about Hughes?

Sharp: No, about Hughes? You didn't, but I located a copy in the historical files of the firm.

Kirkham: [quoting from speech]

"Chief Justice Hughes is usually remembered as an indefatigable worker; handsome, stern, and austere. Stern and austere in appearance he was. One Washington columnist once

¹Felix Frankfurter Reminisces. Recorded in Talks with Dr. Harlan B. Phillips (New York: Reunal & Company, 1960).

irreverently described him as a man who would look like Jove on a garbage wagon. And indefatigable he certainly was. A calendar of a few days of his work while he was a practicing lawyer might be of interest . . .

"On October 14, 1920, he argued Smith v. Kansas City Title and Trust Company involving the constitutionality of the Federal Farm Loan Act. The next day, October 15, he argued United Mine Workers v. Coronado Coal Company, one of the landmark decisions under the antitrust laws. Four days later, on October 19, he argued two cases: Tedro v. Lewis and Son, and Kinnane v. Detroit Creamery involving the constitutionality of World War I price control laws.

"At the opening of the Court's next session three weeks later he argued Berlin Mills v. Procter & Gamble, a complicated patent case, and the next day argued Erie Railroad v. Board of Public Utilities Commissioners, involving the constitutionality of orders of the Public Utilities Commission of New Jersey."

That's in the Supreme Court of the United States! He was believe me, indefatigable.

"As chief justice he was . . . courteous as a presiding officer, but he demanded the same discipline of others that he imposed upon himself. When Chief Justice Hughes presided, the Court opened its session at noon--not 11:59 a.m. not 12:01 p.m. Just as the minute hand of the big courtroom clock swung to 12:00, at just that moment the drapes back of the bench parted and the chief justice led the black-robed Court to the bench.

"When Mr. Chief Justice Hughes presided, counsel were allowed one hour for argument--one hour. It is reported that on one occasion the chief justice called 'time' on a leader of the New York bar in the middle of the word 'if.'

"But with his great abilities and almost superhuman energy, he actually had a very warm personality with a wonderful sense of humor."¹

Anyway, so much on Frankfurter's comment.

¹Kirkham quoted from material he included in a speech he delivered on January 27, 1965, for the students, faculty and alumni of the College of Law, University of Utah.

[Interview 2: February 7, 1986]

Sharp: What we need to do now is to get you to San Francisco and to Pillsbury, Madison & Sutro. I thought we might just begin with that. You were telling me how your move to San Francisco and to Pillsbury came about, why this firm, and how you were hired, and why you came to work here.

Kirkham: Well. [pause] When I was ready to leave Justice Sutherland, Cravath offered me a job and then the chief justice asked me to stay with him for another year and a half. I did that for two reasons. One, I wanted the experience of working with Chief Justice Hughes, and the other, because Robbie [Reynolds Robertson] and I were in the middle of our book on the jurisdiction of the Supreme Court.¹ We hadn't finished that yet. So I stayed on. When I was getting ready to leave the chief justice, the Cravath firm renewed its offer and I accepted. I was going up to practice in New York. At that time Fred Wood was probably the most prominent practitioner before the Supreme Court. He had quite a number of interesting and important cases pending in the Supreme Court, and he had in mind that I could be of special help to him on those cases. Anyway, it was an attractive opening for me, and I was very content with it.

Then Ellis and I were invited one evening for dinner by Harold Stephens, who was a judge of the Court of Appeals for the District of Columbia and an old family friend.

Look, these stories go on and on. Do you want me to ramble?

Sharp: Yes.

Kirkham: I'll try to make them brief.

Sharp: No, go ahead.

Kirkham: Judge Stephens in the course of dinner said, "What are your plans?" I said, "I'm going with the Cravath firm." He said, "Well, that's fine, you couldn't be with a better firm or with a better practice." But he said, "Do you want to live in New York?"

I said, "Well, actually, that's the only drawback." We weren't particularly happy about going to New York, but still it seemed to be the best opportunity.

¹Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (St. Paul: West Publishing Company, 1936).

He said, "I'll tell you something, Kirk, you ought to practice where you want to live. Now, if you go to New York, in a few years you'll be making \$100,000 a year"--and of course that sounded to me like \$100,000,000--"and you'll belong to the right clubs, your children will go to the best schools, you'll have a good life." He said, "If you want to live in Chicago, in a few years you'll be making \$80,000 a year, you'll belong to the right clubs, your children will go to the best schools. If you want to live in Boise, Idaho, in a few years you'll be making \$30,000 a year, you'll belong to the right clubs, your children will go to the best schools, you'll enjoy your life." He said, "Seriously, why don't you practice where you want to live?"

Well, it was interesting, but it didn't make a sufficient jolt to upset plans that were very firm. This was in the depth of the Depression, and one couldn't get a better offer than I had with Cravath.

But, about a week later a messenger arrived from the court of appeals at my office in the Supreme Court building, and that wonderful man had sent me a stack of letters, personally written by him and addressed to lawyers all over the country.

They said: "This will introduce my friend Francis Kirkham, law clerk to the chief justice," and so on, a lot of nice things about me, "he is interested in practicing law in"--Chicago, Louisville, Philadelphia, et cetera, et cetera.

Sharp: Just filling in the blanks?

Kirkham: So here was this whole stack of introductions to everybody all over the country. This finally turned things around. The end of the court term was near, and when it ended, we got in our little Ford V-8 and started driving all over the country. We interviewed lawyers in Boston and Chicago, in Louisville and Cleveland, in St. Louis and Kansas City, in Portland, Seattle, Los Angeles.

Sharp: The whole tour.

Kirkham: All over the country, taking letters of introduction around.

III TRANSITION TO PILLSBURY, MADISON & SUTRO

Where to Go and What to Do

Kirkham: Then we got to San Francisco. We arrived on one of those absolutely glorious San Francisco days. No fog, summertime, blue sky, blissful Pacific living up to its name. It was just absolutely marvelous.

My letter here was to Mr. Oscar Sutro. I presented it to the receptionist, and she said, "Oh, Mr. Kirkham, Mr. Oscar Sutro died last week. Mr. Alfred Sutro, his brother, does not come in on Saturday, but Mr. Alfred's son, John, is here. I'm sure he'd like to see you."

Well, John and Betty were just so cordial and nice to Ellis and me. They drove us all over town, they invited us to dinner at their home and introduced us to their children, who were about the age of our son, and they couldn't have been nicer. We were charmed with the city, with them, and so I postponed an appointment I had in Los Angeles on Monday and stayed over to meet Mr. Alfred.

When we returned to Washington, among the various offers that I got was one from Pillsbury, Madison & Sutro. Not only was I interested, but after our San Francisco experience we were both really sorry we were tied to New York.

In any event, I went to New York to see Mr. Wood at the Cravath firm. I told him that I knew that I had promised I would work with him, and that there was nothing I would rather do in this world than work with him. Then, I told him about Judge Stephens' advice and about our trip. I said, "The truth of the matter is that Ellis and I would really like to live in San Francisco. But I certainly would like to practice with you and

with this firm, and if my leaving would inconvenience you in any way, I'd like to follow through with my commitment."

I remember so well, he was sitting on the corner of his desk swinging his leg back and forth, and he said, "Well, Kirk, I'll tell you one thing. If I were a young lawyer your age, there are two places I'd like to practice law. One would be New York and the other would be San Francisco." And, he added, "I think I'd take San Francisco. You go ahead and work out there." So that was that.

From that time on, Cravath sent all of their West Coast work to us. I have always had a warm relationship with the Cravath firm. One of my nephews is now a partner in the firm.

But that's the reason I came to San Francisco.

Sharp: Did you have any special interests that you wanted to pursue in terms of being an attorney?

Kirkham: Oh yes. There was no question that I wanted to be in litigation. I always have, always.

Sharp: Was that due to the experience of seeing the Court?

Kirkham: Yes, my whole experience had been in the Court. Live cases at a very high level and an interesting level. Fascinating level. To me, litigation is the highest manifestation of a lawyer's skill. Now, it's not the easiest life; you're stupid even to do it, in a way. Lawyers in other fields can more often go home at five o'clock and come in at nine. But to my mind, the lawyers who most influence the direction of the law are litigators. Also, I think the lawyer's greatest skill is to be able to stand on his feet and project and persuade.

Sharp: Let me get back to starting at Pillsbury. Do you remember what some of your first impressions were? The first person you met was Jack Sutro, and then--

Kirkham: The next one I met was Mr. Alfred.

Sharp: I wasn't sure whether you had met Oscar; I didn't realize his death was that close.

The Section 36 Case

Kirkham: Oscar Sutro I never met, although I was familiar with the litigation that he had had in the Supreme Court of the United States in the Elk Hills case. Later on Gene Prince and I took that up, in the later aspects of the Elk Hills case where the United States simply expropriated Standard's [Standard Oil Company of California] properties.¹ That's really the truth.

Sharp: That's a strong word.

Kirkham: Absolutely true. It was worse than the Mexican oil steal.

Sharp: Well, I wasn't aware that you and Mr. Prince had picked that back up.

Kirkham: We were back up in the Supreme Court of the United States on it.

Sharp: When was this?

Kirkham: In the late thirties.

Sharp: So that would have been one of the early big cases that you handled. Maybe we can talk about that.

Kirkham: You know, one has to refresh his recollection. It's all in the brain someplace, but it takes a while to come back. Like a computer, it has to be accessed.

Let's see--the 36 case: Gene Prince and Oscar Lawler had worked on that, and Oscar Sutro, of course. It was an effort by the government of the United States to get Section 36 in the Elk Hills. That was a school land section; the land had been given to the state of California as school land. The School Land Grant Act provided that one section in each township of public lands went to the state for schools unless as of the date of the survey--which in this case was in 1903--the land was "known mineral land," in which event the United States retained title and the state was given a "lieu section."

The question ultimately in the 36 case was whether at the date of the survey, Section 36 was known mineral land. Now at the time of the lawsuit, of course, it was known mineral land and

¹Standard Oil Company of California v. United States, 107 F. 2d 402 (9th Cir. 1939).

very valuable. It was gushing oil. But was it known mineral land at the date it was transferred to the state as school land? On this the record is so clear that it simply, in good faith, could not be misread. After California got the land as a school section it tried to sell it, without bidders, from 1903 to 1908. Finally, it sold the section for \$1.25 an acre.

In the land office proceedings, the testimony of seventy-five witnesses of the highest qualifications and with contemporary knowledge of the Elk Hills in 1903 was undisputed that the land was considered worthless for oil in 1903. The only evidence the government introduced to try to overcome this more-than-obvious fact was the testimony of some "experts" that if they had been there in 1903, they would have known it was possible oil land. Of course, their wonderful hindsight vision came after oil had been discovered many years later and after this "known oil land" sold for \$1.25 an acre. And, of course, the register of the Land Office, who heard the witnesses, held the land clearly was not known to be mineral in character.

It is hard for me even to talk about the case now--after these many years--without becoming frustrated, angry, and disillusioned. The whole story is told in Judge Mathews's dissenting opinion in the court of appeals. But bad as that makes the government appear, there was even more in the background. By the time the decision of the Land Office came to be reviewed by the Secretary of the Interior, the New Deal had come in and brought Harold Ickes as Secretary of the Interior and a number of New Deal judges anxious to disregard history, law, and precedent and make nice, new laws conforming to their own ideas of what our social order should be.

Oh, well, to make a very long story short; New Dealer Ickes blithely reversed the Land Office and held that Section 36 was known mineral land in 1903. This was a pretty shocking ruling to come from a high federal officer who was supposed to give some attention to the evidence, but not to worry--Standard had the right to a court trial to determine, on evidence, whether the secretary was right.

Then here came the real shocker. New Deal Judge [Leon R.] Yankwich held that Ickes' decision was final. The decision of an employee of the United States that his employer owned the land was binding on Standard, who had occupied the land for years and spent millions in its development in reliance on a title given to the state of California years before! Yankwich's decision that Standard had no right to a trial de novo by an independent tribunal overturned the settled law of 100 years.

The affirmance by the court of appeals is another unbelievable chapter. Any lawyer who reads Judge Mathews's dissent can see immediately that it was written as the opinion of the court. Obviously, at least one of the majority judges must have changed his vote--under what influence, who knows.

Boy, I tell you. If that isn't expropriation under the pious guise of law, I'm--. Anyway I went back on that case with Gene Prince and we were writing petitions and briefs for the Supreme Court. We were working with Donald Richberg.

Don had been a lawyer in Chicago, a very successful one. He was one of the men like Frankfurter who was a liberal in the old days and then, by just standing still, became a conservative. In any event, he was an extremely able lawyer, well regarded in Washington, D.C. circles, and Standard, at our suggestion, retained him when the 36 case went for the last time to the Supreme Court.

He had a wonderful home--I think it was called "Sycamore Hill"--in the suburbs of Washington. I have to say I never had any better times than we had out there. He had a group of friends that Gene Prince and I just fitted into, who loved to sing, loved to write, loved to have good times together. At the same time, they were all brilliant people, interesting people.

One of them was a young colonel, Carl "Tooley" Spaatz, who was one of Billy Mitchell's boys when General Mitchell insisted that planes could sink battleships. You remember that Tooley became the commander of the air force in World War II. Tooley's wife, Ruth, had a beautiful voice. Don Richberg could sing and, of course, could write. And Raymond Clapper and his wife, Olive, who wrote a book about the New Deal Washington scene, which became a best-seller. Ray was a famous war correspondent who was killed in the South Pacific. And Lyle Wilson of the United Press, and Ed Goodrich, a lawyer who was then chief judge of the court of appeals in Philadelphia, and Henry Berlinger who built air fields and later lost an arm flying over Berlin during the war.

What a group! They could take a song--say an old ballad like "In the Hills of West Virginia," and get everybody singing, and then, from one to another, they'd just make up verses as they went along. They wrote an entire light opera called The Lay of the Last Minstrel (yes, a pun), and that was loads of fun. They sang that with Ruth Spaatz as the lead. But anyway, we had great times out at Sycamore Hill, and then we'd go down and work our tails off on the Section 36 case.

But let's stop rambling and get back to what you were asking about.

First Impressions, 1936

Sharp: I was interested in some of the first impressions that you might have had when you were first here at the firm.

Kirkham: My impressions here? Mr. Alfred [Sutro]. I enjoyed working with Mr. Alfred very much. He reminded me of Justice Sutherland. He was gracious, charming. Their home, Mr. Alfred's and his wife's--Cherie, we called her--they were just the most charming people. The firm was small then and we were immediately accepted as family friends--entertained in their home in the City and at their lovely place down on the Peninsula, "Mille Fleurs."

Marshall and Elena Madison were also very gracious to us, became warm social friends.

Frank Madison I worked with only a little, mostly on cases that involved the changing law in the Supreme Court. Soon after I arrived he had a stroke from which he later died.

Sharp: He died in 1941, and was ill before that.

Kirkham: He was ill a long time before that.

Sharp: I was trying to piece together when you came in.

Kirkham: I came in '36. I was hired in '35.

Sharp: You went right back, practically.

Kirkham: No, no, when I went back, that was in 1938. At first, I was going to start work in the summer of '35. However, the chief justice asked me to stay till December 1935, to the end of the year, to break in his new law clerk. Then, at the last conference of the Court in December, I wrote a memorandum to the chief justice. The Supreme Court of the United States, by law, is given the obligation to promulgate forms and orders in bankruptcy proceedings in the courts of the United States. In my memorandum, I reminded the chief justice that there had not been a revision of the general orders and forms since the 1898 version, although with the Depression, numerous laws relating to bankruptcy had been passed and half the business of the country was in the bankruptcy courts. Half the railroads were in

bankruptcy or receivership, as were utilities, municipalities, businesses, and farmers. All this enormous practice was going on with sort of ad hoc sets of rules put into effect in various districts differently, and the Supreme Court hadn't--

Sharp: Put it all together.

Kirkham: Yes. I suggested that the Court might want to consider promulgating uniform orders and forms in bankruptcy. So the chief justice got back from conference that day and said, "Well, the Court considered your memorandum. We've been derelict. I am authorized to say that the Court invites you to prepare a proposed revision of the general orders and forms in bankruptcy." [laughs] Here I was, stuck, you know. I got hold of Jack Sutro and told him, and oh, he was very upset.

But I stayed on and prepared the revision of the general orders and forms in bankruptcy. Then I went up to Hartford, Connecticut, to work with Robbie [Reynolds Robertson] completing our book and it was summer of '36 before I got to San Francisco, a year late and six months later than the last promise.

In any event, that was when I got out here, and Mr. Alfred said, "Now look. I want you to work for me only. If anybody asks you to do anything, don't do it. Don't take any assignments from anybody else, any other partners. If anybody says anything, come to me about it."

That was fine with me, but I'd been here about a week when Mr. Felix Smith called me in. "Look," he said, "I've got this case in the Supreme Court of the United States. Oscar Lawler has drafted a brief. Would you mind taking a look at it and see what you think about it?" Well, I decided that would be no sin against Mr. Alfred, so I took a look at the brief. It was this thick [gesturing several inches]; I knew it wouldn't do for the Supreme Court.

The case involved the constitutionality of the slant-well-drilling statute of California. That was a statute that provided that the state could explore wells to determine whether or not they were slant-drilled. Slant drilling had become quite an art. Land owners would drill into adjoining property and even way out offshore. It was an important case, of course. But I knew

Lawler's brief was too long and would just have to be redone completely. A ten-page brief was what was required, just bang-bang-bang.

Anyway, I called Mrs. Hill--she was the rather grim lady that was in charge of stenographers--and asked her if the office had a night force. She said, "Yes, we have someone who can stay," and I said, "Well, can I have someone to help me with a brief tonight?" She said, "Yes." So I got this lady and we started about maybe five o'clock in the afternoon. I wrote a new brief and I took it in and put it on Mr. Smith's chair.

The next morning I came back in about 8:30 and got an urgent message: "Mr. Alfred wants to see you." I went in, and he said, "I understand you kept a young lady in this office up till nearly four o'clock this morning. Mrs. Hill has been in and was very upset about it."

I said, "Well, I thought you had a night force. I thought she worked at night." Anyway I left thinking, "What kind of chicken outfit is this?" and went back to my office not feeling too happy. And pretty soon: "Mr. Smith wants to see you." So I went in thinking at least I'd get some appreciation here. But Mr. Smith held up my brief and said, "Young man, did you write this? Where are Oscar Lawler's golden words?" I said, "Well, I just don't think you can use them. This is what I think you should do."

He said, "Young man, someday you'll learn you can't do things like that. What am I going to say to Mr. Lawler? He's going to be in this office in a few minutes." I felt like saying, "I don't give a goddamn what you say to Mr. Lawler, I'm through." But I didn't. All I could say was, "Well, that's what I think should be done."

So I turned around and walked out, and I began thinking about the Cravath firm and how nice it would be to work where people worked, and I wondered how long I was going to last around here. Then a little while later: "Mr. Smith wants to see you." I went in, and there I met Oscar Lawler for the first time.

Lawler was a great trial lawyer of the Los Angeles bar, Standard's attorney in Los Angeles. He said, "I understand you think we ought to do this." I said, "Yes," and Felix said, "Well, why don't you two go down to Kirk's office and work it out."

We went down to my office and Mr. Lawler read through it and he said, "I think that's fine. I think that's just exactly what we ought to do."

So we filed the brief and everything was fine (and, incidentally, we won the case). But that was a strange introduction to the firm.

Sharp: That was. Was Mr. Alfred also upset that you were even doing the work to begin with?

Kirkham: Yes, he was upset. He said, "I thought I told you not to work for anyone else." I said, "Well, it was just a short thing." But Frank Madison called me in, and others. I had to bootleg most of it, for a while. Then after a while, if it was a question of writing a brief or something in the Supreme Court, why, then they'd talk to Mr. Alfred and I'd do it.

I remember one interesting little matter I "bootlegged" about that time. A Los Angeles lawyer had heard about my work for the Supreme Court on the general orders in bankruptcy and consulted me on some unusual problems that had arisen in bankruptcy proceedings involving John Barrymore. Obviously, to participate in any proceedings concerning any of the three Barrymores promised an interesting episode; and it was.

I went to Los Angeles for several meetings and court proceedings. The lawyer turned out to be typical "Hollywood," with generous entertainment, including some wonderful morning rides on beautiful Palominos with enough silver on their saddles to start a mint, but with deaf ears when it came to discussing a fee. However I finally managed to collect enough to make it worthwhile for the firm.

One very interesting case I had for Mr. Alfred soon after I came was Nester v. Western Union.¹ Mr. Alfred had been the attorney for Western Union and Railway Express for many years and we had numerous cases for those clients. Nester, however, was the shocker of them all and one of the most important cases Western Union ever had.

Its money order tariff provided that its liability for delay or nonpayment of a money order was limited to \$500 unless a greater value was agreed to and paid for at the time the message was sent. Nester sent a money order for \$150. It was delayed. He sued, claiming the delay cost him a contract and damages of some \$7,000.

¹Western Union Co. v. Nester, 309 U.S. 582 (1940).

The district court (our friend Yankwich again) held Nester had suffered no damages but was entitled to \$500 because the tariff provision was for stipulated damages and not for a limitation of liability for any actual damages caused by the delay. The court of appeals affirmed, and Western Union was faced with \$500 stipulated liability--whether or not anyone was hurt--on every delayed money order of the more than 500,000 sent every day! Suits sprang up all over the country and Western Union's potential liability was astronomical. I breathed a sigh of relief when my petition for certiorari was granted by the Supreme Court and the decision reversed.

Incidentally, that was my first appearance in the Supreme Court after my clerkship, and I was really warmed by the cordial smiles I had from Hughes, Sutherland, and several other justices when I sat down for the first time at the counsel table.

The Firm During World War II

Kirkham: Then the war came along, and, of course, everything changed. I've forgotten how many men we had go to war.

In one of my talks at Friday School, I recalled how many people went to war. Really, dozens. Of the partners, Jack Sutro went. Gene Prince went; he was already in the reserves, you see, as was Jack. [Eugene] Bennett was almost more soldier than lawyer--a graduate of the Army War College. Jack became a lieutenant commander, Gene was a lieutenant colonel and Bennett was an eagle colonel.

But in any event, when the war came along we were just decimated. We had two or three very strong additions: Breck McAllister, who'd been teaching law at the University of Washington. As you know, most of the law schools were closed during the war. He came down and worked with us until after the war when he went to New York to practice. And then by good fortune, the senior partner of Ross, Lawrence & Self, Jim Ross, was in San Francisco on a vacation when the Philippines were invaded. Of course, he couldn't go back--there wasn't any way with the Bataan March and all--but he joined us and he was with us during the war.

Then, we had some others. Wally Kaapcke became at that time a very strong addition to the firm. He was 4F, his eyes--did I ever tell you how I hired him?

Sharp: No.

Kirkham: Felix Smith was one of the greatest lawyers ever to practice law. He was a lawyer's lawyer, highly esteemed, but he was impossible at times.

Sharp: I heard that he was quite stern in his demeanor and approach.

Kirkham: Yes. Wally Kaapcke came into the office to call on me. Have you talked to Wally?

Sharp: We're going to start.

Kirkham: Well, I'm the one who hired him. My story about it is accurate. [joking]

Sharp: [laughing] I'll keep that in mind.

Kirkham: He came into the office to see me, not looking for a job--he already had a job with a law firm in Oregon. But he had worked with the Hughes firm in New York and he simply dropped in to bring the regards of Phil [Hogue], my successor as law clerk to the chief justice, who had become a partner in the Hughes firm.

So Wally came in. He said he was leaving the Hughes firm and going to practice in his home state, Oregon, because he decided he didn't want to stay in New York, he wanted to practice in the West. Incidentally, he had graduated at the top of his class in Oregon at law school, and then had been a Sterling Fellow at Yale in the graduate school. And his--what do you call these things where you write about yourself--?

Sharp: Curriculum vitae.

Kirkham: Yes. It was just outstanding. No question that he was an absolute prize as a young lawyer for a law firm, and, moreover, this was wartime, we were desperate. So I immediately got to work with one thought in mind. I took him to the Stock Exchange Club and dined and wined him. I began extolling the virtues of the firm. When he finally said he might be interested, I went in to see Felix Smith. I said, "Gee, I've got this marvelous candidate."

By the way, I called Phil in New York while Wally was out of the room. I said, "Why did you fire this guy Kaapcke who's in my office?" "Fire him?" he said, "We offered to double his salary but he just didn't want to stay in the East." I said, "Do you think I ought to hire him?" He said, "Boy, if you can get him,

hire him." I was just aglow with hopeful prospects, you see, and I wooed Wally and really felt that he was responding.

So I went in to see Mr. Smith and I told him all about this, and he said, "Well, go ahead, if you want to hire him, fine." I said, "Well, how much can we pay him?" He said, "We start young lawyers at \$125 a month." I said, "Felix, you can't. This boy has been to graduate school, he's spent two years practicing with the Hughes firm, you can't offer him \$125 a month." He said [gruffly] "That's our starting salary." I said, "I can't get him. That's ridiculous." "That's our starting salary."

So I said, "Well, let me introduce you to him." So I took him into the corner office, and the first thing Felix said, abruptly, "Why aren't you in uniform?" Well, Wally blushed, he said, "I'm sorry, sir, I'm 4F. I tried to enlist but they wouldn't take me." So Felix turned to me and said, "Well, if you want to hire these cripples, go ahead, Kirk." Literally, he said that, Wally was just--well, we went out into the hall and I said, "Wally, you're going to learn to love that man, you really are."

Sharp: What did he say?

Kirkham: Well, I went on wooing, and in any event I got him. He could have gotten a job in almost any firm, anyplace. But it was true, Wally got to work with Felix later and liked him, and his salary went "boom," like that, within a very short time.

Sharp: Let me just stop you there. I have a question about how the firm worked, how the firm was managed and administered.

Kirkham: At that time it was small enough, of course. Mr. Alfred was the senior partner. What he did by way of consulting with Felix and Gene Prince I don't know, but anyway what Mr. Alfred said, went; he ran the firm. Felix was never a person who liked to administer the firm. He was a legal star. Horace Pillsbury was president of the telephone company [Pacific Telephone & Telegraph Company] and only came back here--when was that? It was in the thirties--?

Sharp: Well, he died in 1940.

Kirkham: Oh, well maybe '38. Round about '38, he turned sixty-five and retired. He came back here in one of those big offices Gene Prince and later I had on the nineteenth floor.

But he wasn't practicing much; he'd been out of practice a long time. I don't recall anything Horace did by way of practice except counseling with the telephone company.

Then he died soon after he came back to the firm.

Bennett never really had much voice in the management of the firm. He was a trial lawyer first and last, and he never lost a case with a woman on the jury. [chuckles] He was the best-looking man you ever saw. [opening drawer] That's the two Genes during World War II.

I had another picture of Bennett--I have to find that. It was when he was breaking ground for the Veteran's Memorial. He was the handsomest man I really ever knew, and as a young man he was something. [showing picture]

Sharp: Oh, yes.

Kirkham: Bennett was G-2 on General White's staff, the army that trained in the desert to go over to Africa. I visited him there as a TA, technical advisor. I was drawing up war contracts for supplies. Then he went over to Burma and India and later with General [Joseph] Stillwell into China.

Once when Bennett was on leave, we gave a little party for him at our house. Bennett had been stationed at Fort Lewis early in the war, and had there met Selby Mason and his wife "Bummy." Selby was vice president and controller of the telephone company. They lived next door to us during the war. Bummy used to talk about meeting Colonel Bennett. She called him the most beautiful man who ever lived.

So of course, we invited Bummy and Selby to our party. Bennett was leaning on the mantle talking with Gene Prince when they arrived. Bummy started walking into the front room, got about halfway, then turned and said, [imitating breathlessness] "Oh, oh, Kirk, that's--Gene Bennett." She practically fainted, couldn't believe it.

Sharp: Swooning?

Kirkham: Swooning. He was a gracious person and a great trial lawyer. He didn't participate in the firm's management. Marshall Madison did that, Jack Sutro did it, Gene Prince less.

Sharp: But you could actually do some hiring?

Kirkham: Oh, anybody could recommend. Through the years, Jack Sutro did most of the hiring and interviewing. Then later on we set up a formal committee. But in those days, if somebody needed somebody you'd hire him.

For example, Frank Madison had an admiralty case and he had working for him at the time a young lawyer named Clif Hildebrand. Does that name mean anything to you?

Sharp: Yes.

