

Volume 9 Issue 1

THE JOURNAL OF  
THE HISTORICAL SOCIETY  
OF THE UNITED STATES  
DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MICHIGAN

# STEREOSCOPE



*"Times have changed  
And we've often rewound the clock  
Since the Puritans got a shock  
When they landed on Plymouth Rock.*

*If today  
Any shock they would try to stem,  
'Stead of landing on Plymouth Rock,  
Plymouth Rock would land on them.*

\* \* \*

*Just think of those shocks you've got  
And those knocks you've got  
And those blues you've got  
And that news you've got  
And those pains you've got  
(If any brains you've got)  
From those little radios.*

*So Missus R., with all her trimmin's,  
Can broadcast a bed from Simmons  
'Cause Franklin knows,  
Anything goes."*

—Cole Porter,  
"Anything Goes"  
(November, 1934)

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## *The Michigan Trust Company, et al. v. Simmons Company: Julius Amberg Shocks the Simmons Company for Its Looting of the Berkey & Gay Furniture Company*

### Introduction

The day of September 20, 1934, dawned on the city of Grand Rapids, Michigan with sunny skies and fair weather; the temperature later that day would reach a high of sixty degrees. The year, 1933, however, had not been auspicious for the United States of America and its citizens, mired as they were in the quicksand of the Great Depression. In February, 1933, a number of large banks in Detroit had closed, many of which would never reopen after the national bank holidays subsequently declared by Michigan's governor and by the newly inaugurated President, Franklin D. Roosevelt.<sup>1</sup> South of Michigan's border in South Bend, Indiana, Colonel George Milburn Studebaker, the 68-year old scion of the founder of the Studebaker Motor Car Company, filed for bankruptcy relief on September 20, 1933. His fortune, once estimated at \$3,300,000 in 1928, had evaporated to just \$5,000 according to his filed bankruptcy schedules.<sup>2</sup> The average American citizen had much to fear concerning his or her family and their future on this pleasant September day.

Also on this morning, the trial of the civil action entitled *The Michigan Trust Company and William H. Gilbert, Receivers of Berkey and Gay Furniture Company v. Simmons Company* began in the courtroom of Federal District Judge Fred M. Raymond in Grand Rapids, Michigan. This action, which had been commenced by the plaintiffs, the state court-appointed receivers of local furniture manufacturer, Berkey & Gay Furniture Company ("Berkey & Gay"), in Kent County Circuit Court and thereafter removed by the defendant to the United States District Court for the Western District of Michigan, demanded an accounting from the Simmons Company for monies due to Berkey & Gay's creditors that were allegedly looted by Simmons, the famous bedding and furniture manufacturer and ultimate parent company of Berkey & Gay.

The plaintiffs' Bill of Complaint dated August 30, 1932 and filed in state court alleged that shortly after Simmons acquired Berkey & Gay in September, 1929, Simmons systematically destroyed its subsidiary's business and annihilated its value by actions taken during 1930 and 1931, which resulted in the eventual liquidation of Berkey & Gay. While the lion's share of the liquidation proceeds were funneled to Simmons in repayment of loans made to Berkey & Gay after the acquisition, other creditors, among them holders of mortgage bonds issued by Berkey & Gay in 1926 and holders of Berkey & Gay preferred stock, remained unpaid. The prayer for relief in the



*Berkey & Gay Plant on North Monroe Avenue in Grand Rapids (named Canal Street at the time)*

Bill of Complaint included the following requests for an accounting and related relief:

(b) That a full and complete accounting be had of and concerning the affairs of Berkey & Gay Furniture Company during its control by said defendant of all transactions between said defendant and its subsidiaries of the one part, and Berkey & Gay Furniture Company of the other part, and of all the moneys and property taken from said Berkey & Gay Furniture Company by said defendant under the direction of said defendant, and that it be determined, decreed and adjudged what is owing by said defendant to your orators with respect to all and singular said transactions and matters, and by reason of the injuries occasioned to said Berkey & Gay Furniture Company by the conduct of defendant, and that defendant be directed to pay to your orators the sums so found to be due with interest thereon, and that your orators may have execution against the defendant therefor.

\* \* \*

(d) That by reason of the conduct of defendant aforesaid it be decreed to pay to your orators such sum, in addition to specific items found to be due, as may be necessary to permit your orators to pay in full all of the debts and obligations of Berkey & Gay Furniture Company, including the principal and interest accrued and accruing upon its first mortgage bonds, and to permit your orators to pay in full the par value of all the issued preferred stock of Berkey & Gay Furniture Company, together with accumulated and accrued dividends thereon, and that your orators may have execution against the defendant therefore.

Co-counsel for the receivers were the Grand Rapids law firms, Butterfield, Kenney & Amberg (now known as Law Weathers), led by Julius Houseman Amberg, and Travis, Merrick, Johnson & McCobb (now Varnum LLP). Co-Counsel for Simmons were the Grand Rapids law firm of Knappen, Uhl, Bryant & Snow (now known as Wheeler Upham P.C.), with Stuart Knappen acting as primary trial counsel, and the Wall Street law firm of Burke & Burke, represented by Thomas F. Gregory and since merged into the New York City law firm of Saterlee Stephens Burke & Burke LLP. The trial



would consume 28 full days spread over a period of one year. Twenty-two witnesses would testify, among them luminaries of the American furniture industry such as Robert Irwin, Clarence Dexter, Hollis Baker and the president of Simmons, Zalmon G. Simmons. Over 650 exhibits were introduced as documentary evidence at trial. At the trial's conclusion, Judge Raymond issued a written decree awarding the plaintiff \$2,367,695.70 plus costs, which amount would bear interest after September 12, 1934, at an annual rate of five percent (5%) until paid. At that time, this judgment was the largest monetary award granted by the United States District Court for the Western District of Michigan.<sup>3</sup> Both plaintiff and defendant appealed to the Sixth Circuit Court of Appeals from this decree but the matter was thereafter settled by the parties.

## History of Berkey & Gay Furniture Company

### **Berkey & Gay Furniture Company: A Brief History from 1862 to 1929**

#### *Formation of the Partnership and its Subsequent Incorporation*

In November, 1862, Julius Berkey and Elias Matter formed a partnership in the City of Grand Rapids for the manufacture and sale of furniture wholesale in the Chicago and Milwaukee markets. At the partnership's formation, Julius Berkey contributed five dollars in cash and a few hundred dollars of machinery and materials as his capital contribution and Matter pitched in his tool chest valued at sixty dollars.<sup>4</sup> In October, 1863, Julius' brother, William A. Berkey, purchased a 50% interest in the firm, the name of which was then changed to Berkey Brothers & Company.<sup>5</sup> Three years later, George W. Gay purchased one-half of William Berkey's interest in the partnership, which name was again changed, this time to Berkey Brothers & Gay.<sup>6</sup> In 1870, Elias Matter retired from this business and three years later, William A. Berkey withdrew from the partnership.<sup>7</sup> In August, 1873, the business was incorporated with a capital stock of \$500,000 under the name of "Berkey & Gay Furniture Co." At the time of its incorporation, Julius Berkey was the corporation's President, George W. Gay was its Treasurer and John A. Covode was its Secretary.<sup>8</sup>

#### *Facilities and Business Practices*

The company's manufacturing facility was established at Canal Street (now North Monroe Avenue) and Hastings Street in Grand Rapids and was expanded over the succeeding years. In 1889, the complex "comprised three buildings; one 100 by 50 feet and four stores high, 125 feet by 70 feet and the other 80 by 40 feet, all containing the latest and improved wood working machinery."<sup>9</sup> The main office building, located adjacent to the factory buildings, contained the corporate offices, shipping departments, storage rooms, finishing areas and showrooms.<sup>10</sup> Berkey & Gay in 1889 also maintained an "eastern salesroom" at 17 Elizabeth Street in Manhattan, which had been established there in 1875.<sup>11</sup> Albert Baxter, in his *History of the City of Grand Rapids* published in 1891, described the firm's business and facilities as follows:

"Every provision is made for the comfort and safety of employees. Heated by steam and carefully guarded from accident, the entire works may be regarded as a model for their uses. The output of the company is from six to eight hundred thousand dollars annually, sent to all parts of the world, though from the class of goods manufactured, consistent of fine furniture in chamber, dining-room, hall and library suits, they naturally only seek the cream of the trade. . . . Probably there is no larger manufacturing establishment of its kind in the world."<sup>12</sup>

Berkey & Gay was also an industry innovator in advertising techniques and distribution methods. The company was the first furniture maker to undertake national advertising and was also an industry leader in establishing a network of exclusive dealerships for the sale of its products.<sup>13</sup> Berkey & Gay also had a history of employing highly skilled furniture designers during its years of operation, including some recruited from world-class furniture manufacturers such as Waring & Gillow in London and W. & J. Sloane in New York City.<sup>14</sup> Berkey & Gay's showrooms were located in its factory and office complex in Grand Rapids and were described thus in 1911:

"The Berkey & Gay Company's showrooms are the largest and most elaborate of all. They occupy

nearly five acres alone in a building devoted exclusively to general offices and show-rooms. These rooms are especially equipped to exhibit furniture, and it is shown in a way that few retail stores can show it, on account of lack of space. Bed-room and dining-room furniture is shown as it should be, each suite in a single room, and the visitor can see the suite as it will look in the home. . . . These show-rooms of Berkey & Gay are open at all times to the general public. Prices at which pieces are sold in all cities are plainly marked on each piece, and visitors may make selections to be delivered through the local Berkey & Gay dealer.”<sup>15</sup>

### *Furniture Styles and Products*

The style of furniture manufactured by Berkey & Gay in its early years was known for its massiveness and its solidity. Its popularity spread once these furniture lines were exhibited at the 1876 Philadelphia Centennial Exposition and, as a result, “put Grand Rapids ‘on the map’ as a furniture manufacturing center.”<sup>16</sup> These product lines are described in detail in the book, *Grand Rapids Furniture: The Story of America’s Furniture City*, published in 1998 under the auspices of The Public Museum of Grand Rapids:

**“1866-1890:** From its very first machine-made, scalloped, walnut and cherry ‘Berkey Tables,’ the company’s products were made for wholesale shipment and sale to the masses. Berkey & Gay capitalized on the public’s interest in whole suites of ‘suits’ of furniture, which included everything needed for bedroom and dining rooms. Pieces were also manufactured for the hall and office. Much of the company’s early production was likely shipped ‘in the white’ (unfinished), to be finished by the retailer upon arrival. Some pieces, however, were given painted faux burl panels at the factory. Large contracts for bedroom suites were supplied to hotels in Washington, and in New York at Coney Island and Manhattan Beach.

With its introduction to the country at the 1876 Philadelphia Centennial Exposition, it became known for production of massive Renaissance Revival beds and secretaries. Typically of walnut

and walnut burl, with lower-end suites in ash, they were decorated with multiple layers of geometric and architectonic panels and carvings. In fact, Berkey & Gay’s products of this period have become synonymous with the term ‘Grand Rapids furniture’ in the minds of many collectors.

An 1878 article in the *American Cabinetmaker* says the company ‘makes a specialty of bevel plate mirrors in their finer work.’ The article revealed that sides and ends of drawers were produced in red cedar to prevent moths. It also noted that Berkey & Gay did not make its own parlor frames, but purchased them from Holton & Hildreth of Chicago, then completed the upholstery for its own retail trade.

Eastlake style suites from the late 1870s and ‘80s were equally massive. Some at the higher end demonstrate keen knowledge of Eastlake’s principles of design, and stand apart from the company’s other medium-grade lines.

**1890-1915:** As consumer style preferences changed, so did Berkey & Gay, but the feeling of massiveness and strength in its furniture remained. The company continued to produce whole suites for the parlor, bedroom, and dining room. Pieces were in Golden Oak or mahogany. Berkey & Gay’s



*One of the Berkey & Gay Showrooms in Grand Rapids.*

Golden Oak pieces have very high relief in their carving, which ranged from grottoesque fantasy creatures to swirling French flourishes.

A few Arts and Crafts style suites were introduced in the first decade of this century under names like 'English Modern,' but generally speaking Berkey & Gay passed on the whole movement."<sup>17</sup>

*"In Amsterdam" by Eugene Field*

As Berkey & Gay's reputation grew during the last quartile of the Nineteenth Century, its name and products became almost a household word in America, synonymous with quality of manufacture. In 1895, American poet Eugene Field, author of poems such as "Wynken, Blynken and Nod," "Little Boy Blue," "The Duel" and "Jest 'Fore Christmas" (1850-1895), immortalized the name of Berkey & Gay in his poem, "In Amsterdam," published in 1895. In this poem, Field tells of his visit to an antique store in Amsterdam where he was smitten by

"... an ancient bed,  
With ornate carvings at its head,  
A massive frame of dingy oak,  
Whose curious size and mold bespoke  
Prodigious age."

When the poet asked the shopkeeper, Hans von der Bloom, how much the bed cost, he was told "Ein tausand gildens" - - the bed had been owned and slept in by "King Fritz der Foorst." While reflecting sadly that he could not afford the price and musing that, although America was

"... full of stuff  
That's good, but its not old enough,"

Field's glance fell

"Upon a trade-mark at the head  
Of Fritz der Foorst's old oaken bed - -  
A rampant Wolverine, and round  
This strange device these words I found:  
'Patent Antique. Berkey & Gay,  
Grand Rapids, Michigan, U.S.A.'"

Field then forsook the "simple, guileless Dutch" and vowed that

"Determined when I want a bed  
In which has slept a royal head,  
I'll patronize no middle-man  
But deal direct with Michigan."

*The Passing of the Founders, Acquisition of Oriel Cabinet and Acquisition by Simmons*

In 1899, George W. Gay passed away in Grand Rapids. His son, George H. Gay, succeeded Julius Berkey as president of Berkey & Gay upon the latter's death in 1908. In 1911, Berkey & Gay acquired the Oriel Cabinet Company, which was at that time "one of the well-known and long established furniture companies of Grand Rapids."<sup>18</sup> The Oriel Cabinet Company had been founded by George W. Gay and, upon his passing in 1899, his son, William H. Gay succeeded him as president.<sup>19</sup> After the death of Oriel's general manager in 1910, the acquisition was made because "it seemed advisable to bring these institutions under one management, thereby effecting many economics in manufacturing and selling not possible before. The line of goods manufactured by the Oriel Company did not materially conflict with the Berkey & Gay line."<sup>20</sup>

The period from 1915 to 1931 has been described as Berkey & Gay's "zenith of production."<sup>21</sup> During this time,

"Berkey & Gay concentrated on living room and bedroom suites. Although designs ran the gamut of freely translated European and American revival styles, most tended toward larger, heavier periods like Elizabethan, William and Mary, and American Empire.

Pieces were well constructed. A variety of woods was used, mostly dark mahoganies and walnuts, with occasional accents of lighter woods, painted decoration, or exotic materials like turquoise. These were further darkened by the application of stains wiped around edges and carvings, to give the appearance of age.



