

# A Lawyer by Accident: Bernie Witkin's Early Life and Career

## Part I: A Suitable Replacement

BY JOHN R. WIERZBICKI

### Introduction

**B**ERNARD E. WITKIN (“Bernie” to everyone), was never a judge, never held elected office, was never a professor, and except for a short time after graduation, never practiced law. Yet he arguably had the greatest positive influence on law in California of any person. Beginning with *The Summary of California Law*, which he first published at age 24, Bernie’s treatises on California law (now maintained by the institute he created), have been cited by California courts in more than 14,000 published decisions. An untiring advocate for legal reform, he championed judicial education and new methods of legal education for both law students and practitioners. He was also personally engaging, and would speak about the law to any group that would invite him. Bernie died 25 years ago this December. After his death, the California Supreme Court held a memorial for him — the first time ever for someone who was neither a justice nor a staff member of the Court. The *Review* is honoring Bernie over the next two issues with a two-part article focusing on his early life and career. This article, part I, explores the unlikely circumstances that led to his appointment as law secretary to Associate Justice William Langdon in 1930. The next article, part II, will focus on Bernie’s years with Langdon, the published decisions in which he participated, and how both tragedy and the law itself nearly ended his promising young career.

### The 1930 Gubernatorial Campaign

To understand how Bernie Witkin became William Langdon’s law secretary, you have to start with why California Governor Clement Calhoun “C.C.” Young’s quest for a second term was in so much trouble. The progressive Republican governor had been elected in 1926 with over 70 percent of the vote in a state as solidly Republican as any in the country. At that time, the Republican Party in California contained a substantial progressive element, dedicated to governmental and political reform. But by 1930, many of these Young supporters had grown disenchanted, particularly with his failure to pardon Tom Mooney.<sup>1</sup> Mooney and Warren Billings, pro-labor activists, had been convicted of murder in the San Fran-



Bernard Witkin, undated image, ca. 1920s. (Photo: Bernard E. Witkin Papers, MSS 0701, California Judicial Center Library, with the permission of the Bernard E. & Alba Witkin Charitable Foundation.)

cisco Preparedness Day bombing in 1916, which killed ten people. Their trial was tainted by allegedly perjured testimony, and Mooney’s imprisonment in particular had become a world-wide cause célèbre, with intellectuals, civil libertarians, and many progressives demanding his release. But a pardon would also infuriate those who were convinced that the men were justly convicted. Young delayed deciding on the matter throughout his term, and then announced that he would wait for the California Supreme Court to declare itself on Billings’ request for a pardon before he would act on Mooney’s application.<sup>2</sup> Unlike Mooney, Billings had a prior felony conviction, and under the California Constitution, a pardon by the governor required the Court’s recommendation. Despite the campaign’s denial, it appeared that Young was trying to push off the decision until after the primary.<sup>3</sup>

Young’s toughest opponent in the August 1930 primary was James “Sunny Jim” Rolph, Jr., five-time mayor of San Francisco, who had the unique ability to



C.C. Young. (Bain News Service, Public domain, via Wikimedia Commons.)

1. Richard H. Frost, *The Mooney Case*, Palo Alto: Stanford U. Press, 1968, 401. Young himself later complained that Mooney supporters helped bring about his defeat. *Ibid.*

2. Frost, *The Mooney Case*, 384–85.

3. Herbert L. Phillips, “Mooney Case Lags as Vote Campaign Near,” *San Francisco Examiner*, April 5, 1930, 3.

bridge the different wings of the Republican party. His cheerful disposition was a salve to those who were just now experiencing an economic depression that would result in 28 percent unemployment in the state by 1932. Rolph, an early adopter of air travel for campaigning, was running a statewide campaign, visiting every county.<sup>4</sup> But geographical bases of support within the state remained critical.<sup>5</sup> Young and Rolph shared the base of San Francisco and its eastern environs. The third major Republican candidate, District Attorney Buron Fitts of Los Angeles, was less of a concern outside Southern California. The battle for the Republican gubernatorial primary between Rolph and Young was going to take place in the Bay Area, and Young needed to appeal to progressives there. Fortunately, he had just the thing — a gift from the voters of San Francisco that he was just waiting to unwrap.

