

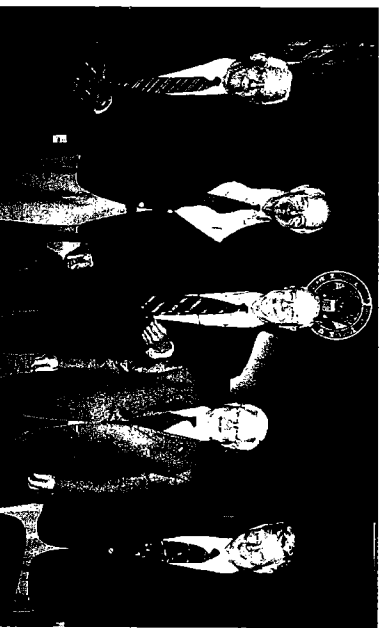
## Warriors for Justice: Oregon Lawyers Recall Fight for Civil Liberties

The summer of 1964 was Freedom Summer in Mississippi, as civil rights activists worked for black voter registration. That summer more than one thousand people were arrested for civil rights related work. There were bombings, cross burnings, shootings and church burnings.

The Lawyers' Committee for Civil Rights under Law was formed in 1963 at the request of President John F. Kennedy. The committee es-

tablished an office in Jackson, Mississippi in 1965. Twenty-four young lawyers from Oregon put themselves at risk personally and professionally to volunteer some of their time to work in that office. All the volunteers won the E.B. McNaughton Award from the ACLU. Four of those lawyers presented highlights from their experiences on May 30, 2002 as part of the US District Court of Oregon Historical Society's Famous Federal Case Series. The panelists were Jacob Tanzer, Don Marmaduke, Charles Merren, and Carl Neil. Frank A. Bauman also added some comments about his experience. Jennifer Johnston and Clarence Behavias served as moderators.

Jacob Tanzer arrived in Mississippi not long after the Mount Zion Baptist Church near Philadelphia, Mississippi burned to the ground. It had been fire-bombed by the Ku Klux Klan shortly after three civil rights workers had held a voter-registration rally there. Two of the activists, Michael Schwerner and Andrew Goodman, were young, white men from New York City. The third, James Earl Chaney, was a black native of Mississippi. On June 21, 1964, all three were murdered by the Klan and buried beneath an earthen dam in Philadelphia. The FBI discovered the bodies on August 4. Jacob Tanzer went to Mississippi with the Civil Rights Division of



Lawyers' Committee for Civil Rights under Law volunteers (from left): Carl Neil, Jacob Tanzer, Frank A. Bauman, Don Marmaduke, and Charles Merren.

the Department of Justice to serve as a grand jury advisor in the case. His job was to turn the FBI informants into courtroom witnesses—a difficult task in an atmosphere of intimidation and violence. He recalled that the sheriffs repeatedly drove by the Justice Department office, both to keep an eye on what was going on and to intimidate the lawyers working there. He said he was curious why black people chose that time to finally stand up for their rights. When he asked, several activists told him that television had widened their view of the world. "When black people in Mississippi began to understand how people in a

normal society lived, they realized they did not have to submit themselves to those awful conditions any longer," he told the audience.

Don Marmaduke spent five weeks in 1965 working with the Lawyers' Committee in Mississippi. As a young lawyer, he felt privileged to participate and gratified to be using his legal training to fight for justice. Of the ten cases he worked on, he found the case to desegregate the Neshoba County Court House the most interesting. He remembered the whole atmosphere as extremely oppressive. The county was under the control of Sheriff Lawrence Rainey and Deputy Cecil Price, men of limited education who drove around with machine guns in the gun racks of their police cars. Rainey and Price were later tried as conspirators in the murder of Schwerner, Goodman, and Cheney. The two lawmen controlled the courthouse. Blacks could sit only in the balcony, restrooms were segregated, and voter registration was in the basement. Marmaduke wanted to get rid of the climate of fear and intimidation so blacks would feel free to come into the courthouse and register to vote.