One interesting novelty was the 'Old Ironsides Table,' of which only about 100 were produced. Its scalloped apron and block-turned legs and stretchers were adapted from an illustration in a Wallace Nutting book on American antiques. An eagle medallion on the single drawer front was carved in wood taken from the *U.S.S. Constitution*, during its restoration in Boston Harbor."<sup>22</sup>

In 1926, Berkey & Gay merged with the Wallace Furniture Company and the Grand Rapids Upholstering Company and, after these acquisitions, members of the Wallace Family were made officers of Berkey & Gay. As recounted later at the trial, the profits of Berkey & Gay began a downward spiral in the mid-to late-1920s. In 1926, Berkey & Gay's net profit was \$637,690 but was reduced during the next two years to only \$156,998 in 1928. During the first nine months of 1929, Berkey & Gay suffered a net loss of \$379,605. On September 13, 1929, Berkey & Gay, after months of negotiations, was acquired by a subsidiary of Simmons, Rosemary, Inc.

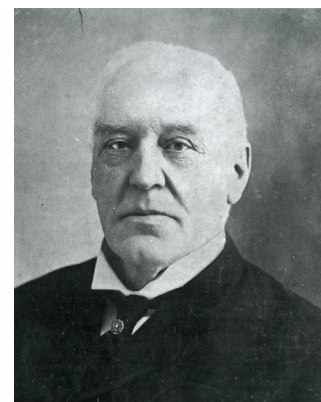
### **The Simmons Company: A Short History from 1870 to 1929**

Simmons was established in 1872 by Zalmon Gilbert Simmons with an initial \$5,000 capital investment.<sup>23</sup> He built Simmons' first factory in Kenosha, Wisconsin, where at first nine employees originally manufactured wooden insulators and cheese boxes. In 1884, his company was incorporated as the "Northwestern Wire Mattress Company," the name of which was thereafter changed in 1889 to the "Simmons Manufacturing Company." Also in 1889, Simmons introduced

spiral-coil springs for its mattresses. By means of an innovative production process, Simmons reduced the retail price of a woven wire mattress from \$12.00 to 95¢, thereby enabling the average American consumer to acquire this product.<sup>24</sup> Prior to this product innovation, the average working man slept uncomfortably on straw, cotton or horsehair pads.<sup>25</sup> On February 11, 1910, the founder of Simmons passed away in Kenosha at the age of 82.<sup>26</sup> At the time of his death, Simmons was one of the largest producers of wire mattresses, steel springs and iron and steel beds in the world. Upon the passing of the founder, he was succeeded by his son, Zalmon Simmons, Jr., as President of the company.<sup>27</sup>

In 1912, Simmons introduced its "Wall-A-Bed" product which was the predecessor to the famous Murphy Bed that Simmons produced for the Murphy Company. Four years later, Simmons began its first national advertising campaign in the Saturday Evening Post magazine. In 1915, Simmons changed its corporate name to "Simmons Company." By 1919, Simmons had established manufacturing plants in San Francisco, Los Angeles, Montreal, Toronto, Winnipeg, Vancouver, Seattle and Atlanta. Also in 1919, Simmons moved its corporate headquarters to New York City. In 1924, Simmons stock was listed on the New York Stock Exchange.<sup>28</sup>

In 1925, Simmons developed the Beautyrest mattress, which became the company's crown jewel. In order to tout this new product, Simmons instituted an advertising campaign featuring testimonials by famous personages, including Henry Ford, George Bernard Shaw and Thomas Edison. By 1929, sales of Beautyrest mattresses exceeded \$9 million. The next year, the company



*Julius Berkey, one of the founders of Berkey & Gay*



*Zalmon G. Simmons (1828-1910), the founder of Simmons Co*



*Zalmon G. Simmons, the President of Simmons from 1910 to 1932 and Chairman of Simmons Board of Directors at the time of the trial. He was the son of the founder, also known as Zalmon G. Simmons.*

created nationwide a “service station program” by which retail stores were permitted to carry only samples of Simmons products. However, customers could order these products in the stores and receive direct delivery of the product from Simmons warehouses within 24 hours. In 1927, Eleanor Roosevelt began to be featured in Simmons print advertising for the company’s Beautyrest line and collection.<sup>29</sup> On her nationally syndicated radio show, Mrs. Roosevelt continued her advocacy for Simmons products into the 1930s.<sup>30</sup>

By 1929, Simmons’ fortunes were soaring, and its common stock was selling at close to \$200 per share, thereby enabling Simmons to acquire furniture and textile businesses that year, among them Berkey & Gay. Simmons’ rationale for its acquisition of Berkey & Gay was best explained by an article in the May 25, 1936 issue of *Time Magazine*:

“In 1929, Simmons bought Berkey & Gay, put in new management. At that time, Berkey & Gay was doing a business of nearly \$10,000,000 per year, making most of Grand Rapids share (33%) of the fine period reproductions in the U.S. It was Bedman Simmons’ belief that if the exclusive dealerships [of Berkey & Gay] were abolished, the semi-annual furniture shows allowed to lapse and standard Berkey & Gay furniture distributed through Simmons’ warehouses to a mass market awakened by national advertising, the old name and the new methods would be good for an annual business of at least \$20,000,000.”<sup>31</sup>

This well-planned acquisition suffered from bad timing, to say the least.

### **The Looting of Berkey & Gay by Simmons (1930-1931)**

On September 13, 1929, only one month prior to the stock market crash and the beginning of the Great Depression, Simmons acquired all of the outstanding common stock of Berkey & Gay through its subsidiary, Rosemary, Inc. Two weeks later, on September 27, 1929, resignations were presented by the following members of Berkey & Gay’s Board of Directors: Mrs. Meta C. Gay, E. A. Wallace, W. J. Wallace and B. S. Warren. All Berkey & Gay officers tendered their resignations at

this same meeting and the following new directors were appointed, (i) Zalmon G. Simmons, Jr.; (ii) Grant G. Simmons; (iii) H. E. Foster; and (iv) L. S. Wallace. At the same meeting, the following persons were elected as new officers of Berkey & Gay: (a) L. S. Wallace, President; (b) George S. Fowler; (c) Grant G. Simmons; (d) Zalmon G. Simmons, Jr.; (e) O. A. Wallace; and (f) Edward P. Grubb.<sup>32</sup>

This new lineup of officers and directors did not remain static, however. At a Berkey & Gay Board of Directors meeting at Simmons’ corporate headquarters at 230 Park Avenue in New York City in January, 1930, L. S. Wallace resigned as President and General Manager of Berkey & Gay and W. J. Wallace resigned as Vice President, Secretary and Treasurer.<sup>33</sup> L. S. Wallace was replaced by Malcolm Mount as Berkey & Gay’s new President<sup>34</sup> and Edward P. Grubb replaced W. J. Wallace as corporate Secretary and Treasurer.<sup>35</sup> In addition, shortly after the acquisition, Berkey & Gay Furniture Co. of Delaware, Inc., a Delaware corporation, was formed, which received the exclusive rights to sell Berkey & Gay furniture except for furniture sold directly to Simmons.<sup>36</sup>

Also in January 1930, Berkey & Gay discontinued its use of its Grand Rapids showrooms for furniture and merged this exhibit with Simmons’ products at the Merchandise Mart in Chicago.<sup>37</sup> Simmons added to Berkey & Gay stationary, signs, checks and advertisements the inscription, “division of Simmons Co.,” after the acquisition.<sup>38</sup> On August 11, 1930, the corporate name of “Berkey & Gay Furniture Co. of Delaware, Inc.” was changed to “Simmons Wood Furniture Corporation.”<sup>39</sup> Also in 1930, new machinery for a new line of Simmons wood furniture was purchased and installed in Berkey & Gay’s plant on Godfrey Avenue in Grand Rapids, whereupon the replaced machinery was shipped to other Berkey & Gay plants.<sup>40</sup> Despite all of this intercompany activity, the Great Depression began to take its toll. The 1930 year-end financial statements for Berkey & Gay audited by the accounting firm of Lybrand, Ross Bros. & Montgomery evidenced an operating loss of \$949,000 and a total net loss of \$1,199,816 for that calendar year.<sup>41</sup>

In 1931, Simmons began to shift and dispose of Berkey & Gay’s assets at an accelerated pace, using the proceeds of this liquidation to repay Simmons’ working capital loans made to its subsidiary in preference to



other creditors. This course of action was primarily stimulated by Simmons' quest for liquidity—its stock price was spiraling downwards and the company required large bank loans to survive. In December, 1930, Alfred Terrell, a Vice President of Simmons and member of Berkey & Gay's Board of Directors asked Edward P. Grubb, Berkey & Gay's Treasurer, for financial projections during the first six months of 1931.<sup>42</sup> Grubb reported back to Terrell with a projected net loss of \$133,089 based on anticipated sales of \$2,442,000.<sup>43</sup> In January, 1931, the name of the Delaware subsidiary of Berkey & Gay was changed back to "Berkey & Gay Furniture Co. of Delaware, Inc." from "Simmons Wood Furniture Corporation."<sup>44</sup> In addition, the added description of Berkey & Gay as a "division of Simmons Co." was dropped in February, 1931.<sup>45</sup> In the first few months of 1931, Berkey & Gay cancelled large numbers of orders for the purchase of raw materials and began selling furniture at discounts of 50% - 60%.<sup>46</sup> The majority of the proceeds of this liquidation was used to repay loans made by Simmons to Berkey & Gay for working capital.<sup>47</sup>

Also during this liquidation process, Edward Grubb was directed by Simmons officials in New York not to deliver copies of Berkey & Gay's year-end 1930 financial statements to creditors unless Berkey & Gay was contractually bound or otherwise required to do so.<sup>48</sup> In Spring, 1931, production at all Berkey & Gay plants ceased and certain furniture designers employed by Berkey & Gay were relocated to the B.F. Huntley Furniture Co. facilities in Winston-Salem, North Carolina.<sup>49</sup> Berkey & Gay's 1931 advertising campaign, planned in Simmons' offices in Chicago, was abandoned at the end of January, 1931.<sup>50</sup> By the summer of 1931, only five persons were on duty at Berkey & Gay's Grand Rapids facilities including a watchman, an engineer and a stenographer.<sup>51</sup>

From January 1, 1931, through May 31, 1931, Berkey & Gay had suffered losses totaling \$1,106,950. In the month of May, 1931, Berkey & Gay incurred an operating loss of \$440,000 on net sales of \$444,000. Working capital had been reduced from \$2,000,000 to only \$250,000 by May, 1931, thereby violating a covenant in Berkey & Gay's mortgage bond issue, the trustee of which was The Michigan Trust Company. By the Summer of 1931, outside creditors of Berkey & Gay including The Michigan Trust Company were clamoring for information concerning the future of the company

and payment of their claims. During this period, Grubb mailed to Simmons daily reports on shipments of Berkey & Gay goods, collections of claims and the outstanding balance of Berkey & Gay's accounts receivable.<sup>52</sup>

On November 15, 1931, Berkey & Gay defaulted on its payment obligations on first mortgage serial gold bonds dated May 26, 1926 for which The Michigan Trust Company acted as trustee. The original principal amount of these bonds was \$1,500,000; the bonds matured serially on May 15<sup>th</sup> and November 15<sup>th</sup> of each year from 1927 to 1941. As security for repayment of these bonds, The Michigan Trust Company was granted a first mortgage on real estate owned by Berkey & Gay, all rents generated by this realty, and all of its machinery, equipment and fixtures. Although the semi-annual installment payment of principal and interest due May 15, 1931 had been paid by means of a loan from Simmons, the succeeding installment due November 15, 1931, was missed. As a result of this default and the failure of Berkey & Gay to pay real estate taxes for 1931 and 1932, the mortgage slipped into default under the bond documents.<sup>53</sup>

In 1932, the American Furniture Mart Building Corporation commenced a civil action in the United States District Court for the Western District of Michigan against Berkey & Gay for unpaid rent due on leased showroom premises in Chicago. On February 17, 1932, the federal district court appointed The Michigan Trust Company and William H. Gilbert, a Grand Rapids businessman<sup>54</sup>, as co-receivers of Berkey & Gay, who were authorized by that court to collect Berkey & Gay's assets and to prosecute any claims on its behalf.<sup>55</sup> On August 29, 1932, the co-receivers of Berkey & Gay filed their Bill of Complaint against Simmons in Kent County Circuit Court seeking an accounting and related relief, which action was thereafter removed by Simmons to the United States District Court for the Western District of Michigan and the case was then assigned to Judge Fred M. Raymond.

## **The Trial Setting and the Tenor of the Times**

### **1933 and 1934: The Years of the Deepening Great Depression, the New Deal and the Rise of Totalitarianism**

The Great Depression of the Twentieth Century sprang upon American on Thursday, October 24, 1929,

when the proverbial bottom dropped out of the stock market on Wall Street. As months and years passed, the humans and economic misery increased in intensity and spread throughout the world. Business failures multiplied, millions of American workers lost their jobs and were forced to sell apples on sidewalks, live in shantytowns known as "Hoovervilles," and obtain their daily meals from religious and charitable soup kitchens.

In the early 1930s, the population of the United States exceeded 122,775,046, which was the tally of the 1930 census. The national unemployment rate in 1934 was a colossal 21.7%. For those Americans fortunate to find work, the average hourly wage was 58¢ in manufacturing, 49¢ in construction, 62¢ in government and 78¢ in finance, real estate and insurance. The overall yearly average wages for American workers amounted to \$1,600.00. The cost of a new 1934 Studebaker truck was \$625 while the average cost of a loaf of bread was 8¢ and a pound of hamburger was 12¢. A one-half gallon of milk cost 22¢ at retail.

In 1932, Franklin Delano Roosevelt was elected the Thirty-Second President of the United States, defeating the incumbent, Herbert Hoover, by 472 electoral votes to 59. In the popular vote, FDR trounced Hoover by 57.4% to 39.7%, with Hoover carrying only six states. In Michigan, Hoover performed better than his national average, capturing 44.4% of the popular vote. As a result of these elections, the Democrats became the majority party, capturing 313 seats in the House

of Representatives, an increase of 97 over 1930. In the United States Senate, the Democrats captured 59 seats - a net gain of 12 over 1930. In Michigan, a Democrat, William A. Comstock, riding on FDR's coattails, defeated Republican incumbent Wilber M. Brucker, for the governor's post. In the Michigan legislature, a sea-change in party composition resulted from the 1932 elections. Prior to the vote, the GOP held 31 senate seats to the Democrats' 1 and 98 house seats to the Democrats' 2. The 1932 elections dramatically altered the existing party balance. After the polls closed in November, the Democrats were the victors in 17 senate races compared to the Republicans' 15 and captured 56 seats in the house measured against the GOP's 44 seats.

In FDR's first term, the new President christened his program for national recovery the "New Deal" in his inaugural speech.<sup>56</sup> During this two-year period, Congress enacted a number of bills designed to stimulate the economy, the most notable and controversial of which was the National Industrial Recovery Act passed on June 16, 1933. This statute authorized the President to regulate industry and permit cartels and monopolies and also created a national public works program. Two years later, however, the United States Supreme Court voided this act as unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The national symbol of this legislation was the cartoon "Blue Eagle" and the slogan, "We Do Our Part." Nevertheless, FDR's efforts at jump-starting the American economic engine failed to have their intended effect and in 1934, an impatient electorate added to the Democratic majorities in Congress. In the United States House of Representatives, the Democrats acquired 9 additional seats for a majority of 322 to 117. In the Senate, the Democrats won 10 additional seats for a total of 69 compared to a total of 25 for the GOP. Bucking this national trend, Michigan Republicans reelected incumbent U.S. Senator Arthur J. Vandenberg and elected a new governor, Frank D. Fitzgerald. In the Fifth Congressional District, incumbent GOP Congressman Carl E. Mapes<sup>57</sup> retained his seat against a determined challenge by Democrat Thomas F. McAllister<sup>58</sup>, retaining his seat by a margin of only 1,735 votes. In Michigan state legislative races, the membership of the house was evenly split between the two major parties, both of which held 50 seats. The Republicans,



*The old Federal Courthouse in the mid-teens.*

however, recaptured control of the state senate, walking away with 21 seats to the Democrats' 11.

