

**CELEBRATION OF THE 150TH ANNIVERSARY
OF THE SUPREME COURT
FEBRUARY 8, 2000
SACRAMENTO, CALIFORNIA**

The Supreme Court of California convened in its courtroom in the B.F. Hastings Building, 1002 2nd Street, Old Sacramento, on February 8, 2000 at 9:00 a.m.

Present: Chief Justice Ronald M. George, presiding, and Associate Justices Mosk, Kennard, Baxter, Werdegar, Chin, and Brown.

Officers present: Frederick K. Ohlrich, Clerk; Brian Clearwater, Calendar Coordinator; and Harry Kinney, Supervising Marshal.

CHIEF JUSTICE GEORGE:

On behalf of the entire court, welcome to this special session commemorating the sesquicentennial of the California Supreme Court. Before oral argument this morning, we shall hear from four speakers as part of the commemoration of the court's 150th anniversary.

I first want to thank the California Department of Parks and Recreation for the substantial effort they have undertaken to prepare this building and courtroom for this event. To the best of our knowledge, this room appears very much as it did when it first was used as a courtroom in February 1855.

It looked very different only two months ago — among other things, there was substantial water damage throughout.

It is hoped that eventually the adjoining chambers, as well as this courtroom, will be restored to a condition that will allow regular tours and other commemorative uses of the site. In the meantime, however, we again express our appreciation to the state Department of Parks and Recreation for its beautiful renovation of this courtroom, enabling its history to be preserved for the enjoyment and edification of the public.

Now I should like to turn to this morning's program. The first speaker is Mr. Jake Dear, a senior staff attorney on my staff, who has served the Supreme Court for some 16 years. He began as an annual law clerk for Justice Mosk, and then worked for Justice Joseph Grodin. After that, he was a senior staff attorney for former Chief Justice Lucas, joining my staff when I became Chief Justice in 1996.

Jake's real qualification for speaking to you today stems not from his work as an excellent staff attorney, but from a side interest he has developed since the Supreme Court returned to its historic home in the State Building 13 months ago. Let me first give you some background.

The court vacated its historic quarters in San Francisco rather abruptly after the October 1989 earthquake rendered the building uninhabitable. After spending time in an adjacent state facility, and moving to a private building in 1991, the court was able to return to a structure that had been fully renovated in keeping with its historic traditions.

In addition to obtaining and displaying artifacts from the Supreme Court's past, our efforts focused on a unique project — obtaining photographs of historic courthouses from each of California's 58 counties. It is, after all, in the individual county courts that cases ultimately heard by the Supreme Court are first filed and decided.

Collecting these portraits turned out to be surprisingly difficult. Requests to courts, chambers of commerce, local and state libraries, county historical societies, and others who might have a desired photograph somewhere on a back shelf, finally resulted in a wonderful display at the State Building of the varied locations in which California's trial courts have held proceedings over the past 150 years.

This project also stirred interest in the Supreme Court's own history. As we returned to our historic building, we began to wonder where the Supreme Court had sat during its almost one and a half centuries. As Jake Dear will describe, through a somewhat convoluted chain of events, the Supreme Court has been headquartered in San Francisco for most of its existence, rather than in our state capital, with the executive and legislative branches of state government. Jake began the task of searching for the locations occupied by the court from its inception, studying the available histories of the court, and discovered that these works all fell short in describing the court's peregrinations, particularly in the second half of the 19th century.

We learned through this research that the court bounced back and forth between locations in Sacramento, San Francisco, and San Jose, moving some 22 times before finally settling down in the San Francisco Civic Center Complex last year. Jake uncovered six previously unknown locations through clever detective work, perseverance, and creative thinking. He reviewed old court records, visited the historical societies in San Francisco, corresponded with knowledgeable individuals in San Jose and Sacramento, visited the state's archives here in Sacramento, scoured the photographic files of the San Francisco Public Library's historical records room and the California Historical Society, reviewed city directories (the precursors to today's telephone books), and generally dedicated an enormous amount of time and thought to tracking down not only every location, but photographs, and in some cases lithographs, of each site. I should mention that Levin, a staff attorney at the Third District Court of Appeal here in Sacramento, who is in the audience today, was of great assistance in this regard.

Along the way, Jake Dear also collected pictures of the commissioners of the court, who assisted the justices from 1885 to 1905, when the first three District Courts of Appeal were created, to ease the burden on the Supreme Court. In addition, a variety of newly discovered photographs and documents depicting the justices, the court, the City of San Francisco, and various historic events that affected the court, now are displayed in the court's hallways. They join a preexisting gallery of historic photographs showing

each individual justice of the court, dating back to Serranus Hastings, the first Chief Justice, up to the current members of the court.

One hundred and fifty years truly is not that long a time. As was noted at a recent celebration of Justice Mosk's record tenure on the court, his more than thirty-five years of service spans almost one-quarter of the court's history. The composition of the court today includes the 86th justice to serve on the court, Justice Mosk, and the 110th justice to serve, the most recent justice to join the court, Justice Brown—as well as the 27th Chief Justice.

The history of the court sometimes seems a bit tame today compared to the stories of duels and drink and vigilantes in its early days. But what is perhaps most remarkable is that despite frequent moves, constitutional changes, strong personalities, and even earthquakes, the work of the court has continued without a break. It is a testament to our predecessors that through the early and often turbulent days of California, they led the way in establishing the rule of law in our state, helping to create the framework of a strong and independent judiciary that serves the people of California today.

And now, I would like to turn to Jake Dear, who will give you some more detail about the court's early development.

MR. JAKE DEAR:

Chief Justice and Associate Justices of the court:

It is an honor to serve this court. And it is an honor to address you at this commemoration of the court's sesquicentennial.

Some might maintain that the actual anniversary was a few weeks ago—150 years after the first three justices were elected by the Legislature in San Jose and sworn into office. And others might say that the actual anniversary is about four weeks from now, on March 4—the date on which the court first met as a quorum, an event that was memorialized in the first paragraph on the first page of the court's first minute book. Historians may quibble about the precise anniversary, just as people recently have quibbled about the starting date of the new millennium—but I prefer to take a middle ground approach: here we are in this historic courtroom, halfway between the two possible historic date markers, so let's just split the difference and celebrate the anniversary today.