### A Municipal Court in San Francisco

The state Constitution was amended in 1924 to permit certain large charter cities to establish municipal courts to replace the justice, police, and small claims courts.<sup>6</sup> Enabling legislation provided that the new courts could be created by city charter or by election. Los Angeles and Long Beach acted swiftly, creating their municipal courts in 1925, while San Francisco dawdled. Four years later, voters approved a measure to create a municipal court in San Francisco. It was to begin operation on July 1, 1930, and be composed of twelve judges. Nine would come from the existing justices of the peace and police

court judges, and the governor would appoint the other three.<sup>7</sup>

Of the forty applicants for the vacant positions, three were women.<sup>8</sup> Here was Young's opportunity. Women's rights had long held a prominent role in progressive politics.<sup>9</sup> For him to appoint the first woman judge in San Francisco, right before the August primary, could be just what he needed to reinvigorate his support.

Theresa Meikle was the best known of the three female applicants. She had been the first woman to serve as a deputy district attorney in San Francisco. In 1925, she would make national headlines for successfully prosecuting a 16-year-old girl who, "in a fit of jazzmania," shot her mother dead for refusing to allow her to go dancing at jazz clubs. Young had already appointed Meikle once before, as lead prosecutor for the state narcotics division, so the municipal court would seem a natural next step.<sup>10</sup>

But instead Young chose Mary Wetmore, private secretary (essentially a legal research attorney) to California Supreme Court Justice William Langdon. She was also married to Deputy State Attorney General Charles A. Wetmore, Jr. The wines from the Wetmore family's Cresta Blanca winery in Livermore had won two gold medals at the 1889 Paris Exposition, gaining California vintners international recognition. The Wetmores had also been extensively involved in real estate, at one time owning and developing Coronado Island in San Diego.<sup>11</sup> Young was himself a real estate developer, and vice-president of Mason-McDuffie, a prominent real estate firm in Berkeley.<sup>12</sup> Young's administration had finally resolved a growing public controversy over its failure to renew the license of a leading East Bay realtor.<sup>13</sup> By appointing a member of the Wetmore family, Young could hope to tamp down any lingering ill will in the real estate business community that incident caused. Young made his decision, and Wetmore arranged for a suitable replacement for her position at the Court.

On July 1, Wetmore was sworn in. She served one week, suffered an appendicitis attack, and died.<sup>14</sup> Young appointed Meikle in her place. On July 2, the Court issued its decision on Billings: it would not recommend a



From left: Julia M. Easley, Mary A. Wetmore and Theresa Meikle. (*San Francisco Chronicle*, June 25, 1930.)

4. Loren B. Chan, "California During the Early 1930s: The Administration of Governor James Rolph, Jr., 1931–1934" (1981) 63 *Southern Calif. Qtrly* 262.

5. Stanley D. Hopper, "Fragmentation of the California Republican Party in the One-Party Era, 1893–1932" (1975) 28 *West. Pol. Qtrly* 375–76.

6. William W. Blume, "California Courts in Historical Perspective" (1970) 22 *Hastings L.J.* 121, 175–76.

7. Earl C. Behrens, "Bench Posts Desired by Large Group," *San Francisco Chronicle*, June 17, 1930, 11.

8. "Three Seeking Woman Judge Appointment," *San Francisco Chronicle*, June 25, 1930, 3.

9. Kevin Starr, *Inventing the Dream, California Through the Progressive Era*, New York: Oxford U. Press, 1985, 258.

10. Mark Hull, "San Francisco's Judge Theresa Meikle" (Spring 2018) *San Francisco Attorney* 52–56.

11. "Charles A. Wetmore Dies in S.F. at 80," *Oakland Tribune*, June 10, 1927, 52.

12. Marc A. Weiss, "Urban land Developers and the Origins of Zoning Laws: The Case of Berkeley" (1986) 3 *Berkeley Planning J.*, 12–13. Young appointed Duncan McDuffie, president of the firm, to be chairman of the State Park Commission.

13. Discussed *infra*.

14. "First Woman Municipal Judge is Dead," *San Francisco Chronicle*, August 9, 1930, 1.

pardon.<sup>15</sup> Following its lead, Young also denied Mooney's pardon request. Fitts charged Young with "political cowardice" while Rolph remained quiet.<sup>16</sup> Just a few weeks later, Rolph narrowly defeated Young in the primary and would go on to become governor. And the "suitable replacement" as Justice Langdon's private secretary? That was Bernie.