Kirkham: Clif Hildebrand became one of the best known plaintiffs' personal injury lawyers. Not too highly regarded for his ethics at times, perhaps, but a darn bright guy. He had put himself through law school by tutoring the Hearst boys. Anyway, Frank Madison said to Clif one day, "Do you know anybody who knows anything about admiralty work?"

Well, [Maurice D. L.] Del Fuller, Sr. was pounding the streets at that time looking for a job--right in the depths of the Depression. Hildebrand knew him and promptly told Mr. Madison, "Oh, yes, I know a very bright guy, specialist in admiralty law, just graduated." So he called up Del and said, "You're a specialist in admiralty law." Del said, "I don't know anything about it. Never had any courses." Clif said, "Tomorrow morning you better be an expert in admiralty law."

So Del went rushing to the library, got a few maritime terms under his belt, "apostles on appeal," etc., went in and interviewed with Mr. Madison and got the job. That was sort of the informal way that hiring was done then.

During the war you'd hire anybody who could stand or sit straight. We had some--let's put it this way--well, we had lawyers who would not have been hired during peacetime. Good, honest, trudging people, you know, and they helped, but they needed constant supervision. Not the kind of work that this firm requires.

Then, of course, after the war we thought we were never going to survive. The statutes required us to rehire everyone who had left us to go into the service, and we wondered where we would ever put them.

Sharp: Then it turned out to be all right.

Kirkham: Oh. Yes.

Recollections: Mr. Alfred, Felix Smith, Marshall Madison, and Gene Prince

Sharp: Last week, you talked about some of the older partners who had been here for a long time. You mentioned Mr. Alfred Sutro telling you that he wanted you to work with him exclusively, but that you also worked for Mr. Felix Smith. But do you have any sense of what their influence was on you?

Kirkham: The partner who influenced me most, definitely, was Mr. Alfred. He wasn't too active in practice at that time. Fran Marshall and I did much of his work, wrote his legal letters, and so on. At the time he was easing off on his own practice.

One thing about Mr. Alfred was his command of the English language. He wrote beautifully and he was a very, very strict disciplinarian on himself and on everyone working with him. He said every letter was a projection of oneself. He refused to let anything go out that wasn't just perfect. Fran and I played a game of trying to write letters that he would sign without change.

Sharp: Did you succeed?

Kirkham: Rarely. We'd go back in the old files and find letters he'd written and try to follow just exactly the way he had written before. But he'd find some way to improve them.

The story went around the office--I don't know whether it's apocryphal or not--that Frank Madison took in a letter for suggestions to Mr. Alfred. It came back all chopped up. Frank came storming in the room and said, "It's a damn good thing, Alfred, that Thomas Jefferson didn't submit the Declaration of Independence to you for your suggestions. We wouldn't recognize it."

Mr. Alfred also had another side.

I remember one case he turned over to me for International Harvester where I was absolutely chagrined and embarrassed when I found out that I had put \$10,000 worth of time in on the case.¹ When it came to billing, that really worried me. I went in and apologized all over the block to Mr. Alfred, telling him that

¹Caterpillar Tractor Co. v. International Harvester, 106 F.2d 769, (9th Cir. 1939).

much of my time was put in after hours, and, "these really don't count in costs--you're not going to take too big a loss on me in this case," et cetera (young lawyers of course were not paid for overtime). Mr. Alfred picked up the telephone and called the chief counsel for International Harvester in Chicago. By the time the conversation ended, International was delighted to pay a fee of \$20,000. [laughs] So he was very good at that type of thing.

Felix Smith was a joy to work with; a mind like a trap. There just wasn't anything in which he wasn't superb, with the exception that came out in our last discussion: he was not the soul of tact. I heard him argue a case before the Supreme Court of California and I just cringed. One of the justices who was noted for his stupidity asked Felix Smith a stupid question. Felix just looked at him, and then proceeded with his argument. And I tell you, the judge blushed and--that's the way to lose a case, you see. It's a type of intellectual arrogance of which he was not conscious.

Then there was this Market Street Railway case.¹ The reason, really, I got into that was because I was working with Felix when he went out to argue the case before the Public Utilities Commission [then Railroad Commission]. Felix Smith just exploded at the commission. Oh, gosh! I couldn't believe it. He was calling them--it's hard to reconstruct, you'd have to read the record, but in any event he was telling the commission that the present members didn't live up to the standards of their predecessors; that their actions were indefensible, et cetera, et cetera. I could see that the chairman of the commission was getting more and more restless. Finally he said, "We'll take a recess."

Well, we went out in the hall, and Felix started walking up and down and I said, "Mr. Smith, I think you had better be ready for them to ask you to show cause why you shouldn't be held in contempt."

"Oh!" he said, "that's the most ridiculous thing I've heard." I said, "Felix, you don't know what you were saying in there." "Oh," he said, "nonsense!"

So we went back in and the commission all filed in. The old chairman reached over and he said, "Mr. Smith, this commission has unanimously adopted a resolution ordering you to show cause

¹Market Street Railway Company v. Railroad Commission of California, et al., 324 U.S. 548 (1945), appealed from the Supreme Court of California.

why you should not be held in contempt." Well, I didn't know what Felix was going to do, because he could be so arrogant. But instead he said, "Gentlemen, if anything I have said to this commission sounded as though I was contemptuous, I apologize. I did not mean it," and he just absolutely backed down, entirely, completely. They said, "Very well, we accept the apology, we will now proceed."

But he wouldn't have anything to do with the case after that. Turned it over to me. I had it for the rest of the time and took it up to the Supreme Court of the United States.

But as you can see, he was a strange sort of person and yet brilliant. I remember once in Los Angeles we were looking at an inscription on the--I think it's the old library building. He read the Latin inscription and identified the period of Roman history when that inscription was written by the idiom that was used at that time--like the way you'd identify the language of Chaucer as against that of Shakespeare or as against modern English.

Another time he was out during the trial of a seaman's case. Norbert Korte was trying the case and consulted Felix about it. The case involved some question of physics relating to machinery. Felix got interested and took over the cross-examination of a professor of physics from the University of California. When the plaintiff's expert finished--I got this story from Norbert, I wasn't there--this professor came by and shook his hand and said, "Mr. Smith, I must say you weren't very kind to me on the stand but I am astounded at your knowledge of physics. Where did you study physics?" And Felix, with that characteristic gesture of his, standing straight and pulling down his grey suit, said, "Lowell High School." [laughs] That'll tell you about Felix.

Sharp: Frank Madison we haven't--

Kirkham: Frank Madison was still practicing and Marshall was taking over his father's practice. I didn't do much work with Frank Madison, and I didn't work a lot with Marshall until later on. Marshall always reminded me of a quote I've seen about what makes a great general, something like, "Even if he doesn't know what is the right thing to do, he instinctively does the right thing." Marshall was very much like that, had an instinct for the right thing. He was a business lawyer, but did try one or two cases, I recall, for Alaska Packers.

Sharp: Mr. Prince's personality, just from what I've heard of him, must have been quite opposite from Mr. Smith's.

Kirkham: Oh, very. I don't know who was the better educated man; I guess Gene Prince was. Because Gene had a greater breadth in the humanities. Both of them took their recreation in scholastic reading and so on, although Gene also liked to play and knew how to play, and I don't think Felix ever knew how to play. He and Mrs. Smith never accepted social engagements. His wife was not too well, but I never knew Felix to accept a social engagement. His whole house--even up the sides of the staircase--was lined with books.

Sharp: That was the main thing you noticed?

Kirkham: Yes. Marshall had to take Felix's place as general counsel for Standard without having any background in Standard work. He had the qualities of a natural leader; he was a natural, instinctive business lawyer. That ability enabled him to discharge his duties as general counsel in a way that was really just fine for the firm.

Sharp: Mr. Madison took it because there wasn't anybody else?

Kirkham: Well, yes.

Actually, you see, Howard Marshall had been groomed to succeed Felix Smith as general counsel for Standard. He was one of the bright young men of his era--assistant dean of Yale Law School when he was in his twenties. He had the good fortune to be crippled; one leg that was shorter than the other. Wasn't [John] Gunther the author who wrote about how lucky he was to be crippled because people remembered him? Howard always impressed everyone by the way he overcame his handicap. He was on the tennis team at Haverford, if you can believe it, and played a good game.

And he danced. I remember the first time he asked Mrs. Kirkham to dance, she was a little startled and wondered. She said he was a beautiful dancer.

You didn't forget Howard. He went down to Washington, D.C. with the New Deal--I forget what job he had--then came to our firm.

He worked closely with Ralph Davies, R. K. Davies. Ralph was heir apparent to the presidency of Standard Oil. Later, of course, Ralph became very wealthy and generous--Ralph K. Davies Medical Center; Louise M. Davies Symphony Hall. Howard worked with Ralph in Standard, and of course with Felix Smith as Standard's general counsel. In addition to his legal ability,

Kirkham: Oh, very. I don't know who was the better educated man; I guess Gene Prince was. Because Gene had a greater breadth in the humanities. Both of them took their recreation in scholastic reading and so on, although Gene also liked to play and knew how to play, and I don't think Felix ever knew how to play. He and Mrs. Smith never accepted social engagements. His wife was not too well, but I never knew Felix to accept a social engagement. His whole house--even up the sides of the staircase--was lined with books.

Sharp: That was the main thing you noticed?

Kirkham: Yes. Marshall had to take Felix's place as general counsel for Standard without having any background in Standard work. He had the qualities of a natural leader; he was a natural, instinctive business lawyer. That ability enabled him to discharge his duties as general counsel in a way that was really just fine for the firm.

Sharp: Mr. Madison took it because there wasn't anybody else?

Kirkham: Well, yes.

Actually, you see, Howard Marshall had been groomed to succeed Felix Smith as general counsel for Standard. He was one of the bright young men of his era--assistant dean of Yale Law School when he was in his twenties. He had the good fortune to be crippled; one leg that was shorter than the other. Wasn't [John] Gunther the author who wrote about how lucky he was to be crippled because people remembered him? Howard always impressed everyone by the way he overcame his handicap. He was on the tennis team at Haverford, if you can believe it, and played a good game.

And he danced. I remember the first time he asked Mrs. Kirkham to dance, she was a little startled and wondered. She said he was a beautiful dancer.

You didn't forget Howard. He went down to Washington, D.C. with the New Deal--I forget what job he had--then came to our firm.

He worked closely with Ralph Davies, R. K. Davies. Ralph was heir apparent to the presidency of Standard Oil. Later, of course, Ralph became very wealthy and generous--Ralph K. Davies Medical Center; Louise M. Davies Symphony Hall. Howard worked with Ralph in Standard, and of course with Felix Smith as Standard's general counsel. In addition to his legal ability,

Howard had an entree to a lot of doors in Washington because of his New Deal days and associates.

However, Ralph Davies got himself in trouble with the Rockefeller interests, and when [W. H.] Berg died--Berg had succeeded [Kenneth R.] Kingsbury as president of Standard--the Rockefellers stepped in and vetoed Davies' appointment as president. Collier was made president. With Davies went Howard Marshall. Howard was no longer persona grata with Standard. So the lawyer who had been groomed by the firm to take Felix's place was no longer acceptable to Standard.

About that time came the war [World War II], and Ralph K. Davies was appointed the administrator of the Petroleum Administration for War. He ran the petroleum industry of the world during the war, and took Howard back with him as his assistant and general counsel. So during the war, Ralph and Howard were back there building a great reputation and winning national acclaim.

Ralph didn't ever come back to Standard. He organized Natomas [Company]. Made millions in that and other ventures. Howard swung over into business, became president of an oil company down in Kentucky and later on was in other oil ventures. Howard made millions too, in business rather than law.

But you asked about Marshall Madison; that's a roundabout way around to it. When Felix suddenly died--heart attack, bang, like that--there really was no one. When did Felix die? [1947]

Well, Sig [Sigvald] Nielson had done work for Standard, and I think Sig thought that he might be selected as general counsel. But Marshall was the strongest that we had in the firm; Sig was a very bright lawyer, very bright, but he had specialized in tax and pension fund work. His business practice had not been as broad as Marshall's had been, and Marshall would be the one who was best known of every member of the firm. His stature in business, in law, and in the community was right at the top. He had the aura of the general counsel for the biggest client we had. Although he was not closely familiar with the oil industry, he did have long experience in counseling business interests.

All of us urged Marshall to take it. He had no idea that he would ever end up as general counsel for Standard, and he did turn to the rest of us for a good deal of help. I think he enjoyed his years as general counsel for Standard.

Notes on Administration

Kirkham: You asked about the administrative division of the firm and its division as to its legal responsibilities.

In those days, the clients generally were clients of the individual partners. They were clients of the firm, but I mean it really worked that way. Historically certain of the senior partners had represented certain clients, and it just continued that way. Instead of having a group doing labor work, a group that did tax work and so on, you had a group that did Standard work, a group that did telephone company work, and so on. You did the law work in all the facets of business. You had to try to be an expert in tax and labor and contract and administrative law and everything else that involved that client. But that was before law became as complex as it is. Administrative law was just starting when I started to practice law. Lord, 90 percent of the practice we do now didn't even exist.

So Mr. Frank Madison had California Packing, Alaska Packers, Bank of California, Blyth & Co., Dean Witter and so on. Mr. Alfred [Sutro] had the telephone company, Railway Express, Western Union, California Wine Association, International Harvester, and others. Oscar Sutro, and later Felix Smith, had Standard Oil.

Sharp: So each senior partner would have had a group of clients, and then when you came in--

Kirkham: I went to work with Mr. Alfred and his clients. So I didn't do any work for Standard except when I got bootlegged occasionally. When the post exchange case came out right at the beginning of the war, Felix asked me to take that. I took it to Supreme Court of the United States and argued it there.¹ But I didn't know or work with any of the Standard executives.

Gradually, later on, all this new law developed. Lawyers had to become experts in specific fields. And that's the reason our firm is of such value to large clients. Each client has access to every lawyer in the firm, i.e., immediate access to experts in every field.

¹Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942). See p. 51, *infra*.

Ethics and Expectations

Sharp: Let me ask you a question. I was talking with Hugh Taylor about how he learned some of the parameters of being an attorney, especially for Pillsbury, Madison & Sutro. He was telling me this story about how he learned to figure out what was conflict of interest and what wasn't. He told me about the time he was listening to a couple of attorneys deciding whether or not to take another client on. Finally, after a very long and detailed conversation they decided not to take this particular client on. He said that's when he really began to figure out just what he could and couldn't do in terms of being an attorney for the firm, with respect to conflict of interest.

Kirkham: We have computers to help us do that now.

Sharp: Yes. [laughs] But how did you learn how you were to conduct yourself in terms of being an attorney at the firm? Do you have any sense or story, kind of like Mr. Taylor's, where he knew that he was learning something? Do you remember any particular stories along that line?

Kirkham: I recall a story about Allan Littman, who is now a senior partner. I interviewed him when he was here looking for a job. I remember that when he told me his birth date, I looked at him and thought, "My God, this kid was born after I graduated from college." [laughs] Now he's a gray-haired senior partner.

Allan Littman was a very able, conscientious, bright young lawyer from Harvard. He called on me one day. I hadn't done a great deal of work with him except I'd talked to him when he was being interviewed, and maybe he got some sort of a feeling that he could come to me as a father figure. Anyway, he asked if he could see me, and I said yes. So he came up and seemed very troubled. He said that he had been given the job of reviewing the books of a client which had been subpoenaed. He said he had found some documents that were not helpful to our client. He said, "I don't know where I get the impression, Mr. Kirkham, and I don't know whether somebody was joking, but I have the feeling that somebody expects me to destroy these documents or do something to keep them from being given up." He said, "I just don't know what to do. I can't do that."

I said, "Allan, you really are troubling yourself over something that is no trouble at all. You are absolutely right in your perception of what you ought to do. Never, never destroy responsive documents that are covered by the subpoena. A lawyer who takes action contrary to the highest standard of legal ethics

not only digs a grave for himself, but does his client a great disservice."

He sort of heaved a sigh, and said, "Well, I was sure that was right, but I just was so worried."

"But," I said, "don't you ever let anything that is contrary to your client's interest in the documents you produce in response to a subpoena go in without having a record of it, a copy of it, knowing what is in it and how you can meet it at trial. You'll find that nine times out of ten what appears to be incriminating documents can be explained if all the facts surrounding them are dug out."

Now, is that responsive to your question?

Sharp: It's responsive in the sense that what you told me is a story involving yourself as the educator or the explainer of the way things are done.

But I wondered also if you remembered any story when you might have been in Allan's situation and coming up with a question that you needed to seek advice from--whether it was Mr. Smith or Mr. Sutro himself? When you got some advice or some straightening out as to what the firm expected of you in any given situation?

Kirkham: [long pause] As far as my practice was concerned with the firm, I was never under any strict supervision. The type of supervision Mr. Alfred would give wouldn't go to anything basic. It would go to the way you did things, the way you wrote things. I don't recall any time that I've gone to a senior partner for any special counsel on how to conduct myself as a lawyer. I'd always walk in to Gene Prince and bounce things off of him, and he'd walk in and bounce them off of me. Ask him if there was a case he knew of that involved this or that, and he usually did. But as far as the handling of cases or the clients and so on, I was never under any restrictions.

IV SAMPLE CASES FROM THE 1930s AND 1940s

Erceg v. Fairbanks

Sharp: I thought we might get into the cases just a little bit. Enough to get a sense of what some of the needs were of some of the clients that the firm had in the 1930s and 1940s. There are a couple that you especially picked out like Erceg v. Fairbanks Exploration.¹

Kirkham: Well, that's a pretty good illustration of the vagaries of the law. [laughs] [Mike] Erceg was the guardian of [George] Gartner. Gartner was a little man who had a little claim on Goldstream Creek in Alaska. He was a sour dough bachelor who lived up there in his little shack on Goldstream Creek. He dug a pit down to the gravel; the terrain up there is basically what they call an overburden of muck and tundra and grass, and under all that, gravel, and then under that, the bedrock.

He dug a little pit down to the gravel, and then dug a little tunnel through that. He'd go down with his wheelbarrow and he'd scratch out a few wheelbarrowsful of the gold-bearing gravel, which was very, very light in gold, haul it out with a little pulley, and sluice out the little bit of gold. He'd get himself enough to go down to Fairbanks and get himself drunk or have a date with a lady, then go back up to his little shack. When he needed another drink or a little more food, he'd scratch out a few more flakes of gold, and so on.

In the meantime, Fairbanks Exploration Company had acquired all the land up and down Goldstream and was planning an enormous gold mining operation. To do that they had to bring water from the Chatanika River, I believe it was called. They built a canal

¹95 F.2d 850 (9th Cir. 1938).

for miles across the tundra and brought water to the top of Goldstream. Their operation put this water under great pressure through enormous nozzles called "giants" that scoured off the overburden in a great mass of crud, dirt, foliage, and corruption. When the gravels were exposed, they were thawed with steam and then a dredge was put in, which, floating in a moving lake of its own making, dredged up the gravels, ran them through sluices, and picked up the gold.

As our client was getting ready to start this enormous operation, with millions invested, they kept bargaining with Mr. Gartner to buy his little thirty acres that sat right in the middle of downstream Goldstream. [chuckles] He wouldn't sell. They offered him \$5,000, which was more than it was worth, \$10,000, \$17,000. Finally, they offered him \$30,000 and drilled his land to prove to him that it didn't have enough gold in it to pay to mine it. They had an expert tell him that \$30,000 was just a fabulous price for it. He wouldn't sell. He was perfectly happy with the way life was going.

Well, I guess progress couldn't be held up, so one morning the company just turned loose all the giants, down came the overburden, swooshed down Goldstream, picked up Mr. Gartner's little shack and dropped it somewhere downstream, filled up his little pit mine and left his thirty acres a sea of mud.

He got a lawyer and the lawyer brought suit.

About this time old Mr. Gartner, driven to the edge, went off his rocker and was incarcerated in an insane asylum. This of course helped our case, [chuckles] as Erceg, his guardian, continued the litigation. The case was tried, and the court, undoubtedly influenced by the offer of \$30,000, awarded \$30,000 in damages.

Fairbanks Exploration appealed on the ground that the award was excessive. Mr. Alfred Sutro for years had been counsel for United States Smelting, Refining and Mining Company, the parent company of Fairbanks Exploration. He asked me to write the briefs and handle the appeal. The interesting thing about the case is that there was \$30,000 involved. Nowadays, you know, you wouldn't take an appeal for \$30,000; that much would hardly cover costs. But at that time it was enough money to appeal.

It was something less than a sympathetic case to present to the court. But something happened that made it very important to win the appeal. Erceg's case consisted of testimony that there was \$1 million worth of gold in his thirty acres and that it

would cost about \$850,000 to mine it. So he had been damaged to the extent of \$150,000.

But now, between the time of the tort and the time of the trial, Mr. [Franklin D.] Roosevelt had almost doubled the price of gold. It was what, \$23 a fine ounce at the time that we had seized this property? It was almost double that at the time of the trial. So the gold was not worth \$1 million, but \$2 million. And it would still only cost \$850,000 to mine it. So he was entitled to \$1,150,000 under his theory.

So the really tough question on appeal came down to: did the price of gold as of the time of the trespass, or the price of gold as of the time of the trial, control? On that, the court of appeals held with us. So Mr. Gartner got his \$30,000, which I felt was pretty fair, don't you think? Or do you?

Sharp: [laughing] I'm not supposed to say.

Kirkham: Anyway, that was kind of an interesting case.

Perkins v. Benguet

Sharp: There are a couple of other early cases I thought we just might describe a little bit. One of these other ones was Perkins v. Benguet.¹ It has very involved details, and I'm still not sure I've figured out all the ins and outs of it.

Kirkham: That was another one where we had very, very unsympathetic circumstances as far as our client was concerned. In one case we were opposing a poor little guy who went off his rocker after he was swept off of his claim. In the Benguet case we had the abused wife of a tough husband on the other side. It was a suit by Mrs. Perkins to recover dividends that the company had paid to Mr. Perkins. Mrs. Perkins claimed they should have been paid to her. We represented the company--Benguet.

Benguet was a Philippine gold mining company and all parties lived in the Philippines. Years of bitter litigation between the spouses in the Philippines and in New York had gone on before a case was filed in San Francisco. When this happened, Benguet came to Mr. Alfred [Sutro] through associations formed when Oscar

¹Idonah Slade Perkins v. Benguet Consolidated Mining Company, 55 C.A.2d 720 (1942).

Sutro headed a branch of our firm that practiced in the Philippines in the early years following the Spanish American War.

Mr. Alfred turned the case over to me. Throughout the case I worked with Mr. Hamilton Lawrence, the attorney for Benguet, who had been a partner in the Manila firm that succeeded Oscar Sutro's firm. We tried the case in the San Francisco Superior Court, appealed it to the California Court of Appeal, and then sought review in the California Supreme Court and the Supreme Court of the United States--and lost all the way.¹ It was a young lawyers' dream as far as interest and challenge were concerned and a nightmare as to result.

In a nutshell: The Philippine courts in a series of suits between the spouses had held the dividends belonged to Mr. Perkins and ordered Benguet to pay them to him and to transfer the stock certificates to him. Benguet proceeded in accordance with these decrees of its courts. Mrs. Perkins refused to obey an order of the Philippine court directing her to turn over the stock certificates to her husband, was thrown in jail for contempt on petition of her loving husband, escaped from jail, fled the Philippines, brought suit against her husband in New York. The New York courts held that Mrs. Perkins owned the stock and was entitled to the dividends and ordered Mr. Perkins to pay the dividends he had collected to his wife.

Armed with that New York judgment, Mrs. Perkins came out here, got Teddy [Theodore J.] Roche to represent her, and sued--not her husband but the company, which already had paid the dividends to the husband. Do you know Roche, the little giant?

Sharp: No.

Kirkham: Oh, he was quite a figure at our bar. He was a partner of Governor Hiram Johnson: Sullivan, Roche and Johnson.

Sharp: The same Roche as Michael Roche?

Kirkham: No, no relation. He was a little fellow not much bigger than a nickel. But dynamic, a very well-known lawyer here. Young Garret McEnerney once said that Roche was the only person he knew who took his dog for a walk in the morning and had to carry the

¹Benguet Consolidated Mining Company v. Perkins, et al. June 14, 1943. Petition for writ of certiorari to the District Court of Appeals, First Appellate District of California, denied. 319 U.S. 774-775.

dog home. He was just an absolute bundle of energy and a very capable lawyer.

So here we have a Philippine company, which had paid dividends from gold mined in the Philippines to a Philippine resident in response to decisions by the Philippine courts, being sued in San Francisco to pay the same dividends over again. If you wonder how in the world a San Francisco court got jurisdiction over a company doing business on the other side of the world, you don't know Teddy Roche. It was a chapter a young lawyer could hardly believe.

Benguet shipped gold to the San Francisco mint. Roche simply went down and attached a gold shipment. That attempt to get jurisdiction quasi in rem in itself was not unusual. What was surprising was, he seized a half million dollars in gold on a personal bond, signed by himself, for \$5,000! The first thing we did, of course, was to file a motion to discharge this illegal attachment, because the rules of court clearly required that when property was seized, a bond in double the amount of its value had to be posted. That would have required a million dollar bond--and Teddy got the attachment on his own personal bond for \$5,000! The way he got it was [chuckling] you see, Teddy Roche was a very prominent member of the Catholic laity in the San Francisco bar, which was then a tightly knit group. He went to Judge [C. Julian] Goodell, who was more Catholic than the pope, and who readily approved Teddy's \$5,000 personal bond to seize \$500,000 worth of Benguet's property.

Well, it simply couldn't happen, but it did. And Judge Goodell denied my motion to quash with a friendly smile. "Oh," he said, "Kirk, I think we can work this out here." [laughs]

Then I filed a motion to transfer the case under the forum non conveniens doctrine because it had no business in our courts. It involved Philippine parties, Philippine law, Philippine court decisions, everything Philippine; it belonged in the Philippine courts. Practically every case ever decided on that doctrine was in my favor, but Goodell said, "Well Kirk--" [laughs]

Sharp: Pretty tight?

Kirkham: Yes, they're pretty tight.

Anyway, he held the case here for Teddy and we had to try it in San Francisco.

So we tried the case in San Francisco--but we didn't try it. I have to end this saga sometime, so I'll explain by saying we

offered to prove that under Philippine law, which was applicable, the dividends belonged to the husband and were properly paid to the husband; that the Philippine courts who had jurisdiction over the parties had so held and had ordered Benguet to pay the dividends to the husband; that their decisions were binding on Benguet. In reply Mrs. Perkins offered only the New York judgment. Judge Goodell rejected all of our offers of proof and held Benguet bound by the New York judgment to which it was not a party and which had simply ordered that Mr. Perkins pay to Mrs. Perkins the dividends he had collected from the company.

Oh well, the court of appeal affirmed in an opinion by Judge [P. J.] Peters which recited as gospel truth all of the facts the New York court had recited but which we had offered to prove--but had been denied the right to prove--were untrue. The California Supreme Court, of course, denied a hearing, and by the time we got to the United States Supreme Court to protest the taking of our property without a trial, the Philippines had been overrun by the Japanese, our client was no more--at least for the time being--and certiorari was denied.

I am not suggesting at all that Judge Goodell made any ruling on the merits that did not express his objective views, but he wasn't going to take a case away from Roche even if he had to look at the ceiling when the absolutely unanswerable rules were called to his attention.

In the end, of course, that made all the difference.

Market Street Railway

Sharp: Well, there were a couple of others that I wanted us to get to if we could.

Kirkham: Go ahead, what's the next one?

Sharp: There were two, actually. The Evaporated Milk Association case, and then the Market Street Railway case.

Kirkham: What are you trying to do--have me recite "Great Cases I Have Lost?" Let's get the railroad case out of the way first. I told you half of that story. That was the case in which the Railroad Commission cited Felix Smith to show cause why he should not be

held in contempt. I took the case to the Supreme Court of the United States.¹

That's an interesting case. If you read Justice [Robert] Jackson's opinion, it's a long one, and treats every issue in some detail. He finally ends up by saying he has done this only because it's such an unusual case.

If I can remember it, basically the Market Street Railway was suffering under two lethal handicaps about that time. One was that it was competing with the Municipal Railway, which had tax subsidies to keep it running. The other was that it was part of a dying industry.