The Great Depression caused, among other things, a surge in labor unrest, strikes and overall militancy. A massive layoff by the Ford Motor Company in 1932 resulted in a march of approximately 4,000 unemployed workers who were attacked by police, firemen and Ford's own security guards at the Dearborn border, resulting in five dead and sixty wounded marchers.<sup>59</sup> In 1934 alone, there were over 2,000 labor strikes in the United States, a number of which resulted in deaths and injuries to strikers.<sup>60</sup> These strikes included the Electric Auto-Lite Strike in Toledo, Ohio, a longshoremen's strike in San Francisco and a textile workers strike along the Eastern Seaboard. The agricultural sector of the American economy and the farmers themselves were battered by the dust storms of the early 1930s, which blew away the thin topsoil of many farms in the American Midwest and Southwest, thereby causing a mass abandonment of unproductive and foreclosed-upon farms and a forced migration of these displaced farmers to other regions of the country. These natural and human catastrophes were later immortalized by John Steinbeck in his 1939 Pulitzer-Prize winning novel, *The Grapes of Wrath*.

The rest of the world also suffered from the fallout of the Great Depression. Europe was beset by severe economic woes, which created opportunities for fascists to seize and consolidate political power in a number of countries. The most notable of these movements was that of the National Socialist German Workers Party, where Adolf Hitler was appointed Chancellor on January 30, 1933 and, one year later, adopted the title of Führer upon the passing of Germany's President, Paul von Hindenburg.<sup>61</sup> In June, 1934, Hitler eliminated many of his political rivals by cold-blooded assassinations during the "Night of the Long Knives."<sup>62</sup> In France, the political scandal known as the "Stavisky Affair" caused the downfall of a national parliamentary government followed by an unsuccessful, violent putsch by the French Far Right in Paris.<sup>63</sup> In Austria, a civil war in February, 1934 between the rightist government and the militant left resulted in numerous civilian deaths in Vienna caused by street fighting and artillery shelling.<sup>64</sup> Developments in the totalitarian states of the Greater Japanese Empire and the Union of Soviet Socialist Republics were also ominous for the future. In Japan, the militaristic government consolidated its

control over the former Chinese province of Manchuria, renaming it "Manchukuo" and installing Henry Pu Yi as its puppet ruler.<sup>65</sup> In Russia, the assassination of the popular mayor of Leningrad, Sergei M. Kirov, on December 1, 1934, which was likely engineered by Stalin himself, sparked the "Great Terror" in which millions of Old Bolsheviks, Red Army Officers, writers, intellectuals and workers were murdered by Stalin and his henchmen.<sup>66</sup>

Although Americans experienced deep misery and witnessed foreign threats to world peace in 1933 and 1934, there were cultural and other diversions available to them that helped distract their attention and ease their pain, albeit temporarily. Escapist films such as "The Gay Divorcee," with Fred Astaire and Ginger Rogers dancing to the strains of "The Continental," and "It Happened One Night," a Frank Capra comedy of manners starring Clark Gable and Claudette Colbert, permitted moviegoers to forget their fears and be reassured once again if only for a few hours. Cole Porter melodies in Broadway musicals, such as "Anything Goes," performed the same function for live audiences. Murals and sculpture began to grace the walls and spaces of public venues, especially the murals of Diego Rivera in the main court of the Detroit Institute of Arts depicting the benefits and risks of industrial capitalism.<sup>67</sup> In the world of sport, the first All-Star Baseball Game was played on July 6, 1933, at Chicago's Comiskey Park, resulting in a 4 to 2 victory for the American League.<sup>68</sup> In 1934, the Detroit Tigers bested the Babe Ruth and Lou Gehrig-led New York Yankees to capture its first American League pennant in 25 years, only to fall to the St. Louis Cardinals and its pitching aces and brothers, Dizzy and Paul Dean, in the Fall Classic by 4 games to 3.<sup>69</sup> In college football, The University of Minnesota was declared the NCAA champion for 1934, while The University of Michigan Wolverines, a team led by future President and Grand Rapids native, Gerald R. Ford, could muster only one victory and that in a non-conference match against Georgia Tech.<sup>70</sup> In soccer, the 1934 FIFA World Cup was won by Italy over Czechoslovakia by a 2-1 score in an overtime thriller.<sup>71</sup> In November, 1934, the manager of the Philadelphia Athletics, Connie Mack, led a team of Major League all-stars including Babe Ruth, Lou Gehrig, Jimmie Foxx and Moe Berg, on a barnstorming tour of Japan, playing exhibition games in various



cities against teams composed of Japanese professional baseball players.<sup>72</sup>

### The Lawyers and the Judge

#### *Julius Houseman Amberg*

Julius H. Amberg was born on February 27, 1880, to David M. and Hattie (Houseman) Amberg in Grand Rapids, Michigan. In 1868, David Amberg had moved to Grand Rapids, where he was engaged in the wholesale liquor trade. He later became Vice-President of The Grand Rapids Chair Company and the Imperial Furniture Company and also managed the estate of his wife's parents, Julius Houseman and Jennie (Ringuette) Houseman. Julius Houseman was born in Zeckendorf, Bavaria in 1832. Twenty years later, Julius Houseman immigrated to Grand Rapids, later entering the lumber business and then politics. Jennie Houseman's father was one of the first settlers of what was to become the City of Grand Rapids.<sup>73</sup>

Julius H. Amberg spent his youth in Grand Rapids, graduating first in his class from Grand Rapids Central High School in 1908. Four years later, he received a Bachelor of Arts degree from Colgate University and was class valedictorian. At Colgate, Julius was the Editor-in-Chief of the college newspaper, leader of the debate team and member of Delta Upsilon and Phi Beta Kappa fraternities. In 1915, he was the valedictorian of his class at Harvard Law School, where

he was an editor of the *Harvard Law Review*. After his graduation, Julius returned to Grand Rapids and joined the law firm of Butterfield & Keeney in 1916. Three years later, the partnership changed its name to Butterfield, Kenney & Amberg.<sup>74</sup>

On October 10, 1916, Julius Amberg married Callie Sutherland Smith of DePere, Wisconsin. They were to have three children together, (i) Mary S. Amberg, who was born on October 10, 1917 and passed away on April 30, 1931; (ii) David M. Amberg, born on January 31, 1920; and (iii) Hazel Felice Amberg, born on April 18, 1925.<sup>75</sup>

In 1917, after the United States entered the Great War, Julius enlisted in the United States Navy and served as an aide to Felix Frankfurter, who was later to become a United States Supreme Court Justice, and was then serving as a legal adviser to the War Department. At the War Department, Amberg advised the Secretary of War concerning handling labor disputes and authored a pamphlet on the enforcement of work hour regulations in private enterprises with government contracts. On December 24, 1918, Julius received his honorable discharge and returned to private practice in Grand Rapids.<sup>76</sup>

After returning to Grand Rapids, Julius became involved not only in the practice of law but also devoted many hours to community and charitable causes. He was one of the founding members of The University Club in 1923. Prior to the Berkey & Gay trial in

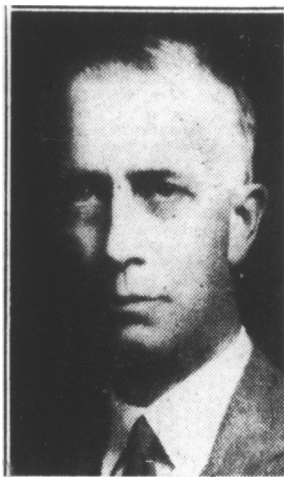


*Julius Amberg and Judge Robert Patterson in Julius' office (looking at Harvard memorabilia--they were classmates at Harvard Law School and editors of the Law Review there)*



*Robert P. Patterson (1891-1952), former Secretary of War (1945-1947), on the left shaking hands with E.F. McGrady of the American Federation of Labor, with Julius H. Amberg at the far left.*

1933, Julius served as a trustee of Butterworth Hospital in Grand Rapids, as a director and president of the Grand Rapids Community Chest, and as chairman of the Committee of One Hundred, which surveyed the City of Grand Rapids delivery of relief services and implemented changes thereto. Julius also was a member of the boards of directors of the Imperial Furniture Company, The Grand Rapids Chair Company and the Wurzburg Dry Goods Company.<sup>77</sup>



STUART E. KNAPPEN

### *Stuart E. Knappen*

Stuart E. Knappen, the lead trial attorney for Simmons, was born on August 30, 1877, in the City of Hastings, Barry County, Michigan. His parents were Loyal E. Knappen, later to be appointed as Judge for the United States District Court for the Western District of Michigan and Judge of the Sixth Circuit Court of Appeals,<sup>78</sup> and Amelia I.

Knappen, née Kenyon. When he was 11 years old, Stuart Knappen moved to Grand Rapids with the rest of his family and, after graduating from high school, attended The University of Michigan in Ann Arbor, where he was the editor of the student newspaper, *The Michigan Daily*, and a member of Psi Upsilon fraternity.<sup>79</sup> He received a Bachelor of Arts degree from The University of Michigan in 1898 and, upon graduating, he returned to read law in his father's law firm of Knappen and Kleinhaus. Stuart Knappen was admitted to practice law before the courts of the State of Michigan in 1900. In 1902, he was admitted as a partner of this firm, whose name was then changed to Knappen, Kleinhaus & Knappen.<sup>80</sup>

In 1914, Stuart Knappen represented the Federal Baseball League in the reserve-clause litigation involving major league catcher, William J. ("Reindeer Bill") Killefer, and the Philadelphia Phillies.<sup>81</sup> In 1916, Stuart Knappen was elected President of the Grand Rapids Bar Association and also in 1916, the name of his law partnership was changed to Knappen, Uhl & Bryant, later to become Knappen, Uhl, Bryant & Snow at the time of the Berkey & Gay litigation.

In 1902, Stuart Knappen married Edna Knappen (née Pilcher) of St. Louis, Missouri. In 1913, Edna passed away in Grand Rapids after a long, debilitating illness, leaving behind Stuart and three young daughters. In 1916, Stuart married Claire Vesey of Memphis, Tennessee. Stuart made his home with his second wife in the neighborhood now known as Heritage Hill in Grand Rapids at 322 Fountain Street. He served as a Director of the Union Bank of Michigan and Grand Rapids Mutual Building and Loan Association, and was a member of Kent County Club, the Indian Club, the Peninsular Club and the University Club.<sup>82</sup>

### *Judge Fred M. Raymond*

Fred M. Raymond sat as the sole federal district judge in the United States District Court for the Western District of Michigan at the time of the Berkey & Gay trial. He had been born on March 22, 1876, in the village of Berlin (now Marne), Ottawa County, Michigan. He attended public elementary and middle schools in Ottawa County but graduated from Grand Rapids Central High School. After teaching in the Ottawa County public schools for three years and graduating from The University of Michigan with a Bachelor of Laws degree in 1899, Fred Raymond began practicing law with the law firm of Hatch & Wilson of Grand Rapids, led by Probate and Juvenile Court Judge Reuben Hatch, in 1906. He continued practicing



*Judge Raymond and Mrs. Katrina Kindel, wife of Charles M. Kindel*

law with this firm until 1922, when he entered into a partnership with Harry D. Jewell. That same year, Raymond was elected President of the Grand Rapids Bar Association.

In May, 1925, the United States Congress enacted 43 Stat. 949, which permitted the appointment of another federal district judge in addition to the then-sitting judge, Clarence W. Sessions, who was seriously ill at the time. This new judge would be senior in status to Judge Sessions and, upon the termination of Judge Sessions' tenure, there would be no successor to him. There was much political jockeying for this newly created position. Michigan Senator James Couzens and U.S. Congressman Carl Mapes, whose district included Grand Rapids, backed Raymond for the judgeship.<sup>83</sup> A number of Michigan circuit judges were touting Allegan County Circuit Court Judge Owen S. Cross for this position and Lieutenant Governor George Welsh and State Treasurer Frank D. McKay supported Grand Rapids District Attorney, Edward J. Bowman.<sup>84</sup> On May 11, 1925, President Calvin Coolidge, in a recess appointment, selected Raymond as the new federal district judge to share duties in the Western District with Judge Sessions.<sup>85</sup> After the death of Judge Sessions on April 1, 1931, Judge Raymond continued on as the sole judge for the district.

In 1927, five years before the trial in the Berkey & Gay litigation, Judge Raymond was specially appointed to preside over the trial in the libel action commenced by Aaron L. Sapiro against Henry Ford arising from anti-semitic articles authored under Ford's name and published in his newspaper, *The Dearborn Independent*, in 1924 and 1925. Sapiro was born in 1884 to an impoverished Jewish family in Oakland, California, who later became an attorney and an agricultural activist. In the 1920s, Sapiro formulated a cooperative grain marketing plan to increase farmers' profits by eliminating middlemen and wholesalers. By 1925, there were approximately 890,000 farmers who were members of this scheme which was labeled the "California Plan" and the "Sapiro Plan."<sup>86</sup>

Henry Ford, in a newspaper article entitled "Jewish Exploitation of the American Farmers Organization: Monopoly Traps Operate Under the Guise of Marketing Associations," directed much of his venom towards Sapiro and his grain marketing plan. Sapiro, incensed at this article, sued Ford for libel in the United States

District Court for the Eastern District of Michigan, seeking \$1,000,000 in damages. The first judge assigned to the trial, Arthur J. Tuttle of the Eastern District of Michigan, recused himself after Ford's counsel, Missouri Senator James A. Reed, accused him of bias. Eventually, Judge Raymond was assigned to preside over the trial. Judge Raymond declared a mistrial after a juror had given an interview during the proceedings to the *Detroit Times* before Henry Ford was scheduled to testify. The litigation was thereafter settled when Ford issued a written apology to Sapiro and the Jewish community which was ghost-written by the prominent Jewish constitutional lawyer and scholar, Louis Marshall.<sup>87</sup>

## The Trial

### The Exchange of Pleadings

The Bill of Complaint filed by the receivers in Kent County Circuit Court against Simmons was not amended after that civil action was removed by Simmons to the United States District Court for the Western District of Michigan. Counts I and II of the Bill of Complaint described the plaintiffs and their authority to commence the action against Simmons and described Simmons as a Delaware corporation authorized to do business in Michigan. Counts III and IV of the Bill of Complaint portrayed the business of Berkey & Gay and its corporate powers. Count V, VI and VII sketched Berkey & Gay's capital structure which included two classes of preferred stock and one class of common stock. As of the date on which the Bill of Complaint was filed, there was \$1,365,000 in value of 7% prior preferred stock and \$1,100,000 in value of 8% cumulative preferred stock outstanding. The plaintiffs alleged in Count VII that since May 15, 1930, no dividends had been paid on any stock of Berkey & Gay. Count VIII outlined the elements of the bond issue for which The Michigan Trust Company acted as trustee and the collateral security Berkey & Gay's obligation to repay these bonds. Count IX of the Bill of Complaint listed the various defaults by Berkey & Gay under the bond documents and Counts X, XI and XII discussed the impact of the acquisition of Berkey & Gay by Simmons. Counts XIII through XXVIII of the Bill of Complaint expressed in detail the causes of action being asserted by the receivers of Berkey & Gay against



Simmons and the last Count, Count XXIX, set forth the plaintiffs' prayer for relief, which included their claim for a complete accounting from Simmons and payment of damages caused by Simmons.