News of Bernie's appointment must have befuddled his law professors at the University of California. True, he had shown great skill as a debater, but how would that help him in this position, which involved writing legal opinions and memoranda for the justice? His lack of focus on his coursework must surely indicate a deficiency of aptitude for the job. In other words, he was no Zara Witkin. Now there, in the minds of many, was a Witkin destined for greatness.

### Zara Witkin's Younger Brother

Bernard "Bernie" Witkin was born in 1904 in Holyoke, Massachusetts to Jewish emigrants from Russia. He was the third of four children, born four years after his brother Zara. The family soon moved west, arriving in San Francisco in 1909. Like his brother, Bernie attended Polytechnic High, graduating in 1921. But his senior yearbook trumpeted Zara's accomplishments: "Zara Witkin, an honor graduate of four years ago, has been elected to numerous scientific honor societies at U.C.; and he is one of four students selected to speak at Commencement this year."<sup>17</sup>

Zara was brilliant, driven and idealistic. *Time* magazine later described him as "smooth" and "upstanding."<sup>18</sup> When still in high school, he designed calculating machines for a local company to manufacture. At age 16, he enrolled in U.C. Berkeley's civil engineering program. By the time he graduated with honors in 1921, he had worked as an engineer for the state, the Southern Pacific Railroad, and the San Francisco Bureau of Governmental Research.<sup>19</sup>

Civil engineering was more than a calling for Zara. He believed that through it could come the creation of a new, more just society. "I came to know the brutal injustices and waste, as well as the wonderful productive capacity, of American capitalism. No academic idea, this knowledge was the result of my continuous work in

15. *In re Billings* (1930) 210 Cal. 669. The vote was 6–1, with Justice Langdon dissenting.

16. William H. Jordan, "Legislative Board of Labor Endorses Young," *San Francisco Examiner*, July 13, 1930, 15.

17. *Polytechnic High School Yearbook 1921*, [http://www.maxie24.com/hailpoly/HailPoly/1920s/1921\\_Spring.htm](http://www.maxie24.com/hailpoly/HailPoly/1920s/1921_Spring.htm) [as of Sept. 5, 2020].

18. "Russia: Balkhazhstrov Conserved" (Oct. 17, 1932) *Time Magazine*.

19. Michael Gelb, ed., *An American Engineer in Stalin's Russia: The Memoirs of Zara Witkin, 1932–1934*, Berkeley: U. of Calif. Press, 1991, 1–2.

civil engineering, begun at the age of 14." His upbringing reinforced his activism: "Our home was one in which social conditions were constantly discussed."<sup>20</sup> In his commencement address in May, 1921, Zara postulated that the engineering profession, by nature of the training it provided, is "pre-eminently fitted" to lead the nation out of the economic paralysis and blight resulting from the Great War, under which "half the globe goes famished, unclothed, without the necessities of life."<sup>21</sup> After graduation, Zara moved to Los Angeles, where he would garner praise for his design of the Hollywood Bowl.

Bernie followed in his brother's path, enrolling at Berkeley in the fall of 1921. But compare Bernie's recollection of how he came to his profession with Zara's. "I got into the law by accident," Bernie recounted. "[S]ome bored upper-class woman taking registration asked me what my major was. Nobody ever told me there was such a thing as a major and I didn't know. A friend of my brother was standing there and he said, 'why don't you say law.' So I said 'law.'"<sup>22</sup>

### Witkin v. Tobriner

Bernie's opportunity to distinguish himself came during his sophomore year. In November 1922, California voters were being asked to vote on Proposition 19, a constitutional amendment to create a state board responsible for managing the distribution of water and electricity. The *San Francisco Chronicle* reported that no other measure "has aroused the interest and antagonism that have been called for by the proposed . . . act."<sup>23</sup> On election eve, Stanford's varsity team met Berkeley's team to debate the initiative at the Scottish Rite Temple in San Francisco. Each team had two members, representing the best debaters at the school. For Stanford, Mathew O. Tobriner, a future California Supreme Court justice, spoke first against the measure.