In spite of being told they would be shot if they showed up, witnesses appeared to testify. The trial ended with an injunction to desegregate the courthouse. Marmaduke said he was overwhelmed by the hatred and resistance to change he found in Mississippi at that time. He remembered an old woman he met on the steps of the courthouse during the trial. She reminded him of his own grandmother until she hissed at him.

Carl Neil volunteered with the Lawyers' Committee for a month in 1966. He worked on a case that concerned a fourteen-year-old black youth, Arthur Roberts, who was jailed for shoplifting. Roberts had

been placed in an adult jail and shot and blinded by an armed prisoner trustee. He was awarded \$100,000 in damages in a later trial.

Neil spoke about the injustice and corruption that were pervasive in Mississippi society before and during the 1960s. Most blacks lived in dire poverty without access to education, and as a result, most were functionally illiterate. "Even without considering the issues of racial inequality," said Neil, "power structures in Mississippi did little to promote a just society." He cited the lack of tenure for teachers, poll taxes, the racist stance of the newspapers, and the ability of insurance carriers to refuse to cover black churches and businesses and to cancel policies arbitrarily with impunity. He said the county sheriffs were not salaried, but were paid instead through a system of fees that amounted to legalized graft. Possession of liquor was illegal at the time, yet the state collected over one million dollars in tax revenue from liquor sales. Neil also noted the generosity of the Oregon law firms, particularly the smaller ones, which encouraged the lawyers who went to Mississippi and gave them paid leave.

Charles Merren spent one month in 1966 working for the Lawyers' Committee. Doing legal aid work, he began to realize that the practice of arresting blacks for many small crimes was just a scam to generate revenue in the guise of fines, rather than paying to maintain them in jail. Merren's most memorable case involved a black couple who attempted to get a safety inspection done on their car before registering it. The inspector asked for a bottle of liquor as a gratuity. When they refused, they were denied the safety inspection sticker. When the case was brought before the judge, the safety inspector admitted he had asked for liquor, but the judge told Merren that this was how things were done. The judge was not willing to let Merren, an outsider, challenge the system. Merren replied that if the couple could not get their car registered, they could not go to work. They would probably end up on welfare,

which would be costly to the state. The judge found in favor of the couple, who were allowed to register their car. Merren was horrified by the whole experience and explained that his contribution was insignificant compared to the immensity of the injustice that was simply accepted in that society. "The video camera was an effective instrument for change in the South," Merren said. "People in charge realized that anyone could film an event and get the news out."

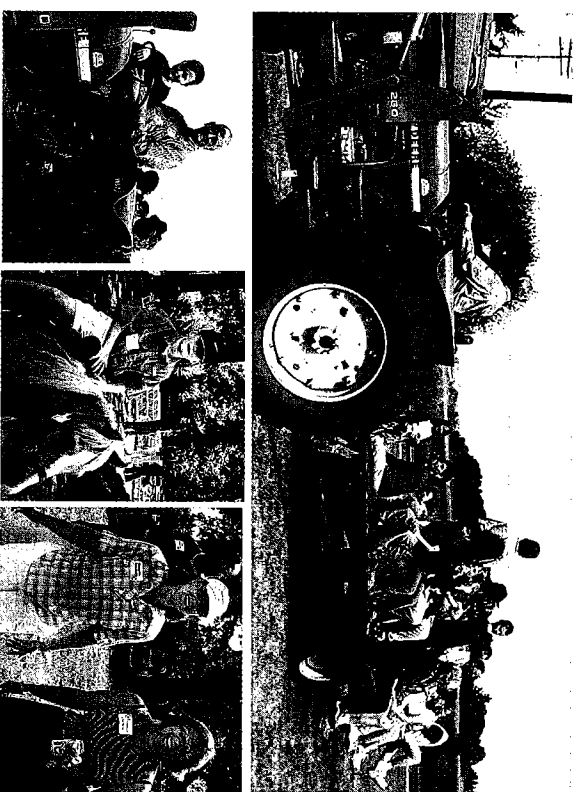
All the panelists agreed that their experiences in Mississippi taught them much about civil rights and the effects of living in a society based on systematic injustice. They were all shadowed by the Klan and viewed with suspicion and hostility by white residents. The Oregon lawyers knew that eventually they could return home to a more open and equitable environment. They all admired the courage of the people of Mississippi who stayed and worked for a just society.