There's a lot that has been written and talked about in recent times as to what happened to that industry. The old Greyhound antitrust case, which I helped to brief, is being revived, and people are talking about how the automobile companies got together and conspired to put all of the municipal railways and short lines out of business in order to enhance the use of buses and trucks, and to overrun the country with automobiles which polluted, and so on, and so on. Actually, automobiles were simply replacing short lines and municipal railways, particularly in the West.

The Market Street Railway case began with a hearing before the California Railroad Commission on the service being rendered by the Market Street Railway. The Railway was Mr. Alfred's client, but he had turned the case over to Felix Smith.

Sharp: There's another name on the case, Cyril Appel.

Kirkham: Cyril Appel was the house attorney for the Market Street Railway Company. This was a case the company decided should be handled by outside counsel. Cyril Appel followed the proceedings and his name appeared on the briefs.

What had happened was that the Market Street Railway Company was charging seven cents--six or seven cents--

Sharp: Seven. And the commission wanted it down.

Kirkham: And the Municipal Railway was charging a nickel (you can tell it was subsidized), and that didn't make for a very happy competitive situation. The commission held a hearing and found

¹United States v. National City Lines, 337 U.S. 708 (1949).

that the Market Street Railway's service was lousy (as it was), not worth seven cents, and knocked it down to six.

Sharp: There was great complaining in the decision about the crummy--

Kirkham: Oh, yes, sure. Because they didn't have any money, you see. Also, the commission wanted the Railway to use its money for replacements and betterments, and Mr. Kahn thought he ought to pay his creditors. It was just one trouble after another.

Well, the Supreme Court wrote a very strange and unusual opinion. It was quite interesting. In effect it said, "You're right in practically everything you say, but there's nothing we can do for you, because no matter what we do, the railway is done for--dead. So we'll just affirm the decision and take our hats off as the funeral passes by."

I never told you, I won two people with my argument. One was Harold Stephens, my good friend who was a judge of the court of appeals of the District of Columbia. He later told me, "You know, Kirk, you really should have won that Market Street Railway case; you were right." The other person that I won was Justice Jackson's law clerk, and this I considered a real achievement. Jackson wrote the opinion. His law clerk at the time was Phil Neal, who is now a nationally known legal scholar.

Phil became an associate of our firm and worked with me in the early stages of the government's suit to break up the oil industry. He left us to teach at Stanford [University] and then [University of] Chicago, where he was dean of the law school. I served as a member of the Board of Visitors of that school while Phil was dean. He was head of the Neal Commission appointed by the president to report on the antitrust laws--a very distinguished legal scholar. Phil always told me, "I studied your briefs and you were absolutely right. My judge was wrong." [laughs] So that's all I got--two good friends (very smart) but none of the nine justices.

Sharp: Well, it was also rather interesting transportation history, in terms of what was happening.

Kirkham: Yes, it was a part of that whole history. There was a commission appointed by--who was it?--quite a distinguished commission appointed to look into the plight of all the municipal railways. Los Angeles had a network of urban and suburban railway transportation, you know. All was ripped and torn up and put

into freeways, and now, boy, would they love to have that back again.

Evaporated Milk Association

Sharp: What about this Evaporated Milk case?¹ I thought it might give us an opportunity to talk a little bit about Thurman Arnold, whom I imagine you had pretty strong feelings about, one way or the other.

Kirkham: [laughs] Well, yes, I had strong feelings about Thurman Arnold. The strongest feelings I had, really, were of friendship. He and Howard Marshall were very close friends. Thurman was an interesting man, no question about it. I entirely disagreed with many of his political views; he was a typical New Dealer.

But he was a charming fellow and, boy, was he difficult. I remember one night he was out here in connection with--probably not the Evaporated Milk case. But he was out for many cases, you know, the Freightways case and others. Every time he'd come around here he'd call on Howard, and Howard would set up a party. Some were at our house. Thurman was a great party man. We'd go down on what was then the strip, quite different than it is now. The Hungry i was once a very nice place to go, did you know that?

Sharp: No, no.

Kirkham: Oh yes, clever shows, and Broadway was that way. Just good, old-fashioned nightclubs. Music, dancing, a little floor show that didn't show anything--

Sharp: Just a show.

Kirkham: Yes, just a show. The girls came in, about as sexy as the Rockettes, you know. Actually, I think it's a good deal sexier than what's happening now.

But anyway, we had a lot of fun with Thurman. I remember one night we were at our house and he had a date to address some group--I've forgotten what it was, it was a group of ladies. What's that political organization?

¹Evaporated Milk Association, et al. v. Honorable Michael J. Roche, 126 F.2d 467 (9th Cir. 1942). See also 130 F.2d 843 (9th Cir. 1942).

Sharp: League of Women Voters?

Kirkham: Could be, or something like that. We went out with Howard, and had two or three drinks and chatted and had a good time. And I said to Thurman, "Maybe you better have something to eat." He said, "No, I'm always too nervous to eat before I give a speech." So then he said, "Let's go out to your house and do a little singing." Eleanor, Howard's wife, had a beautiful voice and we used to do a lot of singing. Howard and Gene Prince loved singing, and Ellis [Kirkham] played the piano. We had a lot of fun doing old-fashioned singing. I said, "Look, you've got to get to your meeting." He said, "Oh, that's all right." So he came out to our house and I couldn't get rid of him. He just kept on drinking and singing. "It's all right," he said, "they really weren't expecting me." Well, they did expect him, and I couldn't persuade him; he wouldn't go.

Sharp: Did he go?

Kirkham: No! Finally I dumped him out of the house and said, "Howard, you've got to attend to Thurman." Howard told me later that he finally got him to his hotel.

But with all of Thurman's eccentricities, he was very able, and his firm in Washington has been very successful, Arnold and Porter. [Felix] Frankfurter's wife was a member of that firm, wasn't she?

Sharp: I didn't know that.

Kirkham: Wasn't she a tax lawyer? I think so.

Sharp: She was? Was her name Frankfurter?

Kirkham: No, practiced under her maiden name. Frankfurter's secretary was the wife of one of the Covington partners, T. Tommy Austern, I think it was. [chuckles] Intimate group.

There's a book recently out that describes the improprieties of Frankfurter and [Justice Louis] Brandeis. Have you read about that?

Sharp: I've read about the book.

Kirkham: Actually, they're improprieties only in the sense that they're acts outside the realm of the judicial process. There's no impropriety in the sense that anybody tried to influence decisions or bribed or anything of that kind. It was just a question of Brandeis (with Frankfurter before he became a justice) being part of the political scene with Franklin

Roosevelt when he should have been taking part only in the judicial scene.

But Frankfurter was an interesting man.

Did I tell you that Mr. Alfred Sutro got a letter from Justice Frankfurter after I argued the Evaporated Milk case in the Supreme Court?

Sharp: No, no you didn't.

Kirkham: Yes, Frankfurter wrote, "I want to compliment you on the argument of your young associate Francis Kirkham." He said he couldn't decide the case in my favor, but he couldn't have heard a better argument or something like that. It was a very nice thing to happen to a young lawyer, and especially because he wrote to the senior partner.

Sharp: And did Mr. Sutro then come and tell you about that?

Kirkham: Oh, yes, he showed me the letter.

During my argument in that case Frankfurter was pretty hard on me, and I sat down in the courtroom not feeling too happy. In a moment I looked up and saw Frankfurter busily writing. He beckoned to one of the pages in his little pantaloon suit and handed him a note. The page disappeared through the velvet curtains back of the bench and then, in just a minute, someone tapped me on the shoulder and I turned around and it was this page. He handed me a note that said, "Dear Kirkham, I would be happy to visit with you in my chambers after court adjourns," signed "Frankfurter." So I went back and we had a nice visit. First thing he said to me was, "Well, you know I'm against you in this case, you know that."

Sharp: Yes, you already knew that.

Kirkham: Now, do you want to hear about the Evaporated Milk case?

Sharp: I think we should finish with it now, since we've already started on it.

Kirkham: All right. Gene Prince started that case. He had represented the Borden Company out here for many years. Then came the war--gee, I hope I'm right. Do you have a copy of the opinion? Let me take a look at it.

Sharp: Yes. [taking it out] This was '42, when it was in the Ninth Circuit [Court of Appeals].

Kirkham: The Ninth Circuit. All right, all right. Gene Prince was called--he was in the reserves--so I took over the case.

We were representing Borden and also Golden State Company, Carnation, Beatrice, Pet Milk, the Evaporated Milk Association, and, I think, others.

Sharp: Golden State is not named in there, but there were forty-three other petitioners who aren't named.

Kirkham: [reading] Yes. Look at these lawyers!

Sharp: Big list.

Kirkham: Yes. [laughing] Thurman Arnold is listed but didn't argue the case. No, Wallace Howland argued it. Wally Howland was head of the San Francisco office of the antitrust division at the time. He and I went at each other hammer and tongs in court for a long time. We ended up by Wally telephoning me about a year later while he was stationed as an officer in the army in North Carolina. He said, "Kirk, I'm coming out to San Francisco to get married. Will you be my best man?" [laughs] So I was best man for Wally Howland, who had been my opposing lawyer for many years. We got along all right.

[pause and he reads opinion again] Yes. There had been a grand jury impaneled in 1941 to investigate violations of the antitrust laws. When the term of that grand jury ended, the jury made an order continuing it in existence for the sole purpose of finishing investigations already begun but not finished. Later this grand jury indicted the milk industry, reciting that it had begun an investigation of that industry before its term had expired. After a lot of digging around, Gene Prince finally discovered from witnesses and the minutes of the grand jury that in fact no investigation had been begun before the term ended and therefore the indictment was invalid. About this time Gene went to war and I had to take over. We filed a plea in abatement challenging the validity of the indictment, but Judge Roche sustained the government's demurrer to the plea.

Well, there we were--stuck with what we felt was clearly an invalid indictment and faced with months if not years of needless pretrial and trial of every company of any size in the evaporated milk industry of the entire country, at a needless cost of millions of dollars, if we waited until after a final judgment to reverse the trial court. So I thought we ought at least try for a writ of mandamus in the court of appeals. None of the other defense lawyers in the case agreed, but Larry Kuechler of our firm, who was working with me, enthusiastically backed me up. So

we called Mr. Robinson of Milbank, Tweed in New York, who was Borden's general counsel. He said, "Well, Kirk, as far as I'm concerned you can do it if you want to, but I'm sure you won't get any place." I was spending a little bit of their money, so I thought I should have his approval.

So Larry and I went to work. That was Monday, I guess; Monday Roche denied our motion. Larry and I started working Tuesday morning and we just didn't leave the office until Thursday. We had a stack of papers this high and worked night and day on the petition for a writ of mandamus, with all its supporting documents including exhaustive memoranda of law. Thursday morning we took this whole stack to the court of appeals.

I had made a date to see Judge [William] Denman in his chambers. We presented our petition and I told him the whole story--the sham and almost fraud of the government in pretending that the grand jury had jurisdiction and making false recitals in the indictment, et cetera. In any event, it impressed the judge enough so that he said, "Well now, wait a minute. I don't want to issue a writ of mandamus here by myself. If you'll come back after lunch I'll have two other judges with me and you can present it to a full court."

Sharp: Uh-oh.

Kirkham: [laughs] So right after luncheon we went back up and there were three judges from the court of appeals--still in chambers. I went over the whole thing again, and the judges said, "Well, we think you're right." So they signed a writ of mandamus directing Judge Roche to cease and desist from any further proceedings in the case until he could show cause why he should not grant us a trial on our plea in abatement.

We went downstairs to Judge Roche's court. Herbert Clark was up there droning along about a long motion to produce some discovery papers. Judge Roche was nodding his head, nearly asleep--you have no idea how boring a big antitrust can be in its early stages. I handed Herbert a note saying: "Please ask the court for a recess." So Herbert said, "My associate just handed me a note requesting that the court allow us a recess."

He said, "What's this all about?" I said, "I wonder if we could have a meeting in your chambers, Your Honor. I have an order from the court of appeals that is pertinent to the case." So he said, "Oh, all right." So we adjourned, and we went into the judge's chambers.

He said, "Now, what is this?" I said, "I have here an order from the court of appeals ordering you to cease and desist from any further proceedings in this case until you show cause why you shouldn't grant our motion for a trial on our plea in abatement." Well, I tell you, old Judge Roche didn't know what to think. He turned to Wally Howland and said, "What's this all about?" Wally said, "I don't know, first time I've ever heard about it."

I said, "That's true, this is a matter that was properly presented ex parte." So Judge Roche leaned back, pointed to Wally and said, "I'll tell you what's happened, young man. You have led me into error. Now get me out of it." [laughs] So the government filed a return for Judge Roche, we argued it in the court of appeals and won it.

Then the United States filed a petition for a rehearing and asked for a hearing before the full court, en banc. Was it Thurman Arnold at that time?

Sharp: It might not have been, because Arnold left in '43. The date of this was '42 [indicating decision in file] so unless it happened within--

Kirkham: Well, anyway, I guess it was Thurman Arnold. They filed a petition repeating their purely technical claim that we had no right to a writ of mandamus at this intermediate stage of the case; that our remedy was by appeal after final judgment.

The court of appeals granted both the petition for rehearing and the government's request for a hearing en banc. I was told it was the first time this court of appeals had ever sat en banc. So all seven of the judges heard the re-argument.

It really turned into sort of an argument between Chief Judge Wilbur, representing the Old Testament, and Judge Denman, representing the New. They were using me as a sounding board to bounce insults back and forth. When I was finished, or just about to the end, Judge Wilbur said, "Mr. Kirkham, your time has expired."

At just that moment Judge Denman said, "Mr. Kirkham, I'd like to ask you a question. Now--," and he started. Judge Wilbur said, "Mr. Kirkham, your time has expired." Judge Denman said, "I would like to ask Mr. Kirkham a question, and I would like to get his answer. Now Mr. Kirkham, is it not true--" Judge Wilbur said, "Mr. Kirkham, your time has expired."

So I backed away, and Denman said, "Let the record show that a judge of this court addressed an appropriate question to

counsel in the course of an argument and requested an answer to that question, and the chief judge of the court refused to permit him to answer." So on that happy note [laughs] the argument ended.

They came back with a divided decision--they ruled for me, with Denman dissenting.

The government petitioned the Supreme Court for a hearing, and when the Court granted certiorari I knew I was in trouble. I knew the Court could throw me out on the old, time-worn, technical ground, but I also knew that this would result in a miscarriage of justice. I also was not blind to the fact that the Supreme Court had changed since I was there--seven new justices, all appointed by Franklin Roosevelt and who had never decided an antitrust suit against the government. In fact, I believe the Hawaii case¹ in 1972 was the first decision by the "new" Court in favor of the defendant in an antitrust case. That, incidentally, was the last case I argued in the Supreme Court of the United States. So at least I ended with that satisfaction.

But to return to the Evaporated Milk Case, I hoped I could in my argument, first, shock the Court with the government's conduct in the case, and then, with that background, get them to let common sense and justice prevail over an anachronistic technicality. I didn't succeed. I still wonder how a court with the admitted power to do otherwise would elect to force a long and expensive trial--months and months and months of time by parties, witnesses, lawyers and judges, at an expense of millions and millions of dollars, on an indictment that gave every appearance of being invalid, on the technical ground that the validity of the indictment should not be decided until the case was tried and carried through its drawn-out final appeals. Under our proposal the validity of the indictment could have been settled in a day's trial and if it was invalid, everyone could go home--now--instead of millions of man-hours and millions of dollars later.

Law is a wonderful thing!

But I have never counted the Evaporated Milk case as a loss. We made it so clear on our mandamus record that the government had bungled, and the Supreme Court's opinion by Chief Justice Stone, together with the comments of the justices at oral argument, so clearly intimated that the indictment might well be

¹Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972).

held invalid on final appeal, that Tom Clark, who was then the assistant attorney general in charge of the antitrust division (and who was later a Supreme Court justice) called me up and said, "Let's settle it and get it out of the way." Our clients got a small slap on the wrist and the case ended.

Sharp: Was this the first antitrust case that you worked on?

Kirkham: Oh no. One of the first cases I worked on with Mr. Alfred was a movie case; he was counsel for Paramount [Pictures]. And the Freightways case, when did that come, Consolidated Freightways?

Sharp: I don't know.

Kirkham: I was on that case.

Sharp: But the Paramount cases: they were part of Mr. Arnold's investigation?

Kirkham: Yes, I think he was in some of the movie cases. I guess some antedated Thurman Arnold, didn't they? You remember, the cases that broke up the whole system of marketing in the industry?

Sharp: Well, I know about them when they pick up in the 1950s. Because they kept going, that was a continuing--

Kirkham: Yes. But the old original movie decree in effect broke up vertical integration. The producers could not exploit integration to tie their bad movies to good movies. I've really forgotten, but there were all kinds of treble damage suits that followed the original decree. A number of them were in our office, tried by Gene Bennett and Charlie Prael.¹

I was involved in one in Salt Lake City after the war. Jack Sutro was good enough to work with me on one discovery phase. It was the only time I ever got him to Utah. Incidentally, we had an interesting episode in that case. A hot-shot attorney for Paramount from New York was meeting Jack and me in Salt Lake City for a conference. He drove up to the hotel from the airport in a limousine with driver, dressed to the teeth. We went up to his suite for our meeting and sat down to start work. He opened his briefcase, which turned out to be a miniature bar, started to pour some drinks and said, "Where are the girls?" Unfortunately, Jack and I, being just simple practicing lawyers, had failed to anticipate his expectations.

¹See Charles F. Prael oral history in this series.

I can't resist adding another little episode from that trip. When we had finished our work in a couple of days, we checked out of the grand old Hotel Utah (after sending our helpful New York lawyer on to Los Angeles) and started in our rental car for the airport. We had gone a few blocks when I looked at my watch, suddenly stopped the car, made a U-turn and said, "Jack, we've got more than a couple of hours; I want to show you something." I drove, not too slowly I'll admit--but it was all familiar country--nearly forty miles south to Provo Canyon, up the canyon to the south fork of the Provo River, up that canyon on the narrow winding mountain road that goes nearly to the top of Mount Timpanogas and down through American Fork Canyon to the main highway heading back to Salt Lake City. It is one of the truly scenic drives in America. Magnificent! I kept telling Jack to look at the incredible views: the snow banks, the aspen groves and pine forests climbing up to the tree line, the towering crags of the high Rockies. He kept saying, "Look out for the curve." "What time is it?" "We'll miss our plane." "Look out!" "LOOK OUT!"

I'll admit there were some pretty sharp curves and that the road at times was carved in the side of some pretty steep cliffs and at times overlooked drops of hundreds of feet.

We reached the airport with a good ten minutes to spare. And Jack finally admitted it had been a beautiful trip, but unusual!

High Honor For S. F. Lawyer

George Washington University Achievement Award To Kirkham

George Washington University has selected a distinguished member of the San Francisco Bar for one of its highest awards, it was learned yesterday.

Francis Robison Kirkham, a senior partner in the Pillsbury, Madison & Sutro firm, 225 Bush Street, is recipient of the Alumni Achievement Award, presented during commencement exercises of the National Law Center of The George Washington University in Washington, D.C., Tuesday last.

Last year's award was presented Secretary of the Treas-



Francis R. Kirkham

ury David Kennedy. Francis Kirkham received a Juris Doctor degree from the University with highest honors in 1931; and a B.A. in 1932.

Following graduation from law school he served as Clerk to Supreme Court Justice Sutherland and, later, Chief Justice Charles Evans Hughes. He is co-author of the leading work in the jurisdiction of the Court, "Jurisdiction of the Supreme Court of the United States." He was appointed by the Court to prepare its revisions of the General Orders and Forms in Bankruptcy in 1936 and in 1938.

Kirkham served as General Counsel to Standard Oil Company of California.

He has been a member of the Board of Governors of the San Francisco Bar Association, of the California Bar Association, and of

the American Bar Association. He has served on the Attorney General's National Committee to study the Antitrust Laws (1953-55), has served on the Council and various committees of the Antitrust Section of the American Bar Association, and was Chairman of that Section in 1961-62.

Kirkham is a Fellow of the American College of Trial Lawyers and a member of the American Law Institute, the American Judicature Society, the American Society of International Law, the International Law Association, and the New York State and International Bar Associations.

While at George Washington, Kirkham was awarded the Lerner Medal as first scholar and was elected to Order of the Coif.

S.F. Lawyer Joins U.S. Court Study

Washington

San Francisco lawyer Francis R. Kirkham has been named to a commission studying the federal appellate courts, the White House announced yesterday.

Kirkham is senior partner in the prestigious San Francisco law firm of Pillsbury, Madison and Sutro.

He is one of 16 named to the National Commission on Revision of the Federal Court Appellate System.

The commission was created by Congress last fall to study the present division of the nation into 11 federal judicial circuits and to recommend, if necessary, changes in their geographical boundaries.

The commission is expected to spend 18 months studying the federal courts of appeal.

Kirkham is a 1931 graduate of George Washington University's law school here. He served as a law clerk to U.S. Chief Justice Charles Evans Hughes before moving to San Francisco.

Kirkham is married and lives in San Francisco. He is the father of two sons and two daughters.

The position is non-salaried but highly influential, since some observers predict that the commission will recommend broad changes in the present circuit court system.

Our Correspondent

Jackson Memorial Lecture

S.F. Lawyer Addresses 'Judge-Graduates' At Ceremony Today

Reno, Nev.—San Francisco attorney Francis R. Kirkham, today will deliver the first 1976 Robert Houghwout Jackson Memorial Lecture at graduation exercises for two special sessions of the National College of the State Judiciary.

Kirkham, a member of the Pillsbury, Madison & Sutro law firm, will address graduates of the 24th Regular Four-Week Session and the Court Management Specialty Session, on "Civil Litigation: Can We Simplify Procedures Without Sacrificing Justice?"

He plans to discuss new methods of handling complex civil litigations such as class actions, civil rights and anti-trusts, and will place emphasis on the cost and time factors as it relates to the justice system.

Kirkham, a graduate of George Washington University, is a Fellow of the American College of Trial Lawyers and the American Bar Foundation.

He is a member of the Commission on the Revision of the Federal Appellate System, and served as a speaker for the recently conducted "National



FRANCIS R. KIRKHAM

Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," sponsored by the Judicial Conference of the United States,

the Conference of Chief Justices, and the American Bar Association.

The two graduating sessions represent two "firsts" for the National College. It is the first time the Regular Four-Week Session has been offered in the spring, and a total of 43 participants from 22 states and the Army judiciary enrolled.

The Court Management Session is new to the College curriculum, and is designed as an advanced course on court management for court administrative officers and presiding judges. A total 38 participants from 19 states enrolled in this course.

The latter session was conducted by Ernest C. Friesen, Jr., formerly dean of the National College, and director of the Institute for Court Management in Denver, Colorado. Friesen is currently serving as dean of the Whittier College School of Law.

The National College of the State Judiciary is an activity of the Judicial Administration Division of the American Bar Association.

KIRKHAM, DON, soil physicist, educator; b. Provo, Utah, Feb. 11, 1908; a. Francis Washington and Martha Alma (Robison) K.; clarinetist diploma McCune Sch. Music and Art, Salt Lake City, 1926; student U. Utah, 1925-27; A.B. with honors in physics, Columbia U., 1933, A.M. in Physics, 1934, Ph.D. in Physics, 1938; Erediplom, U. Ghent, Belgium, 1958; D. Agr. Scis. (hon.), Royal Agr. U., Ghent, 1963; m. Mary Elizabeth Erwin, Sept. 2, 1939; children—Victoria, Mary Beth, Don Collier; Asst. in physics Columbia, 1934-38; instr., asst. prof. math. and physics, also assoc. Agr. Expt. Sta., Utah State U., 1937-40; hydraulic engr. Soil Conservation Service, Dept. Agr., 1940; civilian physicist Bur. Ordnance, U.S. Navy, 1940-46; assoc. physics George Washington U., 1946; faculty Iowa State U., 1946—, Curtus Dising, prof. agr., prof. agronomy and physics, 1959-78, prof. emerita, 1978—; Fulbright prof., The Netherlands, 1950-51; Fulbright prof., Guggenheim fellow, Belgium, 1957-58; lectr. U. Vienna, Austria, 1958, Ireland, 1960, Göttingen U., Fed. Republic Germany, 1974; land reclamation adviser Turkish Govt., 1959; Ford Found. land reclamation cons. U.A.R., also lectr. Alexandria U., Egypt, 1961; sect. chmn. Internat. Soil Structure Symposium, Belgium, 1958; panelist IAEA, Vienna, 1960; lectr., Yugoslavia, Bulgaria, 1964; mem. U.S. AID Univ. Study Team, Argentina, summer 1965; panelist on land reclamation FAO, Egypt, 1974-77; council mem. Internat. Sodje Soil Symposium, Budapest, 1964; soil physics del. to internat. congresses and symposia, Armenia, 1969, Moscow, 1971, New Delhi, 1971, Belgium, 1973, Madras, India, 1973; sect. chmn. 7th congress Internat. Soil Tillage Org., Uppsala, Sweden, 1976; dir. Iowa Water Resources Research Council, 1964-73; Active Boy Scouts Am. Mem. Utah N.G., 1925-27. Recipient Wolf Prize in Agr., 1983-84, Fellow Am. Phys. Soc., Am. Soc. Agronomy; mem. Am. Geophysics Union (award most meritorious paper sci. hydrology 1952), Soil Sci. Soc. Am. (chmn. soil physics 1950; Stevenson award 1951, 25th anniversary honor lectr. 1961, del. to internat. meetings in Bucharest 1964, hon. mem. 1982, disting. service award 1984), Am. Math. Assn., Netherlands Soc. Agr. Research, Internat. Soil Sci. Soc. (U.S. v.p. 1957-59), Nat. Soil Tillage Research Org. (hon.), Iowa Acad. Soc. (most meritorious paper math. 1944, physics 1949), SAR (v.p. Iowa 1966), Sigma Xi (honor lectr. U. Iowa chpt. 1959, gov. Iowa's medal for sci. application 1966), Phi Kappa Phi, Omicron Sigma Delta, Republican, Mem. Ch. of Jesus Christ of Latter-Day Saints (missionary Germany 1927-30, pres. Hamburg dist. 1930). Author: (with W.L. Powers) *Advanced Soil Physics*. Contrib. numerous articles to books, sci. jour., Assoc. editor Jour. Water Resources Research, 1965-71; cons. editor Soil Science. Patentee. Home: 2109 Clark Ave., Ames, IA 50010

KIRKHAM, FRANCIS ROBISON, lawyer; b. Fillmore, Utah, Aug. 23, 1904; a. Francis Washington and Martha Alma (Robison) K.; A.B., George Washington U., 1930, LL.B., 1931; m. Ellis Musser, July 9, 1929; children—James F., Elizabeth (Mrs. James Scullman, Jr.), Katherine (Mrs. Geoffrey Hallam Mowius), Eugene R. Admitted to D.C. bar, 1931, Calif. bar, 1936; law clk. Chief Justice Charles E. Hughes, 1933-35; with firm Pillsbury, Madison & Sutro, San Francisco, 1936—, partner, 1940—; gen. counsel Standard Oil Co. Calif., 1960-70. Mem. arty. gov.'s nat. com. to study antitrust laws, 1953-55; mem. Comm. on Revision Fed. Ct. Appellate System, 1973. Recipient Alumni Achievement award George Washington U., 1970, Alumni Merit Honor award U. Utah, 1976, Fellow Am. Coll. Trial Lawyers, Am. Bar Found.; mem. Am. (chmn. anti-trust law sect. 1961), San Francisco bar assn., State Bar Calif., Am. Law Inst., Am. Judicature Soc., Am. Soc. Internat. Law, Internat. Law Assn., Order of Cof., Delta Theta Phi, Clubs: Pacific Union, Bohemian, San Francisco Golf, Stock Exchange (San Francisco). Author: (with Reynolds Robertson) *Jurisdiction of the Supreme Court of the U.S. Drafted for Supreme Court Revision of General Orders in Bankruptcy*, 1936, 39. Home: 3245 Pacific Ave., San Francisco, CA 94118 Office: Standard Oil Bldg., PO Box 7880, San Francisco, CA 94120