On January 31, 1933, Simmons filed its 32-page Answer to the Receiver's Bill of Complaint, which Answer was signed by the law firms of Knappen, Uhl, Bryant and Snow of Grand Rapids and Burke & Burke of New York City. In its Answer, Simmons denied the material allegations of the Bill of Complaint but also made the following admissions and arguments:

(a) When Simmons acquired Berkey & Gay in September, 1929, Berkey & Gay and its business "were in an unhealthy state" because Berkey & Gay's "Sales were declining and it was operating at a loss." In addition to its bond and preferred stock obligations, Berkey & Gay "had large bank and commercial loans and was without sufficient working capital." In addition, Berkey & Gay carried "an excessive inventory of raw materials, manufactured products and products in process" that had been expensively acquired or produced and many of these products were "old, out of style, broken suits, and unsalable except at great sacrifice." In addition many of Berkey & Gay's departments, especially its design department, were overstaffed and employees and officers were extravagantly paid. Answer, p. 20, ¶ 33.

After the acquisition and as the Great Depression took hold, banks and other creditors of Berkey & Gay began to call in their loans. In response, Simmons loaned Berkey & Gay between September, 1929 and the end of February, 1931, at least \$1,436,545.77 to pay this indebtedness and also for working capital. Although Berkey & Gay had repaid approximately \$1 million of this sum to Simmons as of the date of the receivership, Berkey & Gay still owed Simmons approximately \$416,000, all of which was then due and owing. Answer, p. 13, ¶ 21; p. 25, ¶ 37.

Neither Simmons nor Berkey & Gay attempted to conceal the dramatic downturn in Berkey & Gay's business during 1930 and 1931 from the holders of preferred shares, the bondholders or

other creditors of Berkey & Gay. Rather, there was regular and open communication among all of these shareholders beginning at least in February, 1931. In April, 1931, it became clear that Berkey & Gay could not continue in business and ceased production. In May, 1931, "while negotiations and conferences for the possible reorganization" of Berkey & Gay were continuing between Berkey & Gay and its creditors, Simmons advanced to Berkey & Gay, at its request, the sum of \$100,000 for payment of principal and interest on the mortgage bonds due on May 15, 1931. All of these actions were "done openly" and that Berkey & Gay's "creditors and stockholders had knowledge or the means of knowledge thereof." Furthermore, these actions were taken by Simmons in the exercise of its business judgment and "in the best interests of Berkey & Gay's creditors, bondholders and stockholders." Answer, p. 25, ¶ 38.

Finally in its Answer, Simmons asserted as set-off and counterclaim a claim for \$416,824.69 plus interest and costs arising from the various unpaid loans and advances made by Simmons to Berkey & Gay between September 13, 1929, and February 17, 1932. Answer, pp. 29-31, ¶¶ 44-47. In their Reply to Defendant's Set-Off and Counterclaim dated February 13, 1933, which was thereafter amended on April 22, 1933, the receivers charged that Simmons breached its fiduciary duties by preferring itself over other creditors, including the bondholders, by collecting payment of the debts owed by Berkey & Gay to Simmons. The receivers argued that these collected funds must be first be disgorged by Simmons and returned to the receivers before Simmons could prove its claim for sums that it loaned to Berkey & Gay after the acquisition. Amended Reply to Defendant's Set-Off and Counterclaim, pp. 25, ¶ VII.

### **Phase I of the Trial: September 20, 1933 Through November 3, 1933.**

Trial of this action for an accounting began on September 20, 1933, and continued for 20 days through November 3, 1933, when Judge Raymond adjourned the proceedings until further notice. The beginning of the trial was announced in an article published in the Grand Rapids Herald describing the receivers' position that Simmons "deliberately killed"

Berkey & Gay by using it “to enhance [Simmons’] own products and, when it had accomplished this, abandoned the local establishment.”<sup>88</sup>

The trial opened with Julius Amberg giving his opening statement which took more than one hour.<sup>89</sup> Amberg wasted no time in announcing one of his primary themes of the trial, i.e., that Simmons, upon its acquisition of Berkey & Gay, “assumed a fiduciary relation to shareholders and bondholders of Berkey & Gay” and that these stocks and bonds were held “largely” by local interests.<sup>90</sup> Amberg further charged that Simmons stole trade secrets from Berkey & Gay, improperly copied furniture designs, compelled Berkey & Gay to use inferior materials in furniture manufacture and prostituted Berkey & Gay’s good will.<sup>91</sup> Amberg noted that in early 1928, Berkey & Gay had assets valued in excess of \$10 million and in 1927 had realized a net operating profit of \$472,415. In 1928, Berkey & Gay’s sales amounted to \$7,910,096 for a gross profit that year of \$1,976,000.<sup>92</sup> However, less than three years after the acquisition, Berkey & Gay had ceased production and had been placed into receivership.

Amberg completed his opening statement the next day, September 21, 1933, and then elicited testimony from a hostile witness, Edward P. Grubb, the former Secretary and Treasurer of Berkey & Gay, with reference to numerous business records of Berkey

& Gay generated during 1930 and 1931. Amberg’s and Knappen’s examination of Grubb would continue for four more days.<sup>93</sup> Amberg examined Grubb on the wholesale changes of the members of Berkey & Gay’s Board of Directors and its officers shortly after the Simmons acquisition resulting in control by persons who were also Simmons officers and directors. Two pre-acquisition Berkey & Gay officers who were retained at the September 27, 1929 meeting of the Board of Directors, L.S. Wallace and W. J. Wallace, resigned their positions at the next Board of meeting on January 14, 1930. Shortly before January 30, 1930, the famed showrooms of Berkey & Gay in Grand Rapids were abandoned and the furniture there moved to Chicago for public exhibition along with Simmons products. Under Simmons’ control, Berkey & Gay abandoned its system of exclusive dealers in different sales areas and organized a new subsidiary, Berkey & Gay Furniture of Delaware, Inc. to sell product. Also shortly after the acquisition, the phrase, “division of Simmons Co.,” was added to Berkey & Gay stationery, factory signs, company checks and advertisements. However, after Berkey & Gay’s fortunes drastically sank, on February 20, 1931, this designation was removed by Simmons because, according to Amberg, “so that no legal obligation should be imposed on the Simmons Co.” for Berkey & Gay debts.<sup>94</sup>

On September 22, 1933, the Chairman of Simmons’ Board of Directors and son of the founder, Zalmon Simmons, and his son and Simmons’ President, Grant G. Simmons, were present in the courtroom to witness Amberg’s continuing examination of Grubb. Grubb testified that on August 11, 1930, the new Delaware subsidiary of Berkey & Gay changed its name to “Simmons Wood Furniture Corporation” and began to manufacture in Grand Rapids a new, medium-priced line of wood furniture marketed under that name. Grubb also confirmed that in January, 1931, however, the name of this subsidiary was changed back to its prior name. In the spring, 1931, after the closure of Berkey & Gay plants in Grand Rapids, a number of its furniture designers were transferred to B.F. Huntley Furniture Company in Winston-Salem, North Carolina.<sup>95</sup>

The testimony of Edward Grubb on September 26, 1933, also covered the hurried liquidation of Berkey & Gay inventory in the spring of 1931. Amberg argued



*Julius Amberg at his office desk*

that this wholesale “dumping” of finished goods and raw materials on the market “puzzled the furniture trade and created widespread havoc in the industry.”<sup>96</sup> In what ultimately proved to be crucial trial testimony, Grubb related that Alfred Terrell, a Berkey & Gay officer appointed by Simmons after the acquisition, directed Grubb to deliver to creditors the 1930 financial statements of Berkey & Gay showing massive losses to creditors “only if required” and to disseminate no other information about the company “unless absolutely necessary.”<sup>97</sup> When Amberg obtained from Grubb example upon example of inventory being liquidated at drastically reduced prices, even Berkey & Gay’s supply of light bulbs, Thomas F. Gregory of the Burke & Burke Wall Street firm objected on the ground that it would “save time” if these details were omitted.<sup>98</sup> The next day, September 26, 1933, with Grubb still on the stand, Amberg noted that at the end of this forced liquidation, the Berkey & Gay plant was converted into a “mausoleum” with only five employees on duty.<sup>99</sup>

It was during his time on the witness stand on September 26, 1933, that Grubb discussed a letter from a Simmons official in New York dated April 15, 1931, that directed Grubb to pay over to Simmons all collections of accounts receivable and other, “considerable” cash receipts as they were collected for payment on Simmons’ loans because there was “no outside indebtedness to speak of.”<sup>100</sup> However, under Amberg’s questioning, Grubb admitted that Berkey & Gay was indebted for \$1.3 million of bond indebtedness due to outside investors at this time.<sup>101</sup> Grubb also testified then that on March 31, 1931, an officer of the bond trustee, The Michigan Trust Company, requested Berkey & Gay’s balance sheets and profit and loss statements for the early months of 1931, but that Grubb had ignored this request. Only when this request was repeated on May 25, 1931, did Grubb comply with it.<sup>102</sup>

On September 27, 1933, Simmons struck back with evidence in support of its version of Berkey & Gay’s untimely demise. Stuart Knappen submitted Berkey & Gay financial statements from 1926 and later in an effort to establish that the company had begun to sow “the seeds of its own destruction” before the Simmons acquisition. According to Knappen, the amount of bank debt owed by Berkey & Gay substantially increased during 1927 and 1928 under the management

of the Wallace family and the company paid “excessively high salaries including bonuses not due to officers and employees” while “lavishly entertaining buyers.”<sup>103</sup> From 1926 to 1929, Berkey & Gay’s bank debt increased from \$414,000 to \$1,458,297 and that net profit declined the three years of 1926, 1927 and 1928 from \$637,690 to \$319,163 and then to \$156,998.<sup>104</sup> In the first nine months of 1929, Berkey & Gay suffered a net loss of \$379,605.<sup>105</sup>



*Stuart Knappen circa 1909*

The proceedings on September 28, 1933, addressed what Julius Amberg characterized as the “snobbish and costly” advertising policy imposed upon Berkey & Gay by Simmons, involving the payment of substantial endorsement fees to some of the “nation’s social leaders.”<sup>106</sup> Countering, Knappen claimed that Simmons played “angel” to Berkey & Gay, advancing \$1,350,000 in loans to its new subsidiary during a two-year period during the Great Depression to keep it afloat.<sup>107</sup> With Grubb still on the witness stand, Amberg introduced into evidence an invoice sent to Berkey & Gay by a national advertising agency for \$1,000 payable for an endorsement by Eleanor Roosevelt of Berkey & Gay products. Similar payments were made for endorsements by Mrs. Graham Fair Vanderbilt (\$2,000), Mrs. A. J. Drexel Biddle (\$1,000) and Mrs. J. Borden Harriman (\$750).<sup>108</sup> The gallant Thomas F. Gregory from Wall Street objected to this line of inquiry, arguing that it would prove to be a “source of embarrassment” to the women involved and “would only injure” Simmons.<sup>109</sup> At the close of the proceedings on September 29, 1933, Judge Raymond adjourned the trial to October 19<sup>th</sup>. In the meantime, the engagement of Stuart Knappen’s daughter, Betty, to Chicagoan Paul Frederick Oltman, was publicly announced on October 1<sup>st</sup>.

When trial resumed on October 19, 1933, Edward Grubb had departed from the stand, only to be



replaced by two moguls of the Grand Rapids furniture industry, Robert W. Irwin, President of Robert W. Irwin Company and Chairman of the Furniture Manufacturers Code Commission, and Clarence H. Dexter, the Secretary-Treasurer and Manager of The Grand Rapids Chair Company. These two witnesses had been past Presidents of the Grand Rapids Furniture Marketing Association and, according to the Grand Rapids Herald, were “considered experts in the furniture field.”<sup>110</sup> These witnesses testified about the estimated loss in value of Berkey & Gay’s good will caused by Simmons’ actions taken after the September, 1929 acquisition. Judge Raymond overruled Simmons’ objections to this proffered expert testimony on value, and permitted it to come in noting, however, that the weight of this evidence might prove to be negligible. Robert Irwin testified that, before the Simmons acquisition, the value of Berkey & Gay’s goodwill was approximately \$1.5 million to \$2 million based upon Berkey & Gay’s “large volume of business, character of high grade dealer distribution and consumer acceptance” of its products.<sup>111</sup> Based upon his belief that it would require an investment of \$1,250,000 to \$1,500,000 in new capital to resurrect Berkey & Gay after its shutdown, the value of its goodwill was negligible. Dexter echoed these opinions in his testimony.<sup>112</sup>

which was the result of the company’s large sales volume, national advertising and exclusive dealer network. Simmons’ dismantling of this network beginning in January, 1930, drove down the value of Berkey & Gay’s goodwill. By July, 1931, Berkey & Gay’s goodwill had almost vanished because it was then no longer a going concern.<sup>113</sup>

Frank E. Seidman, a partner of the accounting firm of Seidman & Seidman, followed Hollis Baker as a witness, who spent time reviewing and commenting on Berkey & Gay’s financial statements for periods proceeding and following Simmons’ acquisition. Seidman testified that a writedown of inventory by \$835,200 appeared “arbitrary” and was engineered by Simmons to create a five percent profit on subsequent sales. Although the 1930 year-end statements posted a loss of \$1,273,000, Seidman believed that the loss was understated and should have been reported as \$2,275,416.75.<sup>114</sup>

On October 23, 1933, Frank Seidman continued his testimony, focusing on the loans made and collected by Simmons to Berkey & Gay in 1930 and 1931. Seidman said that the high-water mark of these loans occurred in February, 1931, when they totaled \$1,436,000. However, Simmons shortly thereafter imposed a regimen of accelerated repayment of these loans on Berkey & Gay. From March 31, 1931, through August 7, 1931, Berkey & Gay repaid \$1,250,000 of this debt and, when the receivership began, \$438,437 remained due to Simmons.<sup>115</sup>

Frank Seidman was cross-examined the next day by Stuart Knappen. Knappen questioned Seidman about an article he had written in June, 1930, for the trade publication, *The Furniture Manufacturer*. In the article, Seidman discussed the wholesale dumping of inventory by furniture manufacturers after the coming of the Great Depression and posited that if this trend continued, it would have “a demoralizing effect on the industry.”<sup>116</sup> Seidman admitted under cross-examination that Berkey & Gay’s inventory was worth substantially less in 1930 than in 1929.<sup>117</sup> When asked by Knappen whether he thought that it was good accounting procedure in the conditions of 1930 and 1931 to write down the value of Berkey & Gay’s inventory, Seidman responded by disagreeing with the accounting procedures used as an “arbitrary arrangement to show a net profit of five percent on subsequent sales.”<sup>118</sup>

... Seidman discussed the wholesale dumping of inventory by furniture manufacturers after the coming of the Great Depression and posited that if this trend continued, it would have “a demoralizing effect on the industry.”