## Judge Burns's Role in Forming Historical Society Remembered

By Randall Kester, Board Member

The U.S. District Court of Oregon Historical Society was started at Judge Burns's home on the Willamette River on August 20, 1983. Judge Burns invited a group of lawyers, judges, historians, and others to a picnic at his lovely place. The principal event was a talk by Chief Judge Robert E. Peckham of San Francisco, who told about the activities of the Historical Society of the U.S. District Court for the Northern District of California, which was the first federal court historical society in the nation. His account was so enthusiastically received that it was immediately decided to form another, and Oregon's was the second in the nation. An organizational meeting was held on January 23, 1984, and Judge Burns, who was at that time chief judge, was elected the society's first chairman.

## Fun at the Annual Summer Picnic



Judge Ed Leary's boy farm was the site of this year's annual picnic, a highly successful affair. (Top) Hay rides were a popular feature of the picnic. (Middle from left) Judge Ed Leary and his tractor provided the "horsepower" to pull the hay wagon, boys wrangler Bill Miller on the pony ride, Bullivant Houser Bailey lawyers Gretchen Marmadokor (left) and Heather Van Meter. (Bottom) The band performs outside the barn.

"BE A FULL CITIZEN... REGISTER AND VOTE"  
NAACP



## A Potpourri Of Opinions by Judge Burns



May 1987. *Oregon Natural Resources Council, Inc. v. United States Forest Service* 659 F. Supp. 1441

This is another environmental case. But that phrase is, perhaps, more deceptive than descriptive. Each environmental case is both the same and different. The issues are generally the same, or similar; the scenery, never. The valleys, the peaks, the colors, the trees, the skies, the streams, and the views all are subtly, or strikingly, different.

The centerpiece of the area involved in this case is a river gorge of heart-stopping magnificence. It lies at the bottom of a steep slope of old growth virgin timber; brooding, and presiding over this area is majestic Mt. Jefferson, whose name has been given to the nearby wilderness area. Its beauty is as deep as the determination of the plaintiffs, who seek to protect it by asking me to stop the logging that is about to begin. The strength and solidarity that surround it is matched by the determination of the Forest Service and its contractor, who believe, with equal fervor, that they are fulfilling economic and governmental policies which possess or express equal, or greater, societal value. I have no escape from having to decide.

August 1987. *Oregon Natural Resources Council v. John O. Marsh, Jr.* 677 F. Supp. 1072

This dam case is back. When the case was here before, there was only a dam plan. Now there is half a dam. The chore assigned on remand by the Court of Appeals requires me to determine what sort of half dam is a good (i.e., safe) half dam and which is a bad (i.e., unsafe) half dam. This assignment might seem strange, since my efforts earlier to determine whether the dam plan was good were not even half as good as those of the Court of Appeals.

As I read the June 23 opinion of the Court of Appeals, the plaintiffs assert eight claims of error in my ruling. The Court found reversible error in five, but affirmed on three. In baseball, a batting average of .375 is enviable indeed. Judiciary wise, such an average sends one to the showers in a hurry.

December 1988. *Shane Boulin, et al v. Deschutes County* 712 F. Supp. 803

Federal courts used to be viewed as austere, even learned, tribunals normally charged with such duties as the interpretation of statutes enacted by Congress; once in a while we are asked to consider one of the cherished clauses of our Constitution; and for the rest we would on occasion ponder over lofty and legally difficult questions which may even on occasion attract the attention of the highest court in the land. Not any more.

Thanks to the expansion of civil rights jurisprudence, this is now a "doggie" court. Indeed this case is an animal "double header" since it involves both dogs and llamas!

April 1992. *Data Evaluation v. Harris Corporation* 1992 W: 983354 (N.D. Ill.)

