

**NEW MEXICO BAR ASSOCIATION**

**INTERVIEW – LEON KARELITZ**

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**INTERVIEWER: SARAH BRADLEY**

## LEON KARELITZ INTERVIEW – TAPE ONE, SIDE ONE

**SB:** This interview is part of the Oral History Project sponsored by the State Bar of New Mexico and its Senior Lawyer Division. I'm Sarah Bradley, a member of the Senior Lawyer Division of the State Bar. Today I am interviewing Leon Karelitz at his home in Raton, New Mexico. Leon, is there anything about your childhood or adolescence that influenced the direction of your life?

**LK:** Well, I think that you're forgetting about the difference in ages. When I was a kid growing up, as all kids, we were to be seen and not heard. And we kept our mouths shut, and we didn't get to talk with the grown-ups. They had their sessions in the living room or elsewhere in the home, and we were supposed to be somewhere else. And they didn't pay much attention to us. They just said, 'obey; go to school; you do what the teacher tells you to do, or the teacher will 'whomp' you, and we'll whip you when you come back home, too.'

So as a child growing up, we were children. We just had fun and we enjoyed playing ball and the other things that young children tend to do. And adolescence, I'm not sure how far into older age adolescence goes, but in going to school, I went to Liberal Arts College and Boston University – a Methodist university and an old university. And in retrospect, I learned a lot there. I didn't realize how much I was learning, but I was impatient and went to Georgetown Foreign Service when it was opened or about a year or so after it opened. And there were about 75 students at that time in the third year. And this was the third year of the Foreign Service school, as I recall it there. And we had one person whose advice impressed me very much. And I was old enough at that time to do more than just be mute. We had, as a teacher in Practical American Government, one of the two senators from Massachusetts. He was a member of the Curly Gang in Massachusetts – a tall, smart fellow; strong; as yet, kind of a tummy, but not much there. And he would come in the evenings and speak about how the Congress worked and how state legislatures worked. And he was impressed with the thought that Georgetown had a coherent curriculum that was seriously trying to train people in the many courses that would be useful to Foreign Service officers, including statistics, among other things. We had an Italian attaché who taught statistics, and he couldn't speak English. And I couldn't understand the words in the statistics book, which was a big red book about 'so wide,' practically six or seven inches wide. I never did understand the science of it. It wasn't explained what it was they were trying to do, nor could I understand from that teacher what to do. So having that politician, the United States Senator, who taught in good old Irish Boston, was very nice.

And at one point, he said to us something I still remember: 'all of you in the class' - and he was gentle and he was polite – 'are wasting your time not in getting an education, but believing you are going to get it, and you're going to get it in the Foreign Service. You're not. That's something for the social elite and the sons and daughters of very prominent people. And there is only one of you amongst you' – there were about 30-35 in that particular class – 'who will qualify, I think.' And there was a very fine young man

who was a little older than we were, by the name of ‘Horner.’ I forget his first name, frankly. But he was the son of the Executive Vice President of the Kinard White Star Steamship Line, which handled all of the carriage or transportation of goods by sea from the United States to South America. And they were well acquainted with all the countries in South America. They dealt with the leaders of those countries in connection with their businesses and their allied businesses – both with shipping and farming and ranching and so on. And he said, ‘that young man – that son of the Executive Vice President was the boss in effect of Kinard White Star employees – all of them there. He will be socially elite and wealthy and just the kind of person who knows different foreign language and has the background to deal with the upper crust in all of these South American foreign countries. He’s the type of character that the Foreign Service wants.

‘I don’t blame them for wanting the best.’ He said, ‘if I were you all though, and times are bad now – very, very bad, and times are getting worse, I think that the wiser thing for you to do with whatever education you get, is to go forward and get into some kind of business enterprise of which you are the boss so that you can go to work without asking anybody’s permission. And in that way, while that is equally hard, if not harder than being somebody’s employee, at least nobody can keep you from going to work. And while there is anguish and difficulty and heartache and that kind of thing, you will not be frustrated by anybody else. If you’re honest and you’re decent and you learn your trade and the tools of your trade.’ And I thought that was very practical knowledge. And that influences me.

I had no desire to be an attorney. I never thought of it. And I was reluctant to interfere in anybody’s doings or activities, or interfere with their families. And I did not think I was particularly adjusted to being an attorney. But frankly, you didn’t know what else to do if you’re going to follow the advice – the general kind of advice – that that Senator gave us. I had finished my third year in college and then had to choose what to do and where to do it. I went back to Boston University and enrolled in the law school. They had a three-year schedule. And thought that would be very fascinating to learn what our country was about, because I knew the history of the country fairly well, but I didn’t know what made it tick, or what made it stay together. And we were told at Georgetown that it was the law that did, and we should really pursue some legal course. So I went in there to learn about the law – not because I had any incentive to try to accommodate people. And in being admitted to the law school, I was asked, as everybody else at the time, ‘why do you want to come to law school?’ And apparently, what they had in mind was this: they were trying to call out those persons that wanted to get into law to make a big living; to make a killing; you know ‘this is the way to make a lot of money and to be a big shot.’ And they were excusing those persons.

What they wanted, I learned later – very, very distinctly – were persons who would serve the people in the legal field; be professionals. That is to say, be honest to one’s self; honest to society; and well educated in your field; know your field, and be able to be of use to the people – most of the people; ordinary people in the burrows that they suffered in living in a free society, and be able to try to help them to soften the effect of those burrows, and to make them understand what were the rules of society by which they had

to live. And I answered that I did not exactly know why. ‘What kind of living do you want to make?’ was the question they asked. I remembered that at that time in our history, we had no choice. I think I would have preferred to be a ditch digger because you were out in the open; in the sun; could use your strength and so on. And I didn’t really know what to answer. They said, ‘what kind of living do you want to make? Again. I thought, ‘well, no more than a teacher would make.’ The teachers made a better living than most other people. They had a salary, but the salary was very modest. But they could live on it. And I learned from them and their comments on the questions that they were seeking persons who were not interested in making large funds, but actually in getting above the compensation a teacher would, figuring this was enough to keep you modest; to make you feel with the people – what their problems were. And to have an appreciation of the problems or ordinary living in a very difficult depression era. It was still a depression era, though it was a little bit better than the times in 1930-1932 after the stock market crashed. And at that point, if you had a penny in your pocket, you felt rich; and had two shirts, you knew what it was to be without anything. You gave that one shirt away to another person simply because you appreciated how much that would mean to that other person who didn’t have a shirt. And things were hard – pure and simple. And reality was forced upon everybody.

Just a last thing in connection with that; to give you the concept we had in mind and the lack of thought towards a good future that we had: the postman, as we were growing up, was always the person we admired most of all. He came by every mail day; delivered the mail – snow, rain or good weather – he made \$40 dollars a month. He got \$480 dollars a year. He could buy a house; he could buy a car; he could have a couple of kids; and his life was secure. He wasn’t going to get fired, and he could live a placid life. And all he did was walk around and dump the mail at the proper address, and he was very, very conscience about that; very pleasant; very smiley. We followed him around as kids; welcomed him when he came. And we thought, ‘that really was the kind of life we wanted.’ So we were going to school to a certain extent, to a large extent, because you couldn’t get a job anywhere else. And we had to go to school and college for two semesters; \$50 bucks per semester; \$100 a year. And you got top notch education. And it was either that or walk the streets. So we worked hard at anything that we could find for a few cents an hour to get \$50 bucks up for the first semester, and figured that we’d work and get \$50 bucks working somehow; somewhere, and maybe get a little help from the university as well - \$5 or \$10 dollars. And we could get through the second semester. And the result was that everybody was pretty practical – what are you going to do the next day – not the next five years.

It was a day-at-a-time living, and you had to appreciate what was going on. You make me think of the movies at the time. As kids, pretty young, if you could scrape up a nickel in the early 1930’s, you could go, if you were willing to walk a few miles, to the closest moving picture show and get a ‘double western.’ You could see those great western actors – you know, with honor and truth that characterized everyone of them. And a beautiful girlfriend, and a beautiful horse. And you could see two of those westerns with some comic episodes in the areas of time between the showing of the westerns. And Pat Bay News, or the other news (hums the music). You remember the news? And you

could see the news of the world, which was very depressing and so on. And you would then go for the next week on the same nickel – two weekends for a nickel. And we saw the movies before talking movies came, and then we saw talking movies, when Al Jolson would sing painted up black and singing songs that the people in the south would sing, we were told, amongst the slaves there. And it was quite an education.

But as kids, we didn't associate with the adults, to speak of, because it was not your function. You were to be seen and not heard. And you were herded out of the living room when visitors came, and not shown to them, and not expected to interfere with them, and 'just keep your mouth shut and stay out of our ways' and all that kind of stuff. So one did not have much experience. And when I left to go to Washington, D.C., that was the first . . . I think I was going further away from our home area than anybody in the whole town had done. It was quite a trip. First time I was on a railroad; first time I was in a big town – Washington, D.C., and I had to learn my way around in a big town. So I had no counseling; nobody was given counseling as to what to do. Just survive. Just exist. And the one thing we were counseled on was family life and virtue. This may sound pretty silly to people now, but every adult you saw told you 'tell the truth; be honest; be honest men; come to conclusions that are consistent with what society believes you should do.' It wasn't in that kind of a high-tone definition, but 'don't steal from your boss just because he's not there. And you have to not succumb to temptation. You have to decide things honestly in accordance with what is.' And in connection with the truth, the message was, 'tell the truth all the time, no matter what whipping you're going to get. It's a lot easier to tell the truth than to lie. And you'll always be found out if you lie. Honor counts; truth counts.' And this was not what I was told in my family; it was what all the kids were told, including 'mind your teacher; if you don't mind your teacher, and you get censured, you're going to get whipped at home. We're not going to second-guess the teacher.'

And this was the philosophy we grew up in. And this is what tainted my whole life with being a scrooge; a curmudgeon; someone who thought that other people should be honest and truthful, and made you judge persons against that type of colander(?) that we were told we had to have: not to ask questions of the adults; do what you're told, and when you grow up, you will have the opportunity to determine why you're being taught what you're being taught. You just learn what you're being taught. It is useful, but don't ask questions about it; don't ask questions as to why I should see. And you will learn why. And then when you get to be 21 years old, you can get to vote, and you can start speaking up, and you can change the law if you don't like it. You change it by getting other people to vote with you, and doing it the proper way. But you do it politely in that fashion. And I think I've talked enough to make everybody bored to tears at this point, which is what I do all the time, if I'm permitted to do more than just answer the question.

SB: Well, Judge, let me intervene and ask you. You keep talking about the times in which you grew up. What were the times during which you went to Georgetown and then to law school?