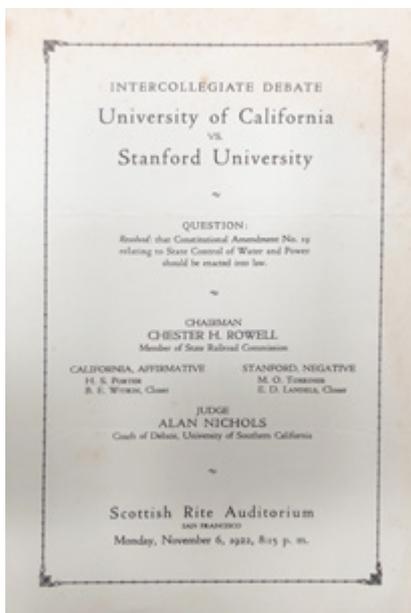
Zara Witkin, undated image, ca. 1920s. (Photo: Bernard E. Witkin Papers, MSS 0701, California Judicial Center Library, with the permission of the Bernard E. & Alba Witkin Charitable Foundation.)

20. *Id.* 29.

21. "Barrows Tells Graduates to Guard Freedom," *San Francisco Chronicle*, May 12, 1921, 8.

22. Unpublished interview with Bernard E. Witkin (Sept. 9, 1986), Witkin Archive, California Judicial Center Library, 2.

23. "Students Will Debate Water Power Issue," *San Francisco Chronicle*, Nov. 5, 1922, 72.



Program, Intercollegiate Debate, University of California vs. Stanford University, Nov. 6, 1922, and accompanying news story. (Photo: Bernard E. Witkin Papers, MSS 0701, California Judicial Center Library, with the permission of the Bernard E. & Alba Witkin Charitable Foundation.)

Bernie was one of the two Berkeley debaters chosen to argue for the measure, and the first sophomore to close a debate for Berkeley. Although Proposition 19 would be decisively defeated at the polls the next day, that evening it was Berkeley's team that won the debate. For Bernie, this was a personal triumph. He had debated in high school, but this was his first intercollegiate debate, and to even be selected for the team he had beaten several more experienced debaters.

From that time on, debate became the focus of Bernie's years at Berkeley. He also dabbled in politics, speaking on behalf of Progressive Party candidate Robert M. LaFollette, who challenged incumbent President Calvin Coolidge in the 1924 election. The Stanford paper noted approvingly (or perhaps ironically): "Bernard Witkin of California upheld LaFollette in a speech pleading for liberal ideals in the finest sense and entirely lacking in the bombast and demagoguery usually associated with oratory for a radical cause."<sup>24</sup>

### "Dreadful"

After graduating in 1925, Bernie entered U.C. Berkeley's law school, an experience he would later sum up with one word: "dreadful." He continued, "I always remember with amusement how hard the law school teachers tried to destroy any possible interest in or understanding of the law (laugh)." It was so bad, according to Bernie, that he "made no attempt to attend classes."<sup>25</sup> He would later turn his disdain into a talk entitled "The Law

Curriculum: How Now, Sacred Cow" which became a regular part of his speaking repertoire.

Roger Traynor, the future California Supreme Court justice, was a classmate of Bernie's at law school. "You could see Roger," Bernie recalled, "but you'd have to look at him through his pipe, and he would keep writing or reading at the same time you talked to him." Bernie also met Madeleine Lackmann, who later married Roger, while he served as the freshman debating coach. Bernie's friendship with the Traynors would last over the next half century.<sup>26</sup>

When not attending classes, what was Bernie doing? Debating, of course. He became a member of Berkeley's first graduate student debate team, and in 1926, was sent on a cross-country tour.<sup>27</sup> He made money tutoring undergraduate philosophy students, and giving seminars to fraternities and sororities on exam preparation.<sup>28</sup> Bernie also made the finals of the moot court competition in 1926, competing in front of Chief Justice Waste.<sup>29</sup>

While still in law school, Bernie enrolled in a bar review class offered by a practicing lawyer ("not a gifted teacher," according to Bernie) who cobbled together past bar examination questions, portions of the encyclopedia, *California Jurisprudence*, and recent court opinion advance sheets. But for Bernie, it was "spectacular because for the first time . . . here was somebody trying to tell us what the law was instead of trying to conceal it from us." Having passed the bar,<sup>30</sup> and thinking that "there may be something in this," Bernie typed up his bar examination notes and sold eight carbon copies to classmates for \$15 a copy (about \$220 in today's currency).<sup>31</sup>

### Law Practice

Graduating nowhere near the top of his law school class, Bernie found no work. He nearly chucked law altogether to become a professor of public speaking. Instead, he was hired by Marcel Cerf, a family friend and former judge<sup>32</sup> whose practice, according to Bernie, was moribund. "I managed to land in a dying office where there was nothing being done and no money being paid." With an "inadequate" knowledge of the law, no reference works on which to rely ("existing materials were preposterous"), and so much idle time, Bernie turned again to his bar

26. Witkin interview, 1986, *supra* n. 22, 6, 23.

27. "Graduate Debaters Leave on Tour," *San Francisco Chronicle*, Jan. 8, 1926, 21.