KIRKHAM, DON, soil physicist, educator; b. Provo, Utah, Feb. 11, 1908; s. Francis Washington and Martha Alzina (Robison) K.; m. Mary Elizabeth Erwin, Sept. 2, 1939; children: Victoria, Mary Beth, Don Collier. Clarinetist diploma, McCune Sch. Music and Art, Salt Lake City, 1926; student, U. Utah, 1925-27; A.B. with honors in physics, Columbia U., 1933, A.M. in Physics, 1934, Ph.D., 1938; Erediplom. U. Ghent, Belgium, 1958; D.Agril. Scis. (hon.), Royal Agril. U., Ghent, 1963. Asst. in physics Columbia U., 1934-38; instr., asst. prof. math. and physics, also asso. Agril. Expt. Sta., Utah State U., 1937-40; hydraulic engr. Soil Conservation Service, Dept. Agr., 1940; civilian physicist Bur. Ordnance, U.S. Navy, 1940-46; asso. physics George Washington U., 1946; mem. faculty Iowa State U., Ames, 1946-; Curtiss Disting. prof. agr., prof. agronomy and physics Iowa State U., 1959-78, prof. emeritus, 1978-; Fulbright prof., The Netherlands, 1950-51, Guggenheim fellow, Belgium, 1957-58; lectr. U. Vienna, Austria, 1958, Ireland, 1960; lectr. Göttingen (Germany) U., 1974; land reclamation adviser Turkish Govt., 1959; Ford Found. land reclamation cons. UAR; also lectr. Alexandria (Egypt) U., 1961; guest prof. Hohenheim-Stuttgart U., 1982; sect. chmn. Internat. Soil Structure Symposium, Belgium, 1958; panelist IAEA, Vienna, 1960; lectr., Yugoslavia, Bulgaria, 1964; mem. U.S. AID Univ. Study Team, Argentina, summer 1965; panelist on land reclamation FAO, Egypt, 1974-77; council Internat. Sodic Soil Symposium, Budapest, 1964; soil physics del. to internat. congresses and symposia, Armenia, 1969, Moscow, 1971, New Delhi, 1971, Belgium, 1973, Madras, India, 1973; sect. chmn. 7th congress Internat. Soil and Tillage Orgn., Uppsala, Sweden, 1976. Author. (with W.L. Powers) *Advanced Soil Physics*; contrb. numerous articles to books, sci. journs.; assoc. editor: *Jour. Water Resources Research*, 1965-71; cons. editor: *Soil Science*. Dir. Iowa Water Resources Research Council, 1964-73; Active Boy Scouts Am.; mem. Utah N.G., 1925-27. Co-recipient Internat. Wolf prize in Agr., Israel, 1984; recipient Gov.'s medal for sci. achievement in Iowa, 1985, Merit Honor award U. Utah, 1987. Fellow Am. Phys. Soc., Am. Soc. Agronomy; mem. Am. Geophysics Union (award most meritorious paper sci. hydrology 1952), Soil Sci. Soc. Am. (chmn. soil physics 1950, Stevenson award 1951, 25th anniversary honor lect. 1961, del. to internat. meetings in Bucharest 1964, hon. mem.), Am. Math. Assn., Netherlands Soc. Agril. Research, Internat. Soil Sci. Soc. (U.S. v.p. 1957-59), Iowa Acad. Soc. (most meritorious paper math. 1948, physics 1949), Internat. Soil Tillage Orgn. (hon. 1982), S.A.R. (v.p. Iowa 1966), Internat. Soc. Soil Sci. (hon. 1986), Am. Water Research Assn. (hon. 1986), Sigma Xi (honor lectr. U. Iowa chpt. 1959), Phi Kappa Phi, Gamma Sigma Delta, Republican, Mem. Ch. of Jesus Christ of Latter-Day Saints (missionary Germany 1927-30, pres. Hamburg dist. 1930). Patentee. Home: 2109 Clark Ave Ames IA 50010 *My career has been based on these guidelines: Do don't stew. Keep moving. Persist. Don't take yourself too seriously.*

KIRKHAM, FRANCIS ROBISON, lawyer; b. Fillmore, Utah, Aug. 23, 1904; s. Francis W. and Alzina (Robison) K.; m. Ellis Nusser, July 9, 1929; children: James F., Elizabeth (Mrs. James Stillman, Jr.), Katherine (Mrs. Geoffrey Hallam Movius), Eugene R. A.B., George Washington U., 1930, LL.B., 1931. Bar: D.C. 1931, Calif. 1936. Law clk. Chief Justice Charles E. Hughes, 1933-35; with firm Pillsbury, Madison & Sutro, San Francisco, 1936-; partner Pillsbury, Madison & Sutro, 1940-; gen. counsel Standard Oil Co., Calif., 1960-70; Mem. atty. gen.'s nat. com. to study antitrust laws, 1953-55, mem. commn. on Revision Fed. Ct. Appellate System, 1973. Author: (with Reynolds Robertson) *Jurisdiction of the Supreme Court of the U.S. Drafted for Supreme Court Revision of General Orders in Bankruptcy*, 1936, 39. Recipient Alumni Achievement award: George Washington U., 1970; Alumni Merit Honor award U. Utah, 1976. Fellow Am. Coll. Trial Lawyers, Am. Bar Found.; mem. ABA (chmn. anti-trust law sect. 1961), San Francisco Bar Assn., State Bar Calif., Am. Law Inst., Am. Judicature Soc., Am. Soc. Internat. Law, Order of Coif, Delta Theta Phi. Clubs: Pacific Union (San Francisco), Bohemian (San Francisco), San Francisco Golf (San Francisco), Stock Exchange (San Francisco). Home: 3245 Pacific Ave San Francisco CA 94118 Office: Pillsbury Madison & Sutro 225 Bush St San Francisco CA 94104-2105

V GENERAL COUNSEL, STANDARD OIL OF CALIFORNIA, 1960-1970

[Interview 3: March 11, 1986]

Early Cases

Sharp: I thought what we would do today is to start talking about your work with Standard Oil and begin with the period when you were starting to do some work for Standard but before you became general counsel. Last time we finished up with your telling me a little bit about Marshall Madison and what his approach was to being general counsel. So we got into the Standard work a little bit, but I thought we might go into that some more. I did come across one case in the late 1940s; now it tends to be just called the Standard Stations case, and I wondered if you had been involved in that.

Kirkham: That was the exclusive dealership case? No, that case was handled by John Hall of Lawler, Felix and Hall and was filed in Los Angeles. I was in a couple of Standard cases before I started spending my principal time on Standard Oil work. One I think I told you about was the post exchange case.¹ Did I tell you about it?

Sharp: No.

Kirkham: Right at the outset of the war the question arose as to whether sales to army post exchanges were subject to the state of California gasoline tax. That ended up in a test case brought by Standard to recover from the state of California taxes collected from Standard on sales to post exchanges. It was a test case for the whole United States on taxation by the states on sales to post exchanges, ship stores, and other instrumentalities of the United States that were selling to members of the armed services.

¹Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942).

The Supreme Court of California held that California could collect the tax, and Felix Smith asked me to brief and argue the case in the Supreme Court of the United States. That court reversed the California court and held that the sales were not taxable by the state. That was in 1942, right at the beginning of the war, and that settled the legal point for umpteen millions of dollars of sales during the war throughout the whole country.

One point that was hidden in that case was of particular interest to me and it could have been a deadly trap. When I got the record, I looked at it and was concerned to see that there was a question as to whether our office had filed the appeal in time. The Judiciary Act required that an appeal from a state court had to be taken within three months of the courts' final decision. If it was taken after three months, it was summarily dismissed. When I looked at the record in this case, I saw that the appeal had been taken more than three months after the Supreme Court of California had handed down its decision but less than three months from the time a petition for rehearing could have been filed. The state court rules provided that a party could file a petition for rehearing within thirty days and if none was filed, the decision became "final" at the end of the thirty days. I was afraid the Supreme Court of the United States would hold that the judgment became final for purposes of its review when it was rendered.

Also, to make it worse, there was nothing in the record on appeal except the opinion of the court so that, on its face, the appeal was untimely. I was ready to argue that the appeal was timely, but I certainly didn't want the point to surface if I could help it. So I went out to Grant Taylor, who was the clerk of the California Supreme Court, and got him to write out a supplement to the record in which he stated that the decision of the California Supreme Court, under its rules, became final thirty days after the filing of the decision. Then I got him to slap the big gold seal of the California Supreme Court on a final judgment order dated thirty days after the decision and I personally flew it back and got the clerk of the Supreme Court in Washington to insert it in the record.

Sharp: So it was all in order.

Kirkham: It was all in order in appearance and no one ever noticed or raised the point. And believe me, we were lucky, because only about two terms of court later, I forced the Supreme Court to decide the question by taking two appeals in the Market Street Railway case, one from the decision and one from the final order after the time for filing a petition for rehearing had expired. The court held that the decision became final when it was

rendered and not one month later. So the post exchange case would have been dismissed as out of time if anybody had noticed it.

Another unusual thing happened in the post exchange case. The United States was on our side. They wanted the court to hold that sales to post exchanges were not taxable by states. Sig Nielson, who was our senior tax partner at the time, had discussed the case with [Samuel O. Jr.] Clark, who was the assistant attorney general in charge of the Tax Division, and Clark had told Sig that the United States would file a brief in the Supreme Court in support of our position.

So when I got back to Washington to argue the case, I went to the Solicitor General's Office to get a copy of the government's brief and was met by a cocky little fellow named Arnold Raum, who told me that the solicitor general had decided not to file a brief supporting us, but instead to file a motion to dismiss the case for want of jurisdiction because it involved only a question of the construction of the state statute instead of a federal question. (You can get his point if you read the case.)

Well, I was dumbfounded. Here this case was going to be argued in a couple of days, and instead of receiving the support of the government, it was going to try to have me thrown out of court. I knew the point Raum was trying to make and I knew he was wrong. I said, "Look, I'm familiar with those cases, they're in our book, I can show you." He said, "I know what you say in your book, but I don't agree with it."

I started to argue with him, and, I don't know, probably got a little upset, and I told him that I thought I knew something about the jurisdiction of the court--

Sharp: [laughs] In so many words.

Kirkham: --and that I knew I was right. Finally I said, "I'd really appreciate it if I could take this up with the solicitor general, because I think the United States would be making a great mistake if they got this case thrown out for want of jurisdiction. It's a test case, and it's one of those situations in the law where it is as important to have it decided as it is to have it decided one way or another. It must be decided, and if you throw this case out, we've got another year or more before the Supreme Court can get around to deciding in another test case whether every sale made to every post exchange in the whole country is taxable by the states!" And I said, "Can't I arrange a meeting with the solicitor general?"

He said, "Mr. Kirkham, I am the solicitor general for the purposes of this case. I have made up my mind, and that's the end of it."

Well, I went out of there just--I could have kicked that little--in the teeth, I was so angry.

Anyway, Raum filed his motion to dismiss and turned up in his formal morning tails to argue the point to the court. I was called first and started immediately on his jurisdictional point, and [chuckles] Justice Frankfurter leaned over and said, "Mr. Kirkham, I don't think you need to address that point. I think the Court is satisfied on that."

I said, "Yes, Mr. Justice, I know, but the solicitor general has filed a brief taking this position, and it is so important the matter be decided that I'd like to make certain that no question--" and I started in just a little more.

He repeated [deliberately] "Mr. Kirkham, I don't think you need to address that point. I think the Court is satisfied on that." So I said, "Well, all right." Then I went on to the merits. When I got through, the chief justice turned to Raum and said, "Do you have anything to add, Mr. Raum?" He said, "No, Your Honor." After the argument, he turned around and marched out; didn't even say goodbye. The Court took just a couple of sentences to knock his point out and went on to decide the case in our favor. It was an interesting case. I was grateful, believe me, that Raum did not notice the question of timeliness.

Sharp: I was just going to clarify a point: The United States would have been interested, you thought, in supporting your side primarily from an economic standpoint? They didn't want to have to bear the state tax, that would have been the reason?

Kirkham: Yes. They didn't want sales at post exchanges to be burdened by the tax. It was one of the perks of being in the army--you know, in those days privates in the army were getting \$30 a month. And the poor devils just lived by having a little cheaper shot at goods at post exchanges. And army officers were getting such low pay that if they didn't have a few perks they just couldn't live. I guess that was one of the things: they wanted the armed forces to get necessities at as reasonable prices as possible. Of course, the constitutional point was whether the post exchange is a governmental instrumentality not taxable by the states.

Sharp: Did this ever get all the way back up to Samuel Clark?

Kirkham: Yes. After Raum had kicked me in the teeth, I talked to Sig Nielson about it and Sig talked to Clark. Clark said, "Well, I can't do anything about it because it has gone from our hands to the solicitor general." And that's true; Sam was in the Department of Justice under the attorney general, and once a case gets in the Supreme Court of the United States, it is in the hands of the solicitor general. He is the lawyer of the United States in the Supreme Court. Ordinarily, if he has any sense, he will at least listen to the views of people in the Department of Justice that have tried the case. But if he wants to be arbitrary and cocky, as Raum was [pause], he won't listen. Who was solicitor then? [James Crawford] Biggs was solicitor general until 1935. And Stanley Reed was solicitor general for a while.

Sharp: After Biggs?

Kirkham: Yes, but Stanley Reed was on the Court that heard the post exchange case so it was someone else. Biggs, you know, was--well, how can I put it? He was simply a joke. We were so busy as law clerks back there, with one law clerk doing what five do now, that we didn't have time to listen to arguments. But we could not resist going up to hear Biggs arguing a case. We'd slip in the side door for just a few minutes, because it was like going to a burlesque show.

Sharp: Was he just incompetent?

Kirkham: Totally, absolutely incompetent. When Roosevelt took office, the South had not had anybody in there, the Republicans had been in since God knows when. So a whole lot of patronage went to the South. Biggs was from North Carolina; I guess he'd tried a few jury cases down there. He would get up before the Supreme Court and be asked a question. He would reply [imitating strong Southern drawl] "Well, y'honahs, down in No'th Carolinah--" and he'd ramble on with a lot of irrelevancies. And the Court--that was a busy Court, giants of the law--had to listen to this stupid ass.

Sharp: And people that you had respect for, too.

Kirkham: Yes, well, it was funny. It was very interesting. There were two youngsters in the Solicitor General's Office at that time. One was Whit [Whitney North] Seymour and the other was Erwin [N.] Griswold. They were just youngsters, but because Biggs was so incompetent they were briefing and arguing the government's cases. Both of them were brilliant. You know Erwin Griswold later became dean of Harvard Law School and solicitor general under three presidents. And Whit Seymour became the senior partner of Simpson, Thatcher and Bartlett in New York and

president of the American Bar Association. Finally it got so bad that Hughes made a personal representation to the president, and Biggs was kicked upstairs into--as I recall--the Reconstruction Finance Corporation. He was given a job paying more and having no responsibility. [laughs]

Sharp: It was just as well.

Kirkham: I forget, Reed must have taken his place. I can remember Reed arguing. Reed fainted, you know, in the Supreme Court. He was arguing one of the New Deal cases before the court and [Willis] Van Devanter was questioning him very, very sharply.

Sharp: As only Van Devanter could.

Kirkham: Yes. Van Devanter was a very able man. I remember so well, Reed just stood there at the podium a minute when Van Devanter asked him this question; he didn't say anything and he looked kind of pale. Then Van Devanter repeated the question rather sharply, and Reed just swayed and dropped to the floor.

Sharp: You were behind him?

Kirkham: No, I was sitting where the law clerks sit, at the side of the court room. He just fell on the floor. Hughes quickly adjourned the court and they revived him.

Sharp: This particular case dealing with the taxing of the gas going to the army posts: was that typical of the kind of case that Standard had during World War II?

Kirkham: Oh, no. I don't know that it was. It was typical of the work I did for Standard before I got into their problems. I mean, I handled the whole case without even speaking to a Standard executive. It was as if I had been retained as outside counsel on appeal. The case had been tried by other lawyers in the firm who worked with company personnel. I guess there may have been one or two other Standard cases I had something to do with.

Oh, I remember. I worked on a Standard Oil case that involved depletion allowances under the tax laws. And the slant drilling case I told you about. But they were incidental things.

Eagle Oil and Refining, 1952, and Basalt Rock

Kirkham: I actually did not do any work directly with Standard until I got to the--oh, what was the name of that? It was a case that involved an alleged conspiracy in restraint of trade--the Eagle Oil and Refining case in 1952.

You'll have to know that every time I talk about something I do, I'm only talking about something that I did with the help of an absolutely magnificent group of men who worked with me always, all of whom did really more than I did on everything.

Now, Bill [William E., Sr.] Mussman worked with me on this case, and also Murray Gartner, who was an absolutely magnificent lawyer. He had been [Justice Robert H.] Jackson's law clerk; worked with me on Eagle Oil and also on the Basalt case, which maybe I ought to interrupt a moment to tell you about because, after we won it, we collected the biggest fee the firm had ever collected up to that time.

It was a case involving Basalt's wartime excess profits taxes--technical beyond description, as you can see before you've read more than the first few lines of the decision of the court of appeals.¹ Harry Horrow had handled it in the tax court and lost by a divided court. He asked me to take it to the court of appeals and Supreme Court, if necessary. I set up a meeting in the conference room, and Murray Gartner and I sat down while Harry told us what the case was all about. I remember we listened for about five or six minutes, when I interrupted and said (Harry will remember this), "Harry, I know I am not as smart as you are, but I am as smart as the judges on the court of appeals and I have not understood one thing you have said since you started, and neither will they. Can't this case be stated in English instead of tax mumbo jumbo?"

Well, we finally got it somewhere near understandable--briefed, argued, and won it in the court of appeals. And then we had to resort to some fancy footwork to hold what we had. The decision came down on February 6, 1950, and I got word soon after that that the government was going to petition the Supreme Court for review. A case involving the same point was pending in the Fifth Circuit (the Sokol case) and I knew the government would put off filing its petition in our case until the last moment (at

¹Basalt Rock Co. v. Commissioner of Internal Revenue, 180 F.2d 281 (9th Cir. 1950); certiorari denied, Commissioner of Internal Revenue v. Basalt Rock Co., 339 U.S. 966 (1950).

the end of three months), so that the Supreme Court would not have time to act on its petition before the end of the term. That would put action on our case over until October, and the government hoped that in the meantime the Fifth Circuit would decide differently from the Ninth Circuit and thus create a conflict of decisions between circuits, which would very much strengthen its position in asking the Supreme Court to grant certiorari.

The last day the government could file its petition for certiorari was May 5. Our brief in opposition would be due thirty days after we were served with the petition, and the government hoped, of course, that we would take that time and thus postpone consideration of the petition until the opening of the fall term in October. However, toward the end of April, I went to Washington, dropped in to see the clerk of the Supreme Court, and learned from him that all pending certiorari ready for consideration would be distributed to the justices on Saturday, May 13, for consideration at the last conference of the Court on May 19 or 20, that thereafter the Court would announce its decisions and adjourn until the next term convened in October.

Well, that gave me only from Friday, May 5, to Friday, May 12--to be safe, I would have to file one day before the distribution on Saturday morning, May 13--within which to prepare and file a brief in opposition to the granting of the petition. But this wasn't all. I dropped by the Solicitor General's Office and learned that the government was also going to file, on May 5, petitions for certiorari in Commissioner v. John Breuner Company from the Ninth Circuit and Commissioner v. Busch's Kredit Jewelry Co., Inc. from the Second Circuit, and claim that the decisions in those cases were related to Basalt and furnished additional grounds for Supreme Court review. I knew that even if I got my brief in opposition in by May 12, the government would jump in and urge that consideration of Basalt be postponed until opposition briefs were in in Breuner and Busch's Kredit, so that all three related cases could be considered together--another ploy to postpone decision on Basalt until October.

So I had only one course. I returned to San Francisco and went to see Roy Bronson and Louis Janin, who were counsel for John Breuner Company, and both of whom, of course, were very good friends. I explained the situation, suggested that the only way to end run the government was for one person to write and file the briefs in opposition in all three cases. I said I would be glad to write their brief and sign their names if they were willing. They agreed--God bless them--and then I called the lawyer in New York for Busch's Kredit. He was a stranger, but

fortunately had used our book on the jurisdiction of the Supreme Court and readily agreed to let me write the brief.

All seemed nicely lined up until the next day when the New York lawyer called me and said his client would not go for the arrangement. My heart went through the floor. The lawyer explained that his client was very cost conscious and had a deal with a printer in Buffalo who gave him a special rate and insisted that the brief be printed there. I revived and said, "No problem. I'll pay all printing costs." And the arrangement was on again with happiness all around.

Murray Gartner and I sat down then and went through the records and briefs in Breuner and Busch's Kredit to familiarize ourselves with the different but related issues in those cases--all in the stratosphere of the wartime excess profits taxes.

Then we waited. I had Noble McCartney, our lawyer in Washington, check each day at the clerk's office--no filings. Finally, it was apparent the government was going to wait until the last day. So, I flew back to Washington on Wednesday, May 3.

When I reconsidered the time schedule I could see it would be a miracle if, after May 5, I could get back to San Francisco, write all three briefs, get all three printed in San Francisco, and file all three in Washington by May 12--seven days! So the next day I went to see Elmore Cropley, the clerk of the Supreme Court and recalled to him that when I was clerking for the chief justice, he (the clerk), toward the end of the term and to clear the docket, would sometimes, at the request of the solicitor general, distribute cases in which the government was respondent before the government's brief in opposition was filed. He did this only if he was notified at the time of the regular distribution that the government would either waive opposition or file a brief in opposition three days before the Court's conference. I told him that if it would be appropriate for him to let me follow this practice in our three cases, it might help me to live to have grandchildren who would bless his name. He laughed and said it would be entirely in order and said he would distribute all three cases for consideration at the Court's last conference on Saturday, May 20, if I assured him I would file my briefs in opposition by Wednesday, May 17. Of course, I gave him this assurance, and this gave me five more precious days.

The next morning I was at the Supreme Court and Noble McCartney was at the office in the Department of Justice which makes service of the solicitor general's briefs. Whichever one of us got the first copies was to rush back with them.

It happened that the first copies we saw were those brought to the Supreme Court for filing. Hal Willey, the deputy clerk, called out, "Here they are Kirk--you can stop having a nervous breakdown." By good luck, I was able to get the midday plane out of Baltimore and got to San Francisco that afternoon, where Murray and I were able to start on the final drafts of the briefs before dinner. I had arranged with Miss Dillon at Pernau Walsh to clear the decks for us as we supplied copy (it was all Linotype printing in those days).

We got the briefs in all three cases written and printed by May 15 and--unwilling to leave anything to chance--I flew them back to Washington and filed them on the morning of the 17th. The court denied certiorari in all three cases on May 29 (339 U.S. 966, 967). Incidentally, the Fifth Circuit later refused to follow Basalt and decided the Sokol case in the government's favor, so a conflict did arise. We were more than fortunate to have forced a final decision in our favor.

You may wonder why all the dramatic dashing back and forth to Washington, but things were different then. No computers to transmit copy instantaneously. I saved a day by picking up the briefs and flying them to San Francisco. The alternative then was to have them read over the phone to stenographers who would then transcribe them. The three long government briefs would have taken endless hours.

Further, only by being on the spot could I get the information I needed to make the arrangements which made it possible to get the writs denied before the end of the term.

And, finally, millions of dollars in refunds were at stake. The Court's decision settled irrevocably not only the taxes for the year in question, but under the principles of res adjudicata, the taxes for all subsequent war years.

And as I mentioned earlier, the firm collected the largest fee in its history up to that time.

Well--to get back to the Eagle case. I was just sitting in my room Friday afternoon waiting for Gene Prince to pick me up to leave for the Bohemian Grove when Felix Smith walked into my office, threw a stack of files on my desk and said, "That damn court in Los Angeles has issued a temporary restraining order, returnable next Tuesday. You have to take this case."

I looked at him and said, "Felix, in court in Los Angeles next Tuesday? I don't know anything about it; I've never seen it before." I called his attention to the fact that the file showed

another partner had handled the matter and was familiar with it. "Oh," he said, "he would wet his pants if he ever got into court, you know that. He can't do it; you've got to take it."

So I was stuck. Gene left for the Grove and for me it was just crash, crash, for the next two weeks. I spent all the first weekend getting affidavits and interviewing people about the case. It involved one of Standard's big accounts that bought gasoline and resold it under the name of Eagle Oil and Refining Company. Eagle's contract expired, Standard refused to renew it, Eagle brought suit to require us to continue to sell it gasoline, claiming we had cut off its supply of gasoline pursuant to a conspiracy to restrain trade, and got the temporary restraining order.

Eagle's attorney, Charlie [Charles H.] Carr, was a hotheaded, redheaded former district attorney of Los Angeles. Later he became a federal judge down there, and was justly most unpopular. We got along just fine--like two tomcats tied in a sack. The case involved the whole top echelon of Standard. Ted Petersen, president of the company, and Ellis McClanahan, vice president in charge of sales, were interested. Hillyer Brown, vice president in charge of legal affairs, was so interested that he came down to Los Angeles and sat through the trial.

Fortunately, Charlie Carr overtried his case. Among other things, he put a girl on the stand who was the secretary of the president of Eagle Oil and Refining. She identified about two dozen memoranda of telephone calls. Each one was dated and recited: "Mr. Lampson called," and the secretary identified the caller's voice as that of Mr. Lampson. Ollie Lampson was Standard's sales representative in Los Angeles. Then the president of Eagle testified that each time Lampson called, he threatened to cut off Eagle's supply of gasoline if Eagle didn't raise its prices. Of course, that was dynamite under the antitrust laws.

I had been over this whole thing with Ollie and he had sworn he'd never telephoned at all. Well, who were you going to believe, and, more important, who was the court going to believe?

So we got back to the hotel more than glum. I said, "Ollie, no one is going to believe you as against that pretty little girl with her contemporaneous memos. If you didn't telephone we have to find something to back up your statement. Let's go over these memos one by one." Finally, we came to one and a great light broke; you could just see his face beam. He said, "Kirk, I was in the hospital that day, just coming out of surgery for a screaming case of hemorrhoids." [laughs] He said, "I couldn't

have talked to anybody, I was like a wounded bear." We went on checking and discovered he was in the woods in Canada when he was supposed to have made some of the other calls.

When I got Ollie on the stand he really put on an act. I've never seen a happier man. To this day I don't know whether the lawyer knew that the girl's testimony had been fabricated. I've always given him the benefit of the doubt. But it was manufactured, and, of course, the testimony of the president of the company went down with it. We won the case.

A Note on Little Mother Hubbard, 1952

Kirkham: When I got back to San Francisco, I was suddenly in the middle of Standard work. Right after that, the United States brought what we call the Little Mother Hubbard case on the West Coast, seeking to break up the oil industry into its functional parts of production, transportation, manufacturing, and marketing--no integration. The case was filed in Los Angeles and ordinarily Lawler, Felix and Hall would have handled it, but Hillyer Brown insisted I try it.

It was an enormous and extremely complicated case, almost a full-time job for me and a full-time job for many other lawyers in the office, and lasted until the late fifties. I remember one time during pretrial proceedings, I had said that if the government didn't specify and limit its claims it would take us years to try the case. George Haddock, chief trial counsel for the government, jumped up and said, "Your Honor, Mr. Kirkham as usual is exaggerating. If we can just be reasonable people and sit down and plan, we can try the case, I'm sure"--he hesitated--"in about two years." And the judge practically fainted. He said, "Mr. Haddock, did you say two years?" Well, you see.

Sharp: How did it end up?

Kirkham: It ended up with the government virtually folding after we got a ruling from the judge that he would not order divestiture. After that, we went back to Washington and disposed of the balance of the case with a harmless consent decree.

Sharp: And how long did it take them from the time you got going on it until the time the consent came through?

Kirkham: About seven years. I think the consent decree was entered in 1959. I can't speak highly enough of the marvelous help I got from Bill Mussman and Dick MacLaury in this case. They were co-counsel in every way. And, of course, numerous others helped--I've already mentioned Phil Neal.

The Cartel Case, 1952

Sharp: And then the cartel--

Kirkham: The cartel case was filed before Little Mother Hubbard and was going on at the same time.

Sharp: That's what I was thinking. Where was Marshall Madison in all this?

Kirkham: Well, Marshall Madison was here handling Standard's numerous day by day problems. But Marshall didn't try cases. I was trying the West Coast case and was doing a lot of work for other clients as well--Caterpillar Tractor, Del Monte, FMC, Varian Associates, Itel-McCullough, Alexander & Baldwin. I'll never forget the hair-raising last minute deadline drama in Washington, D.C., in the Alexander and Baldwin-Matson Steamship case, with Neal Cadigan, the company's president, looking on.