LK: Well, in 1929, the stock market crashed. And I remember that very vividly. I was about 11 years old at that time. And I remember that the newspapers said, ‘Stock Market Crashed’ in the biggest print I’ve seen. Have the page. The stock market had crashed, and everything was gone. We read about stockbrokers and attorneys jumping out of windows and killing themselves. All of a sudden, there were no further jobs. People were being fired from their jobs. It was very quick. It was 1930 that the worst part came – ’30 and ’31. Money had stopped circulating at that time, and Herbert Hoover was the President. Herbert Hoover was a very wonderful human being. Everybody loved him. He was a Quaker. The Republicans had got him for office because he had done a great job as a representative of America – going over to Russia to keep the people from starving to death. And he was a religious man, an honest man, a decent man, a fine man. The only thing he could say as President, he did not have too much in politics there, was that the business men will get their businesses back again. Business will get restored. When business gets restored, you’ll get jobs; government cannot intervene; there is nothing that we can do, other than wait until business gets better. The Depression got worse; more people got fired. More people walked the streets. And then, Al Smith was prominent in politics, but Franklin Roosevelt came along. And Franklin Roosevelt had that illness of the legs – poliomyelitis. And he had suffered with that as a rich man as the world went and suffered with polio. And he had come back from that. And he started in becoming prominent after he became Governor of New York. And started circulating the country there.

And his pitch was: It’s going to take government to get us out of this Depression, and what is government? It is not what the opposing party says it is; that it should just be there to put people in prison and to determine what mode of traffic would be acceptable and so on. Government is the people of the United States molded together; joined together. Government is all of us working together and you need not be afraid of all your brothers and sisters. And if we can get into government, I promise you one thing (this was when he was starting to run for President): we will go forward and try everything under the sun to see to it that money will start circulating. We will try to prime the pump so that instead of money vanishing and nobody having anything, we will be making jobs. If necessary, Government creating jobs. Putting people back to work. Letting some money jingle in your pocket. Your being able to buy things, and being able to work. And it wasn’t until that philosophy started in generating. And it started in generating because the great many of Republicans who were great people, and my family were Republicans there. Everybody was a Republican (inaudible) at that time. They realized that unless the economy was artificially enhanced to begin with, that there never would be a remedy. Roosevelt essentially said I’m going to start enterprises where we will hire people to go out in the woods and to clean up the woods, and pay them. It’s made work, but its needed and we’ll give them pride and pay. And then the work progressed administration on buildings and so on.

‘And we’ll even help the rich people; we’ll help the bankers. We understand that in business, businessman cannot loan to lose. And we are going to have to help business people in the ways that they are accustomed to – as banks, for example. We want them to make loans. But we understand the banker cannot make a legitimate loan and be faithful

to his stockholders, and those affected by the bank, if he gives a loan to a person that he knows is going to default on the loan. So we'll get a system up that will guarantee that loan to the private individual if he satisfies certain criteria. Namely, is he a good man; is he a decent man; does he have some kind of a little job now; is he making a little bit of money now; is it expected that he will continue, or is his work in a dangerous field that will mean he'll get fired tomorrow. And if so, let the bank make a loan; we'll buy the loan from the bank; we'll stake them to it; and we'll let them also process the loan and make a living at that. And this way, we'll get money out of the banks even though we are guaranteeing the payment; and even though that is an infringement on free enterprise, to see to it that the pump is primed; that money comes back into circulation.

SB: Judge, how did the whole new deal era impact you in terms of schooling or going into law.

LK: It gave us some hope. Franklin Roosevelt, when he got to be President the first time – I was about 15 at that time. I remember his fireside chat over the radio. Most of us had radios. Most of us had gone from gas to electricity at that point. Radios had come into existence as a common matter. And he spoke about, for example, greater progress in the future. He said, "I can't give you money as such; we're not going to do that except in limited situations. But we are going to try to see to it that what has affected business adverse, they will never do it again. I am for free enterprise. That is not a fight between me and the Republicans or the Democrats and Republicans. But what I'm going to do is, among other things, get a Securities Exchange Commission passed into law. What is that? That is an outfit that is going to regulate the stock market and big business that is involved in getting money out of the stock market, or selling stock, or where people that buy shares in their corporation can resell their stock. What I'm going to do through the Securities Exchange Commission is to make business be honest. Business is usually honest, but there are a bunch of crooks that helped make the Depression because of the lies or the puffing that got out of line, that made people believe that things were worth a lot more than they were. All that the Securities Exchange Commission will do will be to see to it the folks on the stock market play by the truth and tell you the truth. You need to believe if you've invested, you'll be able to have the money sooner or later. And we want big investors to be able to loan big funds. They will know by written material what is the truth with respect to their organization and with respect to what you're getting into. We're not going to effect their business decisions. They have the right to make the business ventures and business decisions they want. But they've got to tell you about the truth of those ventures; what they have and what they don't have. And we'll make it of such a nature that if you read something, you will know what it is, and you'll have local people who will participate in that business that will be able to help you understand that. We are for business, but against lying and cheating."

Again, what was emphasized was honor and trust, essentially there. "And don't fear government. You can only fear yourselves." Government, he kept on insisting, is just all of us pulling together. He said, "I'm going to try everything I can." And he tried things that the Supreme Court said were unconstitutional. The Republicans opposed him rightly in many respects, including not ultimately backing the Supreme Court. Even all the

people of the Country and the Democrats were against him on that. But his effort did create a new thinking. Such as, for example, is the funding mechanism for the Social Security Act that was passed in 1935 constitutional? And the Supreme Court, at that time with nine Justices, including some he had been trying to get rid of, said it was constitutional. In that *Helvering v Davis* Supreme Court decision, about 1936 if I recall it, and I was old enough to comprehend more or less what was going on at that time; and also, I started law school in 1937-1938. No, 1938. The question then was whether the Federal Insurance Contributions Act, which is a taxing act that imposed an income tax on all employees equal to a certain percentage of their wage, and an excise tax on the privilege of an employer to employ you, was constitutional. This total sum of money – income tax and excise tax, going to the Treasury to fund the Social Security Programs.

The tax was a tax that would be levied, and the Congress would have the right to terminate the tax any time it saw fit. And its purpose was, among other things, to try to see to it that persons at large would have, in due course, a retirement benefit. Also, that women without husbands, but with children, would be able to get some support from the total tax ultimately, or from contributions that Congress would give. For, their children would starve to death, otherwise. And so on. As to the social security part of it, the Supreme Court found that, as usual, we have to determine something within the Constitution, that gives this government of our – our national government of limited powers – express ability to do this. And they looked through Article 8 of the Constitution to try to determine whether the many clauses under Article 8 gave the Congress the power to tax or to spend for that purpose. And they could find none. But there was a preparatory clause, Section I under Article 8 – the first clause of Section 8 of Article I of the Constitution about the Congress that spoke about the right of the Congress to enact legislation for the public welfare of the Country. And the Supreme Court, in that federal contributions tax decision, *Helvring v Davis*, for the first time in the history of our Country, that Clause I of Article 8 of the Constitution gave the Congress the power to act in any responsible way, including the levy of taxes and the use of the monies that were produced from the levy, to promote the general welfare, at least in times of utter emergency. And the Supreme Court said there was a dreadful emergency in the Country. People were dying for want of money to buy food. People were starving to death. The husbands were leaving – going off to California in effect – never coming back again.

And in the meantime, the children had to survive or to die. The State said that they had no way practically of helping; that they didn't have the financial resources to give money help to their people. And if anybody was going to do anything as a practical matter to resolve the crisis, it was the Congress. And certainly, this was legislation to promote the general welfare, and they said, in those circumstances, so long as there was such a crisis, they would be willing to say that Congress had the power to tax; to go forward and raise a plan for social security. But they said this: the tax is not guaranteed to be continued, nor is there any agreement by the Congress that social security shall last forever. It can be terminated by Congress at any time. And because it's just a tax, and is for a proper purpose, the fact that it is related – that Congress also said in this law – that an amount of money equal to what is collected shall be funneled into the Treasury under the heading of the social security contributions, does not mean that the tax has to be continued. It is not

a transfer of wealth from one person to another because one person is better off and the other person is worse off. It is to go forward and resolve a crisis. Specifically the Constitution, in Section I of Article 8 . . . I'm sorry, the Constitution is short that I got in the Amendments there. It's Article I, Section 8, I should say. The preparatory clause, Section I, says, 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States. But all duties, imposts and excises shall be uniform throughout the United States. The Congress also has the power under Section 8, clause 18, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.'

SB: Judge, let me ask you this: how did someone who was raised on the east coast and went to school ever end up in New Mexico?

LK: Well, I didn't like . . . I like the country areas. I like Maine which was wooded. I like the country lands. Massachusetts was a farming country. I like the farms in Massachusetts. I didn't like the city areas. I like back bay in Boston. But I didn't like Boston particularly otherwise, or any of the larger towns. I lived in a small town a distance away from all that mess. And the big towns made me nervous. And finishing school and starting to work, I had to do quite a bit of travel. And what I like was open land; forested land, and I like the kind of forest in the hills – (inaudible). In Mississippi and Louisiana, for example, your forests were like a jungle. You would get lost in them if you went ten feet through the thickets, and then had forgotten what your orientation should be.

In New Mexico, you can see off in the distance through the mountains. In New Mexico, your pine could take 150 years to grow to marketable size – 70-75 feet, to real size. And in the south, with the rains that they had, a similar type of tree – a loblolly (?) pine; a long-leaf pine – your pine generally – softwood pine – would grow about 75-80 feet in about 30-50 years, and to about 100 feet in 70 years. And when we had a grown forest, you would have very little in the way of rubbish along the ground. And the ground often times was just a pine cone, and you could just walk quietly through the woods and so on. I like to see where I was going. I like to see the sky. I like to see the hills. I like to see through the woods. And being with a bunch of people yakking; it didn't thrill me very much. I like the peace and quiet of the country. And I thought that growing something and helping nature realized its potential, and not trying to destroy a whole area of acreage to plant something that was unusual and it was different. Timberland was cut in the south to a large extent to put grass in so there could be herds of cattle. When the herds of cattle were no longer able to be, in a commercial fashion, warranted there from time to time, the grassland devolved into poison ivy; thickets, scrubble. And it wasn't until they were cleared that the better woods – the pine woods; the oaks; would come back in again. And I liked that process. What made me like it, I don't know. But I just got thrilled being out in an area where you couldn't see anybody at all. Or you might pass one person during the day. And where you were alone and could hear the sounds of the wind or animals out

in the woods, or the snow, if you're in the forest, of the winds running through the crowns of the pine – that kind of stuff. You felt at peace.

And actually, I think the thing I wanted most in life when I learned some of the differences between places and people, was to get (real ambition) 10,000 acres of woodlands, which I figured would be enough to support you, your family and some of your posterity if you were lucky enough to have any there. But after a while, I realize that no matter what the place of acreage, it was consistent with the dollars you could earn. And if you couldn't earn much, you couldn't buy very much acreage. And 10,000 acres, which would be about four number sections – 16 sections (roughly in my head I can compute it) was a little bit too much for me in my lifetime with my capabilities. But it would take that much if you wanted to have a forestry enterprise, for example, on a selected cutting basis, where you wanted to have animals in your forest that would be consistent with the growth of the woods. And the animals do help in every respect. The deer browsing for example. This happens in Arkansas and in Louisiana and Mississippi and the southern states with large rainfall – 70 inches per spring and summer and fall. And this was beyond our capacity.