The next day, October 20<sup>th</sup>, Amberg called Hollis S. Baker, the President of Baker Furniture Company, to testify concerning the loss of Berkey & Gay’s goodwill. Baker opined that prior to the acquisition, the value of Berkey & Gay’s goodwill was greater than \$1 million,

Knappen's cross-examination of Seidman continued through October 25, 1933. In his final day on the stand, Seidman held firm on his prior testimony that Berkey & Gay should have weathered the economic storm of 1930-1931 because of its predominant position in the market. Referring to statistics that his accounting firm compiled on the American furniture industry, Seidman contended that larger furniture firms like Berkey & Gay fared better during this two-year period than smaller firms. These statistics demonstrated that firms with yearly sales volumes in excess of \$750,000 saw their financial condition decline by an average of 5.58% from 1929 compared to the overall industry average decline of 10.3%. However, although business conditions improved in the latter part of 1930 and the early part of 1931, Berkey & Gay operated at an operating loss in excess of the average operating loss in the industry during this period. At the conclusion of Seidman's testimony, Judge Raymond adjourned the trial early in the day for William Gilbert's funeral.<sup>119</sup>

October 27, 1933 brought Charles H. Bender, the Vice-President of The Michigan Trust Company to the stand as a witness for the receiver. On direct examination by Julius Amberg, Bender testified that he attended with other individuals the first conference called and presided over by Alfred Terrell on March 31, 1931, at the Pantlind Hotel. Terrell advised the assembled group that the purpose of the meeting was to advise them of the "serious condition" of Berkey & Gay.<sup>120</sup> Terrell stated that unless the payment of principal and interest due on the bond issue on May 15, 1931 was made, Berkey & Gay would likely close its plant and place itself into receivership. Terrell also announced that Berkey & Gay had suffered a "heavy operating loss" in 1930 and held a large amount of inventory.<sup>121</sup> Bender specifically asked Terrell whether Berkey & Gay was in breach of the bond covenant that required it to maintain \$2,000,000 in liquid assets, to which Terrell responded that, although Berkey & Gay presently lacked this value, the difference between the required amount and the actual amount of quick asset values was "not much" and with the anticipated "fair business" coming Berkey & Gay's way soon, that actual value would soon increase to \$2,000,000.<sup>122</sup> Bender testified that he learned later that the May 15, 1931 payment of bond principal and interest was made from money advanced by Simmons.<sup>123</sup>

Stuart Knappen began the trial day of October 27, 1933, by asserting during his cross-examination of Bernard S. Warren, a former director of Berkey & Gay and a holder of preferred stock in the face amount of \$125,000 in the company, that the evidence would show that Berkey & Gay's preferred shareholders were informed of Berkey & Gay's serious financial difficulties by early 1931 but that they failed to propose or engineer any reorganization plans for the company.<sup>124</sup> Warren admitted that he learned of the "financial distress" of Berkey & Gay at the February 5, 1931 shareholders meeting. Specifically, he was informed at this meeting of the large loss the company suffered in 1930 and of the bank loans totaling approximately \$1.5 million that Simmons had repaid on Berkey & Gay's behalf. Warren also testified that on March 31, 1933, he received three copies of Berkey & Gay's 1930 year-end financial statement.<sup>125</sup> However, Warren asserted that there was no mention at the stockholders meeting of the "outlook for future operations" and that nothing was said about the "liquidation of the inventory of finished stock and raw materials and paying the proceeds to Simmons."<sup>126</sup> Warren first heard about the closing of the company's plant during a conversation with Edward Grubb on July 31, 1931.<sup>127</sup>

On October 30, 1933, the Court heard the testimony of Ralph H. Anderson, a sales representative of the Robert W. Irwin Company who had been a prominent member of Berkey & Gay's dealer network before it was abandoned by Simmons in 1930. Anderson testified about the anger of other dealers when Simmons agreed to give certain Berkey & Gay dealers exclusive large discounts on furniture orders.<sup>128</sup> The receiver rested its case against Simmons on October 31, 1933, with Julius Amberg reading into the record Eugene Field's poem, "In Amsterdam," which prominently mentioned Berkey & Gay and its products.<sup>129</sup> According to Amberg, the purpose of this reading was to establish that prior to the Simmons takeover, Berkey & Gay "enjoyed such an enviable reputation as to stir the famed bard."<sup>130</sup>

On November 1, 1933, Stuart Knappen began presenting his defense to the receiver's claims. The first defense witness was Zalmon G. Simmons, the Chairman of Simmons Board of Directors who was examined by Thomas Gregory of the Burke & Burke law firm. When introducing this witness, Knappen

first elicited Simmons' position that at the time of its acquisition of Berkey & Gay, Simmons' business was at its peak and Simmons "was pursuing a policy of expansion."<sup>131</sup> Simmons had decided to acquire Berkey & Gay "because of its excellent name and business."<sup>132</sup> Simmons believed that it could make Berkey & Gay into one of its more profitable units by eliminating "extravagance in the administration of Berkey & Gay's operations and the institution of strict management."<sup>133</sup> Although, the panic of 1929 intervened, Simmons nonetheless believed that it could "do everything possible to work out Berkey & Gay's problems."<sup>134</sup> At all times up to the appointment of the receivers, Simmons entertained "no other thought in mind" other than to generate profits at Berkey & Gay.<sup>135</sup>

Zalmon Simmons testified that he had been the President of the company from the death of his father in 1910 to 1932, when he stepped down in favor of his son, Grant G. Simmons. During Simmons' corporate history, it had suffered operating losses during only two years of operations. Zalmon Simmons testified concerning its strategy in acquiring Berkey & Gay and the decision to abandon its exclusive dealer network. Simmons opined that he believed that distribution of Berkey & Gay products through Simmons' warehouses would generate substantial profits.<sup>136</sup>

Zalmon Simmons continued testifying on November 2, 1933. Thomas Gregory read into the record the text of a telegram Zalmon Simmons sent to W. J. Wallace on December 26, 1929, shortly after the acquisition. In the telegram, Zalmon Simmons explained that in moving the sales department and showrooms of Berkey & Gay to Chicago, he had "one object in mind and that [was] to increase the sales and prestige of the Berkey & Gay Furniture Company."<sup>137</sup> Continuing, the telegram declaimed that "instead of damaging Grand Rapids as a furniture center, we want to do just the opposite, to build it up and make it the greatest furniture center in existence."<sup>138</sup> Zalmon Simmons also testified that other proofs of Simmons' good intentions towards Berkey & Gay were its loans totaling \$1.4 million made in the midst of the Great Depression and the work of numerous Simmons' executives on Berkey & Gay projects for no compensation. Zalmon Simmons confirmed that he had recommended to Simmons' board of directors in February, 1931, that no more monies be loaned to Berkey & Gay.<sup>139</sup>

The next day, November 3, 1933, Zalmon Simmons completed his testimony by stating that the consumer goodwill of Berkey & Gay had been preserved notwithstanding the plant closure and the resulting receivership.<sup>140</sup> At this point in the trial, Judge Raymond advised the parties that he was adjourning the trial and would likely begin again on either (i) December 4, 1933, (ii) December 8, 1933, or (iii) January 17, 1934.<sup>141</sup>

### **Phase II of the Trial: January 17, 1934 Through January 26, 1934**

On January 17, 1934, Judge Raymond resumed the trial, which featured that day James S. Lynch, who acted as President of Berkey & Gay from the spring of 1930 to the spring of 1931. During that same period, Lynch was also President of B.F. Huntley Furniture Company in Winston-Salem, North Carolina, another subsidiary of Simmons. According to Stuart Knappen when introducing Lynch, his testimony would demonstrate that Simmons "went to great effort and did everything in its power to bolster" Berkey & Gay when, "like business in general, it began slipping into the slough of depression in 1930."<sup>142</sup> Lynch stated that after the bad sales month of May, 1930, it was decided to alter the Berkey & Gay line to increase sales by meeting "a need for merchandise in the lower price brackets."<sup>143</sup> As a result, this new product line was launched under the Simmons Wood Furniture name. Nonetheless, sales of these products proved to be disappointing along with sales of the Berkey & Gay line itself.<sup>144</sup>

Julius Amberg cross examined James Lynch the following day, January 18, 1934. Amberg read excerpts from Simmons' intercompany correspondence, which contained complaints from dealers that the quality of Berkey & Gay products had been "cheapened" under Simmons' control.<sup>145</sup> This correspondence referred to the use of Tupelo wood, described as "one of the cheapest gum woods," when Lynch was Berkey & Gay's president. Lynch admitted that B.F. Huntley Furniture Company used Tupelo wood in furniture manufacture and had problems with the wood beyond "ordinary trouble with wood warping."<sup>146</sup> Lynch also admitted on cross-examination that, when he arrived in Grand Rapids in 1930, he had no experience in making furniture of the high quality fabricated in Grand Rapids



and that southern furniture manufacturers used, as a rule, cheaper woods and finish than those used in Grand Rapids. Lynch also confirmed that the quality of B.F. Huntley furniture increased during 1930 and 1931 because “much of the work on it was done in the Grand Rapids plant of Berkey & Gay.”<sup>147</sup>

Lynch continued his trial testimony on January 19, 1934, by asserting that he had “little or nothing to do with dictating policies, seldom, if ever, attended directors or stockholders meetings and was almost never consulted.”<sup>148</sup> He did not attend the board of directors meeting at which Zalmon Simmons announced that no more monies should be lent by Simmons to Berkey & Gay; Lynch was informed of this decision almost two weeks after the meeting.<sup>149</sup>

On January 22, 1934, F.E. Kroehler of the Kroehler Manufacturing Company, testified that Berkey & Gay’s goodwill had not been damaged notwithstanding that its plants had been closed for more than two years.<sup>150</sup> Kroehler also opined that Simmons’ liquidation of Berkey & Gay’s inventory in 1931 was a wise business decision because the loss realized from this liquidation would have been greater if it had been delayed a year. Kroehler admitted on cross-examination, however, that he was a close personal friend of Zalmon Simmons.<sup>151</sup>

On January 22, 23 and 24, 1934, perhaps the witness most important to the outcome of the trial - - Alfred Terrell, the officer in charge of the inventory liquidation - - testified for the defense. Terrell identified himself as a Vice President of Simmons who became a Vice President of Berkey & Gay shortly after the acquisition. Terrell eliminated “a considerable amount of extravagance” after he arrived in Grand Rapids.<sup>152</sup> He arranged for the Berkey & Gay design staff to be moved to New York City so as to combine that staff with Simmons’ design staff and to enable the Grand Rapids designers to be near the New York “style sources.”<sup>153</sup> Terrell and others made every effort to make Berkey & Gay a “hit” at the January 1931 furniture exhibition but the sales there were disappointing. On cross-examination by Benjamin Merrick of the Travis, Merrick, Johnson & McCobb firm, Terrell was questioned about the decision made on April 12, 1931 to liquidate Berkey & Gay and close its plants. Terrell described an attempt by Joseph H. Brewer, a Grand Rapids banker, to raise approximately \$1 million in capital for Berkey & Gay’s reorganization. This effort,

along with others, simply failed.<sup>154</sup> On January 24, 1934, Julius Amberg cross-examined Terrell. Being pressed for details by Amberg, Terrell testified that he recalled giving “no specific instructions” to Edward Grubb concerning what information to distribute and what information to withhold from security holders on the financial condition of Berkey & Gay.<sup>155</sup>

Trial on January 25, 1934, featured as a witness the Yale-educated President of Simmons, Grant G. Simmons.<sup>156</sup> Grant Simmons testified that Simmons’ “tried and true” business plan failed in the case of Berkey & Gay because of the Great Depression.<sup>157</sup> The plan involved selling Berkey & Gay furniture for delivery from Simmons’ “service station warehouses,” where the orders for delivery to purchasers would be received. Delivery of the ordered goods from these warehouses would be speedy, avoiding inventory buildup and accompanying carrying charges for dealers.<sup>158</sup>

The last day of trial took place on January 26, 1934. Grant Simmons completed his testimony on this day, leaving Arthur C. Guthrie, the President of Simmons Co. Ltd of Canada and a Vice President and Director of the Simmons Company, as the final witness.<sup>159</sup> Carl J. Riddering, later to become one of the names of Varnum LLP, cross-examined Simmons and Julius Amberg cross-examined Guthrie on the loans and various phases of Simmons’ operation of Berkey & Gay.<sup>160</sup>

At the close of proofs after 28 days of testimony, Judge Raymond directed that all post-trial briefs were required to be filed by no later than June 1, 1934. It was noted in the Grand Rapids Herald’s story on the trial published the next day that the record of the trial proceedings filled 2,000 pages with at least 1 million words.<sup>161</sup> This trial transcript unfortunately was not in the court file stored at the National Archives in Chicago and therefore may be lost. The forgoing narrative of trial proceedings was obtained by the author from contemporaneous newspaper articles on the trial.