28. Witkin interview, 1986, *supra* n. 22, 4.

29. "Three Jurists to Aid Annual U.C. 'Trial,'" *San Francisco Chronicle*, Nov. 23, 1926, 32.

30. Although many accounts have Bernie passing the bar after graduation in 1928, he actually passed the bar in 1927. "Sixty-Three East Bay Folk Win in Bar Examination," *San Francisco Chronicle*, Oct. 6, 1927, 31.

31. Witkin interview, 1986, *supra* n. 22, 3.

32. "In Memoriam, Marcel E. Cerf" (1935) 14 *Calif. Hist. Soc. Qtrly* 286.

examination notes. He revised them, and with the help of family and contacts at law schools throughout the state, sold his first *Summary of California Law* (1928). Having achieved some success with that, he started a bar review course.<sup>33</sup>

The bar review course is where he would come to know Mary Wetmore. In addition to her work at the Court, Wetmore taught night law classes at Lincoln University in San Francisco, and made a special point of promoting the careers of promising young lawyers. A mutual friend invited her to one of Bernie's bar review lectures. Impressed with what she heard, she invited Bernie to visit her at the Court. According to Bernie, they quickly became good friends.<sup>34</sup>

### Bernie's Account

In Bernie's account of his appointment, soon after he became acquainted with Wetmore, there was a movement to have a woman judge on the courts of San Francisco. "At that time the municipal court judge was appointed by the mayor. The mayor was about to appoint a very political woman<sup>35</sup> to the great anguish of the bar and a number of important lawyers asked Mary Wetmore if she would take the job. She called me up and she told me she would like to do it. I remember that talk. She said 'I can't leave Justice Langdon. He would have to resign.'"<sup>36</sup>

According to Bernie, at that time the law clerks wrote most of the opinions for the justices.<sup>37</sup> "Mary asked me if I would take over her job. She said, 'I will arrange it so that he will not interfere with your Bar Review course or the writing of the Summary. All you have to do is write the opinions and the memoranda.'"<sup>38</sup> Bernie agreed, and was appointed Langdon's private secretary.

In addition to the misstatement about Mayor Rolph (instead of the governor) making the appointment, this account leaves unanswered why Langdon would agree to appoint Bernie to replace Wetmore — on Bernie's conditions no less. Bernie was just 26, and had practiced law in a "dying" firm for fewer than two years after an undistinguished law school career. He may have had Wetmore's support, but what other evidence did Langdon have that Bernie could be trusted in this position?

### Langdon's Choice

Langdon had won election as associate justice with progressive votes in 1926, the same election that ushered in

33. Witkin interview, 1986, *supra* n. 22, 4.

34. *Id.* at 6–7.

35. Possibly Julia Easley, who was secretary to the former head of the bar association. "Three Seeking Woman Judge Appointment," *supra San Francisco Chronicle*, June 25, 1930, n. 7.

36. Witkin interview, 1986, *supra* n. 22, 6.

37. Gordon Morris Bakken, "Conversations With Bernie Witkin" (1998–99) *Cal. Supreme Ct. Hist. Soc. Yearbook* 109, 111.

38. Witkin interview, 1986, *supra* n. 22, 6–7.

C.C. Young as governor.<sup>39</sup> He was noteworthy as the San Francisco district attorney who brought corruption charges against the mayor and others following the 1906 earthquake and fire. Kemper Campbell, who helped form the California State Bar in 1927, recalled that it was Langdon on whom C.C. Young relied to vet candidates for the newly expanded superior court in 1928: "Young had a great deal of confidence in Langdon. If Bill Langdon told him this lawyer was a fine lawyer and would make a good judge, that was enough for him."<sup>40</sup> In light of this, it would be remarkable if Langdon was uninvolved in Young's appointment of Wetmore to the Court, and the selection of his own private secretary.