But I met and fell head over hills with a girl who apparently like the same things. And wanted to the same things. So we had a great union of interest, even though both of us had worked in the cities and made a living in the cities. Yet, we went back to country as much as we could. We enjoyed it very much. My wife was promised by her father a pine plantation. They had a plantation on their own home lands. And her father owns some timberlands, as well which would go to the family eventually. Notwithstanding, Lee wanted her own pine plantation. Her daddy promised it to her, but in the Depression, he could not afford to go forward with it. I learned about it, and she said that was the only thing her daddy had failed to give her that he had promised. And I thought I would give it to her. And I started out after we got married to try to save up enough money to buy whatever acreage we could that was pine land – even though it might have been clear-cut and devolved into grass or scrub trees that we'd have to get rid of there. We did succeed to a modest extent in connection with that. And Lee worked awfully hard in that. She did a lot of planting. She did not look muscled or tough or anything like that. I'd like to introduce you to her. I have two pictures of her before you leave there. And she was a delicate looking person, but did she work in the woods there with the planting dibble. And I have a picture of that I can show you. It's a heavy tool, and used mostly by men. But she used it. And she could plant without stopping a whole acre – 400 seedlings, and plant them well. In fact, in Arkansas, she taught the people in the Department of Agriculture – the soil conservation specialist – who had never planted in Arkansas because you didn't have to plant there. Trees just grew. She taught them how to artificially plant one-year seedlings with a planting dibble we bought them in Arkansas – six of them. And we kept them with us. We had to try to get a little help in planting. The two of us alone couldn't do all the things we needed within the limited winter time in which you have to plant the one-year seedlings in the state nursery there.

It was a lot of fun – a lot of good exercise – hard. And in the wintertime, it would get real cold, and putting your hand in cold water, you had to keep your seedlings in a pail of

cold water all the time, as you dragged them around with you. You'd freeze to death. And your hands would freeze up. But it was a lot of fun. And enjoyable. It was what we liked to do. Our avocation was not our vocation. I read somewhere – I think it was one of the poets, that the man was fortunate – or the person – forgive me, we have a lady here – that the person was fortunate to be able to have, as his avocation, what was his vocation. And I think that that is really a very wise saying. And we did not have that joy, but we took time off to do it. And while it took a couple of days to get used to the quiet of the country, we like it. And we could kind of recreate our marriage – not in terms of anything other than just being together and working together, and working on the things we like together. But I got Lee her pine plantation, and she liked that.

But getting back to this other business. That 1937 or '38 decision by the U.S. Supreme Court was the first time in the history of our country that the Supreme Court had found that a power had been granted to the Congress to legislate solely for the common defense and general welfare of the United States, as distinguished from giving them just general power to tax for the precise purposes stated in Clauses 2 through 18 of Section 8 of the Constitution. And from that time on, unfortunately, politicians who liked to try to raise money so they can con their constituents into believing that they're getting money for them. And they are doing it for them, instead of taxing you to get it from you to give it back to you, you know. From that time on, it started – the Congress started in going forward, particularly under the long-term democratic regime in the Congress – to tax for nearly anything or everything. I don't see that those purposes were bad or anything like that. But this helped to tend us to get away from personal responsibility and from the need of each one of us to try to learn some trade or business or profession that we could independently pursue. And which would make small towns stronger, and continue to have manufacturing plants – small manufacturing plants; machine shops, pottery shops, furniture shops. Be independent. It was also a matter that made President Truman initially, and President Eisenhower after that, seek to get a national transportation device in the form of an interstate highway that would lock us all together. Truman thinking, and Eisenhower too, I think, that what this would do would mean transportation would be easy. Small towns would get stronger, and a little bit bigger. Industry would be dispersed. If the form of enemies, the Germans, if persons as wildly and as strong and competent as the Germans were, would come into being, that would create airplanes and tanks and other things, as well as could our enemies before. Then, even if they hit a town in America, a big town, and knocked out a manufacturing plant or a facility, there would be many *like* manufacturing plants, and many facilities. They tried to get us to decentralize now that the Congress could tax for nearly any purpose, which would be for the common defense. They tried to get us to decentralize and for this purpose, did create the ease in effecting transportation of goods and services from one place to another. But they lost the battle. Instead, everybody from the small towns went to the big cities because life was easier.

Are we getting to a stopping point? Life was easier and a lot of the people in small towns were seduced by the thought that living in the larger towns would be easier; making a living would be easier; you wouldn't be under the domination of small town politicians. They thought big town politicians would be better. I don't think that they were quite

right in that. And instead, our society went the other way. And it's not been good for our society to have these enormous plants that make all of the goods in one place for the United States. Or all the lawyers in one town, and a posity of legal services for the rest of the people, and so on. But that's the way our country has grown.

And I hope that we see a shift back towards more people living in smaller areas that are more or less independent of others, that have electricity that will not get knocked out because the grid gets knocked out. And that will have small farms; small businesses and so on. In truth, it was the small landowner; the small farmer; the small rancher; the small lawyer; the small tradesmen who went forward and created the strength of America. Because again, he could go to work on his own; he didn't have to ask anybody to do so. He had to produce quality in the small town to get customers. He had to get craftsmen to build furniture that would complete with trash from elsewhere, but that would be much higher quality. I sat in chairs as a kid that supported me, and was extremely comfortable. From the time that I married Lee, I could not find a chair to sit in, except I sank into it and couldn't get out of it there. And it didn't fit the human body. And the furniture here – the furniture at my office that I bought from American Furniture Company instead of in Las Vegas, was old fashioned furniture. The American office supply outfit in downtown Albuquerque – I won a little case for about \$10,000-\$11,000. I was able to furnish the whole office I had, which was a large office - a whole store on the first floor – the ground floor of a bank building – several thousands of feet of space – and still had plenty of money left over. But the seats were short, so it didn't cut off the circulation in your legs. It supported your back. It was comfortable and cushioned. And it wouldn't 'give.' And in this home, you couldn't buy furniture at the same time.

That was then. Now we import furniture – a bunch of – well, it's not very comfortable. You used to be able to buy clothes from a store – a small store – or Neiman Marcus if you went to Dallas. They always had a tailor. And men had short waists and long waists. And there was a tailor there who could adjust any pair of trousers to your waist because they were built to do that. And they wanted to do that. And he would just put a little chalk mark on your backside, and somehow, they knew how to – if your waist was low-down, and you had a long chest, instead of having your waist way up, and you had a long waist, they could – in one day – go forward and make all the adjustments needed. And on your suit jackets, if you were a man enough to wear a suit jacket instead of a sweater, or some other kind of work clothes, always there needed to be an adjustment in connection with the cuffs. And by George, they would measure it. And that was part of the cost of the \$20 dollar suit. And that was an expensive suit at that particular time. A \$8 dollar suit was real expensive during the Depression. And people didn't buy suits at that time.

END SIDE 1 – TAPE 1 Begin SIDE 2

**LK:** You either do good work and you're accepted; you make a living consistent with the needs of that particular community, or in continence with the standards of that community. Or you don't. And I didn't really care very much one way or the other

about magnitude of living. Just so long as enough came in to pay the rent; pay the overhead; pay the help that you would hire, and so on. And I figured that I could do it.

**SB:** Did you have a general practice, and

**LK:** It was a general practice. No, I had a corporate practice. I had a completely corporate practice. I joined Rotary, with which I was familiar, at Las Vegas when I went to Las Vegas and came back to New Mexico. I stayed in New Mexico about three or four years after I was admitted in 1948. And then came back. I say corporate practice because I joined Rotary; ultimate cut to be the Program Director, and fooled all the people in Rotary with the people that I brought in there. I got to be President of Rotary after that. And in the Rotary, you had to speak of what part of the law you were in. And so I applied - was requested to apply - as a general attorney. And Rotary said, 'we can't let you in on that fashion.' Roberto Armijo, who is District Judge Armijo's son, and who was a member of the Rotary Club as well. That was his classification. Rotary says you have to have a different classification.

So I had to think of what I had done most recently, and that was incorporating a small corporation. I think I used a form that I had. And it's the one and only time I think I ever organized a corporation. So I thought to myself 'would it be within the standards of Rotary - speak the truth; do this; do that; the other thing - I thought it was, so I said, 'I'm a corporate attorney.' And that's what I was classified as. And they took me in - they were happy to take me in. Then I introduced a guest to Rotary a little later on in accordance with truth and honor, who is one of the Deputy District Clerks in Las Vegas, Fourth Judicial District - she came from Mora. She spoke English. Nicely but hauding. She was a beautiful girl. She came from Mora. She was tall and slim, and aristocratic looking. And she wore beautiful clothes. She didn't know too much about the law or anything, and her English was hauding, as I said. And at that time, Princess Margaret came here as an envoy from Queen Elizabeth II, and I thought I'd have a little fun with Rotary, which didn't have too much fun, actually. And I asked her, when I saw her with a beautiful suit on, behind the counter in the clerk's office, "Jocelyn," I said, "would you like to come to Rotary as the guest of Rotary?" "Yes," she said. "That would be nice." And she was polite about it. And she was such a nice girl - a real nice girl. And so I said, "Well, let us pull a little trick." And I told her what I wanted her to do. Then I taught to the music professor at Highlands, who was also a member of Rotary. And I said, "I want to pull a little trick on Rotary, will you join me? Will you get me five students or so who sing well, and are able to pop up from a chair and sing nice loud songs, and would be willing to do this for nothing more than the fun of it, plus I'll pay for their lunch at the Hillcrest Restaurant in Las Vegas?" And he said, "Yes." So then I told Jocelyn what the plan was: Princess Margaret, the sister of Queen Elizabeth was in the United States and she was traveling through the west at about that time. And I was going to get Princess Margaret to come to the Rotary meeting. And I was going to say, "This is Princess Margaret, and may we please stand up in honor of Queen Elizabeth and Britain and Princess Margaret, play 'My Country 'tis of Thee,' which is the official song in England. My Country 'tis of Thee is the same as the profound songs you sing when the Queen comes (inaudible). I forget what they call her in England. And she said she'd do

that. But I said, “I don’t want you to talk; I want to introduce you.” That’s because of her accent. I want to introduce you and say, “this is Princess Margaret,” and I just want you to say, “this is a pleasure to . . .”

And then we’ll have these five boys – five singers; three boys and two girls – at the table way in the back. Because they can sit on the other side of Rotary, it’s an open chamber, and start any song they wanted to – bright and brilliant and so on, to cut her off. And we would all look surprised. So, she wore the same suit – it was a winter suit, just gorgeous, and she was a gorgeous girl, and sat her next to me. And I said, “Ladies and Gentlemen, we have as our guest, Princess Margaret of England, who came out of her way to join us here to see what a small town in southwestern New Mexico is like.” And she stood up; they all stood up; clapped their hands for her. And then after the lunch, I said, “Well, Princess Margaret will now address you. I’m sure that she will not take too much of your time, but she has a cogent message, though it’s short and blunt and well, from Queen Elizabeth herself.” And she stood up, and these five people started singing, and she couldn’t talk. “What is that interruption?” And the member of the Rotary, the professor from Highlands, stood up and said, “Well, these are singers that sing on impulse.” He was in it with me. And this went on a couple of times, and then finally, we said, “Well, that’s enough. Apparently, they will not let Princess Margaret go forward and speak, and Princess Margaret has to be on her way.” So she said, “Adour” and walked out. We didn’t hear her, you know. And then we confessed at the next meeting that that was so. And they hated me because I tricked them. But I had cause to trick them.