For the second half of its history to date, the California Supreme Court has been headquartered in San Francisco's Civic Center. But that relative stability contrasts sharply with the court's first 75 years, a period in which fire, flood, and politics forced the court to relocate 18 times—including at least two, and possibly three, moves into and out of this very courtroom and chambers. I will focus in these remarks primarily on this first half of the court's history.

Early in 1850, the Legislature sent the court's new clerk off to San Francisco to “rent a suitable room” and procure furniture and other essentials for the court's first term. The Daily Alta California—the leading newspaper of the day—reported on February 27,

1850, that “Mr. Thorpe, [clerk of the court,] has arrived in town to perform the duties of his new office.” The next day, Thorpe went shopping; he purchased supplies, including “1 large Journal full bound,” “4 bottles red ink,” “1 bottle black ink,” “3 gross Gillett’s pens,” “1 Parallel Ruler,” “12 sheets blotting paper,” “2 Hydrostatic Inkstands,” and, of course, “24 sticks red tape.”

Three days later, Thorpe procured quarters at \$1,000 for the month. Then, on Monday the 4th of March—six months before California became a state—the court met for the first time in the Graham House on Kearny Street at Pacific Avenue in San Francisco.

The Legislature directed the court to hold its terms in San Francisco through the end of 1851, and thereafter “at the seat of Government.” But it wasn’t clear where the seat of government was — San José, Vallejo, Benicia, Sacramento, and San Francisco all vied for the honor. So, succumbing to inertia, the court simply remained in San Francisco, but it didn’t stay long in its first quarters: the building—which had also become the site for San Francisco’s first City Hall—burned to the ground in one of numerous major fires that struck the city in the early 1850’s.

So the court moved, together with some key parts of city government, a few blocks down Kearny Street to the California Exchange building. A few doors away, at Portsmouth Square, stood the Jenny Lind Theater. By 1852, the theater had fallen on hard times and was for sale. (Perhaps this is because Jenny Lind, the famed Swedish singer for whom the theater was named, never made it out to San Francisco.) When the City of San Francisco tried to purchase the theater for use as city offices, taxpayers sued, claiming the purchase was illegal. After extensive litigation, this court held the purchase to be proper, and the city took possession of the theater.

Within a few months of the decision upholding the city’s purchase, the court moved—again with much of city government—into the refurbished theater. Presumably, the theater’s saloon, four billiard tables, and six bowling alleys were removed to make room for offices. The basic character of the neighborhood was little changed, however: next door remained the infamous El Dorado saloon, widely known as “a free-wheeling den of iniquity that catered to a not-altogether-reputable clientele.”

In 1854, the court abruptly packed up and moved to San Jose for about nine months — and then it just as abruptly packed up again and headed off to Sacramento, taking up quarters in this very site. Today’s next speaker, Lawrence Schei, will describe the circumstances surrounding these two and other related moves.

The court’s time at this site was certainly eventful, and even though not always decorous, it reflects the rough-and-ready nature of the period. Consider the story of the court’s seventh Reporter of Decisions, Harvey Lee, who worked in or around these premises in the late 1850’s.

Unlike his predecessors, Lee was appointed not by the court, but by the Legislature. The court was not very happy with this new arrangement, and there was some concern that Lee was not up to the job. Justice Steven Field later commented that Lee’s work was so defective that the judges sought to have the new law repealed and the

appointing authority returned to the court. A former dean of Boalt Hall School of Law picked up the story in a 1926 article:

“This [led] to a bitter feeling on [Lee’s] part toward the judges, and in a conversation with Mr. Fairfax, the clerk of the court, [Lee] gave vent to it in violent rage. Fairfax resented the attack, an altercation ensued, and Lee, who carried a sword cane, drew his sword and ran it into Fairfax’s body, inflicting a serious wound in the chest just above the heart. A second wound, not so serious as the first, followed, and Fairfax drew his pistol as Lee raised his sword for a third thrust.”

“[Fairfax] was about to shoot [in self-defense], but, restrained by the thought of Lee’s wife and children, let the pistol drop.” Evidently, this was widely circulated news, and it was said that “All California rang with the story of this heroic act.” I’m hoping that our current reporter and our brand-new clerk/administrator, both of whom are, thankfully, appointed by and therefore accountable to the court, will kindly reenact this scene outside after the morning session.

This and similar anecdotes (including, for example, Supreme Court Justice David Terry’s near-lynching by San Francisco vigilantes, after he knifed one of them in the neck) illustrate the rather unrefined times in which the first justices found themselves. But it would be a mistake to assume that the court was, as a general matter, populated by trigger-happy frontiersmen. From the start, the vast majority of justices were peaceful, albeit colorful, men (of course, all men) of impressive education, vast experience, and highest intellect — and the opinions they produced soon commanded nationwide respect for the institution. Indeed, decisions by Steven Field and other justices of the times still often stand as leading examples on the points resolved.

But back to local history. In 1857, the court moved temporarily a few blocks from here. It returned to this site a couple years later, and remained, except perhaps during the great flood, until moving to the newly constructed capitol building.

In 1872, the Legislature passed a statute requiring that the justices and court personnel must “reside at and keep their offices in the City of Sacramento.” Perhaps this planted nonconformist ideas in the justices’ heads, because only two years later, the court began keeping offices at, and holding many of its regular sessions in, San Francisco, on Clay Street. Then in 1874, the Legislature validated the court’s practice, permitting the court to sit in San Francisco part of the year, so long as the local government paid for the court’s accommodations. Later, the Legislature specified that the court should also travel regularly to hold hearings in both Sacramento and Los Angeles as well — a practice that continues to this day.

The impetus for this movement of the court’s headquarters from Sacramento back to San Francisco is unclear, but it appears that weather, water, and whisky had a lot to do with it. When the delegates to the 1879 Constitutional Convention considered proposals to require the court to hear all sessions “at the Capital of the State” (meaning Sacramento), the relative merits of the Sacramento, Los Angeles, and San Francisco sites were strongly contested.