This is a dreadfully old case assigned to me for trial during my two-week tour of duty on this court. . . It is also an unfortunate case. I use this adjective for a number of reasons, but mention only a few. For one thing, the lawyers seem to have grown used to raw-hiding each other as if they had taken an oath to dissipate any semblance of serenity in the stomach of their adversary.

I do not know whether, when things started to go awry in the early 1980s, the parties should have known that settling at the outset would have been preferable to almost anything short of having the principal of each company walk on red hot coals in a trial by ordeal. Surely, after years of being snagged in procedural thickets and mired in the swamp of docket dependency brought on by the wars on drugs and crime, they should know by now.

## Editor Carolyn Buan Retires

A tribute by the Honorable Ellen F. Rosenblum



Carolyn Buan, Editor of this newsletter since 1987 (!), has retired from this position to go on to new endeavors. Many of us who have worked with Carolyn over the years are going to miss her, and we wish her well. Carolyn has steadfastly and creatively made this publication the centerpiece of the Society's work over these many years. Not only has she written many articles—and edited them all—she has been responsible for virtually all of the invitations to USDCHS events (my favorite is the old-fashioned picnic one), and she has attended executive committee meetings and personally "covered" most of our events as well. As a former chair of the Benchmarks Committee, I have always appreciated Carolyn's commitment to the goals of the organization, her friendly—but convincing—reminders of deadlines, and her pride in an attractive and intellectually stimulating product.

Carolyn intends to spend more time with family—she is fluent in Norwegian and has family in Norway—and to work on personal projects. She was the editor of *The First Duty: A History of the U.S. District Court for Oregon*, a publication of the USDCHS, and her clients have won national awards for books she has edited. Most recently, she co-authored *Portland Then and Now* (Thunder Bay Press), a fascinating photographic comparison of scenes of Portland today and in the past.

We are very pleased that Suzanne Morry, who comes highly recommended by Carolyn, has begun as our new *Benchmarks* editor. Welcome! Carolyn Buan has set a standard for this publication that we are all committed to maintain. Thanks, Carolyn, and all the best to you from your friends and admirers at the USDCHS. Judge Rosenblum is the former president of our historical society.

## A Rare Victory continued

This created confusion about how to manage the river. The commercial and sports fishermen had the first opportunity downriver. The Indians' gill netting was limited to the pools behind the dams. The battle lines were drawn. Understandably, each group wanted more fish, and confusion reigned until Judge Belloni stepped in. When the fish and game commissions of Oregon and Washington let commercial and game fishing practically eliminate any Indian fishing, the situation got critical. After numerous arrests of Indian fishermen, 14 individual members of the Yakima Tribe, led by David and Richard Sohappi, filed an action in federal court in 1968. They named as defendants the members and director of the Oregon Fish Commission and the Oregon Game Commission. They asked the court to define the treaty rights of "taking fish at all usual and accustomed places" on the Columbia River and its tributaries.

The treaties with the Warm Springs, Yakimas, Umatillas, and Nez Perce had all been negotiated separately in 1855. Each treaty contained substantially identical provisions securing to the tribes "the right of taking fish at all usual and accustomed places in common with the citizens of the territory." The state's position was that this provision meant nothing more than giving Indians the same right as all other citizens—in effect that they had no special rights. They had to obey all state fish and game regulations without regard to their treaties. Judge Belloni's response to this was short and to the point. "Such a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored."

His opinion of July 8, 1969, made it clear that the treaties were not treaties of conquest, but were negotiated at arm's length. The word of the United States was pledged. He made it clear that the treaty Indians have an absolute right to the fishery and are entitled to a fair share of the fish produced by the Columbia River system.

At that time he declined to set specific procedures that the state must follow, but simply ordered the state to recognize that the federal right of the Indians is distinct from the fishing rights of others. He recognized the state's police power and gave it adequate authority to regulate the exercise of the treaty rights, provided the regulations recognize the treaty rights as a separate right. He urged cooperation between the state and the tribes.