We got the United States Army Colonel in charge of the Albuquerque District Corp of Engineers come up here in civilian clothes to speak about his job. And he did. And he started speaking. And he was what I said he was, and he was in civilian clothes. And that was the week after. And they said, “oh, he isn’t; he isn’t.” And I said, “He is! How can I prove it to you? I said, “I know how. Do you have your uniform here?” He said, “Yes, I’ve got my colonel’s uniform.” I said, “Would you be willing to do me a favor and go out to your car and get the uniform; put it on in the restroom here, and we’ll accommodate you in anything you need. And come in with your colonel’s uniform on.” He did that, and by God, he looked good as a colonel. And he was straight as a ramrod. And they didn’t know at that time whether this was a fake or not. And he spoke, and he laughed. He said, “Something has happened. I’m not sure what has happened. But I am a colonel. Here are my papers” and so on. So I got the reputation of being . . . well, they weren’t too sure what I was there. But I did this in retribution for the fact that every time a man in Rotary – men were the only persons that could join Rotary at that time – had an anniversary of his marriage, the Club had a habit of getting up and singing “let me call you sweetheart; I’m in love with you.” And I thought that was repulsive. It was terrible. And so, I thought that if they would do that at a meeting, I could fool them a little bit on something else. I could have my reputation in that fashion. But after while, we got to enjoy it. And they did not strip me of my membership or throw me out, but they were not sure of me afterwards. They were not sure whether I believe in the model of Rotary – tell the truth; be a good businessman, or whatever. It’s a four-item pledge. But it was a nice organization. I don’t know why that’s useful, but . . . we had a little fun. But I did do this: I did get the success.

We had a terrible time getting people that had committed a crime, and that I, among other attorneys, had been successful in getting the Judge to give probation to get a job. Without a job, they turned to crime. And I started my own job hiring trade in Rotary. Calling up the people in Rotary – many of whom were the head persons in a particular job area. For example, Penny's or some other outfit that hired people (inaudible): This is a man – I know him. He's a convicted criminal; this is what happened; this was the thing he did. What he did was bad; what he did was a trifle, but it sounds bad, and the D.A. got after him. But we need to get him restored to good citizenship. And he's going to commit a crime again if he doesn't get the ability to work in his (inaudible) job some place, and get some money and start enacting like a man. I believe he is at the point where he wants to change, but he's going to fall back if he doesn't have someone to respect like you, and a job that gives him some money, and that makes him feel useful and appreciated in society. Will you help out? And, By George, those people in Rotary never said 'no' to me. They said 'yes.' And we never had one person that was recommended that failed. That was lucky. Because in the ordinary course of things, no matter how good things appear, there is a 20-40 percent failure. But it happened that there was none here. And we kept this up until I left there, even though I wasn't involved very much in criminal law in the tail end of my practice there. And I feel that they were good people for that. So maybe, having had that fun, maybe enjoying it; maybe fooling them, created a little warmth among people, and got folks to like each other even though they might be of different faiths and different backgrounds, so far as ethnic origin was concerned. But it did work.

**SB:** Judge, were there any significant cases that you were involved in when you were in Las Vegas? I heard that you had one of the early products liability cases?

**LK:** Well, I didn't do too much tort work as such, but we did a wrongful death case against General Motors. And we were fortunate to prevail on that. We did a lot of work and research in connection with it. And we had expert testimony that was strong, and yet that could be critiqued. I had to cross-examine the expert that General Motors bought – 3 hours or 4 hours. And we did a fair job in connection with that. We had to prepare the case with a lot of effort involved. A runaway Chevrolet where the motor mounts, we said had failed. The motor mounts were closed in being at the time of the end of World War II. And in the interim, motors had gone from small horsepower up to 350 horsepower. And General Motors had kept these same motor mounts in this particular Chevrolet because the cost 75 cents per tube for the two sets, to about three dollars for the fail-safe set of motor mounts that would keep the motors down with metal; clutched together on either side. And the car ran away up a railroad trestle; beside a railroad trestle; across the railroad trestle; plump down on the other side of the trestle. The driver was not killed, but his mind was adversely affected. And our client, the passenger, was killed; being thrown out of the car and being smashed underneath the rear tire of the car. This happened in Tucumcari. And we tried the case in Las Vegas. General Motors was a Delaware Corporation. The evil plaintiff's attorney found out that the assistant radio manager, Kay Fund, in Las Vegas, had an uncle living in Delaware. And we got him to be the personal representative of the estate of the decedent. And since he was out of

state, and General Motors was out of State, we could pick any county in the state in connection with venue.

And at that time, the Federal law was such that if there is no diversity of citizenship between the plaintiff and the defendant, we had jurisdiction in New Mexico. We could not be removed from State court. I researched that pretty much. The law has been changed since then; the statute has been changed according to my understanding. And now, the titular representative does not citizenship that would prevent diversity from being utilized. And so we had them here. They couldn't get away from us. And the reason for that is not that the people here are crooked; not that the people in San Miguel County are crooked. Or would vote us just because Benny Flores should come to work in our office. I had left the District Attorney's office, and later became a District Judge with the Court of Appeals; was one of the attorneys. But it just that the death was of persons we've witnesses who were used to speaking to folks in small towns. We've had criminal accused; Spanish surname young fellow, for example, that I represented, who are men. It is a sign of manliness not to be afraid. And his defense was "I was defending myself against an attack that I thought would kill me." Would he confess having been afraid for his life? With his background, it wasn't manly to be afraid for one's life. And I tried to tell him that human beings can be afraid, no matter what their last names are. And we are faced (inaudible), I had some fear. And if he says that to a jury in San Miguel County; if he said, "I had some fear," they understood what he meant. You get before a jury in another area, and they had a little fear. They don't understand the training of kids that live around here. You should be strong; you should be stalwart; you should fight for your family; you should be proud of them; you should do what is right.

And one of the things that happens is that folks in countrysides everywhere get offended with small accusations. And again, local juries understand this. So local juries understand nuances in testimony that some time big city folks and big business men and rich people don't understand. So in that sense, we wanted the enormity of thing in Tucumcari that had happened, which is: when the motor mounts breaks, the engine is lifted, and the accelerator device hits up against the underside of the hood of the car, and you keep on going. This happened to me once in my little BMW – my two-door BMW – coming from Trinidad down Raton Pass. The block had been lifted up, and one of the old men that had been doing the work of putting the block back on again, hadn't tightened it up. And that hits the bottom side of the top of the hood. And you cannot decelerate; you can't brake hard enough to lose your brakes after a little bit, and you cannot decelerate; you have no control over the accelerator. And it is up to the top and stuck there. And I was going down Raton Pass; going like bloody hell, actually. The traffic was very minimal and I had to make up my mind where I was going to make the effort to stop without killing somebody; and finally made a successful effort on a vacant lot on level land at the outskirts of Raton where the land starts leveling off, and where there was about a two-acre area, and it ground to a stop when I turned the emergency brake on; turn the key off and turned the motor off to get it to stop, but I needed the space to be able to stop. In Nevada, for the reason that there can be runaway trucks quite a bit, in many of their interstate highways, they have, when you are going downhill, great lanes – dirt lanes – that have been created off the highway; going off (inaudible) for several miles so that

truckers, if they lose their power, can get off knowing that from time to time, there are such areas. So all we need to do with (inaudible) was to prove that there was some kind of hump or declivity in the roadway which would give the automobile a little jerk; brake the motor mount and so on.

We had a metallurgist who worked for General Electric on jet engines, who would be able to testify that that ‘jerk’ would be sufficient to go forward and bust the ordinary motor mounts that were on that 350 engine, rough speaking. I’m not sure exactly what the rating was, but it was a very high-powered motor; a very heavy motor – 8 cylinders there that would be able to burst the rubber that kept the two levels of motor mount; the old fashioned ones, together. Metal, rubber, rubber metal – cemented together, and bust that apart, and be the efficient cause of the lifting of the motor, which was shown to have lifted by the condition of the inside of the hood. And he wanted to go further, but we wanted to confine him to that, because he was a fellow – a nice fellow – but he like to orate – just like I do, and as bad as I, and we wanted to keep him short and to the point. And we said that was the immediate cause of the breakage. And the expert also could testify that the nature of the motor mounts after the break indicated that it was the accident that caused the scratching on them; not anything after the accident. So we had pretty fair, although testable, testimony able to be limited on cross-examination without any question. And became a matter for the jury to determine what happened. We also had made, by the surveyor of land who like to prepare miniatures, a miniature in wood of the highway. We were not able to get anybody to go out to visit the scene under the circumstances. And he made a large depiction of the highway. And we got the first million-dollar-plus verdict from the jury for damages. And the General Motors wanted to go forward and to get an appeal on it; they wanted to appeal it – everything – both the liability as well as the amount of damages. The Judge would not give us punitive damages there. We had testimony and we had a great deal of literature in a particular case from the Federal Highway Traffic Safety Commission; whatever it’s called at this particular time, in connection with the call-back of those vehicles for that reason. And the experience of General Motors with complaints of this same thing happening elsewhere, we said that for General Motors, it was a business decision, and they have the right to make business decisions. Seventy-five cents per unit; make a million cars, at the (inaudible) from \$3.30 per unit. They were saving a lot of money. And this is what he (inaudible) it. We also had some recommendations to General Motors from some of their employees saying, ‘this is going to happen.’ The Judge wouldn’t let us get it in; he said that there was no way he would let punitive damages go in. And actually, I am against punitive damages by inclination and by attitude in the sense that I think that unless and until punitive damages are nailed down to very specific criteria, and unless the level of the damages is very, very carefully ascertained, that the U.S. Supreme Court decisions on punitive damages are in perfect order.