In favor of Sacramento it was argued that the court should be based at the seat of government, and that the main alternative, San Francisco, was prone to earthquakes.

Opponents claimed that Sacramento had the highest death rate of any city of its size in the world, and its climate and whisky were bad.

Other delegates asserted that the court should at least regularly hold sessions at Los Angeles, because that city — described as a “great community composed of agriculturalists” — was bound to grow in size and stature, and was “about the only place in the State where you can get wine that is not adulterated.” But another delegate argued that “the climate down there is very hot, and a man soon gets lazy who lives in it. . . . And it would not be very long, if you have the Supreme Court down there, before you would see the Chief Justice, and . . . General Howard [a proponent of Los Angeles], walking arm in arm under huge Panama hats, hunting a cool place.” He summed up: “It will not do.”

Champions of San Francisco asserted that it was the center of commerce, and its weather was superior to that of Sacramento. One commented that if the court were based in Sacramento, “[t]he Judges will be seen some of these days coming out of the Court-room in a boat. . . .” Another asserted: “It is the hottest place outside of —_ the one down below that we read of. . . . If you put it in the Constitution that the Court shall sit . . . here in regular session all Summer, they will have to be regular salamanders.” But this testimony was impeached by a strong suggestion of bias. A Sacramento delegate stated: “Now, my colleague, Senator Herrington, . . . vilifies Sacramento to an extent which I think is not warranted. I can account for that. The gentleman has made some effort to get into good society here, and has been barred out. . . . I think what hurts my colleague, is the fact that the ladies of Sacramento have failed to appreciate him, and notice him.”

Ultimately, the drafters of the new Constitution left open the question of where the court should sit, and the court continued to use Clay Street in San Francisco as its headquarters, and continued to hear oral argument at that site as well as in Sacramento and Los Angeles.

In its first two decades after returning to San Francisco, the court was based at five different sites, mostly in the heart of the city. The turn of the 19th century found the court located in the Emporium Building on Market Street (we suspect, but have not verified, that it was situated in the women’s shoes department). It was still located there in April of 1906, when the great earthquake and fire gutted all but the shell of that structure. The court moved immediately to temporary quarters, and began the daunting task of rebuilding. Our own library records show that the court accepted an offer from a legal publisher to replace its numerous library books at “special fire prices” calculated on “the basis of their cost . . . plus a commission of 10 percent.”

After relocating twice more, the court finally found a permanent home in 1923, when it moved for the first time into its present quarters at 350 McAllister Street.

Since the early 1940’s, the court’s chambers on McAllister Street—subsequently named the Earl Warren State Building—have been home to some of the greatest justices to serve on the court. Justice, and soon Chief Justice, Phil Gibson served from 1939 until 1964; he was renowned for modernizing the courts. Justice, and later Chief Justice, Roger Traynor served from 1940 through 1970—and became one of the most respected and followed jurists in the history of the United States. Justice Raymond Peters, known

for his sharp mind, served 14 years on the court after first dedicating more than 20 years to the Court of Appeal. Justice Mathew Tobriner, another intellectual in the mold of Traynor, served two decades, from 1962 to 1982. And just recently, we have celebrated the longevity record of Justice Stanley Mosk, who served with the last three of these justices, and who, after more than 35 years, still graces this court with his wit and wisdom—may that continue for a long time.

In October 1989, the venerable Earl Warren Building suffered substantial damage in the Loma Prieta earthquake. Stairwell walls buckled, bookcases pitched out their heavy contents, and a large bronze ceiling light fixture crashed to the floor right next to the Chief Justice's desk. The court moved immediately into provisional quarters, and then to other temporary quarters, while it waited for renovation of the Earl Warren Building. In early 1999, it finally returned to the Earl Warren site, moving for at least the 22d time in its 150-year history.

Which brings us to today. From its rather humble and fitful beginnings, the California Supreme Court has grown to preside over the largest judicial system on earth—it is far larger than the federal judiciary, or that of any country—and it has become one of the most respected and influential courts in the nation.

This well-traveled court is now firmly rooted and serves the people from its historic and beautifully renovated quarters in San Francisco. But it seems especially appropriate that we celebrate the court's sesquicentennial here, in the oldest existing court site, where we can see, touch, and indeed smell the court's past, and where we can imagine, if not feel, the presence of the real people who worked in and for this court in its infancy, some 15 decades ago.

Thank you.

(For further detail and sources, together with photographs and drawings of the described sites, see Dear and Levin, *Historic Sites of the California Supreme Court*, 4 *California Supreme Court Historical Society Yearbook* (1998-1999).)

CHIEF JUSTICE GEORGE:

Thank you very much. As you can see, Jake truly has become the resident historian of the court, and we are most fortunate to have his assistance. An exhibit showing all the sites just described is set up for permanent display on the fourth floor of the Earl Warren Building in San Francisco, just outside the public entrance to our courtroom there. And I also should note that Jake personally, at home, framed not only most of those photographs but many of the other items on display in the court. In this endeavor, he was ably assisted by someone in the audience today — his son, Adam.

Next we shall hear from Mr. Lawrence Schei, who practiced law in Sacramento for almost five decades, beginning in 1940 and retiring several years ago. During that time he argued cases before the United States Supreme Court, this court, and our Courts of Appeal, and he has been very active in community matters as well as local and statewide bar groups. He has, for example, been significantly involved in continuing

education of the bar, and has served as president of the Sacramento County Bar Association.

MR. LAWRENCE SCHEI:

Chief Justice and Justices of the court: Thank you for giving me the privilege and the honor of participating in this celebration of the court's 150th anniversary. The people of Sacramento are pleased to see you here today. I am sure that you know that we welcome your presence here, as often as you want to come and for as long as you want to stay.

On February 2, 1855, just six days more than 145 years ago, the Supreme Court of California met in this room and listened to arguments in cases on appeal. What brought the court to Sacramento that day? Let us look at the record.