A portrait of the Hon. Robert Belloni

This should have been enough to end the struggle, but it was only the beginning. Both Oregon and Washington continued to deny that Indians' rights were different from those of other citizens. Even after many hearings, the states continued this attitude. I recall Governor Tom McCall attended one meeting in an attempt to moderate and find some peace. He urged representatives of the Oregon and Washington commissions at the meeting to recognize the Indians' treaty rights. When they openly defied him, he left the meeting saying he might have to replace the directors of the fish and game commissions in Oregon. Nothing improved, and the Indians went back to court.

On one occasion Judge Belloni telephoned me in Bend, Oregon, on Saturday night and told me to be in court the next morning. On Sunday morning I and the other lawyers involved in the case learned that an attorney for the commercial fishermen had obtained a state court injunction countermanding one of Judge Belloni's orders. That attorney had recently retired from the Congress.

Judge Belloni advised him that the state court judge who issued the injunction was a personal friend who would not have countermanded his order if the true facts had been presented to him. He advised the attorney that the ethics in the legislative

branch and the judiciary are considerably different. He said he would continue the hearing until the next day, when he could expect to have a copy of the order from the state court judge setting aside his previous order. It was promptly done.

There was considerable bitterness between Indians and non-Indians in both Oregon and Washington during this time. Judge Bolt was holding court in Washington and Judge Belloni in Oregon. Both judges were under extreme pressure from non-Indians, but held fast to the law. In 1974 both judges conferred together and issued the decision that Indians were entitled to the opportunity to catch 50 percent of the runs.

In 1976 the Ninth Circuit affirmed Judge Belloni's 50-50 allocation in the Oregon case and implied that they would do the same in *U.S. v. Washington*, where Bolt had established the 50-50 ratio.

This decision really has solved the problem. Hearings have continued, but now the ground rules have been set. Washington state courts and commissions continued to defy Judge Bolt until 1979, when the Washington State Supreme Court finally came down hard. Recognizing that by this time the United States Supreme Court supported Judge Bolt's decision, the Washington Supreme Court bowed to the decision. Oregon yielded much earlier than Washington, but it's clear now that Indians have treaty rights that are different from other citizens as first established clearly by Judge Belloni's decision in 1969.

## CALENDAR

- September 26. . . *Pennyroyer v. Neff*, Famous Cases Series, 7:00 p.m., Mark O. Hatfield Courthouse, Portland.
- November 14. . . *Annual Dinner* at the Governor Hotel, Southwest Tenth & Alder, Portland. No-Host cocktails 5:30, Dinner 6:30. *Special Speaker*: James J. Brosnahan of San Francisco's Morrison & Foerster, LLP

## President's Message



Almost 50 years ago, Mary Dolan received the following note: *Attention Nigger Lovers: You were picked up by police and escaped, but if you don't get the hell out of this town, we are going to pick you up and give you a nice coat of tar and feathers and it will be impossible for your nigger loving priest to help you, and if he brings those damn niggers to a white church again, he will be sorry for the rest of his life. XXX We Mean Business.*

When Mary Dolan was alive, I knew her as the aunt I could agitate by cracking my knuckles. I knew little about her involvement with Friendship House, a Catholic organization devoted to racial justice. In 1953 Mary and another staff member from Chicago founded a Friendship House office in Shreveport, Louisiana. Among other things, their work in Shreveport led to receipt of the above note. Neither the note nor other harassment stopped their efforts, however, which continued until funding dried up in late 1955.

Unfortunately, my aunt's history was never recorded. What little I know is a consequence of an old magazine article and the recollections of my mother, Mary's younger sister. I have thought of Mary often since our May 30 program, *Warriors for Justice: Cases Tried by Oregon Lawyers in the South During the Civil Rights Movement*. The program was truly compelling, and I am extremely pleased that—thanks to the efforts of program planners Clarence Belnavis and Jennifer Johnston—we have recorded the stories of Jake Tanzer, Don Marmaduke, Charlie Merten, and Carl Neil, four of several attorneys who traveled from Oregon to Mississippi during 1963 and 1964. You can read more about these courageous men and their efforts on page 4 in this newsletter.

The importance of recording oral histories is well recognized. Did you know that our oral history collection contains over 94 histories encompassing more than 833 hours? Besides the histories of many significant attorneys, our archives include oral histories of numerous state and federal judges and justices, including recently completed histories of Judges Panner and Redden.