The U.S. Supreme Court says consistently, “punitive damages are quayside punishment, and under the 154<sup>th</sup> Amendment, no state shall take the life, liberty or property of any person without due process of law. Due process of law in this quayside criminal taking of money, property, from a citizen for nothing more than that he committed a tortuous act allegedly under circumstances such that he should be punished, you have to have

forewarning of some nature given to that person.” Forewarning means the legislature has to pass a law saying you must realize that in these business circumstances, you’re going to be meat(?) for punishment; the State authorizing and directing your money to be taken from you over and above the actual damages, and given to another fellow – not for his damages that are already taken care of; but to punish you or to make an example of you, and give it to this other fellow. And also, in addition to have forewarning, which means either that the State Supreme Court has got to say, “conduct such as this is so vicious, that anybody going forward and doing this type of thing is going to know he is going to be punished. Otherwise, this qualified immunity. Otherwise, you are not aware that what you’re doing violates the constitutional right, which is conferred upon every citizen. And being given for the benefit not of the state, but for another citizen, even if given just for the state. Insofar as quantum is concerned; what are the damages to an ordinary person in connection with . . . what is the evil that has been done to an ordinary person in connection with the award of punitive damages to make him the beneficiary of all of the punishment aspects of damages. The punishment aspect of damages is something that is really a concern of government in the sense it’s either got to do some good to forestall the repetition of this; or actual damages is all that the citizen requires. And in connection with the punishment aspect of it, the Supreme Court says that the state is hell-bent to go forward and say, ‘we’re going to punish for punishment’s sake, and give every penny to the men that happens to have suffered the particular injury, but not the punishment aspects of it. At least we’re going to have to say that it is somewhat similar to what the State would have judged it by reference to a criminal money penalty; by reference to a civil-type of fine that would be given for certain conduct, or something else. The oil company – was it Texaco or Standard Oil – that had that tanker go off the Alaska Bay.

**SB:** Exxon.

**LK:** Texxon, yes. Texxon, for example, through negligence of its captain apparently, would have been liable for actual damages done to those persons who own a fishery; had a right to the fish; after the clean-up activities, and so on. And perhaps the State would have had a right to punish Texxon for doing something wrong. I don’t know that Texxon did something terribly wrong because a seaman, who happened to be the Captain, was drinking a little bit. I don’t know what merchant seaman you could find during World War II, who are the great heroes of World War II, who manned the ships; the cargo ships that went from America to Russia to give Russia the goods and the armament and equipment it needed to fight off the Germans. And who were sunk by the German U-boats. My brother-in-law was a First Mate on such cargo ships, and he had a Captain’s ticket as well. He tried to enlist in the Navy, but they wouldn’t have him because his service in the Merchant Marines was more important to the United States. His two half-brothers, and my wife’s two half brothers, were also seaman on the same run on different ships. These kids that grew up in farm country and in rural lands; they didn’t know how to do much except to learn. They wanted to get away from farming, and they learned how to be seamen. And one of her brothers had been torpedoed three times. And he started to drink and he got to be a drunk. He was rehabilitated, but he was also very weak in connection with that fact.

And one of the things that kept these sailors onboard was that they could drink a little bit from time to time and forget the fact that they might be killed. And her other half brother, followed the sea for a good many years. And he was a good seaman. He started to drink late in life, more or less. He had some problems. But part of the problem is that you don't get these seamen unless you do that. The Captain may have had a little bit of booze. I'm not sure it was worth all of that difficulty. He apparently had to train a First Mate, and so on. But if there is punishment, why not make the punishment available to the Government? Why not have the Congress, for example, legislate such punishment to apparently try to help prevent another accident of the same kind? So I feel very, very terrible when here, every tort case now that I've seen has had a punishment aspect to it. Oliver Wendell Holmes told a client, and he wrote about this: "you have a store in the city. In the city, there is an ordinance that says it's a crime for you, the shopkeeper, to put your clothes on a rack and put it outside your store window, because it clutters up the sidewalk. And on Saturdays and Fridays, the women come along, hordes of them, and they may get hurt because there is not as much space on the sidewalk. Don't do it. And if you do it, there is a fine of \$35 dollars a day." And that fine was a fairly hefty fine at the time. And the client comes to Oliver Wendell Holmes as an attorney, and he says, "May I go forward and do this?" And Oliver says, "I ran through the city ordinances." He gave this example; he wrote about there in one of his books. "I looked it up in the books," he said, "and it is a crime; \$35 dollars, and if you do it, you're a criminal; you're apt to be cited, even arrested, hauled into court. And if the proofs are there, they can fine you \$35 dollars." "Well," said the merchant, "I'll make \$100 dollars gross if I put that rack out on the sidewalk, and what do I do?" Well, the law says you shall not do it, but the punishment is \$35 dollars. Since you know what the punishment is, it's up to you whether you feel it's worth having the criminal conviction and paying the \$35 dollars to gain \$100 dollars. You will not be put in jail, and you will not be blasphemed from it. It is not a *mollen prohibitum* crime, which means the thing is so bad that anybody with any morals knows it's bad. If, for example, some woman may fall on account of the congestion there, it may be that you also might be deemed to be negligent. There might be a lawsuit against you. But if you are willing to take that risk, I've got insurance. "The citizen shopkeeper can make whatever choice he wants in those circumstances," said Oliver Wendell Holmes. "If he knows, and is willing to take the risk, what's the problem? He's covered in all instances." So, this, in a sense, is against punitive damages. On the other hand, for example, when a manufacturing company steals the formula to make some kind of material that will keep the insects from killing off the crop that is being raised, and says that this is of a different nature, then the firm that he is cheating, which is the firm that has that invention and the patent on it there, can come in and say, 'we want our damages.' But again, it's intentional; it's wrong; it should be punished. Once the actual damages are had, and the actual damages are the loss of customers; the loss of earnings; the loss of income; the loss of profits of the company that had the patent violation.

What more is there for society to do? It can punish the man or the outfit that did the wrong by making a criminal statute and saying, 'you are going to have to pay a criminal fine, or we'll wipe you out of existence as a corporation perhaps. Or we will file a criminal suit against the officers and put them into prison for a while.' But if it doesn't

do that, what is the occasion for the punitive damages? Well, it's an example to the people not to do it. I can buy that a little bit there. But if that is what it is, why can't there be something in the nature of a formula in connection with the Judges determining the level of violence to the morals of the community, or the level of corruption that's ensued. For example, even now, under punitive damages there, in State courts, the States are bound by the U.S. Constitution, as determined by the Supreme Court, not to permit the punitive case to go to jury unless there is a forewarning by the State in some fashion. Then only, to determine damages in accordance with the instructions of the Court that (inaudible) of the State which say it's got to have some rationale relationship to the nature of the offense, and what the State would possibly likely punish for if the State were getting some compensation. But even so, we look at the amount of damages in this fashion. We will not let the jury be the last say. The trial Judge has the responsibility, which New Mexico is not doing nothing. The trial Judge has the responsibility to determine in his own mind, based upon the facts that he recites, that he thinks are important and relevant, in determining what the level of the punishment is, and whether the jury is right or wrong on that. And the trial Judge has the responsibility, under Federal Constitutional law, to supervise actually the finding of the Jury as to the amount of the punitive damages – not just to review it. And our Supreme Court here in this State still is talking, as I read their opinions, in terms of the Trial Judge needing only to go forward and to determine if there is sufficient factual basis for the amount of dollar punishment that is being done to the person against whom punitive damages are being horded. But the Trial Judge is suppose to look at that verdict as to the amount *de novo* in effect based upon his view of the facts; his finding of the facts; just as the Appellate Court is supposed to look at that matter actually *de novo*. The conscious of the State has to be in on that. The point is you don't kill off; you don't create a *quasi* criminal penalty without having a review of the amount of it. And where it's indefinite, and where a jury is given leeway, there has got to be some conscious of the State imposed upon it anew, to see to it that since there is no charge of the crime; it's not a \$1,000 fine; a \$5,000 fine, or \$10,000 fine, which definitely and finally fixes the quantum; the level at which this legislature says, 'this hurts us, the people of the State.' And there isn't that.

And because of that freedom of finding that the U.S. Supreme Court has said the Constitution cannot be vindicated unless there is judicial determination since there is no legislative determination in the field of what a proper punishment amount is. And this puts the Judges in a tough spot because to what extent should the Judge be the determiner of a policy matter? Which is, to what extent has the State been hurt, which we can measure in money and punish this fellow who has done the wrong? With particularly as viewed against the fact that that kind of situation has not been given forewarning to the wrongdoer, that you can get hit so hard that you can become a pauper because of what you did that you thought might have been a little wrong. But you did not believe the people of the State would look at in that fashion. Am I all wrong on that, Sally?

**SB:** Well, speaking of which, you went on the Bench. So you, as a Judge, had to be making some of those decisions, correct?

**LK:** Actually, I don't think I ever had a punitive damages case come before me. Or I think I ruled out punitive damages pretrial in any case I had. Because most of the cases I had were like the wife in a domestic relations case. 'My husband batted his eyes at me, and I wanted to shot him.' You know, this kind of thing. You had to have something that is very, very serious. The closest that comes to punitive damages are the common law actions of a deceit. Generally speaking, these things can be resolved in damages. In other words, the person is looking for damages. But punitive damages, I'm not sure exactly how you go forward and create an enhancement of public protection. When you go forward to the young real estate broker who has never been a real estate salesman, but is smart. And opens up her own office, and she makes a mistake. She goes forward and she 'slufs' off some item that, were she experienced, she would be very clear about giving to the persons. She set no malicious motive; no thought to deceive. But she was ignorant. And being ignorant without having been an apprentice in a shop, she does something that a decent man ought not to do. But since we're acting on individual basis, why does one put this young, earnest, good-faith-acting woman for making a mistake in her profession, (inaudible) by the award of the damages that have been ensued – and ample damages? Why do we punish her for the benefit of society, particularly when we give the money to the person whose damages have already been fully compensated?

We don't have very much of that going on in the small town with small firms. And most of this law has been in the field that didn't develop until after I left the Bench. But I've read the Supreme Court decisions – all of them – on or related to this point very carefully. Because I love our Country with a passion. I love the law of our Country with a passion. I learned to respect it. I didn't start out with this love. I learned to respect it being a lawyer; doing research; handling cases, and so on. I learned to respect the seriousness of the law; the fidelity with which most of the Judges seek to fulfill their duties with which they seek to understand, 'what am I trying to do in connection with compensatory damages? Am I trying to go forward and hit this son of a gun? He is a son of a gun, this defendant, who pulled a raw deal on this other fellow. Am I trying to compensate the other fellow? Am I trying to – what am I trying to do actually. Am I trying to give more money to this fellow whose damages have been fully accorded just because he happened to be the butt of an intentional wrong doing on the other fellow's part? What am I trying to do?' What you're really trying to do is this: You're trying to punish on account of the State. You're trying to punish because it is State law that persons should not do things this vile, even if there is no criminal law against it, and no separate tort against it. And thus, the attitude of the criminal law has to be applicable to these damages. One way or another, you're punishing. That's the point of it there. And you are helping the State in saying, 'I'll see to it that nobody else does this kind of thing. But if so, how am I going to get publicity on this? Do I have an agency of the State that is going to write it up, and it's going to say, 'we'll put it in all the newspapers? Do I have an opinion that I write able to report it in the same papers where the Supreme Court and Court of Appeals' opinion come down, so as to alert everybody in the world? No. Will this case be appealed? Probably not. Nobody will put more bad money into good money. Will the juries talk about it?' We suggest to them basically, to not speak about their reasoning to anybody there. And thus, get all the parties to say we want some post-judgment actions in connection with what the juries have told us. We usually, in criminal cases,

instructed the juries not to talk to jurors unless they want to. That if they want to talk to the reporters at all, maybe they would want to talk in Court. And they could say, ‘we won’t talk to you unless we are required to do so in Court,’ and so on. But what are my vehicles to show that what I’m doing is affecting anybody else? Does it get around in the community to people affected? The defendant involved doesn’t talk about it, particularly. There is very little publicity goes on. There may be a little scribe in the newspaper – three lines: the Judge gave punitive damages – the Judge didn’t really do it – of ‘x’ number of dollars. And that’s all. And a few people may remember it. A month later, nobody will remember it. If we are going to do something like this, it seems to me the legislature should get involved, and give us the peoples’ judgment as to what we should do.