California's first Constitution, adopted on October 10, 1849, established a system of government for the state, including a judicial system consisting of trial courts and a three-judge Supreme Court. The Constitution of 1849 also provided: "The first session of the legislature shall be held at the Pueblo de San José; which place shall be the permanent seat of government, until removed by law: Provided, however, that two thirds of all the members elected to each House of the legislature shall concur in the passage of such law."

In 1851, two-thirds of the members of the Legislature voted to move the capital from San Jose to Vallejo. In 1853, they voted to move the capital again, this time to Benecia. On March 24, 1854, the Legislature, by majority vote, designated Sacramento as the capital of the state. The next day, March 25th, the Legislature decreed that the Supreme Court meet at the state capital.

Two days later, on March 27, the three justices of the court met in chambers. Associate Justice Alexander Wells, a resident of San Jose, and Associate Justice Solomon Heydenfeldt believed that the legislation making Vallejo the state capital had not been effective because Vallejo had not met conditions imposed by that legislation, and therefore San Jose was still the capital. Without calling for a hearing and without written opinion, Wells and Heydenfeldt voted to move the court's operations to San Jose. Chief Justice Hugh Murray dissented. Wells and Heydenfeldt then signed a minute order requiring the Sheriff of Santa Clara County to rent quarters in San Jose and to move the court's furnishings, books, and records into those quarters.

The Daily Alta California for March 31, 1854, describes the move in these words: "The archives, and a portion of the furniture of the Supreme Court, accompanied by the Clerk, took their departure yesterday for San Jose, in accordance with the decision recently rendered by the majority of the court. The court went off in a style in keeping with its supremacy. A handsome Express wagon of Messrs. Adams & Co., to which was harnessed the private horses of the proprietors, drew up before the door of the City Hall, and received the legal lore, handsomely bound, which has been accumulating in the Court

since its organization. The Court went off in dashing style, and we fancied that we saw the shades of Blackstone and Coke looking out of one of the windows of the City Hall.”

The court met in San Jose on the first Monday in April and for the rest of 1854.

John Bigler, a resident of Sacramento and Governor of California, filed suit in the district court in San Jose, challenging the Supreme Court's action of March 27. The district court ruled for San Jose. Bigler appealed. On October 31, 1854, while Bigler's appeal was pending, Justice Alexander Wells died. That gave Governor Bigler the opportunity to appoint a replacement for Wells, and on November 20 he appointed Charles Bryan as associate justice. In early January 1855, Chief Justice Murray and Justice Bryan reversed the district court. Murray's carefully reasoned opinion held: The vote of two-thirds of the members of the Legislature to move the capital from San Jose to Vallejo was effective; after that, a majority vote was all that was needed to move the capital again; the power to move the capital belongs to the Legislature, not the Supreme Court; the Legislature's act of March 24, 1854, made Sacramento the capital of California. Justice Heydenfeldt dissented.

What motivated the actors in this play? We can't be sure, but it is worth noting that Justice Wells, who lived in San Jose, voted for San Jose, and that Governor Bigler, who lived in Sacramento, played a large part in bringing the capital to Sacramento. If any of us had been in Wells's or Bigler's shoes, it seems likely that we would have acted as they did. Most of us do what we can for our home town. If it prospers, so do we.

On November 2, 1852, a terrible fire destroyed more than half of the buildings in Sacramento, including the first building put up on this corner of Second and J Streets. Soon after that fire, Benjamin F. Hastings bought the property and built the building in which this court meets today. When the work was finished, Hastings opened a bank on the first floor and rented the rest of the building to others.

In January 1855, shortly after it decided the Bigler case, the Supreme Court rented the second floor of this building from Hastings. By the end of January, courtroom and offices were ready, permitting the court to start hearing cases on February 2.

In 1857, feeling a need for more space for its library, the court moved all of its operations to the larger Jansen Building, at Fourth and J Streets, two blocks east of the Hastings Building. Late in 1859, the first floor of the Hastings Building became available and the court moved back here.

Devastating floods hit Sacramento and most of the rest of California's Central Valley in December of 1861 and January of 1862. Heavy rains in the lowlands and deep snow in the mountains were followed by warm rains. Water from the rain and melted snow filled the rivers to overflowing. Most of Sacramento's streets and buildings were flooded. Legislators had to hire rowboats to get to their sessions in the Sacramento

County Courthouse. In mid-January, the Legislature, the Governor, and most state officers decided to move to San Francisco.

Did the Supreme Court move to San Francisco too? No definite answer to this question has been found. There is no order to move or to rent other quarters in the Supreme Court's minute book. Those minutes show that the court heard, considered, and decided cases during January and February of 1862, without interruption. Newspapers that I have seen contain many editorials criticizing or praising the move from Sacramento to San Francisco by the Legislature, the Governor, and other state officers, but I found no mention of a similar move by the Supreme Court. The "City Intelligence" column of the Sacramento Union, which reported news of a strictly local nature, contains several reports of actions taken by the Supreme Court. This evidence, while not conclusive, certainly indicates that the Supreme Court stayed in Sacramento throughout 1862.

The newspapers also report efforts to move the capital out of flood-prone Sacramento. The Legislature was not persuaded. In May, the Legislature and other state officers moved back to Sacramento.

While it had been apparent from the middle 1850's that the Legislature and other state agencies needed a home of their own, no such home was available to them until 1869. On April 4, 1860, the City of Sacramento gave the state the six blocks bounded by L, N, 10th, and 12th Streets as a site for a state capitol building, closing all streets and alleys in that area. On September 10, 1860, a contract to build was signed, and on May 15, 1861, "a cornerstone was laid with imposing Masonic ceremonies." The first two contractors failed to fulfill their contracts. The flood of 1861-1862 and a host of other difficulties slowed work to a crawl. At long last, on November 26, 1869, the building was finished. The Governor moved in on November 26, the Supreme Court on December 3, and the Legislature on December 6, 1869.

The Supreme Court maintained its offices and held all of its hearings in the new State Capitol Building until early 1874, when it rented quarters in San Francisco and moved its operations there. Later in 1874 the Legislature gave its approval to that move.