In addition to these individual histories, our "Famous Federal Cases" series, started two years ago under the watchful eye of Judge Ellen Rosenblum, has allowed us to record the histories of a number of the court's important cases, as recalled by the judges and lawyers who participated in them. (For our next program, however, we will have to rely on the extensive knowledge of Professor James Mooney, as we have been unable to locate anyone who participated in the case. I hope you can join us for *Pennyroyer v. Neff* on September 26!)

The oral history program is the Society's cornerstone. Steve Brischetto has done a fantastic job managing the program, as did Sara Ryan and others before him. They deserve our sincere thanks, as do the many, many persons who have volunteered their time to interview a significant member of our bar. But there is more to be done: there are interviews to be conducted and tapes to be transcribed. And you can help! Please consider volunteering to preserve the history of our court and its members. You and we will all be richer for it.

Tom

Tom Sonntag

## Passing the Gavel By Heather Van Meter

In keeping with his humble nature, **J**udge the Honorable Michael Hogan presided over a brief—rather than a lengthy—ceremony marking the passing of his gavel as chief judge of the U.S. District Court for Oregon to the Honorable Ancer Hagerly. The ceremony was held on March 13, 2002 at the Mark O. Hatfield Federal Courthouse.

Judge Hogan's term of office (1995—2002) was remarkable not only for interesting and important trials concerning such matters as physician-assisted suicide and Klamath Basin water rights, but also because he oversaw arrangements for the new federal courthouse in Eugene, continued "breaking in" the new federal courthouse in Portland, and presided over a wide range of new security issues.

During the ceremony Judge Hogan welcomed the overflow crowd, which included a delegation of judges visiting from Russia. Judge Hogan noted that there is no job description for the position of chief judge, and that the powers and responsibilities of the job are not delineated anywhere. He joked that the chief judge has no more power than any other judge and cannot tell them what to do.

Judge Hogan paid tribute to District Court Clerk Don Cinnamon for his invaluable service and thanked the court employees for their contributions to the smooth functioning of the court.

The Honorable James Redden, chief judge from 1990 through 1995, recognized Judge Hogan for his service to the district court, as well as his organizational abilities in times of confusion. Robert Barton, current president of the Oregon chapter of the Federal Bar Association, also thanked Judge Hogan for his service to the judiciary and reminded attendees of the upcoming Federal Bar Association dinner honoring Judge Hogan. Judge Hagerly provided closing remarks and officially began his duties as chief judge by dismissing all present to the reception following the ceremony.

Heather J. Van Meter is an associate with *Bullivant Houser Bailey P.C.*

## History of a Coos County Law Firm, Part I

by John W. Whitty

*Periodically, we print the histories of Oregon law firms. In this issue we are featuring the first part of John Whitty's account of the firm of Foss, Whitty, Littlefield, McDaniel & Bodkin, LLP. We encourage the submission of other such histories.*

### The Founder—

#### Joseph William Bennett

The Coos Bay law firm now known as Foss, Whitty, Littlefield, McDaniel & Bodkin, LLP was started by Joseph W. Bennett in 1880. Born in Ireland in 1855, Bennett came to Coos County with his father and brother in 1873.



Joseph Bennett

After spending a short time ranching on the Coquille River, he moved to the city of Empire (now part of Coos Bay), then the county seat. There he associated himself with an older lawyer, General J. M. Siglin, and began to study law. He and General Siglin also operated a newspaper, the *Coos Bay News*.

While traveling the county, Bennett began buying scrip issued by businesses and governmental bodies that lacked money to pay their bills. He held money for clients, and eventually engaged in private banking since there were no organized banks on Coos Bay at that time. He was admitted to the bar in 1880. Both his banking business and law practice grew rapidly. In 1889 he took a partner in his banking business and established the Flanagan & Bennett Bank, the first bank in Coos and Curry counties.