## Decision, Appeal and Settlement

### Judge Raymond Issues His Opinion and Decree

On August 31, 1934, six months after the trial’s conclusion, Judge Raymond issued a 49-page opinion constituting his findings of fact and conclusions of law. Judge Raymond declared that the decree that he

would later issue would award The Michigan Trust Company as receiver for Berkey & Gay, the sum of \$1,069,198.02, plus interest, and an additional sum of \$1,122,552.37, both of which Simmons must pay. In addition, the entire claim of Simmons against Berkey & Gay would “be allowed in the receivership proceedings but subordinated to other claims of the same class.”<sup>162</sup>

Early in his opinion, Judge Raymond framed the issue for decision as follows: “whether [Simmons] in its conduct of the affairs of [Berkey & Gay] was actuated by good faith or, whether, on the contrary, it deliberately depleted the assets for ulterior purposes and to its own advantage.”<sup>163</sup> Thereupon, Judge Raymond reviewed the history of Berkey & Gay, its corporate and its capital structure prior to the Simmons merger, its financial condition during the period from 1926 to 1929, and the acquisition of Berkey & Gay by Simmons and the beginning of the Great Depression in 1929.<sup>164</sup> Judge Raymond then focused upon the board of directors meeting of Berkey & Gay held on September 27, 1929, where “a new board of directors was created consisting, with one exception, of officers or directors of the Simmons Company.”<sup>165</sup> The record of the trial, according to Judge Raymond, was

“ . . . replete with evidence that from that time forward not only the general policies of the Berkey & Gay Company but practically all details of production, operation, management, advertising, sales, credits and loans were dominated and controlled by the Simmons Company from its new York office. It also appears that the final liquidation of the inventory, including raw materials, which occurred in March, April and May of 1931, was dictated by the same source.”<sup>166</sup>

Judge Raymond then found that Berkey & Gay’s records established that, under Simmons management and control, Berkey & Gay suffered a loss in 1930 in a sum not less than \$1,279,816.75. During the first 6 months of 1931, these books and records reflected a net loss not less than \$1,191,669.47 and, from July 1, 1931, through December 31, 1931, the net loss was not less than \$230,607.90.<sup>167</sup>

Judge Raymond also found that, even though a Simmons’ representative had visited the Berkey & Gay plant in January, 1931 and concluded that Berkey &

Gay “could not operate profitably,” there was no mention made at the annual Berkey & Gay stockholders meeting held on February 5, 1931, that operations would cease and assets would be liquidated.<sup>168</sup> Moreover, at the meeting of Berkey & Gay’s board of directors held on February 28, 1931, the board had determined that “it was hopeless” to continue operations because, among other things, Simmons would make no further loans to Berkey & Gay.<sup>169</sup> Thus, the board decided “to curtail Berkey & Gay’s manufacturing to a minimum, to eliminate its office and sales force, and to concentrate on liquidation of the inventory.”<sup>170</sup> That same month, Berkey & Gay’s Secretary and Treasurer, Edward P. Grubb, was directed not to deliver financial statements to stockholders “unless they asked for them and not to give more information to them than was absolutely necessary to answer inquiries.”<sup>171</sup>

Judge Raymond then discussed the \$100,000 payment made to bondholders on May 15, 1931 by Berkey & Gay from proceeds of a secured loan made by Simmons. Judge Raymond stated that this loan and subsequent payment were “made for the apparent purpose of lulling bondholders into a sense of security.”<sup>172</sup> Simultaneously, with making this loan, Simmons executed on its “liquidation procedure.” No new product samples were made after December 31, 1930, and on March 7, 1931, Berkey & Gay’s machine room was shut down.<sup>173</sup> In addition, orders for raw materials were cancelled.<sup>174</sup> Finished goods, work and process and new materials inventory were liquidated “at a rapid rate” and at “larger discounts.”<sup>175</sup> During the period of these “sacrifice sales,” daily airmail reports on the liquidation process were sent to Simmons along with collected cash receipts less reserves for current liquidation expenses.<sup>176</sup> As a result of these liquidation actions, Simmons ultimately collected approximately \$1,070,000 which it applied to reduce the balance of earlier loans.<sup>177</sup>

From this recitation of facts, Judge Raymond then proceeded to address the parties’ claims and defenses, first noting that the parties agreed that Simmons “stood in a fiduciary relation to” Berkey & Gay and to its stockholders and that “excepting in cases where bad faith, fraud or unfairness is shown, the directors of a corporation bear no fiduciary relation toward corporate creditors until after the corporate assets have been taken over by a court of equity.”<sup>178</sup> In this action, the receivers had the burden of proving that the directors lacked

good faith or were unfair in exercising their business judgment.<sup>179</sup> Directors and officers would not be liable for “mere mistake or errors of judgment when they act in good faith and without corrupt motive.”<sup>180</sup>

Applying these principles to the first group of claims asserted by the receivers totaling \$4,399,500, Judge Raymond concluded that they could not be sustained. These claims included those for purchases of machinery, profits received by the Simmons Company for beds made by Berkey & Gay, rentals paid by Berkey & Gay for use of exhibition space in Chicago, expenditures for advertising and operating losses for 1930 and 1931. Judge Raymond found no substantial evidence of any bad faith or unfairness on the part of the directors and officers of Berkey & Gay when they made the business decisions that resulted in these claims.<sup>181</sup>

The second class of claims asserted by the receiver against Simmons encompassed the claim for recovery of preferential payments made to Simmons by Berkey & Gay after December 31, 1930. Here, Judge Raymond held that these claims were recoverable by the receiver, because “the facts in the present case warrant a finding both of bad faith and of fraudulent wasting of assets in connection with the preference complained of.”<sup>182</sup>

At this point in the opinion, Judge Raymond referred back to his earlier factual findings that, as of December 31, 1930, Berkey & Gay was in default on its obligations to the bondholders and that, at annual stockholders meeting in February, 1931, Berkey & Gay officers and directors kept mum about Simmons’ intention “to withdraw its financial support, liquidate the inventory for its own benefit and then abandon the enterprise.”<sup>183</sup> Judge Raymond also quoted the resolution of Simmons’ board of directors adopted on February 26, 1931, and read at a special meeting of Berkey & Gay’s board of directors two days later, that read, in relevant part as follows:

“RESOLVED, that Mr. [Alfred] Terrell be and hereby is authorized and instructed to promptly notify the Directors of Berkey & Gay of Simmons Company’s decision to advance no further funds, and to suggest that the Board of Berkey & Gay arrange as speedily as possible for a meeting with a committee of Berkey & Gay Preferred Shareholders, at which meeting they shall be

acquainted with Simmons Company’s decision and shall discuss ways and means of protecting the various interests involved.”<sup>184</sup>

The minutes of this meeting reflected the decision of Berkey & Gay’s board of directors to instruct the company’s officers “to curtail manufacturing activities to the minimum, to eliminate such office force and salesmen as might be dispensed with, to concentrate upon the liquidation of inventories to the end that as many as possible of the Company’s debts be eliminated that the Company might carry on pending reorganization negotiations.”<sup>185</sup> An accompanying motion that was also approved at this meeting authorized Terrell to arrange a “second meeting” of the holders of Berkey & Gay preferred stock to inform them of Simmons’ decision to cease funding Berkey & Gay and to seek their cooperation in forming a committee representing all of these shareholders to consider strategies for reorganizing Berkey & Gay.<sup>186</sup>

Notwithstanding these fine words and honorable intentions, Judge Raymond declared that there was in the trial record “an appealing eloquence of silence as regarding timely disclosures to vitally interested bondholders, stockholders and creditors or their representatives. Evidence of an element of concealment of plans for frenzied liquidation for the exclusive benefit of Simmons is not lacking.”<sup>187</sup> Evidence of this intent included Terrell’s direction to Grubb not to share Berkey & Gay’s financial statements unless they were specifically requested and the failure of Terrell or anyone else to call a meeting of preferred shareholders to discuss reorganization strategies.<sup>188</sup> Judge Raymond concluded that “at no time prior to receivership were there any plans for reorganization which passed the embryonic stage.”<sup>189</sup> Moreover, neither the bondholders nor the preferred shareholders were advised of the decision of Simmons to cease funding Berkey & Gay, notwithstanding the resolution approved at the board of directors’ meeting on February 28, 1931, directing that this disclosure be made.<sup>190</sup> Judge Raymond characterized the \$100,000 loan made by Simmons to enable Berkey & Gay to pay principal and interest on its bonds due on May 15, 1931 as done only to lull the bondholders “into a sense of belief that Simmons was still financing Berkey & Gay.”<sup>191</sup>



Only in early June, 1931, were Berkey & Gay's bankers given "definite information concerning the hurried liquidation then in progress."<sup>192</sup> At that time, just a small amount of furniture remained at Berkey & Gay, "there were no activities at the plant and lumber was being shipped."<sup>193</sup> One proof of the "abnormality" of the liquidation of Berkey & Gay's assets was the magnitude of the loss suffered by the company in the first 6 months of 1931. Although net sales during this period amounted to \$1,487,848.74, the operating loss on these sales was \$971,578.52,<sup>194</sup> which constituted "an operating loss of \$65.30 on each \$100 of sales. The results of this "frenzied" liquidation established that Simmons' "dominating motive ... was manifestedly none other than to procure this preference."<sup>195</sup>

According to Judge Raymond, the "cumulative effect of these facts and other evidence . . . necessitates the conclusion that from the beginning of February, 1931, [Simmons] failed to meet the requirements of good faith in its dealings with Berkey & Gay."<sup>196</sup> At a minimum, Simmons had a duty to disclose "in due season to creditors, bondholders and stockholders the changed relationship" between it and Berkey & Gay.<sup>197</sup> Not only did the good will of Berkey & Gay suffer but also its reorganization in these circumstances "was practically impossible."<sup>198</sup> Judge Raymond dramatically concluded this portion of his opinion with the metaphor: "The vessel was not only abandoned but it was scuttled as well and left to sink or float upon a sea of adverse fortune."<sup>199</sup>

Continuing, Judge Raymond found that Simmons' liability to the receivership estate was also based upon an "alter ego" theory involving the use of Berkey & Gay as a "mere instrumentality" and "domination and control" of Berkey & Gay by Simmons.<sup>200</sup> Judge Raymond recited various instances of abuse including "the policy of expenditure of large sums for advertising Berkey & Gay Company as 'Division of Simmons Company,'" the expenditure of \$50,000 "for installation of special machinery in Berkey & Gay plant to produce dry-beds and bed ends to be sold as Simmons wood furniture," and "the use of Berkey & Gay designs and finish to improve the output of the B.F. Huntley Furniture Company."<sup>201</sup> On the basis of this evidence, Judge Raymond disregarded the corporate forms and imposed liability upon Simmons "to accomplish substantial justice."<sup>202</sup>

Judge Raymond then declared that the Receiver was "entitled to recover from Simmons Company the sum of \$1,069,198.02 which it received from [Berkey & Gay] during the spring and summer of 1931 in payment of its own indebtedness."<sup>203</sup> However, Judge Raymond recognized that, although the Receiver was entitled to recover from Simmons losses suffered after December 30, 1930, it was a difficult task to identify those losses resulting from Simmons' bad faith actions and breach of fiduciary duties as contrasted with "losses which undoubtedly would have accrued under proper and loyal management."<sup>204</sup> In reviewing the evidence adduced at trial, Judge Raymond concluded that "had the business been conducted [during 1931] with an eye single to the best interests of Berkey & Gay," its losses "would not have exceeded \$500,000."<sup>205</sup> Thus, Simmons was charged with the remaining losses suffered by Berkey & Gay in 1931, *viz.*, \$1,122,552.37.<sup>206</sup>

Judge Raymond concluded his opinion by finding that Simmons could not be charged with any damages for causing a deterioration of Berkey & Gay's goodwill during 1931 because any such damages would be entirely speculative.<sup>207</sup> Finally, Judge Raymond allowed the claim of Simmons for recovery of unpaid loans made to Berkey & Gay but subordinated Simmons' right to receive payments on that claim to the claims of the same type.<sup>208</sup>

On September 12, 1934, Judge Raymond issued a four-page decree embodying the relief that he outlined in his opinion issued twelve days prior. Part I of the Decree directed Simmons to pay to the Receiver within 30 days of the Decree's date the sum of \$1,069,198.02, which represented the preferential payments on prior loans received by Simmons during 1931, plus interest calculated at five percent per annum. Part II of the Decree directed Simmons to pay to the receiver within 30 days of the Decree's date the sum of \$1,122,552.37, representing the operating losses suffered by Berkey & Gay on account of Simmons' bad faith actions and breaches of fiduciary duties. Part III of the Decree subordinated the claims of Simmons in the receivership case. In conclusion, Part VII of the Decree declared that the receiver would recover the total sum of \$2,367,695.70 plus costs to be taxed from Simmons and that this sum would bear interest calculated at five percent per annum from September 12, 1934 until paid.

### **The Parties Appeal to the Sixth Circuit**

On October 26, 1934, the receiver and Simmons executed and filed with the United States District Court for the Western District of Michigan a Stipulation and Agreement that provided for a stay of execution on the Decree pending anticipated appeals to the Sixth Circuit Court of Appeals by both parties. Under this agreement, Simmons agreed to deliver to the receiver by no later than 15 days after the Stipulation and Agreement was approved by the Court \$300,000 in cash and \$1.9 million in 5% debentures of Simmons due on November 1, 1944, and with interest coupons maturing May 1, 1935 and thereafter, for a total principal amount at par of \$2,375,000. Thereafter, this document provided for alternative disposition of the cash and debentures depending upon the outcome of the appeals. The parties then filed separate appeals to the Sixth Circuit as anticipated, assigning numerous errors in the proceedings below.

### **The Parties Settle the Litigation**

On January 8, 1935, pursuant to the terms of a five-page Agreement, the parties settled the litigation and the appeals. Under the terms of the settlement, the receiver returned the Simmons debentures to Simmons, but retained \$365,000 in cash previously paid by Simmons under the Stipulation and Agreement of October 26, 1934, without any duty to account for that sum. Also, on January 8, 1935, the receiver executed a Satisfaction of Decree dated such date reflecting additional terms of the global settlement: (i) Simmons delivered its promissory note payable to the receiver and due on July 1, 1935, for \$50,000.00; (ii) Simmons delivered to the receiver all of its shares of stock in the parent company of Berkey & Gay, Consolidated Furniture Companies; and (iii) Simmons waived and discharged its unsecured claims and claims under debentures against Berkey & Gay. Counsel to the parties also signed and filed with the United States District Court for the Western District of Michigan a Stipulation of Dismissal of the litigation and two days later, Judge Raymond signed and entered an Order Dismissing Appeals.

### **Conclusion**

#### **Berkey & Gay Furniture Company**

In the Spring of 1935, after the settlement of the Simmons litigation, Frank D. McKay of Grand Rapids, the former Treasurer of the State of Michigan and political strongman, joined forces with Abe Demblinsky, a Detroit auctioneer, to purchase the Berkey & Gay assets for \$75,000 in cash and the assumption of tax liabilities amounting to approximately \$180,000.<sup>209</sup> McKay and Demblinsky then recruited former Berkey & Gay dealers for the resurrected enterprise, hired former Berkey & Gay officers for the company and retained 300 workers to begin production in the fall of 1935.<sup>210</sup>

After floating a \$1,600,000 issue of new common stock, Berkey & Gay resumed furniture production.<sup>211</sup> In early May, 1936, Berkey & Gay had its first public exhibition of its product lines since the 1931 shutdown by Simmons. Time Magazine described the event:

“To rehabilitated Berkey & Gay’s first showing last fortnight went more than 700 furniture buyers, nearly three times as many as Grand Rapids drew last year, seven times as many as in 1934. Once indifferent to functionalism, Berkey & Gay had recognized the market for modern stuff (27% of all furniture sold last year) by adding to its period reproductions a line of moderns in ‘softer form, with sweeping rather than boxlike lines.’ Promoter McKay, now Berkey & Gay’s board chairman, became a hero to Grand Rapids. Enough orders were placed to keep his newly-employed workmen busy for five months. Governor Fitzgerald wired congratulations. Beamed Mayor William Timmers: ‘If it weren’t for the fact that hundreds of buyers have come thousands of miles to do business here, I would declare the day a legal holi-day.’”<sup>212</sup>

The euphoria on the reemergence of Berkey & Gay did not last for long, however. During World War II, its factories were converted to war production and in 1948, Berkey & Gay filed for bankruptcy relief, whereupon Harvest Furniture Company of Louisville, Kentucky purchased its name and production of Berkey & Gay products in Grand Rapids ceased.<sup>213</sup>

### Simmons Company

After settlement of the Berkey & Gay litigation, Simmons survived the Great Depression, becoming profitable again in 1935.<sup>214</sup> Simmons continued to use testimonials by celebrities in its advertising. Eleanor Roosevelt furnished bedrooms in The White House with Beautyrest mattresses and, in a full-page ad, she proclaimed her satisfaction with the product.<sup>215</sup> Simmons also introduced the “Hide-A-Bed” sofa in 1940, with a mattress tucked inside the sofa.<sup>216</sup>

During World War II, Simmons converted its facilities to war production, manufacturing 2,700 different items including bazookas and parachutes.<sup>217</sup> Shortly after V-J Day, Simmons resumed production of its consumer products and, in 1946, established the Sleep Research Foundation to conduct research “into the scientific aspects of sleep,” “dedicated to an objective study of sleep from a physiological and medical point of view.”<sup>218</sup>

By the late 1950s and early 1960s, Simmons had become “a national leader in bedding products, well-known and profitable.”<sup>219</sup> In 1968, Simmons enjoyed a net profit of \$8,000,000 plus and carried very little debt.<sup>220</sup> During this period, it acquired a company that manufactured hospital furniture and another that made patient handling equipment.<sup>221</sup> In 1970, Simmons acquired a casket manufacturer and a company that fabricated metal casket linings.<sup>222</sup> Simmons had also established subsidiaries in Canada, Mexico, Venezuela, Argentina, England, France and other countries making bedding products. Thereby becoming a “multinational conglomerate.”<sup>223</sup>

Beginning in 1973, profits at Simmons began to sharply decline. Between 1973 and 1977, earnings had decreased by 50%.<sup>224</sup> Its sales in 1977 of \$468 million were approximately that of 1973.<sup>225</sup> In addition, during this time Simmons consistently lost market share to its nearest competitor, Sealy Corporation, and, by 1978, Sealy was first in market share.<sup>226</sup> During this period, Simmons moved its corporate headquarters to Atlanta, Georgia.<sup>227</sup>

In 1979, Simmons was acquired by Gulf & Western Industries, Inc., another multinational conglomerate, becoming a wholly-owned subsidiary. Thereafter, Simmons was sold numerous times to other companies including Wickes Corporation in 1985 and Merrill

Lynch Capital Partners in 1991.<sup>228</sup> In 2003, Thomas H. Lee Partners of Boston, an investment fund, acquired Simmons, which was the last time Simmons was acquired prior to its bankruptcy.