It has been said, "The impetus for the movement of the Court's headquarters is not clear, but it appears that weather, water and whiskey had a lot to do with it." So far as weather is concerned, most Sacramentans prefer our clear and warm summer days to the cold and foggy summer days and nights of San Francisco. And we firmly believe that our water and whiskey are at least as good as San Francisco's.

The California Constitution of 1879 did not specify where the Supreme Court was to meet. This left the court free to stay in San Francisco and it has stayed there.

Since 1874, the court had held some hearings in Sacramento and some in Los Angeles. I am advised that from now on, the hearings in Sacramento will be held in early February and early November.

In 1917, feeling the need for more space in the capitol building, the Legislature employed architects to design two new buildings to be built on the two blocks just west of the capitol grounds. One of these would be for the use of the Supreme Court, the Court of Appeal for the Third District, and the state library. Construction of the Library and Courts Building began in 1923, but the building was not completed until 1928. Dedication ceremonies were held November 28, 1928. During construction, efforts were made to persuade the court to move its offices back to Sacramento. The justices were not persuaded. The Court's headquarters remain in San Francisco.

It is entirely fitting that the Supreme Court of California has chosen to begin the celebration of its 150 years of existence in this historic B.F. Hastings Building. The court was five years old when it came to Sacramento in 1855. The Hastings Building was an infant aged two. The court's earlier homes are long gone, but this historic monument survives. Using just a bit of imagination, we can fancy that we hear these old timbers saying: "Welcome back! And come again soon!"

CHIEF JUSTICE GEORGE:

Thank you very much, Mr. Schei.

Barbara Babcock is the Judge John Crown Professor of Law at Stanford Law School. She is a graduate of Yale Law School, clerked on the District of Columbia Circuit of the United States Court of Appeals, practiced criminal defense law for nine years, and headed the District of Columbia Public Defender Service. In 1972, she arrived at Stanford as the first woman hired on tenure track.

Professor Babcock is an expert in the field of criminal and civil procedure and, while on leave from Stanford, served as Assistant Attorney General for the Civil Division of the Justice Department in the administration of President Carter. She currently is writing about the first woman lawyer on the Pacific Coast, Clara Shortridge Foltz, and her research has touched on a great deal of California legal history. She serves as a member of the Board of Directors of the California Supreme Court Historical Society. Today she will share some of what she has learned about the role of women as related to the history of the California Supreme Court.

PROFESSOR BARBARA BABCOCK:

Mr. Chief Justice and Associate Justices—I am honored to be here today.

A hundred and fifty years ago, the first California Legislature selected the first Supreme Court. One year later, the Legislature provided for California lawyers: "Any white male citizen of the age of twenty-one years, of good moral character, and who

possesses the necessary qualifications of learning and ability” could be admitted to practice after a “strict examination.” For the next 39 years, only white males were eligible for the California bar.

Then in 1878, women activists, led by an obscure San Jose housewife, lobbied a “Woman Lawyer’s Bill” through the Legislature. Fearing repeal by some future Legislature, the same women placed their right to practice law in the 1879 Constitution, where it still appears today: “No Person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession.”¹

Clara Shortridge Foltz was the housewife who led the lobbying effort. She then used “her bill” to become California’s first woman lawyer: The Portia of the Pacific, as the nationwide press coverage dubbed her. A year later she was the first woman lawyer to argue before the California Supreme Court. That is the story I offer today in celebration of the sesquicentennial of this great court.²

The story opens in “the terrible seventies”_ a decade of crop, bank, and moral failures; of unemployed working men, despised Asians, silver kings, and railroad barons; all on the edge of class and race war fueled by an unrestrained press and flamboyantly manipulative politicians. Almost overnight, the radical Workingmen’s Party of California sprang up, with a program of redistributing wealth and eliminating Chinese labor. Despite the racism, and initial tendencies toward mob action, the WPC gained increasing middle-class support. By 1879, Karl Marx himself was impressed. “Nowhere else has the upheaval most shamelessly caused by capitalist concentration taken place with such speed,” he wrote.

Instead of Marxian revolution, however, Californians, including the Workingmen’s Party, turned to constitution-making as their change agent. The campaign for a new constitution had the qualities of a moral crusade. Reform was not enough; the people wanted rebirth.

Though women are not usually mentioned in the accounts of this period, they were very much in the fray. With their male allies, they pressed for the three great goals of their movement: suffrage, jury service, and access to the professions—especially the legal profession. The women, like everyone else, believed that they would at last find their rightful place in the re-constituted California.

One woman, Laura DeForce Gordon, actually ran for delegate to the Constitutional Convention, aided by her friend Clara Foltz. No woman could vote for her, but no law prevented her from serving. After a spirited campaign, Gordon lost to a man, of course. David Terry was the man. Terry had been on the California Supreme Court before the Civil War, had resigned to duel with United States Senator David Broderick, and fled the state after killing him. By the late 1870’s, Terry was back practicing law in Stockton, and a forgiving, or perhaps forgetful, public elected him as a delegate to the convention.

At the convention he became the unofficial leader of the Workingmen—and a friend to the women’s cause. The convention started in September 1878, the same month Clara Foltz became a lawyer, and also the same month that the first law school opened in California. Hastings College of the Law was established with a grant from Serranus Clinton Hastings, the first Chief Justice of the California Supreme Court.

The first woman lawyer greatly desired to study at the first law school in order to improve herself and better serve her clients. Having eloped at fifteen, and borne five children, Foltz had little previous opportunity for formal education. She and Laura Gordon (who was to become California’s second woman lawyer) signed up for the January term and paid the \$10 tuition. But after three days, they were expelled. No reason was given, but unofficially they learned that the rustling of their skirts bothered the other students.

When all their efforts to negotiate failed, Foltz and Gordon sued the Hastings board of directors, the cream of the bar, which included a former justice of the Supreme Court, W.W. Cope, and a future justice, J.R. Sharpstein. Though their opponents had all the prestige, Foltz and Gordon had all the good arguments. Hastings was part of the University of California, coeducational from its founding. And the recent passage of the Woman Lawyer’s Bill enabled Foltz to scoff at the idea that California would be a state where women might practice law but not learn it.