Bennett first appeared before the Oregon Supreme Court in 1891. He participated as counsel in 36 cases argued in the Oregon Supreme Court, a rather amazing record when one considers the exigencies of travel between Coos Bay and Salem in the nineteenth century. In his varied practice he represented a candidate in a city election dispute, a mechanic's lien

claimant, an employer being sued by an employee injured in an explosion, and a railroad in a condemnation action. Bennett also became involved in politics. He was chosen as a member of the Democratic State Central Committee in 1888, although he later changed his party affiliation and became a Republican.

In 1898 Bennett took in an associate, his cousin T. G. Bennett Swanton. In 1910 Bennett's son Thomas T. Bennett and Swanton both became partners in the firm, which was then known as Bennett and Swanton, and thereafter as Bennett, Swanton & Bennett.

J. W. Bennett's law practice and bank both flourished, and he involved himself in a number of causes. He sup-

ported port improvements and served on the Harbor Commission. He also constructed many buildings in town and was instrumental in having the streets of Marshfield paved (paid for in part with his contributions). When the Oregon State Bar was organized, he was selected for the important post of chairman of the Bar Examination Committee. He was also an actor and an accomplished singer, entertaining audiences in local productions. Bennett died in 1916.

Perhaps the finest compliment to Bennett came in an editorial published by the *Evening Record* on the day after his death. The editor said "Mr. Bennett's personal traits were as prominent as his business ability. He

*Continued on page 8*

## PENNOYER V. NEFF by John W. Stephens

**C**ertainly one of the most famous cases to come out of the District of Oregon is *Pennyroyer v. Neff*, 95 U.S. 714 (1877). It has terrified generations of first-year law students with its baffling discussion of jurisdiction and its association with strange words like *quasi in rem*. Less well known is the fact that the case involved some of Oregon's leading legal citizens of that day. The trial judge was Oregon's premier pioneer jurist, Matthew Deady. Other characters included John H. Mitchell (an alias)—lawyer, bigamist, Oregon governor, and U.S. senator—and Sylvester Pennyroyer—lawyer, Portland mayor, Oregon governor, and anti-Chinese demagogue.

In the Society's continuing Famous Cases Series, Oregon law professor and legal historian Jim Mooney will speak about *Pennyroyer v. Neff* on Thursday evening, September 26, 2002, at 7:00 p.m., at the Mark O. Hatfield United States Courthouse. Professor Mooney is working on a biography of Matthew Deady and is, therefore, uniquely qualified to talk about this subject. He will talk not only about the trial and Justice Field's opinion, he will also talk about Matthew Deady and his relationship to the other parties, particularly the despised John Mitchell. The location of the Neff donation land claim, the property at issue, will be identified. In short, all mysteries will be explained!

The presentation will be in conjunction with a reception for the national meeting of the Court & History Group, the association of court history societies. The group will be meeting in Portland in connection with the national meeting of the American Association of State and Local History. As a bonus, Judge Panner will speak to the group about the new Courthouse.



Oregon's infamous John Mitchell

## Coos County Law Firm *continued*

was a man of jovial disposition and always pleasant to meet. It mattered not the station in life of any man. The poorest friend was treated with the same greeting as the rich man. Mr. Bennett was a big enough man to look upon all alike."

### The Next Generation in the Firm

After the death of J. W. Bennett, the firm was continued by his son Thomas Tankerville Bennett and his cousin T. G. Bennett Swanton under the name Bennett & Swanton.

T. G. Bennett (Ben) Swanton was born in Ireland in 1874 and arrived in Oregon in 1894. In 1898 he was admitted to the bar and became an associate in the firm. Swanton was a rather shy, quiet man who did not like automobiles. He sometimes walked 17 miles to the courthouse in Coquille if the train schedule did not fit his own timetable. Once while en route to Coquille, he fell ill but refused offers of passing motorists to take him to the hospital. He insisted on waiting until a horse-drawn wagon could be brought. As office manager for the firm, Swanton was a zealous steward of its finances, even docking the pay of secretaries one penny for every sheet of paper discarded because of errors. All the secretaries were re-

ported to have had large purses where they could stash their mistakes.