Alexander and Baldwin, one of the "Big Four" old missionary companies in Hawaii, wanted to acquire Matson Steamship Company--the well-known ocean carrier between the islands and the mainland. Such an acquisition presented serious antitrust problems, complicated by the fact that an antitrust suit was pending against Alexander and Baldwin (and others) in the islands. Cadigan came to San Francisco to see me and asked if I could represent the company in a proceeding before the Antitrust Division to obtain clearance for the merger under the antitrust laws. I told him our firm would be pleased to represent him. He said, "No. That's not enough. I want you to assure me that you will personally handle the matter." I explained that I had recently taken on the job as general counsel for the Standard Oil Company of California, that this demanded much of my time and required constant availability, that, however, I could staff his proceeding with highly qualified antitrust lawyers, that I would supervise their work and be available for consultation, et cetera. He said, rather bluntly, "That's not enough." He went on to emphasize the importance of the merger to the two companies. He said he had made extensive inquiries about counsel and had concluded that if he retained San Francisco counsel it

would be either me or Moses Lasky. And then he added again bluntly, "If you can't handle this case personally, I'm going to Lasky."

Well, Mose Lasky is one of my warmest friends and also one of the best antitrust lawyers in California; indeed, in the entire country. We have been co-counsel in many cases, and opponents in one or two. But naturally, the old rivalry instincts were stirred and, to sum it up, I finally agreed to handle the proceedings personally.

The case turned out to be even more troublesome than I had anticipated. Wally Kaapcke worked with me and, as always, contributed immeasurably. We moved to Washington for days on end. We made presentations to Bill Orrick (then the assistant attorney general in charge of the Antitrust Division) and his staff. We even persuaded the attorney general of Hawaii to come to Washington and bring the backing of the State of Hawaii to the merger and to our contentions that it would not adversely affect competition.

We were working against a deadline. Matson had agreed to give Alexander and Baldwin until midnight of a fixed day to confirm its offer. If it did not do so by that time, Matson would accept a rival offer of a mainland company.

We thought we were close to an agreement with the government. But at a final meeting with Orrick and his staff on the afternoon of the last day, Bill told us they had concluded to reject our contentions and to oppose the merger.

We were bitterly disappointed. Alexander and Baldwin could not proceed without Justice Department approval. We returned to the Madison Hotel and started to pack for the evening plane to San Francisco. Neal Cadigan, who had been with us throughout the proceedings, was good enough to say that he was convinced we had done everything possible; no one could have done more.

I remember so well--Neal and Wally took their suitcases down to the elevators. I picked up mine, got as far as the door to our room, then dropped it and called down the long hallway to Wally to come back; that I was not leaving until the deadline had expired at midnight Hawaii time, which would be the following early morning, Washington time. I said, "There is one last thing we can do; we can make one last appeal to the deputy attorney general, Nick Katzenbach." So I called Nick at his home. He was out for the evening, not expected back until nine o'clock. I left an urgent request for him to call me at the hotel.

We waited.

Shortly after nine he returned my call. He was familiar with all that had occurred and was good enough to review again with me our main parting point with Orrick and the staff. Without going into detail of the legal problems, the upshot was that what to us was a small (if not a large) miracle happened: I was finally able to reach agreement with Katzenbach, coupled with an assurance that the department would not oppose the merger. Cadigan called Hawaii and confirmed Alexander and Baldwin's offer before the midnight deadline. The next morning, at a special meeting on Saturday, we joined Orrick and his staff and reached final agreement on the necessary documents.

It was quite an experience.

But to return to the cartel cases. The government brought the cartel case as a criminal case. Then they dismissed that and brought the civil case. Jim O'Brien can tell you all about that because he followed it from beginning to end.¹

Sharp: Well, he said that you worked on it, you and Bill Mussman, and you were meeting with officials from the Department of Justice: Mr. Bill Kilgore and some others.

But I really wasn't sure what your responsibilities were with respect to the case itself, over the long term.

Kirkham: Which, on the cartel case?

Sharp: Yes, and the settling of it--or nonsettling of it. My understanding is that it went along until '68 and several of the defendants had taken consent decrees along the way but Social didn't.

Kirkham: That's right, it was finally dismissed as to Standard.

Sharp: Finally it was dismissed, I think in 1968, against Social and Mobil.

Kirkham: We had a real stake in that because of Galtex. We had a consent decree in the West Coast case, but no consent decree in the cartel case.

¹See James E. O'Brien oral history, also in Pillsbury, Madison & Sutro series.

Sharp: By '68 the only two that were left were Socal and Mobil. The suit was eventually dismissed as to them. But everybody else had taken consent decrees much earlier.

Have you seen this book on the cartel case?¹ You're actually quoted in here, by the way.

Kirkham: [pauses to look at book] Where am I quoted?

Sharp: Let me find it for you. He quotes from the Dale Jacoby study at the University of California, Los Angeles, which I believe is called the Mootness Study. Then he says, "Francis Kirkham to Donald F. Turner." Who is Donald Turner?

Kirkham: Don Turner was the assistant attorney general in charge of the antitrust division at that time.

Sharp: This was a memo that you wrote December 3, 1965, to Turner. Kaufman quoted you, "'In this time of war, revolutions, rampant nationalism and the emergence of international and regional blocks,' a Socal spokesman noted in 1965, 'American oil companies are locked in a struggle for survival in foreign markets.'"

Kirkham: Did I say that?

Sharp: Apparently.

Kirkham: Pretty good, huh? [laughs]

Sharp: So you're immortalized.

Kirkham: Yes, in print. Has Jim O'Brien seen this?

Sharp: I don't know if he has or not.

Kirkham: Show him.

Sharp: I will.

Kirkham: [reading]

Memorandum of David I. Haberman to [Allen A. Doby], Justice Department: Putting to one side the question of whether a dismissal

¹Interviewer shows interviewee Burton L. Kaufman's, The Oil Cartel Case: A Documentary Study of Antitrust Activity in the Cold War Era (Westport, Conn.: Greenwood Press, 1978).

without prejudice offers a suitable formula for dealing with the most [favored nation] clause problem, and based on a quick survey of Mr. Kirkham's legal analysis conceding the probability that it will, what other questions bear on the disposing of the oil case? . . . [pause] At best, the case against Social has always been the weakest.

[laughs] That's kind of interesting to read; it's the first time I've read these interoffice memoranda of the Department of Justice.

Sharp: Sure, this is the real stuff.

Kirkham: He's worrying about whether if he agrees to a dismissal without prejudice, which lets us off the hook, he would be letting Standard of New Jersey off the hook under the most favored nation clause.

[continues reading]

In view of the above, it is my conclusion that we should hold onto the judgments against Jersey, Gulf, and Texaco. Assuming that Texaco would attempt to have its judgment vacated, the cases cited by Mr. Kirkham are persuasive, that a dismissal without prejudice is not a final judgment, and thus the most favored nation clause on Texaco's judgment would not apply. A strong point can be made of the fact that on Texaco negotiation--

I did not want to let them mistakenly think that they had to let Texaco and the other companies off the hook if they dismissed us from the case. I see I sort of half-convinced him there, eh? That's interesting. Well, you asked me about what my role was in the cartel case, and what Mr. O'Brien's role was--it would be hard to describe. Anything that Jim and I did we just did jointly. I mean, I can't remember any time when we disagreed, which shows what a good lawyer he was. [laughs] It's really the reverse, a compliment to me. But we just worked together, as we had from the time when we were young men in the office together fifty years ago.

When I was busy with the Little Mother Hubbard case on the West Coast, Jim would be handling the cartel case directly with the help of the Cahill firm in New York, and when there were

parts of the cartel case that he wanted my help on, why, he would call on me. Afterwards when the case was finally dismissed, I was general counsel for Standard and Jim was its vice president and director in charge of legal affairs. I went to court on the motion to dismiss, and Jim was also there.

That was really a great day for both of us. We had never wavered in our recommendation to Standard that it refuse to admit to being part of any conspiracy and that it refuse to belly-up with a consent decree, as did other oil companies. Standard had never been a party to the conspiracy charged in the cartel case, or to any conspiracy in restraint of trade in the vast foreign panorama of production, refining, transportation, and sale of oil and oil products. The government's unconditional dismissal of all charges against Standard of California brought complete vindication to that company and, believe me, great satisfaction to its counsel.

The same thing happened in the Kentucky merger case. Jim was there when I took that case into court and obtained the decree in favor of Standard of California and Standard of Kentucky. He probably remembers it more than I do: when you're an actor in the thing, why, you may not see as many of the side events as someone sitting on the sidelines. I know I had Jim get hold of the man from the press and keep him under control so the story didn't break, didn't hit the New York Stock Exchange, before the decree was signed.

But Jim and I worked together very closely at all times. Before he went downstairs [to Socal], of course, he'd be working on some cases, I'd be working on others. He was doing a lot of work for clients other than Standard, and his interest in Standard was principally in foreign work. The Kentucky case started about the time I became general counsel.

Sharp: Very shortly thereafter.

Kirkham: About '61. About the time the West Coast case was being settled, the Moore case came along. When was the Moore case?

Sharp: I don't know, that's one that escaped me.

Kirkham: Where are the briefs in that case? That was one on which Bill Mussman did so much fine work. It had to be not long after the Eagle Oil Refining case, because it involved the same economic situation. [long pause as he looks through briefs] There are so many of these cases!

Sharp: Well, hopefully we'll be able to talk about a good portion of them.

Kirkham: Here's an interesting one--about Visa and--

Sharp: When was that one?

Kirkham: Visa? That wasn't Standard, that was Bank of America.

Sharp: That sounds more recent.

Kirkham: I was the midwife for the credit card thing; I think I told you that.

Sharp: No, but I'm wondering if that's good or bad!

Kirkham: Oh, I totally, 100 percent disapprove of it. I remember when Sam Stewart came into my office and wanted me to represent the Bank of America in clearing under the antitrust laws the joint action of the banks in issuing credit cards. Sam was the executive vice president of Bank of America and had been its general counsel. He said, "Kirk, I'm here to tell you that you are witnessing the end of money." "Well, not quite that," he said. "But there won't be any money except for maybe parking meters and sales tax." He added, "After this, it's all going to be just credit cards. You just go and pay with a card."

That was really before there were any bank credit cards. He'd bought this idea that the Bank of America put into practice; it was called BankAmericard. Then from that beginning, the banks that joined in BankAmericard organized Visa, a company that licensed Bank of America and other banks all over the United States and abroad. A group of competing banks joined in forming MasterCard. Visa passed a bylaw forbidding any of its member banks from joining MasterCard.

We had a series of discussions with the Department of Justice and litigation up through the Eight Circuit Court of Appeals on whether or not Visa could enforce this bylaw. My theory was that the bylaw was not only valid but required under the antitrust laws in order to preserve competition between Visa and MasterCard. Jack [John B.] Bates and my son [James F. Kirkham] tried the case down in Arkansas, I guess it was. A bank down there had violated the bylaw and claimed it had the right to issue both cards. The district court so held, and we took the case on appeal to the Eighth Circuit Court of Appeals and

reversed the district court.¹ Then I tried to get the Department of Justice to go along with my interpretation and they wouldn't. They just dillydallied and dillydallied; they would not say they would sue if we enforced the bylaw; they would not say that they would not sue us.

Finally, faced with possible treble damage liability, the board of directors of Visa gave up and now banks issue both cards. I still think I was right and that competition has been diminished.

The Moore Case

Kirkham: But to get back to the Moore case.² It was tried in '57. George Moore was running a service station up in Seattle, buying his gasoline from Tide Water [Oil Company]. We [Standard] didn't know anything about him, never heard of him. Tide Water, because he'd been an unsatisfactory account, refused to renew his contract when it ran out. He thereupon sued them and joined every major oil company on the West Coast, alleging Tide Water cut him off pursuant to an illegal conspiracy among all the major oil companies. Charlie Burdell, who had been in the Evaporated Milk case, was plaintiff's attorney. The case was tried in Seattle before Judge Bowen. Bill Mussman and I were there for the trial. There was absolutely no merit in Moore's case, but anything could happen before that judge.

Oh, my. You don't want me to reminisce, do you?

Sharp: Yes, I do.

Kirkham: Judge Bowen was the fussiest old man I've ever seen--bar none--and utterly impossible as a trial judge. Just one example: the case proceeded like antitrust cases do with endless discovery. Plaintiff had filed interrogatories, and all of the major oil company defendants, after months and thousands of man-hours, had prepared answers which covered thousands of typewritten pages. They were all mimeographed because dozens of

¹Worthen Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973).

²Standard Oil Company of California v. Moore, 251 F.2d 188 (9th Cir. 1957).

copies were required for filing and service. That was before the days of photocopying--so easy now.

We sent Standard's huge pile of answers to Seattle to our local lawyers to file. They presented these mimeographed answers to the clerk for filing, and he said, "I can't accept these because the rules of court require ribbon copies." Our local counsel pointed out to the clerk that every paper filed in the case up to that time, including the complaint, was mimeographed; that this was the only feasible practice to follow because of the numerous copies required for service, that the practice was followed in every court in the country in so-called "Big Cases"; that the "ribbon copy" rule was automatically waived in these cases.

So the clerk said, "All right, I'll go get an order from the judge that permits the rule to be waived." After a while the clerk came back looking unhappy and said: "I made a mistake in filing all the earlier papers. The judge says he can't permit these to be filed at present, but will have a hearing on the matter this afternoon after court at which he expects all parties to be represented."

Well, there were seven major oil companies with one or more lawyers representing each, plus lawyers for the plaintiff--all at X dollars an hour--and all summoned by the judge for a hearing on whether to file a mimeographed copy or a ribbon copy of a paper--both equally legible. They all trailed up to court at four o'clock and plaintiff's attorney, Burdell, got up and said, "Your Honor, it's really our fault. We filed the original mimeographed complaint and should have obtained the routine order. All of the papers filed by all of the parties since then are mimeographed. It is necessary to use mimeographs because we have to serve about thirty copies of each, and in all of the federal courts that is the way it's being done. We now, accordingly, consent to an order permitting Standard to file these copies and waiving the rule in this case." So he sat down; everybody expected the judge to say, "Very well." Actually, everybody was pretty damn mad to have been brought up to the courthouse for such nonsense.

But the judge said, "Very well, do counsel for the defendants have anything to say on this matter?" There wasn't anything more that needed to be said to even a child, but a couple of lawyers for the defense got up and in effect said, "Well, just as Mr. Burdell has said, we have to do it in these cases." The judge then said, "Is that all any of you have to say?" There was silence for a moment. Then, "Very well," he

said [imitating prim voice], "Motion denied. The rules of this court will be observed."

No one could believe it. Everybody jumped up and began a frantic protest. They said, "But Your Honor! This means that we will have to send back thousands of pages to company offices all over the western states to have ribbon copies typed. We don't have time to do that before our responses are due." He said, "The defendants in this case have ample resources to comply with the rules of this court." They said, "But we don't have time." He said, "Time will be allowed. I'll give you a week."

Of course, at the end of the week he had to give us more time--it was physically impossible to comply with his order--and every one of many thousands, literally, thousands of pages, including long tabulations, had to be retyped to produce a ribbon copy for filing before that stupid judge who, of course, never looked at a single page. They were simply worksheets for counsel. Then, after that, he gave us an order permitting us to file mimeographed copies. [laughs] Can you believe it? That's the kind of judge we were trying this case before. He went into a Standard station with his automobile one day--the boys reported this to me--and said, "I think the air in the tires is getting old; you had better change it." [laughs] And, believe it or not, he waited while they let the air out and put new air in.

Incidentally, a little later, during the pretrial proceedings, several defendants filed a petition for a writ of mandamus to overturn one of Judge Bowen's orders. The court of appeals denied the writ on the ground that Judge Bowen couldn't have meant what he said, and if what he said was construed to be the opposite of what he said--and the court of appeals said, "That's the way we'll construe it"--there was no need for the writ. If you don't believe me, read the opinion--General Petroleum Corp. v. District Court, 213 F.2d 689 (9th Cir. 1954).

The jury finally returned a verdict in favor of the plaintiff for--as I recall--about \$250,000. I remember so well. It was late at night; the judge had called us up to the big, old, empty courthouse. We sat silently as the jury filed in. And then, when the verdict was announced, the quiet was shattered by Moore jumping up and yelling, "Hooray!" Just shouted it, and it echoed all over. The judge said, "Mr. Moore, sit down or I will have you expelled from this courtroom." He sat down, and I turned to Mussman and said, "It's going to be a cold day before he ever gets one penny of it."

We reversed the judgment in the court of appeals.

They never attempted a retrial.

Assumption of Duties as General Counsel: Taking Over from Marshall Madison

Sharp: Let me just ask you, was there a point before it was clear that Mr. Madison was going to retire that you had the sense that you were going to be taking over from him, or was that made very clear at some point to you, or not at all clear?

Kirkham: Gee, I'm trying to remember. Let me see. There was no one else to take over the work at that time.

Sharp: There were plenty of other attorneys.

Kirkham: Oh, yes, but I mean, what age group? There was Sig Nielson, a very capable lawyer, he was still alive then, of course. Al [Alfred B.] Tanner was still alive, who had done Standard work from the beginning. Both of them were my contemporaries. But Sig had specialized in tax work and also legislation, and I don't think Al Tanner--I mean, it just never occurred to him.

Sharp: Were you thinking about it?

Kirkham: I don't know that I thought about it. It wouldn't have mattered. I can't remember. I'm sure Hillyer must have mentioned it to me before Marshall retired that he thought he would want me to take that job. Not long before, I think. It wasn't a plum that was being sought by anybody in the office, particularly. Howard Marshall would have been general counsel if he'd stayed with the firm.

Sharp: Yes, we talked about that.

"A Lawyer's Lawyer": Eugene Prince

Kirkham: Oh, wait a minute. Gene Prince was here. Yes, Gene Prince would have been a logical successor to Marshall. Oh, I'm beginning to remember now. Gene Prince should have been general counsel for Standard. He was very capable. But a number of years before he had been sent to Arabia to try to work out a settlement with the Arabians for Aramco. Things were getting tighter and tighter and the provisions of the concession were obviously unfair to the

Saudis. It was about that time, you know, that they had all this hassle about paying royalties in gold sovereigns. Remember that? Aramco even minted sovereigns in the Argentine and shipped them across the seas, and searched the streets of Bombay to find gold to pay the Saudis. The Saudis, being good Mohammedans, would not break a contract, but on the other hand they could construe it. They construed it to provide that they were entitled to gold and not to its equivalent. Well, of course, the contract said equivalent, but not in Arabic to the Arabians. And there simply weren't enough gold coins in the world to pay the huge and growing royalties.

Gene went there and he was unsuccessful in making the deal that Standard wanted. No one could have. But Harry Collier and other Standard people expected Gene to do the impossible. When he didn't do the impossible, he sort of fell away from Standard work and I fell into it.

Sharp: And not Mr. O'Brien, either?

Kirkham: No, I don't think Jim ever thought of that at that time. Did he?

Sharp: It was not covered in his oral history, so I don't know.

Kirkham: What was he doing then? Oh, I remember, he was doing international work--

Sharp: And he was away.

Kirkham: He was away a lot of the time.

Sharp: Well, you know, I want to go back to Mr. Prince for just a minute because I was talking with Mr. Sutro about when he took over as senior attorney--

Kirkham: For the telephone company?

Sharp: No, for Pillsbury, Madison & Sutro.

Kirkham: Oh, for that.

Sharp: And he mentioned to me that one of the reasons that he took it was because Mr. Prince didn't want to. So Mr. Prince is kind of out there as this, well, kind of a shadow, you know--

Kirkham: He was much more than a shadow! He was a tremendous mind. He was a lawyer's lawyer. We all turned to Gene for counsel and advice. He handled many important cases, including the loyalty

oath case for the University of California,¹ and was a superb brief writer. He handled the work of many clients. He had the Westside Lumber Company, which was his father's company, and was in control of it as a business as well as handling its legal work. He was always busy; everyone would go in and seek his advice.

Sharp: But he didn't necessarily seek a real limelight position or a very key position like--

Kirkham: Oh, he was in the limelight as far as the firm, the inner firm, was concerned. There's no question where Gene Prince sat as far as the firm was concerned, and his participation in the firm and the firm's earnings. I mean, there was never a time when he was not appreciated within the firm. And also outside the firm. I do not believe there was any lawyer in California more respected by the courts than Gene Prince. But I don't think he--no, he didn't seek any limelight positions. Those that he got from outside were thrust upon him. I mean, he was president of the State Bar, but I don't think he ran for it. No one contested his election as president of the San Francisco Bar Association.

But he was all brains from the time he graduated Phi Beta Kappa from Cal as a boy just out of his teens. Plus, just the most wonderful personality, and the broadest knowledge in the humanities of almost anyone I have ever known. Just a joy to be with, on a camping trip, in the office, working or playing or horseback riding.

Sharp: Well, to get back to you, I wonder what the transition was like between Mr. Madison's retiring and your picking up that spot?

Kirkham: Well, there wasn't any particular transition. I mean, I just moved my office in there and went on doing the things I'd been doing.

You see, the way this firm handles Standard's work it almost takes care of itself. You have somebody at the helm, yes, but you've got everybody doing his job. I suppose it does take somebody, it does take a skipper. But, Al Brown was handling all the corporate matters; the tax matters were with Harry Horrow and Sig Nielson and Frank Roberts; Hugh Taylor and Jim O'Brien handling the foreign dealings; Tom Haven and Turner McBaine working on the production problems and other litigation. So when the captain's cap went from one person to another, why, he was

¹Tolman v. Underhill (Regents of University of California), 39 Cal.2d 708 (1978).

still running the same efficient ship. It isn't as though you just suddenly take on something that's entirely new and you're doing everything yourself. You're not doing everything yourself.

Sharp: But as general counsel you became a much more senior person, and so all these people--

Kirkham: Well, maybe you do and maybe you don't. I didn't consider myself any more senior.

Sharp: They did.

Kirkham: Who did?

Sharp: The board, for instance, at Standard. Didn't they relate to you in a much different--

Kirkham: Oh well, Standard Oil did. But by that time I was doing Standard work and working with all the top executives on these big cases. By that time I was handling it.

Further Comments on Responsibilities as General Counsel

Sharp: How would you describe what you did, then? If Mr. Horrow and Mr. Taylor and the rest of these gentlemen are handling certain aspects of Standard's work, what did you do?

Kirkham: The main thing I did was a lot of litigation. A lot of litigation and keeping my finger in all the pies. No one handling Standard's affairs took any unusual or important steps without conferring with me. That is simply the way it worked. I was responsible for the firm's work for Standard.

I know we nearly got into terrible trouble in one case where one of our oil fields in the South was about to be taken over under Louisiana law. That was the Leiter case, that Turner [McBaine] worked on.¹ We didn't even know it existed until we were just about ready to lose an oil field worth hundreds of millions of dollars. Follis got pretty upset about that. He set up a system under which every legal matter--no matter where in the country--had to be reported to me.

¹Leiter Minerals, Inc. v. United States, 329 F.2d 85 (5th Cir. 1964). See Turner McBaine's oral history, part of this series.

The Leiter debacle happened because the California Company's lawyers in Louisiana had gone ahead with the case without conferring or acquainting Marshall or later me with its importance or even its existence, and they didn't come around crying for help until the barn was almost burnt. Well, we pulled it out ultimately and very fortunately.

So I followed all litigation and I knew who was handling it. Then copies of all legal opinions and memoranda addressed to Standard came over my desk so I followed what was being done. And the partners who were working for Standard would confer with me. But they were all highly capable lawyers. One lawyer, no matter how good he is, could not possibly do a tithe of Standard's work. That was the work of dozens of lawyers. I suppose you could say I supervised them. I conferred constantly with Hillyer Brown and the company's other executives over their legal problems.

Sharp: One of the questions I had was asking you to look over that chronology that I sent you that I worked up from all those Standard management newsletters.

Kirkham: Well, you see, my work with Standard involved its legal affairs and not its business interests, although they are closely integrated. But to the extent there was a decision of what step you should take from the business standpoint, that was not my bailiwick at all.

Now the years when I was general counsel of Standard were very happy years for Standard, generally speaking, you know.

Sharp: Because there was a lot of expansion?

Kirkham: Yes, there was expansion, and everything went fine, and every year Standard made more profits and every year there was more production. We had problems all the time, a lot of them with our own government and with foreign governments. We had the Iranian consortium come up, and Turner McBaine handled that, with Jim O'Brien working in London.

There were constant antitrust problems and litigation. I don't know, I half-lived in New York and Washington, D.C. for ten years it seemed to me; also in Los Angeles and in Biloxi for months on end, participating in the trial of the Kentucky case.¹ I'd walk into the Pierre [Hotel] in New York or the Madison

¹Standard Oil Co. (Kentucky) v. Humble Oil & Refining Co., 363 F.2d 945 (5th Cir. 1966).

[Hotel] in Washington, D.C. and everybody from the lowest bellboy on up knew me. I mean, I was just in and out, back and forth all the time, handling one thing after another. We had hearings before the Senate, the Church Committee, and in the Department of Justice and before the Federal Power Commission, and cases in the Fifth Circuit and in Washington, D.C., and in the Supreme Court involving gas production.

Jim O'Brien at that time, of course, and Hillyer Brown before him, were on Standard's executive committee. They were attending the directors' meetings, they were directors; they participated in the company's business as well as its legal affairs. As general counsel, my problem was to advise with respect to legal matters.

Sharp: When you gave some advice on a legal matter, how did you decide how to handle certain legal issues that could have been solved several different ways?

Kirkham: Well, that's kind of a general question, but I'll try to answer it. There are two or three ways you handle it. Number one is your own experience gives you enough information to be able to answer it right then. That's good. However, that isn't the ordinary situation in law, particularly about a question that's tough enough for a top executive to ask a general counsel. But if it's a question of getting an answer on the thing, then you get it researched for you, the law.

Antitrust Counseling

Sharp: Maybe I should make this a little more specific. I have a lot of questions about antitrust counseling, maybe we should go to those.

Kirkham: Go ahead and ask them.

Sharp: One question has to do with the major issues with respect to antitrust that you worked on as general counsel. I'm trying to get a sense of the long-term picture, how the handling of antitrust might have changed. I know there were certain Department of Justice guidelines, the 1968 guidelines for example, that came out.

Kirkham: For mergers?

Sharp: Yes. But just generally, if you could kind of skim over the surface, what some of the most obvious major issues were with respect to antitrust that you worked on. Whether they had to do with pricing or mergers or just everything.

Kirkham: Well, certainly a lot of the major ones had to do with mergers, because the law was then being enforced, Section 7 of the Clayton Act was very strictly enforced. There was hardly a time during that period that I wasn't working on some large merger case. They were just like trying cases, almost. If a merger was contemplated, then you had to make an economic analysis of both parties to the proposed merger, and then you had to see whether or not the merger would, in your opinion, objectively, tend unreasonably to restrain trade. Then secondly, you had to make a practical guess as to whether or not the Federal Trade Commission or the Department of Justice would have jurisdiction over it. Each of them had jurisdiction, but as a matter of practice one office took some and one took the others. You knew that you'd have to make a decision as to whether or not you could get the approval of the antitrust division. Then if you couldn't get the approval of the antitrust division, whether or not you could beat the antitrust division if they sued you, and so on and so forth.

There were merger cases occurring all over at that time. The biggest one was for Standard, of course, the KySo [Standard Oil Company of Kentucky] case. I also worked for Caterpillar Tractor on the acquisition of Towmotor, and we got Department of Justice approval on that. I represented IteI-McCullough and Varian Associates in that merger where we got the approval of the antitrust division.

I guess one of the strengths in my practice was that I knew most of the people in charge at the Department of Justice and the Federal Trade Commission. I knew not only the tops but also the staff and the way they worked, and I worked closely with them.

Sharp: I wanted to ask you about that specifically, because I would think that your clients for whom you were doing this antitrust work would take that into account, that you had been there.

Kirkham: Well, I think that's so. Some of those with the government had served with me on the Attorney General's National Committee to Study the Antitrust Laws.

But yes, I did know them, and I guess it's not unfair to say that I could get an appointment with any one of them at any time, and every one of them knew that I would not impose on him. Every one of them knew that I was not seeking a favor, I was simply

seeking a fair hearing, and not imposing on him. I didn't abuse that relationship in any way, but it was valuable.