The case was assigned to Judge Robert Morrison, of the San Francisco district court, who within the year would be elected Chief Justice of the Supreme Court under the new Constitution. After a dramatic and highly publicized courtroom hearing, while Morrison was considering the case, the convention passed the women’s employment clause and added another, providing that that all departments of the University of California should be officially open to women. This was partly a consolation prize for the narrow defeat of suffrage, and partly David Terry’s behind-the-scenes efforts to help the women.³

Foltz said of Judge Morrison that though “he did not believe in women lawyers, he did believe in the law.” Citing the Women Lawyer’s Bill, “pending at the same time as the bill to establish Hastings,” and the constitutional clauses, Morrison issued a writ of mandamus ordering the women’s admission. But to Foltz’s dismay, he stayed the writ pending appeal.

The San Francisco Chronicle “hunted up S.C. Hastings to get his opinion about admitting Mrs. Foltz and Mrs. Gordon among a lot of innocent law students who had never seen a woman.” Hastings said he thought Judge Morrison was right and opposed the appeal. His main concern was how to separate the sexes once women prevailed, as they inevitably would in the Supreme Court. The reporter had a lot of fun with this—imagining a gilt-edged balcony, or a simple pine platform in one corner, and noting that conception of “the details required a judicial intellect.”⁴

Clara Foltz did not see any humor in the matter. Years later, she was still steaming at her opponents “who strove to defeat the letter of the law and to overcome its intent and spirit by arguments unworthy of the profession they adorned.” Even though she was sure of victory in the end, the semester would be over before her case could be heard in the Supreme Court. She had spent the “scholarship” put together by family and friends, and never would again have the chance for study and reflection, freed from the interests of a client or a cause.

She returned to San Jose, and prepared to argue her case. Meanwhile, the Constitution was ratified by the people. It created a new seven-member Supreme Court, but Clara Foltz’s case came before the old institution in its last month of existence. Chief Justice Wallace said her argument was the best for a first argument that he had ever heard. She won without dissent.⁵

So ended the first appearance by a woman lawyer before the California Supreme Court. As to the characters and institutions, here is the rest of their story.

Clara Foltz and Laura Gordon practiced law and had many more firsts, though Foltz always thought of the Hastings case as her finest hour.

Hastings College of Law graduated its first woman, Mary McHenry, in 1882. She was chosen to give the graduation address and Foltz wrote to her: “You scored one for your sex [today]. As a sort of mother of the institution, I rejoice in your success that at the first public graduating exercises, a bright and beautiful young girl comes off with the honors of the class.”

David Terry was killed in 1889 by a United States Marshal who was protecting United States Supreme Court Justice Steven Field (also a former member of the California Supreme Court).

In 1888, the papers reported that Miss Alice Parker of Santa Cruz became the third lady lawyer admitted to practice by the Supreme Court. When, before the examination, Chief Justice Searls reminded the applicants they must be 21 years of age, she “blushed and smiled, and the Chief Justice with a merry twinkle in his eyes, relieved her embarrassment by stating that if they were not all twenty-one, they would be by the time the court finished with them.”⁶

The women’s employment clause of the Constitution was cited in an 1881 Supreme Court case allowing Mary Maguire to be a barmaid. It then fell into desuetude for almost a hundred years. In 1971, the old clause played a large part in one of the first legal victories of the renewed women’s movement: the same movement that brought the first women to the bench of the California Supreme Court and many other courts as well; the same movement whose effects on the profession, on the polity, and on the culture are being written, even as we meet here today.⁷

(For a detailed account of the events portrayed here, see Babcock, Clara Shortridge Foltz: Constitution-maker (1991) 66 Ind. L.J. 849; Babcock, Clara Shortridge Foltz: "First Woman" (1994) 28 Val.U. L.Rev. 1231; Women's Legal History Biography Project, Clara Shortridge Foltz (Summer 1998) Robert Crown Library, Stanford Law School - <http://www.law.stanford.edu/library/wlhbhp/>)

1. California Constitution of 1879, article XX, section 18. In 1970, the wording was changed to, "A person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation or profession."

2. Foltz was not, however, the first woman to argue before the court. In 1878, Jeannette Frost, a temperance worker and anti-suffragist, argued in pro per in a property case before the court. Despite the fact that Frost was opposed to women's rights generally, proponents of the Woman Lawyer's Bill used her example to show that women have the capacity to be lawyers.

3. On Terry's advice, Gordon filed her action directly in the Supreme Court, arguing that mandamus should issue in order to have a quick, conclusive decision on this issue "of great public interest." At the same time, Foltz filed hers in the San Francisco district court. The Supreme Court refused to hear Gordon's action and it was joined with Foltz's.

4. San Francisco Chronicle (Mar. 6, 1879) p. 3.

5. *Foltz v. Hoge* (1879) 54 Cal. 28.

6. Daily Alta California (Sept.5, 1888) p. 2.

7. *Matter of Maguire* (1881) 57 Cal.604; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529.

CHIEF JUSTICE GEORGE:

Thank you very much, Professor Babcock.

Mr. Kent Richland is a former supervising attorney in the California Attorney General's Office, and in the State Public Defender's Office. He served as a staff attorney for Justice Otto Kaus when Justice Kaus was on the Court of Appeal. He is founding partner in Greines, Martin, Stein & Richland, one of the two largest civil appellate firms in California. He is a former president of the California Academy of Appellate Lawyers, a fellow of the American Academy of Appellate Lawyers, a member of the Board of Trustees of the Los Angeles County Bar Association, and president of the California Supreme Court Historical Society. Membership in that society is open to persons interested in the history of the court, and the Society among other activities produces books and regular newsletters that contain a wealth of information about this court's past. We also are pleased to have with us today the Society's very able executive director, Mr. James Pfeiffer. And now we shall hear from Mr. Richland.

MR. KENT RICHLAND:

Chief Justice George, Associate Justices of the Supreme Court and honored guests: I am pleased and honored to address you at this special session commemorating the 150th anniversary of the court.