All good things must come to an end sometime and, for Simmons, this happened on November 16, 2009, when it sought bankruptcy relief in the United States Bankruptcy Court for the District of Delaware and filed a prepackaged reorganization plan. Pursuant to the plan, Ares Management, LLC and Teachers Private Capital, the private investment department of Ontario Teachers’ Pension Plan, acquired Simmons and its debt was reduced from \$1 billion to \$450 million.<sup>229</sup> Ares Management and Teachers are part of a group that owns Simmons rival, Serta Mattress in an entity known as National Bedding Company, LLC.<sup>230</sup> This prepackaged Chapter 11 plan was approved by an order entered by the Delaware Bankruptcy Court on January 5, 2010.<sup>231</sup>

### Lawyers and the Judge

#### *Julius H. Amberg*

After the Berkey & Gay/Simmons litigation settled, Julius Amberg continued his practice of law and immersed himself in community and charitable endeavors. From 1933 to 1936, he was chairman of the Kent County Relief Commission and in 1938 was named leading citizen of the year by the Grand Rapids Community Chest. In 1935, he authored a series of articles on dispensation of relief services for *The Grand Rapids Press*, which was later awarded first prize for social work publicity by the National Conference of Social Work. In 1935, he was appointed by the Michigan Supreme Court as a commissioner-at-large for the State Bar of Michigan, a position he held until 1940. In 1939 and 1940, Amberg served as the President of the State Bar of Michigan.<sup>232</sup>

On January 9, 1941, the United States War Department appointed Julius Amberg as Special Assistant to the Secretary of War, Henry Stimson, under an Executive Order of President Franklin D. Roosevelt. His duties in this position included drafting procurement legislation, working with industries to mobilize military supplies, coordinating War Department and War Production Board activities and handling litigation for the War Department, including antitrust actions. In 1945, Amberg was awarded the



Presidential Medal of Merit, the nation's highest civilian honor. However, on April 8, 1945 one of Amberg's partners, Morton Keeney, took his own life, whereupon Amberg immediately resigned his position at the War Department and returned to Grand Rapids.<sup>233</sup>

Julius Amberg's "Last Hurrah" was his successful challenge to George Welsh, mayor of Grand Rapids from 1938 to 1949. A citizens rally on May 12, 1949, demanded the recall of Welsh as mayor and the three city commissioners who supported him, calling for the institution of clean and honest city government. As a result of this rally, a grass-roots recall committee was founded with Julius Amberg as its chairperson and promptly began to distribute recall petitions throughout the city. In response, Mayor Welsh filed an injunction action in Kent County Circuit Court to stop the recall election. Amberg responded by commencing a mandamus action with the Michigan Supreme Court to compel the Kent County Clerk to conduct the election.<sup>234</sup>

On June 21, 1949, Amberg argued the mandamus petition before the Michigan Supreme Court and, eight days later, the Court issued a writ of mandamus ordering the County clerk to hold the recall election. *Amberg v. Welsh*, 325 Mich. 285 (1949). As a result, one city commissioner and Mayor Welsh resigned and another commissioner was recalled by the voters.<sup>235</sup>

Julius Amberg died in Grand Rapids at the age of 60 on January 23, 1951. Upon his death, numerous tributes to him and his many contributions to the nation were received, among them notes of condolence from President Harry S. Truman, Secretary of Defense George C. Marshall, former Secretary of War, Robert P. Patterson, and Lieutenant General Brehon V. Sommerwell, Commander of the Army Service Forces in World War II. The honorary pallbearers at Amberg's funeral were John M. Brower, Marshall M. Uhl, Paul W. Jones, Dale Law, Philip W. Bucher, Neil A. Weathers, Robert W. Richardson, Frank E. Serdman, Irving J. Bissell, M. R. Bissell, Gerald McCoy, Charles R. Bowman, Isaac S. Keeler and G. Howard Guttman. The New York Times on January 25, 1951, carried a news story of Amberg's passing. Julius Amberg's surviving family included his widow, Callie, his son, David, and his daughter, Hazel, all of whom then resided in Grand Rapids. Amberg's law firm, the former Butterfield, Keeney & Amberg, carries on Amberg's

tradition and dedication to excellence under its present name of Law Weathers.<sup>236</sup>

### *Stuart E. Knappen*

Stuart Knappen passed away after a long illness on April 14, 1938, in Grand Rapids, shortly after returning home from a trip to Tucson, Arizona. At the time of his death, Stuart Knappen was still a senior member of his law firm. At his funeral, his pallbearers were his colleagues in the practice of law: Marshall M. Uhl, Harold W. Bryant, Winter N. Snow, Donald G. Slosson, Willis R. Leenhouts and Thomas K. Perry. The survivors of Stuart Knappen were his widow, Claire Vesey Knappen, three daughters, one son, one sister and five grandchildren. Remarking on his passing, Kent County Circuit Court Judge Leonard D. Verdier, described Stuart as "the most courteous advocate that it was ever my pleasure to know. He virtually disarmed all opposition by the courtesy by which he treated both counsel and witnesses on the other side."<sup>237</sup> Stuart Knappen's law firm of Knappen, Uhl, Bryant & Snow still prospers today in Grand Rapids under the name of Wheeler Upham P.C.

### *Judge Fred M. Raymond*

After the settlement of the Berkey & Gay litigation, Judge Raymond continued on the bench handling civil and criminal cases and also being very active in the Judicial Conferences held each year by the Sixth Circuit Court of Appeals. Judge Raymond passed away at the age of 69 on February 6, 1946, after suffering a sudden heart attack. The day before, Judge Raymond had held court as usual, and the next day, he visited his dentist. Later that evening, he suffered his fatal attack. The Grand Rapids Herald honored Judge Raymond by proclaiming that he enjoyed the "reputation as one of the hardest working of judges" whose rulings were "rarely reversed by higher courts."<sup>238</sup> The paper continued by declaring that Judge Raymond's life was "simple, unostentatious, devoted to the high calling of the federal bench and the cause of justice, to the profession and his family and the loyal friends in the few clubs and fraternal organizations to which he belonged."<sup>239</sup>

At his funeral, Judge Raymond's pallbearers were (i) United States Circuit Judge Thomas McAllister,

(ii) Grand Rapids District Attorney, Joseph F. Deeb, (iii) Clerk of the United States District Court for the Western District of Michigan, Orrie J. Sluiter, (iv) United States Marshal, Edwin Bolger, (v) Federal Probation Officer, Masten Brown, and (vi) United States Commissioner, Fred C. Wetmore. Judge Raymond was survived by (a) his wife, Mabel H. Kentworthy, originally from Oskaloosa, Iowa, (b) his son, Russell K. Raymond of Nashville, Michigan, and (c) his daughter, Mrs. William G. Kraber of North Hollywood, California.<sup>240</sup>

## Endnotes

- 1 Willis F. Dunbas and George S. May, *Michigan: A History of the Wolverine State*, pp. 520-521, William B. Eerdmans Publishing Company, Grand Rapids, Michigan (3d ed. 1995); Lester G. Telser, *Reconstruction Finance Corporation and The Great Depression: II*, pp. 10-19, [http://works.bepress.com/lester\\_telser/5](http://works.bepress.com/lester_telser/5).
- 2 "Colonel Studebaker Left Penniless," *Grand Rapids Herald*, p. 1, col. 6 (Sept. 21, 1933).
- 3 Ellen Arlinsky and Mary Ed Conn Kwapil, *A Grand Profession, a Grand Tradition: A History of The Grand Rapids Bar*, p. 59, John H. Dekker & Sons, Grand Rapids, Michigan (1995).
- 4 Albert Baxter, *History of the City of Grand Rapids*, p. 465, Munsell & Company, Publishers, New York and Grand Rapids, Michigan (1891).
- 5 *Id.*; Z.Z. Lydens, *The Story of Grand Rapids*, p. 314, Kregel Publications, Grand Rapids, Michigan (1966).
- 6 *Id.*
- 7 *Id.*
- 8 Albert Baxter, *op cit.*, p. 465. By a contemporary, Julius Berkey was described as "a practical and careful business man, whose methods attain to the most correct standard." This same observer described George Gay as someone who is "recognized as one of the most discerning business men in the west." Robert H. Baker, ed., *The City of Grand Rapids: Municipal Advantages; Commercial Importance*, B.F. Conrad & Co., Grand Rapids, Michigan (1889). In a privately-published address made by William Widdicomb to the Grand Rapids Board of Trade, described the character of the individual entrepreneurs who built the furniture manufacturing business in Grand Rapids in the mid-to late-Nineteenth Century, and paid a special homage to Julius Berkey, thus:  
  
"It is often asked, what peculiar conditions existed, or what local advantage did we have, that could develop from this insignificant beginning the business and position we now hold? This question is not easily answered, for doubtless a combination of causes produced the business now employing such magnificent establishments as are the life and pride of our people.  
  
In a former address I touched upon this point and said there was no special local advantage that was of importance after the first year or two; at first walnut lumber was abundant and cheap. It was equally abundant at other places manufacturing furniture and, perhaps, lower in price, for there was a shipping business in walnut from this section to the Boston market which gave that lumber a higher value here. I mention walnut, as comparatively no other lumber was used then in furniture manufacturing.  
  
Certainly it was not our wealth, although I might except Mr. Berkey with his capital of some \$250, which he had accumulated by prudent economy, and this was about ten times the capital I had when The Widdicomb Furniture Co. was founded; in fact, gentlemen, as I recall those early days, we had nothing to show but disadvantages, except in this one particular – the indomitable will and energy of the men first engaged in the business. I doubt whether Julius Berkey knew the meaning of the word discouragement, and perhaps I was equally dense in my ignorance, and I shall give this perseverance, combined with ingenuity and unflagging industry, as the forces developing the business which sustains our city, for, mind you, the men who came in later years brought to the business the same characteristics or they would have fallen from the ranks as the years went by, for our business will tolerate no negligence no incompetence."
- 9 *Id.*
- 10 *Id.*
- 11 Christian G. Carron, *Grand Rapids Furniture: The Story of America's Furniture City*, p. 130, Village Press, Inc., Traverse City, Michigan (1998).
- 12 Albert Baxter, *op cit.*, p. 465.
- 13 Z.Z. Lydens, *op cit.*, p. 314.
- 14 Christian G. Carron, *Grand Rapids Furniture: The Story of America's Furniture City*, p. 131, Village Press, Inc., Traverse City, Michigan (1998).
- 15 Wilbur D. Nesbit, *The Story of Berkey & Gay: A Corporation Which is Part of American History*, *Munsey's Magazine*, pp. 22-25 (September 1911).
- 16 Wilbur D. Nesbit, *The Story of Berkey & Gay: A Corporation Which is Part of American History*, *Munsey's Magazine* (September 1911). Berkey & Gay received an award at the Philadelphia Centennial Exhibition for its bedroom suite

of Michigan black walnut with French burl panels and lounges. Christian G. Carron, *op cit.*, pp. 41, 131.

17 Christian G. Carron, *op cit.*, pp. 131-132.

18 Wilbur D. Nesbit, *op cit.*,

19 *Id.*

20 *Id.*

21 Christian G. Carron, *op cit.*, p. 132.

22 *Id.*

23 Zalmon G. Simmons was born in 1828 in Montgomery County, New York and moved to Kenosha, Wisconsin at the age of 20 with only \$3.00 to his name. Upon completing school, he became a teacher and also worked as a clerk in a general store which he purchased 18 months later. Later, he became the President of the Kenosha, Rockford and Rock Island Railway Company (1858-1864), and in 1889, he organized the Manitou and Pike's Peak Railroad Company which in 1891 laid cogwheel tracks to Pike's Peak's summit. Zalmon Simmons also acted as the President of the First National Bank of Kenosha from 1871 to 1909. A lifelong Republican, he served as a Wisconsin state assemblyman and as Kenosha's mayor. Zalmon Simmons was described as "proud and straight, in his tall, black hat, he walked to work at precisely 7:30 each morning. He neither smoked nor drank and didn't read much, except business news in the imported big city papers. [He] lived with his family in a mansion sprawled across an entire city block. . . . There [he] had an elaborate greenhouse with an English gardener, a pair of Prussian house servants, a cook and a live-in nurse for the frequently ill Mrs. Simmons." <http://archiver.rootsweb.ancestry.com/th/read/simmons/2001-04/0988137509>.

24 <http://www.simmons.com/pressroom.cfm>.

25 *Id.*, [www.simmonsgenealogy.netfirms.com/new\\_page\\_8.htm](http://www.simmonsgenealogy.netfirms.com/new_page_8.htm); <http://www.fundinguniverse.com/company-histories/simmons-company-company-history.html>.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 "Business & Finance: Grand Rapids Heroism," (May 25, 1936), <http://www.time.com/time/printout/0,8816,756140,00.html>.

32 "Aims to Show that Simmons Saw Mistake," Grand Rapids Herald, p. 1, col. 8, p. 3, col. 5 (Sept. 22, 1933).

33 *Id.*

34 Malcolm Mount passed away approximately one month

after the arrived in Grand Rapids to assume his duties as Berkey & Gay's President. On March 10, 1933, Berkey & Gay's board of directors named James S. Lynch of Winston-Salem, North Carolina to fill this vacancy. At the time, Lynch had been President of B. F. Huntley Furniture Company, a Simmons subsidiary that manufactured lower-end furniture. *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 "Contend that Simmons Units Were Puppets," Grand Rapids Herald, p. 1, col. 6; p. 3, col. 4 (Sept. 23, 1933).

40 *Id.*

41 *Id.*

42 "Simmons Firm is Accused of Dumping Stock," Grand Rapids Herald, p. 1, Col. 6; p. 2, col. 5 (Sept. 26, 1933).