As I mentioned earlier, I represented Alexander and Baldwin in the acquisition of Matson Steamship. That was a very interesting case. And I represented FMC [Food Machinery Corporation] in the acquisition of American Viscose. In that case the Department of Justice turned us down, but fortunately we had a very tough client in Paul Davies's father, who was the head of FMC. He said, "Go ahead and let the bastards sue us," so they did, and we won that lawsuit. Bill Mussman was more than a strong right arm.

Incidentally, in that case we got a lucky break. It made me realize--as I did on more than one occasion through the years--that it really is true, "God works in a mysterious way his wonders to perform." The government sued for a preliminary injunction to prevent the merger of FMC and American Viscose. The district court denied the injunction and the government appealed to the circuit court of appeals. I moved to dismiss the appeal on the ground the Expediting Act did not allow an appeal from a preliminary injunction in a government antitrust case. The court of appeals agreed and dismissed the appeal.

The government's remedy was to go to the Supreme Court, but the Supreme Court was in its summer recess. So the only path open was for the government to go to the circuit justice and get an order holding everything in abeyance until the Supreme Court convened in October. Here the sky darkened for us.

Justice [William O.] Douglas was the circuit justice for the Ninth Circuit and he, of course, was notoriously pro-government in antitrust cases and definitely anti-big business. Also the case had been heard by the court of appeals on an expedited calendar in Santa Barbara during the meeting of the Judicial Conference, with Douglas right there in attendance and apparently available to act immediately on the government's request. But here Providence intervened.

Douglas had just married his pretty child bride, was locked up in his bedroom, and refused to conduct any business other than that which was occupying his full attention, to the definite exclusion of any legal proceedings. Accordingly, the government had to present its petition to Justice [Arthur J.] Goldberg in Washington, D.C., where--as you can see from his opinion¹--he sustained our position, which put an end to the case.

¹United States v. Food Machinery Corp., 11 L.Ed.2d 20 (1963).

VI MORE RECOLLECTIONS OF EARLY DAYS

[Interview 4: March 8, 1987]

A Few More Stories

Hicke: I thought we might start off this morning with the story that I've heard about the question of your salary when you were hired at PM&S.

Kirkham: Well, when I received an offer from the firm, I was offered \$300 a month, and that seemed to be somewhat meager. I had a wife and one child and another child on the way. I'd been out of law school for more than four years clerking at the Supreme Court, and I thought I ought to have more. I'd also been offered more than that when I was offered the job of assistant dean of the law school and considerably more by the Cravath firm. The Cravath firm had offered me \$6,000 per year, which was a lot of money in those days: \$500 a month!

So I wrote and said that I thought I at least ought to have as much as I was then making (\$400 a month) and not take a reduction in salary, and got a letter back saying that they would be willing to pay me \$400 a month. So that's what I started at.

Soon thereafter, without me having any advance word of any kind, the firm adopted--I don't remember whether it was the first year or the second year--a practice of giving a Christmas bonus to some of the young lawyers. I remember I was astounded and delighted to get a \$600--I think it was \$600--Christmas bonus. So that added a little to the \$400 a month on which I was supporting a family.

Hicke: And then you also made partner fairly shortly, I think?

Kirkham: Yes, and then I took a reduction. [both laugh] As I recall, I was guaranteed a minimum of \$10,000 a year when I became a

partner, which compares to the \$50,000 approximately now paid new youngsters out of law school.

But that didn't really represent the amount of income, because within a few years thereafter, Felix Smith and Frank Madison and Alfred Sutro and then Horace Pillsbury all died. They all had agreements with the firm under which their widows or estates received a retirement amount or a death benefit, and that came out of the income of all of us who were earning it. With taxes going up at the wartime rate at that time and paying off these amounts, we suddenly found that we were making less money as partners than we would have made as associates, meager as that was. So it was a little while before we sort of got on our feet.

Hicke: Is that the normal procedure for a law firm?

Kirkham: No, no, that bind that we were all in was the thing that lead Marshall Madison and Gene Prince particularly, and Jack Sutro to institute a retirement program under which the retirement amount paid to partners was income to the retired partners and deductible to the active partners, and the amount of capital in the firm that we had accumulated under the old system which was paid to us at death, tax-free, was gradually reduced, so that the amount of capital interest in the firm of all the partners became just a minimum amount of a few dollars. So that situation could no longer arise.

Hicke: Okay. And then I wanted you to tell me the story about Mr. Alfred and the no-smoking rule.

Kirkham: [chuckles] Well, I don't know whether it was Mr. Alfred who started the no smoking rule; it could have been E. S. Pillsbury. But in any event, when I got here, I was a fairly heavy smoker and used to working long hours, and that had added to it--coffee and cigarettes. So the first thing I did, I met Hugh Fullerton, who was a young associate, later our partner in Washington. He came into my office and I started to light a cigarette. He said, "Hey, you can't do that here; there's no smoking in the office." I said, "What! No smoking in the office? In your own room?" He said, "No, no smoking, a rule of the office." I said, "Well, let's go down to the can and have a smoke." He said, "No smoking in the can." [laughing] I said, "Come on, Hugh!" He said, "That's right, you can't smoke in the office."

Well, it was a hardship, [chuckles] but probably a pretty good thing. As a matter of fact, Gene Prince, who was a fairly heavy smoker, just developed the habit that he didn't ever smoke during the daytime, but at night, just five o'clock and the first

cocktail, he'd start and then hit it full speed. But it was somewhat of a hardship for me. I could always light up when the office closed, at least, and I spent about half my working time in the office after five o'clock anyway.

I do remember--and I guess this is where Mr. Alfred comes in--I remember that Christmas Eve came along and we were getting off work early; we worked until noon on Christmas Eve in those days. So I was working along and I was just waiting until noon would come so that I could be sure that everyone had left and I could light a cigarette. So at 12 o'clock, I leaned back and lit a cigarette.

What I didn't know was that Mr. Alfred had a custom on Christmas Eve of stopping by each office wishing everybody a Merry Christmas as he left. Well, the door opened and in walks Mr. Alfred and here I've got a smoking cigarette in the ashtray in front of me. I was embarrassed and he was embarrassed--it was just as though he'd found me in bed with a strange woman. [laughs] He wished me a Merry Christmas and I thanked him very much. He backed out and I backed off and I thought, [still chuckling] "Oh hell, what's the use, you can't lick it!" Now, of course, we've got laws that say you can't smoke.

Hicke: You don't know who promulgated this rule? Somebody must have kept it up, though.

Kirkham: Yes. Mr. Alfred did not smoke and I don't know whether Mr. Madison did or not. I didn't ever see him smoke. I think E. S. Pillsbury must have been the same. I don't think anything could have been adopted without E. S. Pillsbury approving it. He was active with the firm until shortly before I came. Oh, Jack would know.

Hicke: Okay. That might be a good question to ask him. Well, after they all died, then did the no smoking rule disappear?

Kirkham: It disappeared. It was honored in the breach for a time after the older partners died, except that we retained what I thought was a very good rule which I was very willing to observe. We had no smoking in the library, and that was useful because you didn't build up a great, blue fog, which was customary in those days. You'd go into any conference or deposition and you'd just fight your way through smoke. Unfortunately, that rule was also observed in the breach, and one of the people who should have known better was Jack Sutro [both laugh], who would light up his cigar whenever he wanted to, much to the dismay of people like Francis Marshall. Oh, I think Fran was actually allergic to

tobacco, and it was a great hardship for him to be around anybody that smoked.

Hicke: Well, what about clients?

Kirkham: Oh, you didn't enforce it as far as clients were concerned.

Hicke: They didn't probably even know there was such a rule. That was really rare in those days, to keep an office smoke-free.

Kirkham: Very, yes, it was rare, certainly was. Looking back on it, a very good thing.

Hicke: Yes, somebody was way ahead of his time.

Kirkham: That's right.

Hicke: Okay. Well, then I heard another story that I thought you might tell me about and that is about Gene Prince and Gene Bennett taking a flight. I don't remember this--they turned the plane around practically in mid-flight?

Kirkham: [chuckles] Well, yes. That really is one of the best illustrations of what Bennett could do that I recall. Bennett was a trial lawyer of superb ability, smooth as could be. At the same time, on cross-examination he could be deadly. He was a person who got his way, and could talk not only the jury but anyone else who was around into doing what he wanted to have done.

On this particular occasion he and Gene Prince were on their way to Los Angeles to meet a group going on a fishing trip. It was when [Earl] Warren was governor, and he was on the trip along with several others--everybody waiting at the boat in Los Angeles.

Prince and Bennett got on the plane for Los Angeles, started chatting a little, and suddenly Gene Prince looked out the window and said, "We're not going to Los Angeles." He looked again and it looked very much like they were approaching Sacramento.

[laughs] Bennett called the stewardess and said, "We're bound for Los Angeles, aren't we?" And she said, "No, we're bound for New York."

I never got the whole story, but I do know that Bennett insisted they had been directed to the wrong plane by the United Airlines representative, and I have no doubt he foretold dire things that might happen if they did not arrive as scheduled in Los Angeles. In any event, for the only time in history that I

know of, he talked that pilot back to San Francisco, and both Genes were put on a plane to Los Angeles. Which pretty well tells how effective Bennett was in getting his way.

Hicke: That's a very good story.

Kirkham: There is one anecdote I might tell you about Felix. I may not have told you this; if I have, we can strike it out.

Felix and his wife did not participate in any social activities; they just didn't go out at all. But on one rare occasion they did accept an invitation to dinner at Mr. and Mrs. Alfred Sutro's.

General Bowles, I think his name was, who was then commanding general of the Presidio, was one of the other guests. Mrs. Sutro's home was beautifully furnished, mostly in antiques, lovely things. Somehow a conversation about furnishings started and General Bowles turned to Felix and said, "Mr. Smith, how is your house furnished?" He hesitated just half a moment and then said, "In splinters." [both laugh] I guess his three boys kept his house pretty bashed up.

Incidentally, that comment gave me quite a bit of comfort once when Kirk, our oldest boy, came charging in with one of his friends when he was young and jammed one of his toys smack into the side of our grand piano. I said to Ellis, "Well, now that's a scar we'll love forever. [laughing] It's the beginning of furnishing a house in splinters."

Hicke: That's a wonderful way to look at it.

Moving on just a little bit, were you part of the partnership meetings that were held at the University Club later?

Kirkham: No. The first partnership meetings that I attended were in the Stock Exchange Club.

Hicke: Okay, can you tell me a little bit about that?

Kirkham: Well, we used to meet in one of the dining rooms on the eleventh floor, which held I guess a maximum of sixteen people. There were ten partners in the firm when I joined the firm, and during the war they didn't increase. When the firm increased after the war we went to the Palace Hotel, and from the Palace Hotel to the Commercial Club. Then from the Commercial Club to practically the whole fifty-first floor of the Bank of America building.

Hicke: Then Marshall Madison had sort of a--was it rather an informal management committee, or did you have formal meetings or how did that work?

Kirkham: Well, I guess he had an informal management committee of Marshall Madison, Gene Prince and Jack Sutro. Bennett, no--Bennett's ideas of running the firm were not like Gene Prince's and not like Marshall's or Jack's. Bennett would have been more conservative in size of the partnership, and so on. Marshall, as a business lawyer, recognized the necessity of growing with the firm's clients. So Bennett, although senior, did not participate directly in management. Marshall would discuss major things with all the partners at the firm meetings, and, of course, our group was small enough to make this feasible.

Hicke: Did you ever do any hiring or was that pretty much Jack Sutro's job?

Kirkham: Well, it was Jack Sutro's job, but anyone who had a good candidate certainly could woo that person and then clear it with the firm. When I hired Wally Kaapcke, I went in to talk to Felix Smith about it. But I'm sure that if anyone had a good candidate, he would have been accepted.

Jack was the one who sort of kept his finger on our requirements and interviewed the applicants for employment. But I interviewed many, yes. I mean, my friends throughout the bar, throughout the country, would write to me--people at the law schools, Dean Phil Neal at Chicago and others would write me about good candidates and I'd say, "Yes, send him in." I'd interview them, and if I thought they were good, why then I'd talk to Jack about it, if he was here, or Marshall or Felix and get a consensus. I don't know just how we did it.

Hicke: It seemed to work beautifully.

Kirkham: Seemed to work. I can't recall anybody who I liked and recommended after an interview who wasn't hired. During the war, we'd hire anyone who could stand upright.

Hicke: [chuckling] Well, then I'd like to go to some other cases that I've heard about. The Evis water softener case?

Kirkham: [chuckling] Oh, dear, a wonderful victory, all to no avail. Well, Mr. Evis manufactured a device which was made of metal--just a little metal collar--which he hooked onto the intake water pipe in a building or a home. According to his representations, this device softened the water and kept scale

from forming in the pipes or boilers or other equipment on the water line. He started a little business in Palo Alto.

My recollection is that he had more than a million dollars in sales annually, and was getting along fine, and then the Federal Trade Commission moved in on him--I guess stirred by some competitor's complaint--and charged him with fraudulent and false advertising in saying that this little hunk of metal would soften water and do all these things.

Well, of course, his business just went, gone, over.

Harry Horrow knew this chap and, [chuckles] in a sad minute as far as the firm was concerned, persuaded the firm to defend him before the Federal Trade Commission. Jimmy Michael handled the case through the hearings before the Examiner of the Federal Trade Commission and came up with a 100 percent victory. I took over the appeal of the examiner's decision to the full commission, lost there by a divided vote, and appealed to the Court of Appeals for the Ninth Circuit. I briefed the appeal and was ready to argue it, but by the time it was heard, I had been appointed general counsel for Standard and had conflicting commitments. So Jimmy Michael swung back in for the court of appeals argument and that court reversed the commission.

Hicke: Can you explain a little bit about how the water softener worked?

Kirkham: Well, that's one of the things that we never could explain, and that was one of the interesting things about the case. The people that handled this in the Federal Trade Commission looked at a little piece of iron hooked onto a water pipe and said it simply can't work; it simply can't do what Mr. Evis says it does--soften water, remove scale, and prevent the formation of scale and so on--it can't. You just look at it and you can see that it can't.

Actually, it did work. It was all summed up by one of Jim's witnesses. Knott's Berry Farm installed an Evis device on their equipment, which was subject to tremendous use, and it worked. When the government cross-examined the witness about how putting a little piece of metal on a pipe could prevent the formation of scale, et cetera, he said, "I don't know how it works; I only know it works. It's like the bumblebee, aerodynamically it can't fly, but it does fly."

One of the most dramatic instances in the testimony was of a school for mentally retarded children in the state of Washington. The children did their own laundry work. They were trained to put a certain amount of soap in the automatic washers, and they

did this over and over again. Then an Evis device was installed. The children came in and put in the same amount of soap and in a few minutes, soap suds were flowing all over the floors because the water had been softened.

Over and over and over this type of testimony went in.

Also Jim presented witnesses who testified about the remarkable results that have been achieved by adding metal devices in similar uses--like Sir Humphrey Davies's famous idea of placing zinc on the hull of a vessel to eliminate corrosion. Everybody said what a ridiculous thing, to think you can eliminate corrosion by putting a piece of zinc on the stern post of a vessel, but that's exactly what it did. Today devices of that kind--it's now magnesium, I think--are used to prevent corrosion in oil pipelines; they protect the locks of the Panama Canal.

After hearing all of the testimony, the examiner rejected every contention of the government, and held that the Evis device was a useful device and that the statements made in the advertising were true. But the commission, true to form, upheld its staff and reversed in a decision which in effect said--you can read it--that the device couldn't work, and therefore it didn't work, even though it did work. Happily, the court of appeals reversed that decision.

[interruption]

Hicke: You were just reading to me the explanation you wrote about how it works, which is electrically; basically it has an electrical explanation in physics.

Kirkham: Well, I was reading from my brief in the court of appeals.

Hicke: And why couldn't that explanation have been offered to the court?

Kirkham: Oh, it was offered. But, of course, that was a different type of thing; I mean, you weren't preventing corrosion, you were preventing the scaling of waterpipes. Those examples of what had been done with metal were brought to the attention of the commission. But it couldn't be shown in any way that the Evis device worked the way magnesium, for instance, works on the stern post of a vessel.

Hicke: These weren't strictly applicable?

Kirkham: But like the magnesium, the Evis device did in fact work. I started out by saying that unfortunately for the firm, Harry

Horrow took this case. It was a fascinating case and I enjoyed working on it, particularly because I was outraged at what the commission had done. Here was a little businessman suddenly come onto something that was really good, and whango, they bang down on him, without knowing what they were doing or making a decent investigation.

Obviously, he couldn't sell any more with the Federal Trade Commission suing him for false and fraudulent advertising, so by the time we got to the court of appeals, he couldn't even pay the cost of printing the briefs; let alone our fees. Just as a matter of stubbornness, I guess, the firm paid for the printing of the briefs and carried the appeal to its conclusion. But in the meantime, the poor guy was broke. His business was gone, and he couldn't revive it because it was always tainted with this charge. We had the satisfaction of paying for the appeal and winning it for him. [chuckling] One of the little bits of brightness in my legal career.

Hicke: It almost seems as if the commission should have had to pay for that.

Kirkham: It certainly should have. Just like they should have paid in Standard's F-310 case.

The Alfred Sutros

[Interview 5: June 3, 1987]

Hicke: Well, we're going to have to fill in some gaps here to make this complete and so I wondered if we could start this morning by going clear back and I'd like to ask you to tell me some of your recollections of Mr. Alfred Sutro and his family and his brother, if you knew him.

Kirkham: You know my son took a tape recording of Mrs. Alfred Sutro's recollections. We went over there one night and for a long time I just got her to talk about her early days. She had an interesting life. Her father was the American consul in Paris, and she remembers sitting on Prince Edward's lap--later Edward VII--at one of his meetings with her father. Her name was Newmark. She came from Los Angeles, and was just a lovely person. She was decorated by General [Charles] de Gaulle for her work with the free French during the war. She was bilingual, spoke French from the time she was a child, and spent a lot of her time in France.

The Sutros had two beautiful homes, one on Jackson Street near the Presidio in San Francisco and one in Atherton. They called their Atherton home Mille Fleurs. Mrs. Kirkham and I were there many times. We didn't know their youngest daughter. There were two daughters and a son. The youngest daughter, Margaret, died while the family was on one of their trips to Europe, just after Jack graduated from college. And then the oldest sister, Adelaide, later died of cancer.

Mr. Alfred Sutro was a very interesting man as well as a splendid lawyer. He had a beautiful library, including a collection of first editions, autographs, and so on. We spent many, many interesting hours in his library.

Hicke: This is at home?

Kirkham: At home, yes, in the City. He had a collection of--what do they call them--books that have pictures painted on the edges. You spread them to see the pictures. Jack, I think, gave most of the library to some libraries. Did he tell you?

Hicke: Somebody said maybe some of them went to Stanford, is that right?

Kirkham: Could have been, could have been. But anyway Mr. Alfred had a wonderful collection. He kept up an interesting correspondence with booksellers and collectors in England. I remember that.

Hicke: Did he have first editions?

Kirkham: Yes. He wrote very well. I'm trying to remember. He wrote one or two essays about some early English writers. I've forgotten exactly. Samuel Johnson could have been one. I may have copies but I've forgotten. He also wrote children's books for his grandchildren.

Hicke: I've seen a couple of those. That's a marvelous thing to do.

Kirkham: Dinner at the Alfred Sutros' was really a lovely event.

Hicke: Tell me about what an occasion would entail.

Kirkham: Well, you'd arrive and you'd have a cocktail, and cocktails at Mr. Alfred's was one cocktail [chuckles]--a martini. Jack and I would sometimes slip one or two on the side. Then after that, at dinner, there was always interesting table conversation. Toasts back and forth. Their home was not lavish but gracious. Mrs. Sutro had a chauffeur, a butler, a cook, and a maid. Maybe a laundress downstairs. I don't know what happened downstairs,

but the home was beautifully run and managed. And they enjoyed having family dinners and friends in.

Hicke: Who would be some of the other dinner guests? Can you recall?

Kirkham: Well, their son-in-law Bob Bullard, and Adelaide, his wife, Gene and Mildred Prince, Jack and Betty and other social friends, rather than business associates, you know, and largely Jack's and Adelaide's friends, instead of older groups. It was in a way an older couple giving nice dinners for their children and their children's friends, ones I remember.

Mrs. Newmark, Mrs. Sutro's sister-in-law, of whom she was very fond, was often there. Her brother Henry Newmark died quite a number of years before Mrs. Alfred.

Hicke: Did Mr. Alfred do any other community activities besides his writing and that sort of thing? Was he involved in organizations?

Kirkham: I don't recall that he did. Now he may have done, but he was mostly a family and professional man, very much a family man. He loved the mountains, and took his family on fishing trips in the Sierra. Jack and Betty and Ellis and I used to meet at Lake Tahoe sometimes for vacations in the summertime.

Mr. Alfred, as far as I recall, did not have any offices with the local bar associations or the ABA [American Bar Association]. It wasn't until later on in his life that the firm really began to take an active interest in the bar associations. Maybe Mr. E. S. Pillsbury was a little above that, I don't know. [both chuckle]

But later on, of course, the firm became very active, and four of our partners were presidents of the San Francisco Bar Association: Jerry Levin, Fred Hawkins, Jack Sutro, and Gene Prince. And Gene Prince and Jack Sutro were both presidents of the State Bar of California. Since I have been with the firm, we have encouraged participation in bar activities. The firm has also been very generous in pro bono work, as you know, sending out lawyers to do public service, public defender's office, and so on. Many of us have spent a lot of time in American Bar Association and State Bar activities. But I don't recall that Mr. Alfred did.

Hicke: Well, his son certainly made up for that. [laughs]

Kirkham: [also laughs] I'll say so.

Mission To England

Hicke: Maybe we can move on just a little bit. Another thing that I wanted to ask you about was your mission to England for the Mormon church. Could you tell me a little about that?

Kirkham: Well, I guess I was one of the youngest who ever went. I was sixteen when I was called on a mission. I think that was because I was beginning to worry my parents. [chuckles] I got into college quite young, and then I began being too active in things they did not like. I joined the National Guard. Went up to Fort Lewis in Washington. I am two years older according to Uncle Sam's record than my own record [chuckles], because I lied about my age and got in the National Guard when I was sixteen. Actually, I didn't do too badly, because I was in the field artillery, and the field artillery at that time had French 75s from World War I, drawn by horses. I had been playing and working with horses since I was eight years old on the farm, and so I had no trouble hitching, driving, and riding the horses. There were four horses pulling each gun. You rode one horse and drove the other three.

Hicke: Pulling the gun?

Kirkham: Pulling the guns and caissons. Also, I played the trumpet, so I was a bugler. [both laugh] My accomplishments have been very widespread.

Hicke: Did you have to play reveille in the morning?

Kirkham: "Oh how I love to get up in the morning!" Yes. I played the trumpet in my high school band, the cornet.

Hicke: [laughs] Well, you had to get up earlier than everybody else if you had to play reveille.

Kirkham: I spent one summer in Fort Lewis in training with the National Guard. Then I came home and adopted so many worldly habits, I think, that my parents thought I should go on a mission. I don't know how they arranged it, but there were members of my family all through the hierarchy of the church.

So in any event, I got called on a mission. I was sixteen, I turned seventeen in August, and left in September 1921 for England, and was in England for a little over two years until I was released on or about the first of January of '24. And then I joined my cousin and two others, and we spent six months roaming

all over Europe with our packs on our backs, and ended up on Easter Sunday in the Church of the Holy Sepulchre in Jerusalem.

Hicke: That was probably a time when you could get in on Easter. The crowds now are such--

Kirkham: Yes, well, there were problems then. It was in 1924, but the British were thoroughly in control.

Hicke: It's been a site of pilgrimage for quite a few centuries, I guess.

Kirkham: Shephard's Hotel in Cairo was full of British officers. It was very interesting. I went through some of my old records not long ago, and read again what it cost me to get from Geneva, Switzerland to Jerusalem. I think it was something like thirteen dollars. We rode the old Italian trains out of Switzerland and down the length of Italy, third class, sitting on wooden seats, stopping off at Milan and Bologna and ending up at Brindisi, where we got a boat for Greece.

We paid four dollars and a half for the right to sleep on the deck of a little tramp steamer with a herd of sheep on the front deck and four of us on the afterdeck. [both laugh] That was a three- or four-day trip. We stopped at Corfu, Zakynthos, and other Greek isles, and then went up to Albania, back down to Corinth and then around to Pireaus. In Athens we hiked, illegally, up the cliffs to the Parthenon at night and watched the moon rise over the temple.

After a while in Athens, we paid two dollars to get across the Mediterranean to Alexandria, again sleeping on the deck of a small steamer, and then after interesting adventures in Cairo, traveled by rail into Jerusalem. We had a--you don't want me to go into all of this?

Hicke: I do want you to, if you promise not to cut it out later. [chuckles]

Kirkham: We had an interesting time in Cairo, very interesting. One of my friends, David O. McKay, who had been my mission president in England and who later became president of the Mormon Church, told me if I went to Egypt, to see Salim el Gabri, chief dragoman for American Express in Cairo. President McKay said he had used him once on a visit to Egypt and found him reliable. So the four of us went into the headquarters of American Express and asked for Salim el Gabri, saying that Mr. McKay had suggested we seek his services.

Sure enough, he came out in a few minutes, his robes swirling around him. He greeted us like long-lost friends. He threw his arms around us. We couldn't believe it. He wanted to know how Mr. McKay was. When would he come back again to Cairo? He said, "You must meet my son." He brought his son over and said, "You must take care of these young men. They are friends of Mr. McKay." Let's see, what was his name--Faris. Faris certainly took care of us. He took us all over Cairo, day and night, including some very interesting spots off limits for His Majesty's Troops where the dancing girls were swaying around.

Hicke: Belly dancers.

Kirkham: I'll say so. And then later el Gabri told us he had arranged for us to go out to the pyramids and stay overnight. We protested that we didn't have any money, we're just students, we can't do this. He said, "Oh, for Mr. McKay I'd do anything, anything." He said, "How much do you have?" We said, "We don't have any." "Well," he said, "give me a pound." [both laugh] So we went out there and he had three tents set up: the cooking tent, the sleeping tent, and the entertainment tent. He brought dancing girls out from Cairo with a man who played for their dances on one of these small instruments that sounds like a flute.

The local sheik and a group of gowned men came out and sat around the tent. We had a wonderful evening. Faris couldn't come in the tent, because he couldn't be in the same tent with his father before an unveiled woman. So he sneaked back behind where we were sitting and lifted up the edge of the tent and watched what was going on. Then el Gabri arranged a camel trip to the pyramids of Sakara, the old pyramids. And we spent a day that way.

Finally back in Cairo after four or five days, when we were all through, we said goodbye to Faris with great affection, exchanged gifts, swore eternal friendship, and we said to Salim el Gabri, "We can't thank you enough." "Oh," he said, "it's all right. You just tell Mr. McKay when you get back to New York that it was my pleasure." And he talked a few minutes.

Finally from what he said it dawned on us that he was talking about Mr. McKay who was the owner of the New York Times--or was it the Tribune?--who had been in Egypt many times, and [laughing] who had employed el Gabri to lead caravans on some archeological expeditions--and not our missionary Mr. McKay. Anyway, we had a great time.

Hicke: [also laughing] I trust you didn't enlighten him at that point.

Kirkham: I knew that the Lord moves in mysterious ways his wonders to perform.

Hicke: That's a wonderful story.

Kirkham: And then, after Jerusalem, Damascus, Beirut, we went up to Constanta on the Black Sea and then around to Naples, Rome, Florence, Paris, London, and home.

My mission for the church in England was a wonderful experience for me. I became president of the conference, which is like the bishop of a diocese. In the Midlands there were branches, or what would be called here parishes, in Northampton, Coventry, Nuneaton, Walsall, Birmingham. There were about eight or ten meeting houses in those cities which were under me and about twenty missionaries. I preached sermons every Sunday, buried the dead, blessed the new arrivals. It was quite a spiritual experience, and one that I value very highly.

As time has gone on, I haven't been as religious, but I still treasure that as a very valuable experience. The Mormon church is a remarkable church in my opinion, remarkable. That's probably the reason it's growing faster than any other Christian church. Well, what else do you want?

Golden State and the Milk Control Law

Hicke: Well, still back in the early days, one thing that Mr. Kaapcke told me about was a Golden State case regarding overpayments to the farmers. He thought you might have some interesting comments on that case.