Meeting in this historic courtroom brings to mind J.P. Hartley's famous remark, "The past is a foreign country. They do things differently there." For while today we occupy the same physical space as our 19th-century forebears, the temporal space in which they lived was, indeed, quite another country.

In his panoramic rumination on mid-19th century California, *A Cast of Hawks*, Milton Gould focuses on perhaps the most notorious denizen of this courtroom, Supreme Court Justice David Terry. In the 1850's, when Justice Terry served on this still-infant court, both law and order were in very short supply, particularly in San Francisco, the toughest town on the West Coast. Because the civil authorities couldn't control the gangs of hoodlums who roamed the streets preying on ordinary citizens, a vigilante movement arose; at its peak, the Vigilance Committee comprised an army of almost 5,000 armed men—the largest military force in the West.

Notwithstanding their shared law enforcement objectives, the vigilantes presented a political problem to Justice Terry and his ally, Governor Neely Johnson. For in those days immediately preceding the Civil War, Californians were bitterly divided on the slavery issue. Governor Johnson and Justice Terry, both of whose origins were in the South, were vigorously pro-slavery, while the members of the Vigilance Committee were overwhelmingly Unionist and anti-slavery. Johnson and Terry planned to turn California into a slave state, but the well-armed private army that was the Vigilance Committee presented a major impediment. In 1856, Governor Johnson dispatched Justice Terry to San Francisco as his emissary to try to get the vigilantes to disband.

Now, Justice Terry was not someone you would get from central casting if you were looking to fill the role of Supreme Court justice. When he was elected to the court in 1855, he was 32 years old. He was well over six feet tall, weighed more than 220 pounds, and was known for his hair-trigger temper. Uncommonly blunt in both his personal affairs and his opinions, it was said that during oral argument he would take out his pistol and lay it on the desk. Like his colleague Chief Justice Hugh Murray, he was never without his large Bowie knife.

Not surprisingly, Justice Terry's delicate diplomatic mission to San Francisco ended abruptly: A street brawl with several vigilantes culminated with Justice Terry plunging his Bowie knife into the neck of one Sterling A. Hopkins, an officer of the Vigilance Committee. Justice Terry was immediately arrested by the vigilantes and imprisoned. For six weeks Hopkins hovered precariously between life and death. Then, miraculously—and to the relief of all—he recovered. Perhaps most relieved were the vigilantes, who realized that it would be the worst sort of public relations to have to try

and execute a sitting justice of the California Supreme Court. The vigilantes tried Justice Terry for lesser crimes, convicted him, and summarily released him from custody.

Justice Terry was unchastened by this experience. Indeed, his vehement pro-Southern views led a few years later to the infamous duel in which he shot and killed California's highly respected (and staunchly Unionist) Senator David Broderick. And Justice Terry's own death several decades later was equally violent: He was shot dead at the train station in Lathrop, California, by a United States Marshal who was trying to protect then United States Supreme Court Justice Stephen Field, Justice Terry's former colleague on this court, after Justice Terry physically attacked Field because of a legal dispute involving a woman of dubious character, who had recently become Terry's new wife. But I digress.

When Justice Terry returned from his imprisonment, it was to this very courtroom, where he was greeted with an enormous backlog of work. It seems that during his absence, one of the other three justices, Solomon Heydenfeldt, had been vacationing in Europe. The remaining justice, Chief Justice Murray, had been left to amble about these chambers by himself and, because there was no quorum present, he essentially shut down the court during the entire period.

Although no doubt Justices Terry and Heydenfeldt were disconcerted by the fact that no court business got done while they were away, it was probably a good thing that Chief Justice Murray did not take it upon himself to decide cases all by himself. For Chief Justice Murray is best known for his infamous opinion in *People v. Hall* (1854) 4 Cal. 399, in which he concluded that for purposes of a statute barring the testimony of Indians and Blacks in any proceeding against Whites, a Chinese person was to be considered an Indian or Black and therefore was likewise disqualified from testifying.

What are we to learn from these events of the early years of this court's existence? There are several lessons. One is the evanescence of times and mores. As John F. Kennedy noted, "History is a relentless master. It has no present, only the past rushing into the future. To try to hold fast is to be swept aside." The California of the 1850's seems another world entirely, and the exploits and attitudes of Justice Terry and Chief Justice Murray thankfully seem possible only in an exotic culture bearing the most tangential connection to our current society.

Another lesson is the remarkable strength and resiliency of this court. Although born in turbulent times and no stranger to controversy throughout its existence, this court, which began as a small appellate tribunal serving the relatively parochial needs of a population of 93,000, continues 150 years later at the apex of one of the largest appellate systems in the world, and as the primary promulgator of law for a population of more than 35 million, in the most complex, sophisticated and technically advanced jurisdiction ever known.

But there is an even more timeless lesson to be gleaned from this tale of the early years of this court. That is: Whether you are vacationing in Europe or incarcerated in a

vigilante prison on attempted murder charges, if you are away for six weeks, you will have a pile of work on your desk when you get back.

CHIEF JUSTICE GEORGE:

Thank you very much, Mr. Richland. Our special session will conclude with some closing remarks from Justice Brown—appropriately so, in view of her distinguished service here in Sacramento in all three branches of our state government, culminating in her service as a justice of the Court of Appeal for the Third Appellate District, before she joined the California Supreme Court in 1996.

JUSTICE BROWN:

Thank you Chief.

I am honored to be able to speak on behalf of the court at its 150th birthday party and delighted that all of you are here to share the occasion with us. This has been an extraordinary program.

Shakespeare said, “[The] past is prologue.” H.J. Mueller muses that history is poetry and the poetry of history consists in its truth. “It is the fact about the past that is poetic.” The playwright and the historian are both right.

I want to thank the participants in this morning’s program who have evoked this court’s rich history with passion, poetry, and truth. We have certainly had our share of colorful characters and moments of high drama, and our speakers today have made our story live. And those stories about perseverance, independence and courage — and even eccentricity — are the touchstones from which we shape our visions of the future. Holmes said that knowing our history is not a duty; it is only a necessity.