I am not against punishing for evil as such. But I think, as in the criminal law, I would love to have guidance from the voice of the people to tell me what to do. And my philosophy may not be the philosophy of all of the people. And I think that rectitude and uniformity would be better had if, if the field of punitive damages, our Constitution should be had. But let me tell you something about ‘old law.’ Do you have ten minutes?

**SB:** Sure.

**LK:** Yes. 15 minutes?

**SB:** No, we don’t actually . . . Let me ask you something, and then we’ll go to this in a little bit so that you have time.

**LK:** I’m really asking how much more time you are going to give me completely? I’ll take 20 more minutes here.

**SB:** Yes. We can keep going, but we will break in ten minutes.

**LK:** Yes. Well, just go on with what you’re doing now.

**SB:** Okay. Why don’t you go ahead and let’s do this, and then when we come back, we’ll shift gears a little bit.

**LK:** So many people today think the law is new. We look at what the Supreme Court said last. That’s it. We look at what Justice Sotomayor said last. That’s new. We don’t have to go back. That’s current. But that’s wrong. They have to understand the whole field of law. They have to understand this thing said today is just a little itty bitty bit of what the law is today. And even though it handles a good bit of the aspects of that law today, you don’t really understand if you don’t go back to the basics. For example, in connection with New Mexico, in the law of the parole evidence rule, let’s say. In 1947, the State Supreme Court very well; very happily; very joyfully; very respectfully, decided what was the parole evidence rule for New Mexico. And they decided it on an auto mass basis, you might say. They followed Rigmore’s Ten Volumes of Evidence. Though several sections were fairly long on the parole evidence rule, they couldn’t have had a

better master. They couldn't have done a better thing. And the whole area of parole evidence rule was, more or less, encompassed in those three sections or so. It was what Rigmore says the parole evidence rule means. It's a rule of substantive law – not a rule of evidence. There was a ruling by Justice Sosha back about 1990 or so, on the parole evidence rule. And he briefly stated what the parole evidence rule was. And we had the parole evidence rule before us on this particular case, by a learned young attorney. And Justice Sosha had enunciated the law on parole evidence rule. And based on that, one could infer such and such a thing. But Justice Sosha was just dealing with a tiny fragment of the parole evidence law. And it was not the whole thing. I said, 'well sir, if you go back to New Mexico law, you'll find that is not all there is to it; that's a segment of it.' And Justice Sosha was correct in his conclusion, and correct in his reasoning. He was a good Judge, too. 'But the aspect you're talking about is something quite different it there. And it's a difficult rule to administer; particularly, the more complicated contracts. There may be an oral contract and a written contract, and another written contract. And how you apply it depends upon what happened, and what is an integrated contract; what is not; and to what extent, what was decided here; what was decided there. And so on. And there are reams of paper that are written in every situation in connection with it there.' So you can't just read the law today.

I picked up this book for three or four dollars in Las Vegas. This book was in the hands; was handled by some fellow called William J. Mills. He's got his little ticket over here, and a little inscription over here – William J. Mills. Well, you know, it was just a book – that's all. Except that Williams Mills was a great man in New Mexico. This book is Law on Presumptive Evidence. And Lawson is John D. Lawson. And this book was published in 1886. And it's called The Law of Presumptive Evidence Reduced to Rules. It includes presumption both of law and effect and the burden of proof. Should I quit now?

**SB:** No.

**LK:** . . . both in civil and criminal cases – reduced to rules. John Lawson says he authored a similar work – not long before this – on the law of expert and opinion evidence. Great. Today, we should not use the word 'expert' at all here. But that's what he did. And I knew the name William Mills, because I'd seen some of his cases in Las Vegas. He was a lawyer in Las Vegas. And I knew he was on the bench at some time. But this is his history: President William McKinley, who took office in 1897, named William J. Mills as successor to Thomas Smith as Chief Justice of the New Mexico Supreme Court. In that office, the Chief Justice also toiled as District Judge for the Fourth Judicial District, where in 1900, he presided over the trial of Black Jack Ketchum, whose sentence to death was in due course, hanged from the neck in the Courthouse grounds in Clayton. I sat with my back to the wall of the location of the same wall in the original Courthouse in Clayton, just at the bottom of which Black Jack Ketchum, and his head rolled off in that hanging, and thought to myself, 'this is a comfortable situation.' Mills had served as Chief Justice for twelve years. He had the reputation of being a great administrator, like you are a great administrator, Sally. Where upon receiving the appointment of President William Howard Taft, to succeed George Curry as Governor of New Mexico. That was

on March 1, 1910. What happened was, I read further, the President of the United States wanted to have a governor in the territorial position who would have the expertise to make the transfer from territorial government to statehood government. And he picked, as the most honest person, and the greatest administrator, William Mills. At noon, on March 1, 1910, Judge Mills took the oath of office as last territorial chief executive – the Governor - on the steps of the capital of Santa Fe. The oath was administered by Judge Mills' successor, Chief Justice William H. Pope. Mills served as Governor until statehood, January 15, 1912, and then, as most good people from Las Vegas, he then returned to his home in east Las Vegas – the fancy part of Las Vegas; not the historical part – where on Christmas Day in 1915, he died a victim of pneumonia.

So I think this has been in good hands. And I'll tell you something about the content of this in just a bit.

**SB:** Good.

### **END OF SIDE TWO, TAPE ONE - Begin TAPE TWO**

**SB:** . . . talking about the particular case.

**LK:** On this Lawson; on presumptive evidence. My hand clutching the same book that the former Chief Justice and Governor's hand clutched; and that came from his library there. What this does is to give you research of the author as to every case on which he found a presumption of fact or presumption of law. Often times, a presumption of law following a presumption of fact because un-rebutted, to help you in connection with proving up certain matters, particular when there has not been much evidence. For example, the captain of the ship that went down by explosion with no one knowing why. And the cargo owner suing the ship owner for damages. And nobody knowing, as I said, what happened. There being a statute saying, and the captain was familiar with this, it was shown, that the captain shall be responsible to see to it that nothing explosive that may cause great fire shall be put on the boat without getting consent and approval by his shipping company. Who has the burden of proof to show how the ship went down? Was it just an accident? Was it the faulty of the shipping company? The old court said the presumption is people are good and people obey the law. And this being so, there being no evidence, we say that we will adopt the presumption that the master of the vessel performed his statutory duty. Presumption and the burden therefore is on the plaintiff who lost his cargo – a million dollars or so – to prove the captain did wrong. Every situation in the world, this man (inaudible). Again, the rule against perpetuities and all the rules in connection with property, this book – it was in the 1600's that the rule against perpetuities and the rule in connection with uses – started coming into being there.

This book was written in 1912, I believe there, by a New York State lawyer who could not apparently, as a student, understand the bloody English words. And he precede 250 cases in New Mexico in Old England; got them to be understood in ordinary American words, and showed what the rules that emanated from them meant, and preceded each one of them – facts, questions, held, proposition; half a page on each. So you can go to

this thing here and you can determine what the law of Old England was; what did it actually mean. And you know, we have a sensible background, and then you can read current law in the light of that old law, but you can't understand current law without reading this stuff. And this, for example, says that, "an option to buy real estate is considered to be real estate itself. And also, is subject to specific performance. And therefore also is subject to the rule against perpetuities."

These are valuable books, there. In connection with just cases and practice in Las Vegas, I had a specialty in real estate law. I did most of the abstracting work for the big attorneys and the big firms that were helping people buy land in the vacation land of Las Vegas or adjoining counties there, and gave them title reports in connection with what the title was and what needed to be done. I did this from 5:00 to 7:00 every morning; I paid my rent with it; I paid some salary with it. I did it every day of my life virtually there. I got to be pretty much of an expert on real estate. I knew the Federal law in connection with that when we were a . . . before we became a state.

**SB:** Territory?

**LK:** Territory, yes. And knew all the territorial problems as well, there. We had defensive criminal cases. We defended the case of the man who was charged with the murder; the assignation of the district attorney, in Tucumcari. I was a very qualified criminal attorney. I became known as the "man of conviction" in one instance there. I was assigned that by the Chief Justice of the State Supreme Court when the Tucumcari D.A. got murdered with an M-1 rifle and rifle shot. Bennie Forest had just come in with me. They thought we were an ideal combination because Bennie knew how to speak Spanish. The defendant was a man about 50 years old with a Spanish surname. And between the two of us, they thought that we would do a good job in connection with it there. And in that connection, we encountered a man who was a pleasant fellow actually there, when everything was placid and quiet. But he was suffering from - all of the psychiatrists agreed to this - schizophrenic with a paranoid reaction and a religious ideation; one of the most severe cases they ever saw. And while, if he did this - he never told us - if he did this, we would think he knew that what he was doing; he knew the nature and quality of what he was doing. But he did not know it was wrong. I became a convert to mental illness. I also was given that task because I was the first one in the State that became a special master to Judge Ainsley when he was a judge who handled all of the mental commitments to the State hospital for the whole state. And I did that for about three, four, five years until we had the new statute on mental illness, which afforded me money to go forward to get an attorney to represent the defendant mentally ill patients. And I could not get that money, and I quit and said, "if I can't get the money to make for a valid contest, I'm not about to do it. I don't want the money myself; I don't care about that. But I need it for the attorneys." I learned a lot about mental illness. And the best psychologist they have was a former police officer in Chicago who said, "I am tired of looking down the muzzle of a pistol from these hoodlums in Chicago. And I figured it would be much easier to be the psychologist who puts them away." And his pitch was very simple. I don't know too much about psychology, but I'm pretty sure that when a fellow does some crazy thing that is half criminal, in particular, over and over again, he's

going to do it again. And I'm going to testify to that. And I thought that probably made more sense than a psychologist had ever given.

But the psychiatrists were the real masters of medicine and mind. And I paid attention to the psychiatrist. I really went through them on those hearings. And they were a very great number of people. And they did well. It was the attendance at the State hospital that gave mercy and kindness to the persons that were committed there. The psychologists hardly looked at them to a certain extent. They wrote a little note about them. But it was the attendants that did more, I think, to bring these people back to a decent life or a better life. And then we didn't have a system that followed the discharge, as not needing further imprisonment in the hospital, to going back home, but nobody to follow the medication and the help. But I tried to fight for monies here in Raton for the mentally ill when we were told by the hospital they wouldn't take our patients. And we ordered them to take them. We said we were going to punish them for contempt, and cited them for contempt if they wouldn't take them, pursuant to a judgment we made. They said, 'we're not going to pay attention to judgment. In ten minutes, we'll look at them and say we're going to send them back home.'" And we got them to obey us with the help of Justice Reardon from the Supreme Court who said, 'you're going to obey judges.' But the Supreme Court was not too helpful for us overall in connection with that. I'm through in my time on that.