Other than Wetmore's endorsement, what about Bernie would appeal to Langdon? Bernie's backing for the progressive LaFollette in 1924 may have reassured Langdon that he and Bernie would be compatible on the issues. Bernie's employment by Marcel Cerf may also have helped in that regard. Although Cerf was a Democrat, he had been appointed to the superior court in 1913 by a progressive Republican governor, Hiram Johnson.<sup>41</sup> Langdon, too, had been appointed by Johnson to the superior court just a few years later.

Bernie also had shown himself to be an advocate of legal reform, by being active in the campaign to establish a municipal court in San Francisco. He, along with Tobriner and future California Governor Edmund G. Brown, were members of the campaign's speakers bureau.<sup>42</sup> The measure passed in November 1929, opening up the spot to which Young would appoint Wetmore.

Finally, just a few months before Langdon selected him, Bernie helped C.C. Young resolve the real estate licensing fiasco that may have contributed to Wetmore's appointment. Martinez realtor C.A. "Cappy" Ricks had been denied a renewal of his realtor's license by Young's appointed state real estate commissioner, Stephen Barnson. Ricks, a former officer of the California Real Estate Association, demanded a hearing to clear himself of Barnson's charges that Ricks had acted unethically in



William H. Langdon, Associate Justice, January 1927–August 1939. (Photo: California Supreme Court.)

39. Frost, *The Mooney Case*, 392.

40. Corinne L. Gilb, "Reminiscences of Kemper Campbell," *University of California Regional Cultural History Project*, interview conducted April 13, 1954.

41. "In Memoriam, Marcel E. Cerf," *supra* 14 *Calif. Hist. Soc. Qtrly* 286, 286.

42. "Campaign Committees For Municipal Courts," *San Francisco Chronicle*, Oct. 12, 1929, 4.



Governor James Rolph circa 1932 speaking at rostrum with large microphones. Mayor Angelo Rossi in background. (Photo: Open SFHistory, courtesy of a private collector, photographer unknown.)

real estate deals. Barnson at first refused, but after a “wild scene” at the association’s annual convention, agreed so long as Barnson could choose the judge. Ricks rejected Barnson’s proposal, and in January 1930 hired Bernie to talk to “the powers that be” on his behalf.<sup>43</sup>

Young was in a difficult spot. Were he to back Barnson, he would anger his fellow East Bay realtors in an election year (Martinez is only 25 miles from Berkeley) — yet he desperately needed their support to fend off Rolph. To intervene on Ricks’ behalf would open Young to charges of favoritism and violate progressive principles. Bernie’s involvement provided him a possible third way — to act only after an “independent” hearing on the matter. It was the same strategy that he was using with Mooney’s pardon. Young decided to bypass Barnson and appoint Corporations Commissioner Fred Athearn as special hearing officer. The published account by the United Press Syndicate admired Bernie’s advocacy. “Speculation is rife as to just what Witkin said to certain officials that convinced them a new hearing was essential. It must have been a good argument, for the reopening means a virtual repudiation by the administration of

43. “Real Estate Commissioner Offers Young Resignation,” *Oxnard Daily Courier*, Jan. 17, 1930, 6.

Barnson’s policies.”<sup>44</sup> Bernie and Henry Robinson, who also worked for Cerf, represented Ricks at the hearing. Ricks was exonerated.<sup>45</sup>

How Bernie, with no apparent connection to any of the principals, nor experience in state government or real estate, got involved in this matter is unknown. But Young must have been relieved that the issue was finally resolved, just in time for his campaign for re-nomination to begin in earnest. To anyone who may have been following the matter, such as Langdon, Bernie’s talents were favorably displayed.

## Revelation

Becoming Langdon’s private secretary was a revelation to Bernie. Unlike his brother Zara, Bernie had no clear career path in mind. As Bernie himself admitted, pursuing the law was “an accident.” But now Bernie understood, for the first time, what inspired him. “I realized that my interests were in the law. All aspects of it. In the improvement of the law.” He was now where he wanted to be, “getting into the middle of where the law was being laid down.”<sup>46</sup> ★

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44. Elwood Squires, “California Real Estate Chief to Quit Post Soon,” *Bakersfield Californian*, Jan. 17, 1930, 18.

45. “Real Estate Man Freed on State Charge,” *Santa Rosa Press Democrat*, Jan. 22, 1930, 7.

46. Witkin interview, 1986, *supra* n. 22, 7.

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