43 *Id.*

44 "Contend that Simmons Units Were Puppets," Grand Rapids Herald, p. 3, col. 4 (Sept. 23, 1933).

45 "Aims to Show that Simmons Saw Mistake," Grand Rapids Herald, p. 3, col. 5 (Sept. 22, 1933).

46 "Simmons Firm is Accused of Dumping Stock," Grand Rapids Herald, p. 2, col. 5 (Sept. 26, 1933).

47 *Id.*

48 *Id.*

49 "Contend that Simmons Units Were Puppets," Grand Rapids Herald, p.3, col. 4 (Sept. 23, 1933).

50 *Id.*

51 "Hold Simmons Reduced Plant to Mausoleum," Grand Rapids Herald, p. 1, col. 3; p. 3, col. 5 (Sept. 27, 1933).

52 *Id.*

53 Bill of Complaint filed by Plaintiffs/Receivers against Simmons Co., ¶ VIII, August 29, 1932. Another event of default under the mortgage was Berkey & Gay's failure to maintain "net current assets or working capital in an amount equal to at least twice the amount of its current liabilities, and in any event not less at any time than the sum of \$2,000,000." *Id.*

54 William H. Gilbert passed away on October 23, 1933, in the midst of the Berkey & Gay trial from a "heart ailment." "William Gilbert, Veteran Realty Man, Succumbs," Grand Rapids Herald, p. 1, col. 4; p. 3, col. 3 (Oct. 24, 1933). Gilbert was born in Ypsilanti, Michigan, on May 17, 1865, and had moved to Grand Rapids in 1889. Gilbert had been the corporate secretary and one of the founders of



the American Box Board Company and a director of the Peoples National Bank. He was also the developer beginning in 1922 of the Ottawa Hills subdivision in southeast Grand Rapids. *Id.* After his death, he was not replaced as co-receiver. The day after his passing, Judge Raymond observed a moment of silence in the courtroom to commemorate his passing. *Id.*

- 55 Bill of Complaint, *supra* at ¶ I.
- 56 Stuart Chase (1888-1985), an American economist, engineer and prolific author, arguably coined the phrase, "New Deal," when his cover story entitled "A New Deal for America" was published in *The New Republic* magazine the week of President Roosevelt's acceptance speech at the 1932 Democratic National Convention. [http://en.wikipedia.org/wiki/Stuart\\_Chase](http://en.wikipedia.org/wiki/Stuart_Chase).
- 57 Carl E. Mapes was born on December 26, 1874 on a farm near Kalamo, Michigan in Eaton County. He graduated from Olivet College in 1896 and the University of Michigan Law School in 1899. In 1901, Mapes became an assistant prosecuting attorney for Kent County, Michigan, and served in that position until 1905, when he became a member of the Michigan House of Representatives. In 1908, Mapes was elected to the Michigan Senate, serving there from 1909 to 1912. Mapes was elected to the United States Congress in 1912 for Michigan's Fifth Congressional District, thereafter serving 14 consecutive terms in the House of Representatives. Congressman Mapes passed away on December 12, 1939, in New Orleans, Louisiana while still in office. [http://en.wikipedia.org/wiki/Carl\\_E.\\_Mapes](http://en.wikipedia.org/wiki/Carl_E._Mapes).
- 58 Thomas F. McAllister was born on March 4, 1896 in Grand Rapids, Michigan. From 1917 to 1918, he piloted combat aircraft in World War I for the French Foreign Legion. In 1918, he received his Bachelor of Arts degree from the University of Michigan. Rather than attend law school, he "read law" and was admitted to the State of Michigan Bar in 1921. From 1921 to 1937, he was engaged in private practice in Grand Rapids. McAllister was a justice of the Michigan Supreme Court from 1938 to 1941 and in 1939 acted as a member of the United States Attorney General's Commission on Bankruptcy Administration. On May 22, 1941, McAllister was confirmed by the United States Senate as a judge of the Sixth Circuit Court of Appeals and held the position of Chief Judge there from 1959 to 1961. On January 1, 1963, Judge McAllister assumed senior status. Judge McAllister passed away on November 10, 1976. [http://en.wikipedia.org/wiki/Thomas\\_Francis\\_McAllister](http://en.wikipedia.org/wiki/Thomas_Francis_McAllister).
- 59 Sidney Fine, *Frank Murphy: The Detroit Years*, pp. 403-409, The University of Michigan Press, Ann Arbor, Michigan (1975); Robert Lacey, *Ford: The Men and the Machine*, pp. 342-345, Little Brown & Co., Boston and Toronto (1986); Douglas Brinkley, *Wheels for the World: Henry Ford, His Company and a Century of Progress*, pp. 390-392, Penguin Group (USA), New York (2003); Christopher H. Johnson, *Maurice Sugar: Law, Labor, and the Left in Detroit: 1912-1950*, pp. 120-124, Wayne State University Press, Detroit (1988); Maurice Sugar, *The Ford Hunger March*, Meikeljohn Civil Liberties Institute, Berkeley, California (1980).
- 60 James M. McPherson, *et al.*, *Liberty, Equality, Power: A History of the American People, Since 1863*, p. 654, Wadsworth Publishing Company, Boston (2007).
- 61 Richard J. Evans, *The Coming of the Third Reich*, p. 307, Penguin Group (USA), Inc., New York (2003); William L. Shirer, *The Rise and Fall of the Third Reich*, p. 314, Simon & Schuster, Inc., New York (1959).
- 62 William L. Shirer, *op. cit.*, pp. 297-314; Richard J. Evans, *The Third Reich in Power*, pp. 31-41, Penguin Group (USA) Inc., New York (2005).
- 63 William Wiser, *The Twilight Years: Paris in the 1930s*, pp. 97-107, Carroll & Graf Publishers, New York (2000); Janet Flanner, *Paris Was Yesterday: 1925-1939*, pp. 109-116, Harcourt Brace Jovanovich Publishers, San Diego, New York and London (1988); Ilya Ehrenberg, *Memoirs: 1921-1941*, pp. 251-54, World Publishing Co., Cleveland and New York (1963).
- 64 Steven Bellen, *A Concise History of Austria*, pp. 223-224, Cambridge University Press, Cambridge, United Kingdom (2007); Gordon Brook-Shepherd, *The Austrians: A Thousand-Year Odyssey*, pp. 279-284, Carroll & Graf Publishers, New York (1996); Ilya Ehrenberg, *op. cit.*, pp. 255-259.
- 65 Marius B. Jansen, *The Making of Modern Japan*, pp. 576-590, Harvard University Press, Cambridge, Massachusetts and London (2000).
- 66 Simon Sebag Montefiore, *Stalin: The Court of the Red Tsar*, pp. 142-158, Alfred A. Knopf, New York (2004).
- 67 Linda Bank Downs, *Diego Rivera: The Detroit Industry Murals*, W.W. Norton & Company, New York and London (1999); MacKinley Helm, *Mexican Painters: Rivera, Orozco, Siqueiros and Other Artists of the Social Realist School*, pp. 53-55, Dover Publications, Inc., New York (1989); Diego Rivera, *My Art, My Life: An Autobiography*, pp. 111-124, Dover Publications, Inc., New York (1991).
- 68 Lew Freedman, *The Day the Stars Came Out: Major League Baseball's First All Star Game* McFarland & Company, Inc., Jefferson, North Carolina (2010).
- 69 John Heidenry, *The Gashouse Gang*, pp. 199-284, Public Affairs, New York (2007); Richard Peterson, ed., *The St. Louis Baseball Reader*, pp. 185-213, University of Missouri Press, Columbia, Missouri (2006); Frederick G. Lieb, *The Detroit Tigers*, pp. 203-216, Kent State University Press, Kent, Ohio (2008).

- 70 Will Perry, *The Wolverines: A Story of Michigan Football*, pp. 150-155, 421, The Strode Publishers, Huntsville, Alabama (1980).
- 71 Frederic P. Vandome, *et al.*, *1934 FIFA World Cup*, Alphascript Publishing, London (2010).
- 72 Connie Mack, *My 66 Years in the Big Leagues*, pp. 58-60, Dover Publications, Inc., Mineola, New York (2009); Nicholas Davidoff, *The Catcher Was a Spy: The Mysterious Life of Moe Berg*, pp. 87-96, Random House, Inc., New York (1995).
- 73 Letter dated March 7, 1936, from the Citizens Historical Association of Indianapolis, Indiana to Julius H. Amberg; Alan Bennett, *Law Weathers & Richardson: A History*, unpublished (1988); "D.M. Amberg Dies at 91," *Grand Rapids Herald*, p. 1, col. 7 (Oct. 13, 1939); "Busy, Fruitful Years Marked Career of David M. Amberg," *Grand Rapids Herald*, p. 2, col. 6 (Oct. 13, 1939).
- 74 *Id.*
- 75 *Id.*
- 76 *Id.*; Ellen Arlinsky and Mary Ed Conn Kwapil, *A Grand Profession, A Grand Tradition: A History of the Grand Rapids Bar*, p. 59, John H. Dekker & Sons, Grand Rapids, Michigan (1995)
- 77 *Id.*
- 78 Loyal E. Knappen was born on January 27, 1854, in Hastings, Michigan. He graduated with a Bachelors of Arts degree in 1873 followed by a Masters of Arts degree from the same University in 1876. He was a member of the Psi Upsilon fraternity while a student in Ann Arbor. After reading law and passing the Michigan Bar, he became a partner in a Hastings law firm. Later, he served as Prosecuting Attorney for Barry County, a position he held from 1879 to 1883. In 1880, Knappen became a United States Commissioner for the United States District Court for the Western District of Michigan. In 1888, he moved to Grand Rapids and practiced law there until December, 1906, when President Theodore Roosevelt appointed him as district judge for the Western District of Michigan. In January, 1910, President William Howard Taft elevated Judge Knappen to the Sixth Circuit Court of Appeals, from which position he retired in April, 1924. Judge Knappen passed away on May 14, 1930.
- 79 *The Men Behind the Guns in the Making of Greater Grand Rapids*, pp. 83-84, Dean Hicks Printing Co., Grand Rapids, Michigan (1909); "S.E. Knappen, Prominent Grand Rapids Attorney, Dies," *Grand Rapids Herald*, p. 1, col. 5; p. 3, col. 2 (April 15, 1938).
- 80 *Id.*
- 81 Patrick E. Mears, *The Catcher, "The Quick Lunch King" and Baseball's Reserve Clause*, 1 *Journal of the Historical Society* of the United States District Court in the Western District of Michigan, No. 1 (Winter 2003).
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- 83 "Believe Judgeship Now Lies Between Raymond and Cross," *Grand Rapids Herald*, p. 1, col. 5 (May 9, 1925).
- 84 *Id.*
- 85 "To Be New Judge Here," *Grand Rapids Herald*, p. 1, col. 7 (May 11, 1925); "Raymond Goes to U.S. Bench," *Grand Rapids Herald*, p. 1, col. 2 (May 12, 1925).
- 86 See, e.g., Grace H. Larson and Henry E. Erdman, *Aaron Sapiro: Genius of Farm Co-Operative Promotion*, 49 *The Mississippi Valley Hist. Rev.*, Vol. 2, pp. 242-268 (Sept. 1962).
- 87 See generally *Victoria Saker Woeste, Detroit's Trial of the Century: Sapiro v. Ford, 1927*, Vol. VIII, *The Court Legacy*, No. 2, The Historical Society for the Eastern District of Michigan (Sept. 1999); Jonathan R. Logdson, *Power, Ignorance, and Anti-Semitism, Henry Ford and His War on Jews*, [http://history.Hanover.edu/hhr/99/hhr99\\_2.html](http://history.Hanover.edu/hhr/99/hhr99_2.html).
- 88 "Berkey-Gay Trial Will Open Today," *Grand Rapids Herald*, p. 3, col. 7 (Sept. 20, 1933).
- 89 "Counsel Gives Regal Picture of Berkey-Gay," *Grand Rapids Herald*, p. 1, col. 6 (Sept. 21, 1933).
- 90 *Id.*
- 91 *Id.*
- 92 *Id.*
- 93 "Aims to Show that Simmons Saw Mistake," *Grand Rapids Herald*, p. 1, col. 8; p. 3, col. 5 (Sept. 22, 1933); "Contend that Simmons Units Were Puppets," *Grand Rapids Herald*, p. 1, col. 6; p. 3, col. 4 (Sept. 23, 1933); "Simmons Firm Accused of Dumping Stock," *Grand Rapids Herald*, p. 1, col. 6; p. 2, col. 5 (Sept. 26, 1933); "Hold Simmons Reduced Plant to Mausoleum," *Grand Rapids Herald*, p. 1, col. 3; p. 3, col. 5 (Sept. 27, 1933)
- 94 "Aims to Show that Simmons Saw Mistake," *Grand Rapids Herald*, p. 1, col. 8 (Sept. 22, 1933).
- 95 "Contend that Simmons Units Were Puppets," *Grand Rapids Herald*, p. 1, col. 6; p. 3, col. 4 (Sept. 23, 1933).
- 96 "Simmons Firm is Accused of Dumping Stock," *Grand Rapids Herald*, p. 1, col. 6 (Sept. 26, 1933).
- 97 *Id.* at p. 2, col. 5.
- 98 *Id.*
- 99 "Hold Simmons Reduced Plant to Mausoleum," *Grand*

- Rapids Herald, p. 1, col. 3 (Sept. 27, 1933).
- 100 *Id.*, p. 3, col. 5.
- 101 *Id.*
- 102 *Id.*
- 103 "Claim Decline of B-G its Own Fault," Grand Rapids Herald, p. 1, col. 6 (Sept. 28, 1933).
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- 105 *Id.*
- 106 "Simmons Firm Played Uncle, It Is Claimed," Grand Rapids Herald, p. 1, col. 3 (Sept. 29, 1933).
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- 108 *Id.*
- 109 *Id.*, p. 2, col. 3.
- 110 "Berkey-Gay Loss in Goodwill is Heavy, Says Irwin," Grand Rapids Herald.
- 111 *Id.*, p. 3, col. 6.
- 112 *Id.*
- 113 "Testifies Losses of Berkey & Gay Were Minimized," Grand Rapids Herald, p. 3, col. 4 (Oct. 21, 1933).
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- 115 "Berkey & Gay Co. Debt to Simmons Under Analysis," Grand Rapids Herald, p. 1, col. 7 (Oct. 24, 1933).
- 116 "Bookkeeping of Depression Days Hit and Defended," Grand Rapids Herald, p. 1, col. 7 (Oct. 25, 1933).
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- 118 *Id.* at p. 7, col. 6.
- 119 "Says B&G Could have Withstood Hard-Time Test," Grand Rapids Herald, p. 1, col. 7 (Oct. 26, 1933).
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- 121 *Id.*
- 122 *Id.*
- 123 *Id.*
- 124 "Defense Implies Berkey & Gay Owners Dilatory," Grand Rapids Herald, p. 3, col. 1 (Oct. 28, 1933).
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- 126 *Id.*
- 127 *Id.*
- 128 "Testify Simmons Policy Drove Off Dealers," Grand Rapids Herald, p. 7, col. 1 (Oct. 31, 1933).
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- 133 *Id.*
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- 135 *Id.*
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