Kirkham: I'm trying to think of the name of it. I remember it very well. California had passed a milk control law that required, among other things, that dairy companies pay farmers a certain minimum price for milk. This was because during the Depression the price of milk had fallen so low that it was being dumped in the streets. The constitutionality of this milk control law was challenged in the Jersey Maid case--that's the name of the case. The trial court held the statute unconstitutional and enjoined its enforcement. The dairies, accordingly, from that time on paid the farmers the competitive price which was much lower than the minimum price the law required. The farmers' association appealed the decision, and the California Supreme Court finally reversed the trial court and held the milk control law, with its minimum price, valid.

Well, here we were. All the dairies had underpaid for years and, of course, the farmers sued to recover the underpayments. To this day I'm darned if I know what legitimate defense the dairies had. It's like a tax, you know. If you don't pay a tax because you claim it is unconstitutional, and ultimately you lose the case, you have to go back and pay the tax. But we scoured the books and finally Al Shults turned up one lonely case--I believe it was from New York Supplement--that gave some support to a wild theory I had decided to try.

There was a provision in the milk control act that said that for any violation of the law, the penalty was \$500. Well, I doubt that that provision was ever intended to apply to underpayments of the minimum price for milk. But in any event, I took the position that the law itself provided the only remedy for its violation, namely a \$500 fine.

Hicke: That would be a one-time thing.

Kirkham: Yes, that is what I claimed, a one-time \$500, instead of numerous \$500s for numerous underpayments, or instead of \$500 million or more--whatever the amount of the underpayments were--for all those years. Anyway, I went down to Los Angeles to argue our demurrer. I remember so well--we had planned a week in Evolution Valley in the high Sierra with some friends and this darn case came up for hearing on the day we were to leave. So the party went on up ahead, but left a horse for me at Strawberry Lake. I argued the demurrer, then drove up and got on my horse, went into the Sierra, trying to follow the old Muir Trail, and promptly got lost. But I finally caught up with the party late at night. When I got back after a couple of weeks, the court came down with a decision holding my way, I think probably only because they knew they'd break every dairy company in California if they held the other way. That's the case Wally meant, I guess.

Hicke: He said that you were offered the job as president of the company eventually.

Kirkham: Does he remember that? Yes, well, I was. Jack Sutro had been general counsel to Golden State Company, and he went to war and I took over and was with the company all during the war, and it was a very interesting assignment. During those years Golden State became the third highest paying client of the firm, after Standard and the telephone company.

The company was led by an interesting and brilliant man, Grover Turnbow. We spent a lot of time together during the war. Golden State was one of the biggest suppliers of dried milk products to the armed forces throughout the world. We drew

contracts and patent licenses with the big milk producers in Wisconsin, and with Kraft, National Dairies, and other food companies. Grover and I spent a lot of time together in the East with Kraft. Most of the dried products that Kraft produced during the war were under Golden State patents. I also worked closely with management in San Francisco, including Frank Buck, the president, and was on the board of directors.

Hicke: You were the general counsel?

Kirkham: And was general counsel. But I also participated more on the business side of that company than of any other company I've represented. Anyway after the war they had management problems. Grover resigned and formed his own company.

One day Frank Buck, the president of the company, asked me to come over to his office and told me that he'd suddenly had a stroke of genius and had decided who ought to be the new head of the company.

He offered me a very attractive financial arrangement with some stock options (later on Russ Little picked up the same deal and made a million dollars in about six months). I almost considered it. But I told Frank that I was a lawyer and wanted to remain a lawyer.

Incidentally, I had a vivid dream that night. I dreamed I had accepted the job and was over in Frank's big office as president of the company. I looked around and thought, "My God, what have I done? I've left the practice of the law?" I thought, "I'm crazy. What have I done?" And I tell you I woke up with the most relieved feelings that you could ever imagine. [laughing]

Hicke: You made the right decision?

Kirkham: Well, I think so. I didn't make the right one financially.

Hicke: Well, right, but I mean for your own satisfaction.

Kirkham: Yes, did all right here, yes.

I might add one other reminiscence about my work with Grover Turnbow. It is one I greatly cherish--typical of Grover, who was a very special client, as was the Golden State Company.

We had been in Chicago, with excursions up into Wisconsin, for the better part of several weeks working on agreements with Badger Consolidated--a large milk-producing cooperative

headquartered, as I recall, in Shawano, Wisconsin. It was wartime. The agreements, whose ultimate purpose was to provide for the manufacture of dry food products for the Allied armed forces, were complicated and difficult. They involved patent licenses, the construction of large plants to use those patents, purchase and sale agreements. Collateral agreements with Kraft Foods of Chicago and National Dairies of New York and others were involved. We worked day and night in Chicago's August heat.

Suddenly one evening Grover stood up and said, "Kirk, I've had it. I'm tired of sandwiches and coffee. I'm going downstairs and have a real dinner. Come on." I demurred; said we simply had to finish the drafts we were working on; we didn't have time to waste on a dinner. But he was adamant. He said we were entitled to a break sometime and, laughingly, ordered me as his attorney to drop my work and come with him for an hour or two.

We went downstairs to the beautiful dining room at the Drake Hotel--I believe it was called the "Empire Room." The orchestra was playing, couples were dancing. Grover had ordered a special table and a delicious dinner. It was delightful. I soon relented and relaxed, and told him I had been wrong. This really was pleasant and needed. After the dishes from the main course had been removed, I said I'd even go for a dessert. He said, "Oh, yes," turned around and made some motion to the head waiter.

The band suddenly stopped in the middle of a dance and, after a brief pause, burst out with "Happy Birthday to You." I looked around to see who was the happy celebrant and saw the chef in his tall white headdress leading two waiters carrying a huge birthday cake covered with candles. To my complete surprise the whole entourage came directly down to our table and put the cake in front of me. Then everyone stood up and sang "Happy Birthday." I couldn't believe it! I turned to Grover and he said, "Don't you know it's your birthday today?" I had completely forgotten. Grover had learned about it when he had talked to Ellis a few days earlier and had planned the whole affair.

It was quite a moment.

And that reminds me of another incident of great thoughtfulness. It was during the war. I've forgotten at the moment just what took me to Washington--it may have been the argument in the Supreme Court of the Post Exchange case. In any event, Marshall Madison called me and asked me if I was feeling all right. I assured him that I was, and he went on to say that one of our mutual friends in Washington had called him and said

he had met me on the street and that I looked like the wrath of God. Marshall urged me to try to take things a little easier and to get home as soon as I could.

Actually I was feeling about the way our friend described it. I had lost weight. I had been working endless hours. Shortage of personnel, greatly increased responsibilities, an inordinate work load, all were telling on all of us. I was about whipped but was trying hard to put it all behind and bolster myself for renewed work at the office when I returned to San Francisco. When I got off the ferry, Ellis was there to meet me--and also, a big black limousine with a chauffeur and instructions from Marshall Madison that I was not to go near the office but to proceed with Ellis to Palm Springs where reservations had been made for both of us for a six-weeks vacation.

When we got to Palm Springs the red carpet was out. We stayed at the old Desert Inn--an absolutely wonderful place--all expenses paid by the firm. (We never could have afforded it ourselves then.) I learned I had blossomed out with my first stomach ulcer and went on a diet not only of appropriate food, but of exercise, sunshine, relaxation, and pure heaven.

Among other things, I got up each morning at six o'clock and I went for a swim in the west side pool. Swimming has always been one of my favorite exercises--I was on the swimming team at the University of Utah in 1924. I started at ten lengths of the pool each morning and ended with fifty. After a few days a very pretty young lady came quietly to the pool early each morning and swam a few lengths. We were the only ones in the pool at that early hour, and after a couple of days we greeted each other pleasantly each morning. I didn't even impose on her by telling her I had recognized her the first time she dove in--Judy Garland.

Gene Bennett, G-2 on General White's staff in the army, was training nearby in the desert for an invasion of North Africa. On weekends, and occasionally in between, he and some of his fellow officers would come to town, where some had visiting wives, and we would often dine and dance at--oh! I've forgotten its name--but at a grand nightclub in Palm Springs. The band leader got to know us and each time we came in the door, he'd stop whatever the band was playing and swing into our theme song, "You Made Me Love You."

Actually, when Ellis and I were leaving Palm Springs after an incredibly wonderful vacation, the band leader happened to drive by in his car and saw us waiting by our bags. He stopped

his car, reached behind him and brought out his violin, leaned way out the window and played, "You Made Me Love You." It was a grand send-off to a simply perfect vacation--one which completely restored my health and energy and also left memories for a lifetime.

Not too long after the war I had an interesting experience that grew out of my representation of Golden State Company. The director of research of Golden State, with whom I had done a good deal of work, left to become head of research for International Minerals & Chemical Company in Chicago. That company had acquired patents covering the production of monosodium glutamate from Steffen Waste.

Steffen Waste is just what its name indicates--the waste or residue remaining in the process of manufacturing beet sugar after all the sugar that can be crystallized has been removed from the beet juices. This residue is a thin liquid composed of about 97 percent water. The 3 percent solids are mostly protein; they can't be dumped in streams or oceans; if they are dumped on open land they smell to high heaven. They presented serious problems of disposal to the beet sugar industry.

Toby Bishop, a vice president of International, came to me at the suggestion of my old friend from Golden State. Toby literally enchanted me, with all the ardor of a super salesman and a practical dreamer.

His vision for monosodium glutamate was the rainbow's end. He explained that this high sounding product was the salt of glutamic acid found in proteins; that it had been derived for many years by the Chinese from seaweed; that it had virtually magic powers to enhance flavors in cooked foods; that Chinese cooks had carried it with them for many years and had kept its origin a deep secret and never let it get out of their hands; that International now had patents on a process to derive it from Steffen Waste; that he wanted legal help in getting in motion the purchase of Steffen Waste from all the beet sugar companies in the West, the building of concentration plants in all of their major factories to concentrate the waste, and the building of a central plant to receive these concentrates and derive from them the monosodium glutamate and other products--principally animal food.

Well, it was apparent that the sugar companies should welcome him with open arms. He would pay them to get rid of a growing and expensive waste problem and add another useful product to be derived from the humble sugar beet. Toby was so enthusiastic that he almost made me feel as if I could become the

ultimate benefactor of mankind if I would help him produce this miracle product.

First, he said, no one can popularize "monosodium glutamate" as a name for a household product; so he himself came up with the trademark "Ac'cent," which you now see on the little red containers found on the shelves of all the grocery stores. The name was perfect--if not an inspiration. The salt does not have a favor of its own; instead, it increases or expands the natural flavors of the product on which it is used. As Toby put it, "You can take a steam table of cooked vegetables that are all tired out and have lost their flavor, shake a little Ac'cent on them, and the carrots immediately taste more like carrots, the peas more like peas, et cetera, and what it does in enhancing the flavor of meat is simply unbelievable."

Indeed, his enthusiastic description was sadly justified by a problem we encountered with the Food and Drug Administration of California. They insisted that meat products containing monosodium glutamate be labeled "adulterated" because, as one whimsical official put it, "You can boil twenty chickens in a small tub of water, and one chicken in a second like tub of water and add a little Ac'cent, and the soup in both tubs tastes the same." We finally managed to overcome that problem with the help of the federal regulations. It was a natural product--no adulteration.

Well, to go on, we completed a vast network of contracts for the purchase of all the Steffen Waste from all the sugar factories in the West, from the coast to the Rocky Mountains. You can see immediately that this involved serious antitrust problems, but we limited the time of the purchase contracts to a period we felt was defensible--time to permit the return of the capital required to start up a new industry. International then entered into contracts with each company to build plants at each of its factories to concentrate the Steffen Waste. It then acquired a site in San Jose and built a large plant to manufacture the finished product. Here, we had some unusual problems. We found of record an old dedication of a highway right through the land on which the plant was to be built. I managed to get the chamber of commerce (San Jose was just starting its plans for its enormous growth) to help me persuade the title company to write a policy without exceptions. (My "land law" partners could never believe I had persuaded a title company to issue such a policy and insisted that this achievement should be listed as the single greatest piece of advocacy in my long career in the law.)

In any event, the whole program was finally put together and Ac'cent became a household product.

KySo Merger

Hicke: Well, do you have a little more time?

Kirkham: Yes, I have time.

Hicke: Okay, maybe we can now go to the--this is really skipping around--up to the KySo merger. That was crucial, as almost everybody knows, because Standard Oil had been split up in 1911 and here Standard Oil of California was wanting to merge with another Standard Oil company, Standard Oil of Kentucky.

Kirkham: Which simply couldn't be done. [laughs]

Hicke: [also laughing] That's what I believe; what I find hard to believe is that you did it.

Kirkham: Well, it was an important event for Standard. Even more important in a way than the Gulf merger, which has now just made a bigger company. At that time, Standard had a lot of production on the Gulf; they'd been very successful in discovering oil, and they had no market for it. They were selling their oil as crude, at a low price. With the crude market depressed at that time, they even had companies--I think Tide Water was one of them--which were defaulting on their crude purchase agreements. They were having a problem in getting rid of the crude and certainly in realizing its value. So they were looking around for a market.

They had a small refinery in El Paso that took care of some of the production, but they still had excess production because of their outstanding success in the Gulf offshore and in the Delta. I don't know just how the merger talks originated; I think Buddy Smith came to Gwin Follis with a proposal to take over Standard of Kentucky.

Hicke: Oh, so it came from KySo.

Kirkham: I think so. I believe that's where it originated, with just some tentative discussion and then, of course, it seemed to be a natural if it were possible, because Standard of Kentucky had a large market but no production, no refining.

Hicke: They were buying their oil from Standard of New Jersey, weren't they?

Kirkham: Buying all of its product from Standard of New Jersey; it was just a sibling of Standard of New Jersey in the five southeastern states. It was a very successful marketing company, but that's all it was. What it needed was refining and production for its marketing, and what we needed was marketing and refining for our production.

Ultimately, we did acquire the market of Standard of Kentucky, and built a refinery in Pascagoula to supply its products. That took care of our production there and made a very profitable operation out of what had been a problem.

But from the legal standpoint, the merger presented serious problems. At that time Section 7 of the Clayton Act was being strictly enforced, very strictly. I don't believe there was one lawyer in a hundred--or even a thousand--in the antitrust field who would have thought that there was any chance of effecting the merger. But we had a series of unusual events that we capitalized on as best we could.

One of these was that the government of the United States had sued both Standard of Kentucky and Standard of New Jersey on the ground that the arrangement between the two of them violated the antitrust laws. The suit charged that Jersey had agreed not to sell to anyone else in Kentucky's territory, and Kentucky had agreed not to buy from anyone else. Whether or not such an agreement existed, the fact was that Jersey didn't sell to anyone else in that territory, and Kentucky didn't buy from anyone else. The government's suit to break up this arrangement faced Standard of Kentucky with the possibility that it would be compelled to rely for its supplies upon its most powerful competitor.

Hicke: Well, that explains why they might have come to Standard of California.

Kirkham: Yes, and believe me Buddy Smith, Kentucky's president, was very antsy. He could foresee only disaster for Standard of Kentucky if its sole supplier, Jersey, was forced by the United States to become a cut-throat competitor. How long would its supply last? How certain would it be? The government had a theory that Kentucky could buy its supplies from independent refineries on the Gulf, but Buddy knew such a source of product was totally inadequate.

With this background we thought we could make Standard of California into a godsend to both Kentucky and the government.

It was the only major oil company not doing business in the Kentucky territory, so horizontal competition would not be diminished. On the contrary, competition would be increased, for Kentucky could remain a strong competitor when Jersey came into the market.

So we thought we'd take a shot at it.

From the business standpoint, of course, the marriage was made in heaven, you see. It would give Standard of Kentucky a source of supply and it would give Standard of California a marketing outlet.

Hicke: Going into it, did it look so impossible to you, too, or did you think you could maybe bring it off?

Kirkham: Well, it looked pretty grim. There were two problems that we had there; they were tough. One was Section 7, and that was bad, and the other related to the trademark--and I can tell you about that later--and that was worse, that was worse. But as far as the merger was concerned, to bring together two of the old Standard Oil companies again after they had been divested by the government seemed an impossibility.

Hicke: How did you feel when this fell into your lap?

Kirkham: Well, [laughing] challenged. Hillyer Brown and I had lots of discussions about it. The point we made and the one that we thought we could possibly get over was the one I have mentioned--that competition would be strengthened if we could take over Standard of Kentucky, which would force Jersey to come into that territory as a competitor. The alternative, if the government won its lawsuit, would be the death of Kentucky as a major factor in the market and the consequent diminution of competition.

Well, we had problems without end. Principally, the government clung to the idea that Kentucky could get adequate supplies from the independent refiners on the Gulf and this would build up strong competition against all major oil companies. Another collateral problem was secrecy. We knew that if the possibility of this deal became known, Jersey would move heaven and earth to kill it.

Hicke: Probably cut off their supplies immediately or something.

Kirkham: Well, kill the deal so that Kentucky would continue to buy its supplies from Jersey, because Kentucky was its biggest customer by far, by far. That would include going up to the Hill, to the

Kefauver committee and yelling about the antitrust impossibility of merger of two Standard Oil companies, about the plight of the small Gulf Coast refiners, and so on and so forth.

Also secrecy brought troublesome problems under the Securities and Exchange Act's requirements of disclosure. Al Brown, who was the best lawyer in America in SEC matters, was always at my right hand, worrying and helping and handling that aspect of the transaction. If we made a disclosure, we'd kill the deal, and that would hurt the stockholders. But if it could be kept entirely secret, then the stockholders probably would come out best of all. It was the widows' and orphans' stock of the Southeast, you know; it wasn't traded a lot.

Hicke: The KySo stock?

Kirkham: The KySo stock, and if nothing came out until the actual event, why there wouldn't have been many shares traded and the same widows and orphans would benefit. Whereas if we disclosed it earlier, there would be wild speculation in the stock. There were just more darn problems on every side. But in any event, we kept it secret and I think it was the best-kept secret in the history of American business, really.

Hicke: For how long?

Kirkham: Well, months. I went back there and--I've forgotten when it was--early in '60 I guess--and I worked with the Department of Justice for several months. I didn't take offices downtown. We rented the whole floor in an apartment building way out in the suburbs, and the Standard Oil executives that came back to help me and work up the facts and so on would come out there. They didn't stay downtown, and people working with me didn't go downtown.

Hicke: This is Washington?

Kirkham: Yes. At one time, one of the boys in our Washington office said that he'd talked to some lawyer from Jersey and this Jersey lawyer had reported that I was spending a lot of time in Washington. They were wondering what I was doing there and so on, and they'd even considered whether I might be contemplating a merger with Standard of Kentucky. But they went to their counsel and he said it was utterly impossible, forget it. [both laugh] And so they'd sort of forgotten that, but anyway we kept a very low profile every place we went. What we did, you see, in our presentation to the Department of Justice, was work out pro forma supply arrangements for the whole area of southeastern states. We built phantom refineries, and we built phantom pipelines, and

we built phantom distribution facilities, all to demonstrate to the government that the only thing that Standard of Kentucky could do for a supply to keep its operations going was to merge with Standard of California. We had to demonstrate to the government that the independent refineries were incapable of supplying Kentucky. Also, in order to meet some of the government's objections, we proposed arrangements under which the merged company would buy products from independent refineries.

Hicke: So one of the main points that you hung the case on was preserving the entity of Standard Oil of Kentucky.

Kirkham: Preserving the entity of Standard of Kentucky, operating as a strong competitive factor in the Southeast and, in particular, a competitor that could stand up to Standard of New Jersey's vast wealth when it was cut off as Kentucky's supplier and went into Kentucky's territory to market its own refined petroleum products.

Well, I didn't convince them.

Bob Bicks had become acting assistant attorney general in charge of the antitrust division. I had worked with him on the Attorney General's National Committee to Study the Antitrust Laws and respected him as an able lawyer. I hoped I could convince him before there was a change of administration.

But after months and months, I finally got that long, long letter in July of 1960, saying that the antitrust division was not willing to accept my contentions and would oppose any merger, by a lawsuit to enjoin it if necessary. Well, that was a sad blow. So I sent a letter back to Bob saying I had received his "tentative views" [chuckles], and asked for further hearings. What I wanted to do was to keep him from closing the books. So every time he'd reject our contentions, I'd accept his further tentative views and ask leave to make some further submissions. I want to emphasize I had the help of the ablest people in Standard; they were wonderful. I'd just call for anything and they would produce it: every conceivable fact regarding supply, refining, production, current data and projected data, and so on.

Hicke: Do any particular names come to mind?

Kirkham: We had a whole group; there must have been ten or fifteen people in Standard that were assigned to help me.

Hicke: From the operations?

Kirkham: Yes, operations. They had an office of their own downstairs. They had draftsmen, and I tell you we submitted endless data--tabulations, projections, statistics--involving domestic and worldwide problems: Arabian crude, domestic crude, independent and major refineries, competition in all its aspects, et cetera. Names? Tom Powell and Max Jayne were just wonderful help.

Just an aside--in the middle of all of this--on a trip back from New York to make a report to Standard's board of directors, I blossomed out with a bleeding ulcer. I had had attacks before, but this one threatened to be serious. It really turned out to be a blessing in disguise, however, because after being rushed to the hospital for emergency transfusions, Dr. [Charles] Noble (bless him) kept me on my back for a week and then on strict rest for a couple more weeks and put me on a regime which I have religiously kept to this day, and which I am sure has kept me reasonably well and active for many more years than otherwise might have been allowed me--no tea, no coffee, no cigarettes, no alcohol in any form, no pepper or hot dishes (gone all those wonderful curries, chili, tamales, et cetera); indeed, for several months I graduated slowly from milk and baked potatoes to hot milk toast, eggs, breast of chicken--and finally to a steak! But it worked!

When I got back in the saddle we continued our barrage of submissions to the Department of Justice, and I finally convinced a very able young lawyer who was head of the litigation section of the antitrust division--Gordy Spivak--that we were right. But Bob Bicks remained unconvinced and finally, despite everything I could do, the administration ended and [John F.] Kennedy came in. The only thing I had really accomplished was to keep the matter open--and, of course, we had built up a tremendous economic record.

Then Kennedy did something I'll always bless him for. Instead of appointing a politician who would look only at the political implications of the government approving a merger of two Standard Oil companies, he appointed Lee Loevinger as assistant attorney general in charge of the antitrust division. Lee was considered a liberal, and when he was appointed I really thought we were through. But I also knew he was brilliant and an intellectually honest legal scholar. He had been general counsel of the National Labor Relations Board and a member of the Supreme Court of Minnesota.

I made an appointment with Loevinger. By this time the file had grown to enormous proportions. I had a long session with him, Spivak, and the other attorneys in the antitrust division

who had been working on the case. Incidentally, all of this time they had cooperated with me in keeping this whole matter secret. They had a locked file on it, and by a miracle nothing had come out through these many months and a change of administration. But anyway, I had this long session with Lee Loevinger and at the end he said, "Well Kirk, I'm going to Minnesota for a vacation, and I'm going to take this whole file with me up to my summer cottage. I'm going to study it and I'm going to make a decision. We've got to bring this thing to a conclusion. It's ridiculous; it's been about a year." So he said, "I'll do that and I'll let you know."

He made a date with me, a specific date.

So I went down to Louisville to see Buddy Smith, the president of Kentucky. I said, "Buddy, you've been a good worker for me all these months, but I've got to prepare you now for the biggest job you'll ever have." I said, "We have a date with Lee Loevinger; it's now or never. We have to convince him." I told him how, in a couple of my cases, I had brought the president of the company back to talk to the assistant attorney general in close cases, and their testimony had turned the tide. But anyway, I told Buddy, "If Loevinger indicates he's going against us, you've got to take over. You're our last hope."

So I went over it with him, and I had him picture the inevitable destruction of a great company if the government left him at the mercy of Jersey--the biggest and most powerful oil company in the world. I had him picture the fate of the widows and orphans in the South weeping because their stock had become valueless. I emphasized, "Now Buddy, one thing I want you to do: you can't let him say no. You have to give this story before he says no."

Hicke: What you did was add the human interest.

Kirkham: Yes, we worked it out, and I had Buddy all tuned and [chuckles] ready to bring tears to the eyes of a stone god if Loevinger started to rule against us.

The day of our meeting arrived and we gathered in the attorney general's big office in Washington. Without further ado Loevinger said, "Well, Kirk, I think you're right. We'll go along with you."

Buddy, in the meantime, looking sort of glazed-eyed, hadn't heard anything; all he remembered was me saying, "You've got to get your story before this man." So he suddenly began talking [hearty laughter by both] and he began saying how terrible it

would be for the widows and the orphans. I said, "Buddy, we've got it; it's all right." [more laughter] He wouldn't listen to me because I'd told him, "Don't stop, don't let anything stop you." So he went on. Finally Lee said, "Look, Mr. Smith, do you want me to change my mind?" [continued laughter] and then he finally realized what was happening, and there we were, we had it.

Hicke: That's incredible.

Kirkham: We had it but we had to get it consummated some way before it hit the headlines, or the Kefauver committee and the rest of them in Congress could probably have killed it.

Hicke: Let me stop you just one second. How did you feel when he said that?

Kirkham: Well, very happy. It was the end of a year's work of a whole team, wonderful people working with me--Bill Mussman, Wally Kaapcke, Dave Steffan--a whole group in our office and a whole group in Standard downstairs.

Hicke: Had you actually believed it would happen this way?

Kirkham: No, no, I'd about given up hope, I'd about given up hope. But I couldn't have been more convinced of the rightness of what I was doing. But in any event, we then had to see how we were going to effect it.

Standard of New Jersey didn't know a single thing that had happened. So I began working out with the government a form of a decree to be entered against Standard of Kentucky and Standard of California in the lawsuit against Jersey and Kentucky. What I wanted to do was to get California in the case and get the court to order us to do this, because if the court ordered us to do it, why then nobody could undo it.

If the Department of Justice just said, "Well, we agree not to sue you," then they could always change their minds, and if they got enough pressure from the Hill and a new assistant attorney general, they could come in and sue to divest the acquired company. But if I could get the court to order us to do it, then I'd really tie it up.

So we worked out with the government a procedure in which California would become a party to the Jersey-Kentucky suit, and we agreed on a form of decree under which California would be ordered to merge with Kentucky and thereafter to buy a certain

amount of gasoline from independent refineries and to extend its marketing operations in the Southeast.

At the same time we looked up the law and made certain that Jersey did not have to be notified of the hearing before the court at which this decree would be entered.

When we were ready the government made a date with the judge in the Jersey-Kentucky case to see him in chambers.

Hicke: This is the antitrust division?

Kirkham: Yes, in the antitrust suit. They didn't mention to the judge that they weren't notifying Jersey; they just asked for a conference, routine, and the judge granted it. So then he showed up in his chambers and suddenly found not a couple of the government lawyers and a couple of Standard of Jersey lawyers and Kentucky lawyers, but a whole new array of lawyers. I was there with a group from Standard of California; and Charlie Middleton was there with his group representing Standard of Kentucky; the Department of Justice was there with a group led by the chief of litigation. The judge came in and said, "My goodness, gentlemen, what is this?" [chuckles] And he didn't notice that Standard of New Jersey wasn't represented.

Gordy Spivak made the initial presentation, explaining that the government had a proposal to make for the disposition of the Kentucky case as far as Standard of Kentucky was concerned. As he proceeded the judge began to realize he was into something important and unusual. He said, "Well, wait a minute, where are the attorneys for Standard of New Jersey?" And Gordy Spivak, being well prepared--

Hicke: By you?

Kirkham: --said, "They're not here. They haven't been notified, Your Honor, because the problem is one that does not concern them." Then he began talking about the terms of the proposed decree. Suddenly the judge said, "Oh, by the way gentlemen, Mr. So-and-so is here," and he pointed to him, "He represents the press. You don't mind, I suppose, if he participates in these discussions."

Jim O'Brien, who was sitting next to me, and I looked at each other. The last thing in the world we wanted was to have this reporter jump up and rush out of the room and get on the wire. So I asked Jim to take charge. [both laugh] He went over and sat by him. When the merger plan of Standard of Kentucky and Standard of California began to unfold, the reporter started to jump up. Jim whispered, "Now wait a minute, wait a minute, the

judge hasn't ruled yet. If you get on the wire now, you're going to have a story that may change. If you just stick with me until this is over, you'll have a real story." So Jim held him right there. [more laughter by both]

The judge finally said, almost whimsically, "Well, gentlemen, you don't expect me to sign this right now, do you? Give me a little time to consider it." So we of course agreed. He said, "I'll see you in court in an hour." So we went out to court and everybody was watching everybody to make sure that nobody got away.