**SB:** Judge, you mentioned being on the bench in Raton. How did you come to go from being a practitioner in Las Vegas to a Judge in Raton?

**LK:** Well, I'll tell you the truth, and I'll tell you what's not the truth. We had some great attorneys here. And the Bar here is a very great Bar. And it doesn't try to hometown you as a Judge by an large. Some of these attorneys are so good, they feel they can tell what the Judge should do. But that's because they are good attorneys and have a good ego. I don't blame them for that. But they are good Judges. I think, as a practical matter, without any disrespect for Taos, which is part of this District, Taos and two different types of counties in a way, moderately different - Raton and Clayton. The people in Taos, when I went to Taos; the people in Taos would say to me, "Judge, forget about the fact that the only things that count are cattle with a Texas accent. Culture is here." I said, "I don't know what culture is." They said, "we'll train you." And I don't quite understand culture. Anyway, I think that Taos, from being the place where Judges went, got to be the place where they wanted to have Judges live. And Taos had a greater population than this county and Clayton, which together with all three of them, constitutes the Eighth Judicial District. And the sight of the Court was Raton, the headquarters of the Court. And ultimately, there got to be two Judges – one here in Raton – Division One; one in Taos – Division Two. We covered the two counties here. But we were able to keep the drug couriers from coming from Mexico through Colorado, through Interstate 25 while I was here. Because everyone that I caught – everyone that we caught, was convicted – duly and properly – I put in the Pen. I was going to stop the interstate transportation of drugs through these stooges. The 60-year-old-men; the pregnant women that had a daughter. They were going to the Pen. If they were willing to participate, I was going to stop them. The net result was they went through north

Texas and through the Taos area – they didn't come through this area. And our probation officer told us that. Because no matter what they were, they went to the Pen. A fellow had heart trouble; I sent him to the Pen. The girl had a baby; I sent her to the Pen. Because you cannot make money trying to make people sick and dead. You can't do it there.

What were we talking about before? Yes. Taos people outnumbered 2 ½ to 1, the folks here. So you had to go forward and campaign in Taos. And the people here, I think, didn't want to campaign in Taos. I like Taos in the sense that Taos was much like Las Vegas except they had hippies in Taos. And Taos, I just told them all the truth there. Which was that I had no friends; I had no enemies; I had no causes. And I was going to call things as I saw fit. And as far as I was concerned, I was not for anybody or against anybody, and I would listen. You learn as a lawyer, and you learn as a Judge, too. You never make up your mind in advance, no matter how irrational or crazy an allegation seems to be in a complaint, or a general announcement in an opening statement seems to be. You wait until you hear something before you start making up your mind. Because some of the craziest things get to be proved. And therefore, you keep a clean and empty mind until you hear the testimony, and until you read the evidence that is offered into evidence in its written form. I don't think they wanted to endure that and the politics. If they had a good Judge, they'd much rather practice law. And I think that most good lawyers want that. If they have a good Judge to go before; someone who will – and I put it this way consistent; I told everybody: I am not going to be a politician. You've asked me to promise not to send your boy to prison if he gets in trouble. This was common. They treated you like a county commissioner. I can't do it. Because if I say I'll promise you that, what will happen if the father of the opponent says he'll give me \$10,000? I'll just go for the man that gives me more money. I can't be a crook. I've got to tell you that I'm going to decide as the law says. That is to say, I will try to determine in as simple language that I can, 'what is the question?' And I will try to determine with all my heart 'what is the law that is applicable, if it can but be found, that answers the question? If not, I'll try to find that portion of the law which is closest in its application of this, and try to build on it by varying from it, or by adding to it - one or the other – so I'll be consistent with prior law. But I'll find the facts honestly under any circumstances. And that will be it. I'm not a county commissioner; I can't make these kinds of promises.' They were asked, and that's hard politicking. And when you say, 'I would like you both, but I'm not going to try and get it in that fashion, and I have to do it, please learn this.'

**SB:** Judge, when you went on the bench, what year was it?

**LK:** 1981 . . . no, 1980, yes. When the Eleventh Circuit Court came into being.

**SB:** Was it strictly elective situation then, or were you appointed?

**LK:** Yes, I was appointed. And then afterwards, twice elected.

**SB:** Okay. And who appointed you?

**LK:** Governor King.

**SB:** Okay. You told me an interesting story about a conversation with Governor King. Would you remind repeating that?

**LK:** Can I go to one thing first though?

**SB:** Sure.

**LK:** In connection with the judging, lots of important cases; water cases; the water system; the after shoot of the water system in Cimarron River; the fight between the Angel Fire Corporation and the local ranchers in this City. We went through that. The many, many cases; so many cases involving new questions of law and important questions of law. In the Bravo Dome; the oil company; the successor to Standard Oil Corporation that operated Bravo Dome; carbon dioxide to be transported to the oil wells in southwest Texas so that they can use tertiary method of extraction of the oil and bring it up there. And the carbon dioxide was good for that there. There were four judges along the east side of the state that were involved in this action for eminent domain to let a pipeline be run from Bravo Dome all the way to Odessa Texas, there, were involved. I was the northernmost judge. Stanley Frost below me, and then the two judges in southeastern New Mexico below that. The statute authorized the taking by eminent domain. But I was the first judge to handle the case, and I ruled after trial on the merits; made the decision very, very quickly in connection with that; that this pipeline accommodated only the family of the oil company that was the administrator of Bravo Dome. And that it was only within that family, that there was going to utilization. They were not a common carrier; they did not have a certificate of public convenience of necessity, there. And I said, ‘well, under the Constitution, the only grant that can be given is for usage for the public – public use. And there is no public use here. This is a private use for your corporate family, and I will not force you to give this protesting landowner who doesn’t want you on his land, the right-of-way through his land.’ The other three said, ‘yes, you can do it.’ And we never did get together to try to find out just what the differences were. But the solution to that was very simple. The oil company just spent some more money and just went forward and paid for a right-of-way through my area. But they didn’t get it there. One of the great cases that I had was after I left the Judgeship, I was appointed the Judge of a pending case – El Paso Production Company versus P.W. Partnership versus Abraham. Good lawyers in them all – 33 lawyers entered their appearance. And what it amounted to was who owned the rights to most of the oil that was about to be produced – coal bed methane gas. This involved, in most instances, the determination of who owned an option to take up the gas production after a certain quantity of gas had been produced by El Paso. 30 billion cubic feet of gas had to be pulled out, and extracted and mined before that option could be exercised. And there was a big contest about the exercise of that option. The big questions came in connection with whether or not that original owner to whom the option was supposed to have been given – it actually had never been given, but it was required to be given – what he’d done with that option. And to do that, I had to get into Old English law.

This presumption over here, which I set for the second time in my life and read; I read it first in an English case book when I was going to law school because I didn't understand what a presumption was. We had the English cases. And I went upstairs, and ran through them; through an index; and learned something about presumptions. There is a presumption of lost grant. And it means just that – 'lost grant' or 'non-existent grant.' It had nothing to do with adverse possession, although possession is a requisite in connection with presumed grant. What it says is that in effect, if a fellow and another fellow; if two people act in such a fashion, let's say, that formerly owned a home. Suddenly Sally moves in on it, and she pays taxes on it, let us say – let's forget the taxes completely. She lives in it; she lives in it all the time; and the former owner lives half a block down, let's say; walks by that house that Sally is now living in; never said a word to anybody. A good period of time passes by, and then Sally goes away after selling the house; after letting some of her family reside in the house there. And the heirs of the former owner come in and say, 'that property belongs to us by the will of the former owner because he had a deed to the property; he's died, and now it's ours. And where is your record ownership?.' Well Sally also has passed on. And all that anybody knows about it is that Sally let her family live in it there. Well, what happens then? This is not adverse possession. You never ousted anybody as such. Nobody ever challenged you. What does the law say? The law says, well, people are presumed to do what is right. People normally also protect what they own, and they stand on their rights. And where the situation is such that the uses by Sally and by her family after that would have been unable to be explained by anything other than that there must have been some kind of deal between the two of you that made this man, when he walked down the street, and never said, 'who in the name of hell is living in my house? Why am I not getting rent? Why don't I have a dispute with this person? Why don't I exercise the indicia of my ownership, or the incidents of my ownership?' The only explanation is that both parties must have been acting honestly and decently in accordance with the conventions of life, which is that a former owner doesn't complain if someone is in his house. The present occupier doesn't improve the house that Sally did spending a lot of her money on it. Unless she owns the house; she wouldn't go away to California, let her family in, and then die there. So there's a presumption that when there has been a fairly long time that has elapsed, plus physical circumstances that are inconsistent with anything; cannot be explained by anything other than a presumed grant that the law can create a presumption of grant. Not based on adverse possession. It doesn't have to be for that same time; you don't have to pay the taxes, and that will be it. When the only answer to a situation is that there must have been a conveyance, there is an old Supreme Court decision in early 1870's where a trial judge refused to give that presumption to the jury, the U.S. Supreme Court said he's wrong. Eight or ten circuit courts in the United States have said that is a correct application. Churches against railroad company, and so on there. Also, there is a case in 1860 or 1862, U.S. Supreme Court, that says in every instance, where presumption of fact can be had, because people act this way, that will become a rule of property if not rebutted within a certain time; if not contradicted within a certain. We believe the law has to say people act honestly and in accordance with the ordinary course of human events. And when that's the only rationale explanation to a riddle, we presume them. I presume, even though forty percent of 12,000 acres had not been deeded, that a

deed in fact had been granted, or in the alternative, that there had been judicial estoppels because of the acts of the parties. I practically wrote a title report to the Supreme Court on this, and went through everything that happened after to show what was the intention of parties never expressed, and said, ‘truth is that I believe that everybody was telling the truth at the time; even though there was no documentation.’ And I gave title based upon the presumption of a grant having been made.

And the New Mexico Title Association came in without authority afterwards, and without even asking for permission, and asked for a rehearing on this. And on the rehearing, four judges agreed out of five, that there should be no rehearing. This was because Justice Montgomery had a conflict. Montgomery and Andrews was in on this case. And the Supreme Court agreed with me on every point except the \$25,000 dollar matter, which was good for the domestic relations industry on which I just made a mistake at the tail end. I thought that perhaps there might be some meeting of the minds through the parties. I made a right decision; I stick with the decision; I said an attorney had committed wrong; fined him \$25,000 dollars for criminal content. I stuck with that; I believe in that, but I just made a wrong conclusion. I said, “I think I can forgive you,” because he’d been no more a devil than the other attorneys in connection with the balance of the case. But that was not a right reason; I was wrong on that.