J. W. Bennett's son Thomas T. Bennett was born in 1886 and graduated from Stanford University in 1909. Shortly after entering his father's firm, he began handling litigation and seems to have handled nearly all of it after the death of his father. He was active in the Coos & Curry Counties Bar Association and served as president of the association in 1925. During this time the association was very aggressive in devising and enforcing a schedule of minimum fees, designed to prevent lawyers from "business-getting" by charging lower fees than their fellow attorneys. The schedule included items like "uncontested divorce cases—\$75.00." The use of the minimum fee schedule continued until 1975, when it was outlawed by the United States Supreme Court. T. T. Bennett was elected to the Oregon House of Representatives and served two terms in the legislature. He died unexpectedly in 1929 at age 42.

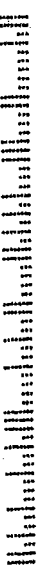
*Part Two covering the years from 1930 to the present will appear in our next issue.*

**John Whitty is a partner in Foss, Whitty, Littlefield, McDaniel and Bodkin, LLP.**

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Portland, OR 97204

601 S.W. Second Avenue, Suite 1600  
Chernoff Vilhauer, et al.  
Nancy J. Moriarty

CHERNOFF, VILHAUER,  
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AUG 27 2002

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The U. S. District Court  
of Oregon Historical Society  
740 U. S. Courthouse  
1000 S.W. Third Avenue  
Portland, OR 97204



# Oregon BENCHMARKS

THE U.S. DISTRICT COURT OF OREGON HISTORICAL SOCIETY NEWSLETTER

*Richard Schabby v. McKee A. Smith*

## Judge Panner on a Rare Native American Victory

*What follows is an edited text of the speech given by the Honorable Owen Panner on October 21, 2001 at the Discovery Center in The Dalles, Oregon. This speech reviews the events leading up to the case of Richard Schabby v. McKee A. Smith, et al., decided in 1969. Judge Panner recalls the role of the Honorable Robert C. Belloni in deciding this case, and his own role as an attorney for the plaintiffs.*

Our title today, "A Rare Native American Victory," doesn't refer to the individual court cases about fishing rights which the Indians won repeatedly. The Indian fishermen up and down the river consistently won their cases on an individual basis when they went to court after being arrested for fishing violations. But as the wise old leaders of the Warm Springs Tribe told me when I started with them as a young lawyer, "We aren't hiring you to win court cases—we want to outsmart the white man. Every time we win a court case, it seems like we lose." This was true. The crowning defeat for tribes along the river was the construction of the dams. The first instance was Bonneville, with the negotiated promise of "in lieu fishing sites." Roberta Ulrich, in her wonderful book *Empty Nets*, chronicled the sad history of the federal government's broken promises regarding "in lieu fishing sites." It can be summarized briefly by saying that since the start of construction of the Bonneville Dam in the early 1930s, the government has not yet kept its promise to furnish the tribes the promised "in lieu fishing sites."

Then came The Dalles Dam. This is probably the only dam ever built favored by everyone except the Indians. Commercial fishermen, sports fishermen and environmentalists made no protest about the construction of this dam because it eliminated the Indians' dip-net fishery on the Columbia River. Everyone salved his conscience when the Corps of Engineers negotiated with the tribes and agreed to compensate each tribe monetarily on a perpetual basis for the fish they lost. In other words, the amount of money paid to each tribe should pro-

duce sufficient interest to pay the tribes the same amount of money they would have received each year from fish. They completely ignored the fact that Indians didn't want the money—they wanted the fish. Once again the white men believed they had snookered the Indians, but soon the Indians were fishing with boats and gill nets. "Whoa!" yelled the white man, "we bought out their fishing rights." But here's where our title comes in to play. Because of conscientious and able lawyers (not me—this was done before I became an Indian lawyer), an agreement was negotiated so that Indians just subordinated the fishing rights to the construction of the dam—they didn't give up the fishing rights. "Whoa!" yelled the white men, "Historically, Indians never fished with gill nets." But they were wrong about the history, and the Indians continued fishing with gill nets.

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Native Americans fishing at Celilo Falls in the 1950s.  
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