Hicke: Was Jim O'Brien still holding onto the reporter?

Kirkham: Jim O'Brien was still holding onto the press. Stan Natcher, Standard's public relations director at the time, was standing out at the outer door to check on anybody coming in or going out, and he sent a message in once about some mysterious person who we'd better check out. It turned out to be Charlie Middleton's secretary [both laugh], so that was all right.

Finally the judge came in and got on the bench and announced the opening of court. Just then the marshal went up and whispered to him and he said, "Oh, gentlemen, you know the law requires the courthouse be open when court's in session." He said, "The front doors haven't been unlocked yet." You see, our whole group had entered court through the back doors leading from the judge's chambers. So the marshal went out and unlocked the doors and then we kept looking for anybody coming in or going out.

Finally the judge said, "Well, gentlemen, I've been over this, and it seems to me a very wise solution to the whole problem. I'm prepared to sign the decree." So he signed all the papers and then Jim let the press loose [hearty laughter by both] and it hit the New York Exchange and the London Exchange and the Paris Bourse, and it really hit Standard of Jersey in New York.

Then Standard of New Jersey did a very silly thing. It was furious, absolutely furious. Their biggest customer covering the whole southeastern United States cut off. In anger, they immediately instituted a program to move into Kentucky's territory, not with competition--which we expected--but with a massive program of unfair competition. They immediately acquired service stations all over the South, put the Esso name on them, and brought a suit for a declaratory judgment giving them the right to use the name Esso in Kentucky territory. We counterclaimed for an injunction to enjoin them from using the trademark Esso.

Hicke: Now, why was that?

Kirkham: Because Esso was confusingly similar with Standard Oil. "Esso" came from Standard Oil; it was just a spelling out of "S.O." "S.O.," as well as "Standard Oil," were Kentucky trademarks appearing on Standard products all over the Kentucky territory.

Hicke: Socal, appeared on Socal.

Kirkham: Not in Standard of Kentucky's or Jersey's territory.

Hicke: Oh, okay.

Kirkham: Jersey opened red, white, and blue stations identical in appearance with those of Kentucky and put the Esso sign up. Since "Esso" meant "Standard Oil" to most customers, Kentucky's customers flocked into Esso stations thinking they were buying from the same company.

Well, I have to end this story sometime, so I'll only say that after a pretrial and trial extending over a longer period, we were told, than any other case in the history of the Southern District of Mississippi, an appeal to the court of appeals and certiorari to the Supreme Court of the United States, we won a complete victory. The injunction we obtained forbidding Jersey from using its trademark "Esso" in our territory ultimately led to Jersey's adoption of the nonconfusing Exxon mark, and the money settlement we accepted more than reimbursed Standard for all its expenses and costs of litigation.

Our trademark counsel, Beverly Pattishall from Chicago, did a splendid job as trial counsel, with outstanding help from Mike Richter, Jack Sutro, Jr., Jim Atkin, and others from our firm. With the help of everyone, I made the closing argument in the trial court and also briefed and argued the case on appeal. Bill Mussman was indispensable, heading up the work in San Francisco while I was in Washington or Mississippi. The trial was bitter at times. Jersey did some incredible things, among others putting more than one hundred Pinkerton detectives on our lawyers and economic staff who were gathering evidence of confusion, and even bugging the rooms of our lawyers. One of them was a young man who had his bride with him after just returning from their honeymoon. Young Jack Sutro heard about the tapes taken during this surveillance in a series of cloak and dagger meetings with a disgruntled Pinkerton employee. After an acid hearing at which, believe me, the old Southern judge's instincts as a gentleman were deeply offended, he ordered all tapes and memoranda destroyed without anyone reading or hearing them.

[Interview 6: February 7, 1989]

Kirkham: You have asked me about public service. And I will be glad to come to that. But first, let me reminisce for a moment.

More Than Just Taking Out Goiters: Diversity in Practice

Kirkham: One of the things that's really interesting to me [speaking slowly], I was just running through some of my briefs up here--the first time I've seen many of them in thirty or forty years--and the thing that really strikes me again, as I look back over the years of the practice of law, is the diversity in practice. That's something I mentioned, you remember, in the talk I gave. It's what Chief Justice Hughes said in contrasting the work of his brother-in-law, who was a surgeon and constantly took out goiters. I mean, a lawyer's life is the opposite of repetitive.

I was just writing down some of these things. I think I told you about the St. Paul Fire and Marine case, that was one of the earliest ones. That involved the jettison of a deck cargo from a sailing vessel in a storm in the Gulf of Alaska during World War I, in 1917. I had that thing thrown in my lap to litigate in the 1930s. It was a proceeding to limit liability under the Admiralty Law.¹ Then I told you about gold mining in Alaska, gold mining in the Philippines. Also about San Francisco's municipal railways.

Then there was the Samoa case; whether or not the antitrust laws apply in the island of Samoa.² That was Bill Mussman's case. The government's position there was simply farcical. It sued Standard for conspiring to restrain trade in American Samoa. Standard had one little operation that didn't do as much business as a single service station in this country. Bill moved to dismiss on the ground the Sherman Act didn't apply to Samoa, which was not a "territory" of the United States but one of its "possessions," where we had purposely left in effect the old native mai tai system of law under which land was owned by the tribe and business was conducted at the pleasure of the chief.

¹Pacific Freighters v. St. Paul Fire & Marine Ins. Co., 109 F.2d 310 (9th Cir. 1940).

²United States v. Standard Oil Co., 404 U.S. 558 (1972).

Not even the Constitution of the United States was made applicable, because its provision against involuntary servitude might conflict with tribal law! Obviously, the Sherman Act didn't apply and the trial judge so held, but the Supreme Court overruled him without even giving us a hearing!

I got into the case when it went to the Supreme Court and am still outraged. We got one little dividend. The government had built this into a big case, kept it in the courts for years, subjected Standard to hundreds and hundreds of thousands of dollars in costs and legal fees, so that when it came to fashioning a decree, the Court treated it like a big deal and ordered a hearing in Samoa--with more expenses and large fees. When the judge finally got down there and saw one little tank and a grocery store business, he said, "My God! Is this what this whole case has been about?"

But to return to my point--the diversity in the practice of law: storms in the Gulf of Alaska; gold mining in Alaska and the Philippines; the mai tai tribal system of law in Samoa; and--to go on--the numerous facets of the oil industry in this country and abroad; endless litigation about the gas industry from the Federal Power Commission to the Supreme Court.

I'll never forget the night Jim Atkin and I were writing a proposed form of brief for the Federal Power Commission to file in the Supreme Court in one of the gas cases. We didn't get the opportunity to submit this proposed brief until late in the afternoon, and whatever we proposed had to be delivered to the commission the next day. It was most of the night at top speed, or forget it.

Justin Wolfe, our counsel in Washington, D.C., obtained for us a young secretary he said was the fastest and best he had ever used. And she was a jewel. I started dictating about 6 o'clock and we went on without a break. She would have a draft back to me almost before I could get my thoughts and notes together for the next dictation.

Suddenly, as I was about to dictate the third or fourth installment, she said, "Mr. Kirkham, don't you ever eat?" I looked at my watch; it was nearly 10 o'clock. I said, "Oh, forgive me, I'm sorry, I forgot. Jim, please run across the street and get this young lady a couple of hamburgers." She looked at me, pokerfaced, and said, "Mr. Kirkham, if I eat one more hamburger, I'll vomit." I said, "Jim, take this young lady to the Statler"--it was half a block away--"and get her everything she wants in the best dinner they serve. We can't

lose her now. We have too much to do." They weren't long and we finished up well before dawn.

But to go on:

Litigation for the telephone company involving rate making, accelerated depreciation, division of revenues, and antitrust matters; tax litigation to the Supreme Court involving depletion allowance, wartime excess profits taxes, post exchange sales; litigation involving the allocation formula of the Alaska income tax, the taxability of sales by states on goods being exported, the validity of restrictions on bonded indebtedness; litigation involving demurrage charges by railroads in Nevada; litigation for Colgate-Palmolive and Best Foods for trademark infringement; cases involving Railway Express and Western Union; defending Sears Roebuck for false advertising; the loyalty oath litigation involving the University of California; contract and patent cases in the semiconductor and aerotech industries; the right of TWA [Trans World Airways] to use facilities at the San Francisco airport; litigation re Visa and other bank credit cards; litigation in the Court of Customs and Patent Appeals regarding the power of the president to modify rates of duty under the Trade Agreement Act; litigation regarding water conditioning devices; preparing patent licensing agreements and construction contracts for wartime production of dried dairy products and numerous problems regarding wartime restrictions, including litigation over price controls; litigation regarding labor trouble in Alaska Packers' salmon fishing fleet and the problems under the Alaska Unemployment Compensation Act which followed.

Alaska Packers was Marshall Madison's client. He tried the case but asked me to take over when the case went to the Supreme Court. I briefed it, but then, before I went to Washington to argue it, it occurred to me that Gene Prince, notwithstanding his broad appellate practice, had never argued a case in the Supreme Court of the United States. I asked him if he wouldn't like to argue this case. He said he would. He did and won it.

But again to go on with the kaleidoscope:

Antitrust cases involving not only the oil industry but the electronics industry, the evaporated milk industry, the trucking industry, the chemical and fabric industries, the heavy equipment industry, the shipping industry, the food industry, the sugar industry, the steel industry, the hardware industry, the fire extinguisher industry--truly a panorama of almost endless variety. As I look back on it, I see no greener pasture in any other life. The practice of law has been my life and it has been a rewarding one.

And now for a few final words in answer to your inquiry about public service.

Early in my work I was active in the State Bar and served on a number of committees of that Bar, including, I think it's called, the Committee on the Administration of Justice. I also served as a member of the Board of Directors of the Bar Association of San Francisco, and for two or three years as a member of the committee of that association which selects the nominees for its officers for the ensuing year. I was the "young guard" of that committee which had as additional members the grand "old guard" of Theodore (Teddy) Roche, Eustace Cullinan, Sr., and Garrett McEnerny, Sr. The stories I heard about the "old days" at the bar in San Francisco during those luncheon meetings were priceless.

Later on my practice was mostly before the federal courts--my activities mostly in that field.

I suppose I could start by saying that my service as law clerk to Justice Sutherland and Chief Justice Hughes, as well as writing, with Robbie, a book on the jurisdiction of the Supreme Court of the United States, could be classified as public service. In any event, the clerkships were the foundation for my life-long membership in the federal bar association. My work with the Court also led to appointments by the Court to work in public service: the revision of the General Orders and Forms in Bankruptcy in 1935--1936 it was, I guess, we can check it in the reports¹--and again, after passage of the Chandler Act, in 1938 and '39. The latter was a, oh, rather large and difficult task. I was in Washington for several months.

Hicke: This is the bankruptcy?

Kirkham: Yes.

Hicke: That was right when you'd been invited to join the firm and you were about ready to do so, and then they asked you to stay around for awhile in Washington and do this revision.

Kirkham: No, that was the first one.

Hicke: Oh, okay. This is the one in '38 and '39.

Kirkham: Yes. The second one was--I held hearings at the Supreme Court attended by members of the National Bankruptcy Conference, the

¹297 U.S. 735.

National Association of Referees, and representatives of the Departments of Commerce and Justice, and other interested persons.

My final recommendations were adopted by the Court and published in the United States Supreme Court Reports, 305 U.S. 677.

Hicke: Do you recall any specific changes?

Kirkham: Oh, it was a complete revision. The Chandler Act had changed the law.

But, to go on:

During the war we were all engaged in semi-public service. Practically all of our practice related to work being done for the armed services. Litigation, of course, was suspended, and we were working on supply contracts and dealing with the numerous regulations that related to working with the government and the armed services.

Hicke: Prices, and quotas, and that sort of thing?

Kirkham: That's right. After the war a number of large cases arose relating to price, alleged overcharges of prices fixed by the government. One of the biggest of those was against Golden State Company for alleged overcharging on sales to the armed services of dried milk products, which I won.

[tape interruption]

In any event, after the war the antitrust litigation began to explode, and I became interested in that, not only from the standpoint of my clients, but also from the standpoint of the appropriate enforcement of the laws as far as the public was concerned.

I remember Bill Simon led a group that was seeking to have the American Bar Association form an antitrust section. They enlisted the support, among others, of John Chadwell and Templeton Brown in Chicago, and of myself and Herbert Clark on the West Coast. Finally, after the meeting of the American Bar Association in San Francisco in 1952, that section was set up. Ed Johnson, as I recall, was the first chairman and not long afterwards, I was appointed on the council and later elected as chairman of the section. That was in 1961.

Hicke: This is the Section of Antitrust Law?

Kirkham: Yes. In the meantime, I had served from 1953 to 1955 on the Attorney General's National Committee to study the Antitrust Laws. This was a serious and demanding task. The Committee's 400-page report had a definite effect on the scope and enforcement of the antitrust laws.

Incidentally, the formation of this committee was in line with the suggestion made by my partner Jim O'Brien in a speech delivered at the first meeting of the Section of Antitrust Law in San Francisco on September 17, 1952.¹

For many years I served as a delegate to the Ninth Circuit Judicial Conference and as a member of the special committee of that conference on judicial disability. I also served for a number of years on the Research Committee of the American Bar Foundation.

In 1973 the president appointed me a member of the Commission on Revision of the Federal Court Appellate System, and later I testified before the Judiciary Committee of the Senate on bills implementing the recommendations of that Committee.

Later I was selected on the recommendation of the Chief Justice of the United States as one of the six speakers to address the Pound Revisited Conference in St. Paul in 1976. This conference, sponsored by the Chief Justice of the United States, the chief justice of each of the fifty states, and the American Bar Association, was convened on the seventieth anniversary and at the scene of Dean Roscoe Pound's famous speech to the American Bar Association in 1906 on The Causes of Popular Dissatisfaction with the Administration of Justice. It was described by Chief Justice Burger:

"The conference we open tonight is significant because it is the first time that the chief justices of the highest state courts, the leaders of the federal courts, leaders of the organized bar, legal scholars and thoughtful members of other disciplines have joined forces to take a hard look at how our system of justice is working."

The proceedings of this conference are reported in 70 F.R.D. 79 and 80 F.R.D. 497.

Following the conference, I served on the American Bar Association Pound Conference Follow-Up Task Force, chaired by the attorney general, and on the Pound Committee and the Committee on

¹Proceedings of Section of Antitrust Law, Vol. 1, p. 76, 90.

Special Problems in the Administration of Justice of the American College of Trial Lawyers; also on the Federal Judicial Center Committee to Study Discovery abuses.

From time to time I have given lectures on various legal topics to the Judicial Conferences of the Second, Seventh, Eighth and Ninth Federal Circuits; to the Conference of Metropolitan Chief Judges, the National Conference of Bar Presidents, the National Conference Board, the New York State Bar Association and the American Bar Association. I gave the Robert Howard Jackson lecture at the National College of the State Judiciary, and was later the commencement speaker at that college.

In 1983, I was appointed a member of the Advisory Board of Project '87 (the bicentennial commemoration of the adoption of the Constitution).

I served as a member of the Board of Visitors of the University of Chicago Law School and of the J. Reuben Clark Law School of the Brigham Young University; also as a member of the Parents Committee of the Harvard Law School.

In 1965, I received the Distinguished Alumni Award of Delta Theta Phi Law fraternity; in 1970, the National Alumni Achievement Award of George Washington University; in 1976, the Alumni Merit Honor Award of the University of Utah; and in 1989, the Brigham Young University created the Francis R. Kirkham Professorship in Law at its law school.

[Interview 7: February 6, 1990]

Hicke: Do you have anything to add in conclusion?

Kirkham: I can't think of anything better than to repeat what I said earlier--that I could not overstate the satisfaction my lifetime practice of law has brought to me--its endless variety, its endless challenge. I could not have been with a better firm, nor with more capable and stimulating partners and associates.

As I look back over sixty years of practice, it would be hard for me to conceive of any other profession that could produce the colors of such a broad canvas from the palette of one short lifetime.

As I once said in a talk to a group of law students, "Law in its truest sense is a learned profession. It is the very expression of man's moral achievement, the measure of his civilization. It is a profession married to the humanities, to philosophy, to politics; it demands felicity of expression, the

power of reasoning and of comprehension, and a constant inquiry into the experiences of yesterday and the goals of tomorrow. I know of no other profession more rewarding, even as it places upon all of us its exacting demands."

Hicke: Well, I'd just like to thank you very much for contributing so much to the history project, as well as to the history itself of Pillsbury, Madison & Sutro.

Transcribing and revisions by:

Georgia K. Stith
Charlotte S. Warnell
Shannon L. Page

INDEX--Francis Kirkham

- Alexander & Baldwin, 69-71, 86
 Allison, Bill, 11
 American Bar Association, 14, 62, 97, 123-124
 American Viscose, 86
 Anderson, Myron, 7
 antitrust law, 46-47, 50-56, 66-68, 69-79, 83-86, 107-118, 121, 123-124
 Appel, Cyril, 46
 Aramco, 79-80
 Arnold, Thurman, 48-49, 51, 53, 55
 Atkin, Jim, 118, 120
 Austern, T. Tommy, 49
- Badger, Ashby, 4
 Badger, Carl, 4
 Badger, Carlos, 4
 Bank of America
 Visa, 75-76
 Barrymore, John, 26
 Basalt Rock Company, 63-68
 Bates, John B., 75
 Benguet Consolidated Mining Company, 42-45
 Bennett, Eugene, 27, 30, 55, 90-91, 92, 105
 Berg, W. H., 36
 Berlinger, Henry, 22
 Bicks, Bob, 112, 113
 Biggs, James Crawford, 61-62
 Bishop, Toby, 106-108
 Bohemian Grove, 66-67
 Borden Company, 50
 Bowen, Judge _____, 76-78
 Bowles, General _____, 91
 Brandeis, Louis, 49-50
 Brigham Young University, 1-2, 125
 Bronson, Roy, 64
 Brown, Al, 81, 111
 Brown, Hillyer, 67, 68, 79, 83, 84, 110
 Brown, Templeton, 123
 Buck, Frank, 103
- Bullard, Bob, 97
 Burdell, Charlie, 76-77
 Burger, Warren, 124
- Cadigan, Neal, 69-71
 California Supreme Court, 33, 43, 45, 58, 101
 California Railroad Commission, 33-34, 46
 Carr, Charles H., 67
 Chadwell, John, 123
 Clapper, Olive, 22
 Clapper, Raymond, 22
 Clark, Herbert, 52, 123
 Clark, Samuel O., Jr., 59, 60-61
 Clark, Tom, 55
 Collier, Harry, 80
 Cravath, Swaine & Moore (New York City), 5, 16, 18-19, 25, 87
 Cropley, Elmore, 65
 Cullinan, Eustace, Sr., 122
- Davies, Paul, 86
 Davies, Ralph K., 35-36, 86
 Denman, William, 52-54
 Depression, 1930s, U.S., 17, 23, 31
 Doby, Allen A., 72-73
 Douglas, William O., 86
- education, 2-10
 Edward VII, 95
 el Gabri, Faris, 100
 el Gabri, Salim, 99-100
 Erceg, Mike, 40-42
 Evaporated Milk Association, 48-56
 Evis, Mr. _____, 92-95
- Fairbanks Exploration Company, Alaska, 40-42
 FMC (Food Machinery Corporation), 86
 Follis, Gwin, 82, 108
 Frankfurter, Felix, 14-15, 22, 49-50, 60

- Fuller, Maurice D. L., 31
Fullerton, Hugh, 88
- Garland, Judy, 105
Gartner, George, 40-42
Gartner, Murray, 63, 65, 66
George Washington University, 4-10, 11, 125
Goldberg, Arthur J., 86
Golden State Company, 101-104, 106-108, 123
Goodell, C. Julian, 44-45
Goodrich, Ed, 22
Gossett, Bill, 14
Gossett, Elizabeth Hughes, 14
Gray, Allan, 11, 12
Griswold, Erwin N., 61
Gunther, John, 35
- Haberman, David I., 72-73
Haddock, George, 68
Hall, John, 57
Haven, Tom, 81
Hawkins, Fred, 97
Hildebrand, Clif, 31
Hill, Mrs. _____, 25
Hogue, Phil, 28
Horrow, Harry, 63, 81, 93, 95
Howland, Wallace, 51, 53
Hughes, Charles Evans, 8, 9, 12, 14-15, 16, 27, 62, 119, 122
- Ickes, Harold, 21
International Harvester, 32-33
- Jackson, Robert H., 46, 47, 63
Janin, Louis, 64
Jayne, Max, 113
Johnson, Ed, 123
Johnson, Hiram, 43
- Kaapcke, Wallace, 27-29, 70, 92, 101, 102, 115
Kahn, _____, 47
Katzenbach, Nicholas, 70-71
Kefauver, Estes, committee, 111, 115
Kennedy, John F., 113
Kilgore, Bill, 71
- Kingsbury, Kenneth R., 36
Kirkham, Ellis (wife), 6-9, 12, 16, 18, 35, 49, 87, 91, 96, 97, 104, 105-106
Kirkham, James F. (son), 75
Kirkham, _____ (father), 1-4
Kirkham, _____ (mother), 1-3
Korte, Norbert, 34
Kuechler, Larry, 51-52
KySo (Kentucky Standard Oil), 108-118
- Lampson, Ollie, 67-68
Lasky, Moses, 70
Lawler, Oscar, 20, 24-25
Lawrence, Hamilton, 43
Levin, Jerry, 97
Little, Russ, 103
Littman, Allan, 38-39
Loevinger, Lee, 113-115
- McAllister, Breck, 27
McBaine, Turner, 81, 82, 83
McCartney, Noble, 65
McGlanahan, Ellis, 67
McEnerney, Garret, 43-44, 122
McKay, David O., 99-100
MacLaury, Dick, 69
Madison, Elena, 23
Madison, Frank, 23, 26, 31, 32, 34, 37, 88, 89
Madison, Marshall, 23, 30, 34-35, 36, 57, 69, 79, 81, 83, 88, 92, 104-105, 121
Market Street Railway, 33-34, 45-48, 58
Marshall, Eleanor, 49
Marshall, Francis, 32, 89-90
Marshall, Howard, 35-36, 48, 49, 79
Mason, "Bummy," 30
Mason, Selby, 30
Mathew, Judge _____, 21-22
Maw, Herbert, 5
Michael, Jimmy, 93
Middleton, Charlie, 116, 117
Mitchell, Billy, 22
Moore, George, 76-79
Mormon (LDS) church, 1-2, 98, 101

- Mussman, William E., Sr., 63, 69, 71, 74, 76, 78, 86, 115, 118, 119
- Natcher, Stan, 117
- Neal, Phil, 47, 69, 92
- Newmark, Henry, 97
- Newmark, Mrs. _____, 97
- Nielson, Sigvald, 36, 59, 61, 79, 81
- Ninth Circuit Court of Appeals, 50-51, 64, 86, 93
- Noble, Charles, 113
- O'Brien, James E., 71, 72, 73-74, 80, 81, 83, 84, 116-117, 124
- Oppenheim, S. Chesterfield, 6
- Orrick, Bill, 70-71
- Paramount Pictures, 55
- Pattishall, Beverly, 118
- Perkins, Idonah Slade, 42-45
- Peters, P. J., 45
- Peterson, Ted, 67
- Pillsbury, E. S., 88, 89, 97
- Pillsbury, Horace, 29, 88
- Pillsbury, Madison & Sutro, *passim*
- administration, 37
- cartel case, 69-76
- during World War II, 27-31
- Eagle Oil Refining and Basalt Rock, 63-68
- Erceg v. Fairbanks Exploration, 40-42
- ethics, 38-39
- Evaporated Milk Association et al v. Hon. Michael J. Roche, 48-56
- Evis water softener case, 92-95
- first impressions of, 23-27
- Golden State milk case, 101-104, 106-108
- hires Kirkham, 16-19
- Idonah Slade Perkins v. Benguet Consolidated Mining Company, 42-45
- Kirkham as general counsel, Standard Oil of California, 57-86
- KySo merger, 108-118
- Little Mother Hubbard case, 1952, 68-69
- Market Street Railway case, 45-48
- partners, 32-36
- partnership meetings, 91-92
- salaries, 87-88
- Section 36 case, 20-23
- smoking, 88-90
- Standard Oil of California v. Moore, 76-79
- Pound, Roscoe, 9, 124
- Powell, Tom, 113
- Powell v. Alabama [Scottsboro case], 6, 13
- Prael, Charles F., 55
- Prince, Eugene, 6-7, 20, 22, 27, 29, 30, 34-35, 39, 49, 50-51, 66-67, 79-82, 88-89, 90-91, 92, 97, 121
- Prince, Mildred, 97
- Raum, Arnold, 59-61
- Reed, Stanley, 61-62
- Richberg, Donald, 22
- Richter, Mike, 118
- Roberts, Frank, 81
- Robertson, Reynolds, 16, 24
- Robinson, _____, 52
- Roche, Theodore J., 43-45, 51-53, 122
- Roosevelt, Franklin D., 42, 49-50, 54, 61
- Ross, Jim, 27
- San Francisco Municipal Railway, 46-47
- Seymour, Whitney North, 61-62
- Shipp, Ellis R., 8
- Shults, Al, 102
- Simon, Bill, 123
- Smith, Buddy, 108, 109, 114-115
- Smith, Felix, 10, 24-25, 28, 29, 32, 33-36, 37, 39, 45-46, 58, 66-67, 88, 91, 92
- Spatz, Carl "Tooley", 22

- Spaatz, Ruth, 22
 Spaulding, Hector, 6-7
 Spivak, Gordy, 113, 116
 Standard Oil Company of
 California, 20-22, 25, 35, 36,
 37, 57-86 *passim*, 93, 95, 102,
 108-118, 119-120
 Steffan, Dave, 115
 Steffen Waste, 106-107
 Stephens, Harold, 16-17, 18, 47
 Stewart, Sam, 75
 Stock Exchange Club, San
 Francisco, 91-92
 Stone, _____ (Chief Justice), 54
 Sutherland, George, 6, 8, 11-17,
 27, 122
 Sutro, Adelaide (Bullard), 96, 97
 Sutro, Alfred, 18, 19, 23, 24-25,
 26, 29, 32-33, 37, 39, 41, 42-
 43, 46, 50, 55, 88-89, 91, 95-
 97
 Sutro, Mrs. Alfred (née Newmark),
 91, 95-97
 Sutro, Betty, 18, 97
 Sutro, Cherie, 23
 Sutro, John A., Jr., 9, 18, 19,
 24, 27, 30, 55-56, 80, 88, 89,
 92, 96, 97, 102, 118
 Sutro, Margaret, 96
 Sutro, Oscar, 18, 19-20, 37, 42-
 43

 Tanner, Alfred B., 79
 Taylor, Hugh, 38, 81
 Taylor, Grant, 58
 Turnbow, Grover, 102-104
 Turner, Donald F., 72

 United States Supreme Court, 11-
 17, 19, 20, 22, 23-26, 27, 37,
 45, 46, 47, 54-55, 58-62, 63-
 68, 84, 86, 87, 118, 120-121,
 122-123
 University of Utah, 3, 5, 7, 125
 Utah Agricultural College, 3

 Van Devanter, Willis, 62

 Warren, Earl, 90

 Western Union Co., 26-27, 37
 Wilbur, _____ (Chief Judge), 53
 Willey, Hal, 66
 Wilson, Lyle, 22
 Wolfe, Justin, 120
 Wood, Fred, 16, 18-19

 Yankwich, Leon R., 21, 27

Carole E. Hicke

B.A., University of Iowa; economics

M.A., San Francisco State University; U.S. history with emphasis on the American West; thesis: "James Rolph, Mayor of San Francisco."

Interviewer/editor/writer, 1978-present, for business and law firm histories, specializing in oral history techniques. Independently employed.

Interviewer-editor, Regional Oral History Office, University of California, Berkeley, 1985 to present, specializing in California legal, political, and business histories.

Author: Heller, Ehrman, White & McAuliffe: A Century of Service to Clients and Community, 1991.

Editor (1980-1985) newsletters of two professional historical associations: Western Association of Women Historians and Coordinating Committee for Women in the Historical Profession.

Visiting lecturer, San Francisco State University in U.S. history, history of California, history of Hawaii, legal oral history.