But I’d like to give you this, which is a copy of the Supreme Court version. I’ve got the citations here. You might want to take a look at. That’s for you to keep; I don’t want that back. And I think I have the *Fletcher* case; the old Supreme Court decision if you ever want it, I’ll send it to you. But this is the only I have of it in which the Supreme Court in 1870 said, “by George, the Title Association said you can’t get a title except with a deed. And this man has broken our system. He says that there is no deed that is required.” But I hadn’t done that because I had considered that at length. And in title policies, every title policy exempts any problem from liability on the part of the title company if it is not a matter of record, or there has to be a recording. And this is not a record, of course. This has to do with a 50-year tracking of what various persons had been done. You had to track 50 years. All the lawyers were great; 32 lawyers. The Modrall Firm was great; the Gene Gallegos Firm was great. He did a great job in the case there, along with the Modrall Firm. John Kooney of the Modrall Firm did a great job. John Kooney’s younger assistant, Lisa Mann and another man (pause), Walter Melendres did a fine job in connection with handling the argument on motions for summary judgment. Also, there was another young man about the same age as Walter Melendres – Lynn Slade of the Modrall Firm, also did a good job. He was very patient with me in trying to see to it that people preserve their rights.

On the third part of the trial, which was a part of the trial in which the damages were settled between the parties; I’ve known (inaudible) what that was, I told the attorneys I was not going to make determinations as to questions on which there were legal issues. I said, “if you have legal issues, I want you to make a tender of the evidence. I have ruled against this, but you say I’m wrong. And I want you to tender evidence – not in narrative. Lawyers don’t speak the full truth in narrative form. They bend it to their own fashion. Put your witnesses on and put it in question and answer form. I want the

opposing attorney to make the objections that would be made if this were evidence that was being admitted there. And then I'll give you a ruling after it tenders on the law as to whether or not it will come in, and I'll admit it if I change my mind." On that, Lynn Slade; I said, "take your time; I don't care how long you take," I was told that there was a very large sum of money involved, and I believe that – a very, very large sum of money involved. I don't want to mention it there. But I said, "this is your opportunity to get everything you want on the record, and to get individual evidence rulings within that tender, and then a ruling on whether the tender will be accepted or not," which is way I think tenders ought to be done. And Lynn Slade was very patient with me in that he asked question after question after question. I said, "I'm going to object to this on the ground . . . I myself am not going to let this in; I'm not going to let the accountant make a legal determination in interpretation of the contract. That is up to this court, and that is a function of this court, and I say I will not determine that until later, but I don't believe it means that." And so on. And Gene Gallegos was supposed to make objections for his side as if this were coming into evidence. So we got a lot of the evidence in by tender before I ruled on the tender that I think helped the attorneys make a determination that there might be some settlement on the damages issue, which would have been a very large issue, and a very difficult issue for everybody there.

And I was kind of happy that they settled because I think they knew more about the pros and cons, and about what each one could live with than any judge or any court in the future. So I think that the trial judges need to know a lot about one logically, fact specifically, and they also need to know the techniques to get a matter through them, the judge following the law to an upper court, if there is a real reason for a tender to be made. You can refuse the tender, but you are giving them the opportunity to get to the Supreme Court. And after all, the District judge essentially is not, by virtue of his office, the last person, but a person that might be last. And if not last, he is the vehicle through which everybody should be able to get his claims to a Supreme Court on appeal if there is any worth at all to the claims, and let the Supreme Court do its work of enhancing, modifying, changing the law.

And with that, I apologize for not sticking to actual legal things. One last thing I would commend for your reading, the recent 2007 case in the U.S. Supreme Court of *Twombly v The Telephone Company*. The decision was made in April of this year, I think. It has to do with what should a complaint have in it to be able to resist dismissal. And the question has come up again as to whether any facts have to be alleged, which themselves would tend to show possibility of winning. And strangely, the Supreme Court has backtracked. Before the current Rules of Civil Procedure were adopted many years ago, the complaint had to show facts that would warrant a legal claim. Facts. And therefore, the complaint was always assailed. Motion to dismiss complaint was the time when you were able to determine that you would get a litigant kicked out of court on the merits when the Rules of Civil Procedure were enacted that we still have. But the U.S. Supreme Court has modified them a little bit by a new set of rules effective December 1, 2007, if the Congress doesn't stall it for a while by legislation. And the new Rules of Civil Procedure at this philosophy; let's forget the complaint; let it just show a story; let it just generally outline the things that happened.

I was walking about Balston Street as we mentioned there, and an automobile hit me. The automobile was negligent; it caused damage to me. And I've suffered damage and so on. And this is when it happened. Now, let the discovery phase be the phase in which you find out the facts. And where they have to be elicited, some facts to show you may win on the claim. Let's forget about fighting about the words on a piece of paper, the complaint. Then let motions for summary judgment or other appropriate motions to define further the facts of the case be had. And then, if necessary, go to trial. The U.S. Supreme Court decision in *Conley* about the time that the Rules of Civil Procedures were changed to current status, said, "we don't need to have any facts that would set forth a legal claim for relief in the complaint. That can wait until a later stage. If it's just a story, that's good enough." New Mexico has followed *Twombly*. And I think New Mexico will follow that because this decision in *Twombly* is not federally constitutionally imposed on the State. The State can make its own system. The *Twombly* decision says that in addition to a story, there's got to be something alleged that would show plausibility of success at trial. Here, the case was plaintiffs wanted to get access to the equipment of telephone companies and pay rent for that. The Congress had provided for that. The four or five successors to the Ma Bell outfit, who are not local telephone carriers, all said, 'no; ain't gonna help you no how.' And the suit was on the part of the private prospective renters of equipment who wanted to run their own little telephone operations, saying 'this is in violation of the restraint to trade under Section I of the Sherman Act. And these people, they have a society that they attend together. They go to lunch together. They have the same country club memberships. And no doubt, this is why they were able to get together and all do the same thing, and refuse this access to their facilities. And the Justice from New Hampshire – the one that I was talking about ...

**SB:** Scalea?

**LK:** No. Justice Sooder, for the majority. He said, "I agree with you." He is very logical. He said, "the reasons why we're doing this is because all of the defendants had the same business reason for doing what they did. And there is nothing to show that the conversations were not harmless, and in their own business interest. So really, there is nothing there." Stevens, on the other hand for the minority of four, said, "balderdash. You cannot be sure of that. Why not let them do what our civil rules say? Let them fight out what the facts are in discovery. And then at that point, if that's what's discovered, throw it out. But why fight about the words in the complaint?" The trial judge has all the powers at his disposal. He does under the Federal rules, under our rules, which are the same. The trial judge can do anything in discovery. The trial judge can orient discovery anyway. If instead of the trial judge sitting back and say, "I'm going to let the lawyers do the dirty work; the hard work. I'll sit back and just look at the results; I won't know what's going on, but I don't want to do all that work." If the trial judge participates, he can say to every litigant: what is it you want the other fellow isn't giving you? And why aren't you giving it to him? I'm going to resolve it in favor of discovery; I'm going to give it to him, except for privileges. Privileges are a total different story that the judge has to go into." I have trifurcated cases because that's been the easiest things to do in my experience. I trifurcated this case here in connection with the trial of it there – the one I

just handed to you there. I did it because it's easier for the attorneys. The judge needs to understand to be able to rule intelligently, the people deserve a judge who works and who says, "I know what you're talking about." The people deserve . . . I've shocked the people here; I've told attorneys in open court: "I haven't understood what you said; I'm not sure I understand your words; I'm not sure I understand the concept. Will you please treat me like a six-year-old, and use simple words and explain it to this judge who to understand. That's my function. And you have to do it." And if you have to look stupid, look stupid. I'm not concerned with how I look; what I'm concerned with is do I understand what the attorney is getting after. And any attorney can be a lot smarter than I am, and I will give any attorney credit for that. I simply want to know where he is; what he is talking about; want me to give him authority.

One last thing on that, and then I'll just shut up for good: I would like to see if there is no strong *ex parte* argument against him, attorneys able on starting a case, to go forward to the judge and say, "let us give you a memo on this case. We will make no statements; we will argue no points; do nothing that can be considered *ex parte*, but we will give you blocks of cases – Block A; Block B; Block C; Block D. We won't even tell you what is in the cases. And we won't tell you if there are three or four points in the case; which point we're even talking about. But within each block of those cases is the law on something that we are going to try to explain to you. And cases which rule in ways wherein we're going to try to get the facts to you. And even not have to go forward and file a copy of that to the opposing counsel, because a lot of attorneys feel, and rightly, why should we tip our hand if you're not even willing to ask us questions in discovery? All we want is for the judge to understand basically the law that we will be arguing eventually. It's his job to read the law – not to go out and drink at night, or to play pool, or what have you. He's got to spend more than eight hours in courtroom, just like we have to spend more than eight hours in the courtroom, we attorneys."

And I think that this would be a great help to the judges if they haven't been required to read law for 50 years. I've been a member of the Bar for 66 years at this time, which makes me feel sick to my stomach to admit that I'm that old. But the judges really should be oriented on the law when they listen to anything involving these questions; to be able to understand it. The judge should not be the only person in the courtroom that doesn't know what, in the name of heavens, either the facts or like, or what the law may be like. He really should be that. And there should be much more emphasis on his getting involved in discovery. I believe with Justice Stevens on that *Twombly* case, that the judge should be deeply involved in discovery; deeply involved in the pretrial order – not force the attorneys independently of one another, to make up the pretrial papers there. The judge should be culling it all out and saying, "what do I understand by this paragraph to me; where are we going with that?" The judge also has to rule. I had a graduate of UNM Law School that complimented me: "I hear tell you're a very good judge. I didn't therefore bother to put the contract on that we're alleging has been broken." At that time, contrary to the rules that required you, if you were resting on a contract, to attach the contract as an exhibit. And I thought to myself, "what a stupid fellow he is. How is the court supposed to rule if he doesn't even know what's in the contract? How is the court supposed to understand the argument if he hasn't even looked at the contract? What is

this about? Is this about the delivery of matter in that telephone company has given to a rancher that will poison all the insects there? Or is it about love and marriage? I don't know." And it's strange that the courts don't push the trial judges to do more that would help get practical decisions on actual facts decided, instead of talking about a lot of fancy theories that have peripheral applications, and that relate to matters which could be ignored, very likely, in lieu. Instead, the effort concentrated on the important facts; the important issues. And therefore, 99 percent of everything decided. Judges have to work harder. Attorneys have to feel that judges want them to be prepared on the facts; on the law; on evidence and procedure, which is a difficult hurdle, at the very – to say it – modestly, for attorneys. But that's what the courts are about.

And now, I'm sorry. I didn't cover so many of the things I wanted to cover about the technical things. But you all have been so gentle and so kind to me. No one – since I can't bother attorneys in their offices, here I am bothering them in their time off. I thank you so kindly for letting me participate. You are very, very generous.

**SB:** Thank you, Judge. I'm showing a picture of Lee Karelitz. You'd referred to Lee earlier, and I think this is just a wonderful picture of her.

**LK:** That was when we were married, yes.

**SB:** Yes. And I thought this should be made part of the record. So thank you for sharing this with us.

**LK:** Thank you. Thank you.

**END OF INTERVIEW WITH LEON KARELITZ**