Sometimes, though, history seems oddly familiar. Or, as the French say, the more things change, the more they remain the same. Consider this brief survey of the press coverage of the court’s first hundred years.

On April 6, 1855, the same year the court moved into the B.F. Hastings Building, the daily *Alta California* published an editorial entitled “Contempt of Court.” The paper gleefully congratulated the Legislature for passing a law overturning the court’s recent decision in *Johnson v. Gordon* (1854) 4 Cal. 368, in which the court held the United States Constitution gave no authority to the Supreme Court of the United States to exercise appellate jurisdiction over the state courts. According to the *Alta*’s editorial page: “The doctrines laid down in this opinion were so novel and so startling, that in some they caused surprise, in others alarm, in all contempt.” The newspaper applauded the Legislature for pulling off “the coolest contempt of court ever committed.” Of course, given the way things have turned out, the Legislature might want to reconsider.

Curiously, eight years later the same paper lamented that the \$8,000 annual salary proposed for justices of the Supreme Court was inadequate. Said the paper's editorial writer on March 8, 1863: "This upon reflection must be regarded as very poor economy. First class talent cannot be procured for this stipend. The office of a judge in this state is no sinecure. . . . One of the greatest elements of prosperity is an able, upright, and brilliant judiciary. We can have such only by paying for it." But here we are. Able, upright and brilliant jurists, and still underpaid.

And in a surprisingly sympathetic tone, the Sacramento Union reported, on December 4, 1869, on the first case to be heard in the Supreme Court courtroom at the capitol. The day before, Judge Sanderson had heard the habeas corpus case of Nellie Smith and Anna Keating — a case brought to test the validity of the city ordinance providing that women shall not exhibit themselves in a drinking saloon after midnight. The women argued the ordinance conflicted with the equal protection clause of the Fourteenth Amendment of the United States Constitution. But the city attorney argued that the ordinance, "like all other laws, merely placed restrictions on one for the benefit of many." That was not so uplifting a cause as the one led by Clara Shortridge Foltz, but still a claim for the rights of women.

In 1886, when an unpopular decision concerning riparian rights (*Lux v. Haggin* (1886) 69 Cal. 255) led to vociferous calls for the resignation of the justices, the San Francisco Call came stoutly to the court's defense in an editorial published on June 18 of that year. Chastising the "infamous plan of dragging the Supreme Court into politics," which the Call said was being advocated by papers like the Chronicle, Examiner, and Alta, the Call ridiculed "these journalistic wiseacres" who with "their usual pretensions to a universality of knowledge, sum up the law of the case in a line and abuse the majority of the Supreme Court in a paragraph" and "stigmatize as ignorant and stupid" the judges who had devoted months "of weary labor to a patient study of the law."

And then there is the long-running and apparently endless debate about where the Supreme Court should have its headquarters. One editorial, appearing in the Alta California on January 20, 1865, takes a somewhat jaundiced view of the reason for the opposition of the City of Sacramento to the court's removal to San Francisco. According to the Alta California, the Sacramento Union opposed the removal of the Supreme Court because it feared "there may be less demand for drinks, and fewer boots to black." (Parenthetically, I should say I do not think the writer was accusing the justices of being heavy drinkers. He seems to have been referring to the lawyers who would come to town to appear before the court.) On the other hand, the Marysville Express had complained that "the removal of the court would necessitate the removal of the State Library," which the Express said was needed as much for the benefit of the Legislature as the court. The Alta conceded that point was "good in theory," but noted:

"The Library would be a great assistance to our legislators, provided these gentlemen made a practice of seeking wisdom among its shelves. But when have they done so?"

Books in certain cases, it cannot be denied would be of great service in framing of enactments, but the trouble about them is, they can neither buzz nor buttonhole. The 'lobby' has an advantage over them which cannot be overcome. Champagne can make more converts to a given opinion, any day, than Blackstone."

The court did move to San Francisco, but the controversy was still very much alive in 1957 when the Sacramento Bee reported Governor Goodwin J. Knight's favorable reaction to "the growing movement to return the state supreme court from San Francisco to Sacramento." The article noted that no new law would be needed since the Constitution specifies the court shall be located in Sacramento, and cited in support reports in recent weeks that Chief Justice Phil Gibson favored returning the court to Sacramento to "do away with the expensive and exhausting practice of holding court periodically in Los Angeles and Sacramento as well as in San Francisco." (Sacramento Bee (Feb. 22, 1957) p. 1, col. 4.) Apparently, that was only a rumor. Almost 50 years later, the court remains in San Francisco.

After 150 years, we may perhaps be entitled to feel some confidence that — despite our ups and downs — the court's existence is secure. In 2050, we hope the court will be able to return to the B.F. Hastings Building to celebrate its 200th anniversary. You are all invited. I am reminding you now to save the date. Mark your calendars because Justice Mosk will be very disappointed if you are not here.

Finally, on behalf of all the members of the court and the court's staff, I want to thank the people of Sacramento for being generous and gracious to the Supreme Court of California during the whole of its 150-year history. And I do not think it was only because you thought we would give a boost to the local economy.

I promise. If I ever get three more votes, we'll be back!

Thank you.

CHIEF JUSTICE GEORGE:

Thank you very much, Justice Brown. In accordance with our custom at special sessions, it is ordered that the proceedings at this commemorative session be spread in full upon the minutes of the Supreme Court and published in the Official Reports of the opinions of this court.

Thank you. It is time for the calling of the calendar, and there is one more historical fact that I want to mention. The calendar will be called for the first time by Frederick Ohlrich, the new Clerk/Administrator of the California Supreme Court. The entire court and its staff is very pleased to have Fritz join us. He developed a statewide and national reputation for excellence in court administration at his previous position as court executive of the former Los Angeles Municipal Court. He started at the Supreme Court only one week ago, and improvements in our operations already are being seen.

We all are looking forward eagerly to the historic changes that we know he will make.
Welcome.

(Derived from Supreme Court minutes and 22 Cal.4th.)