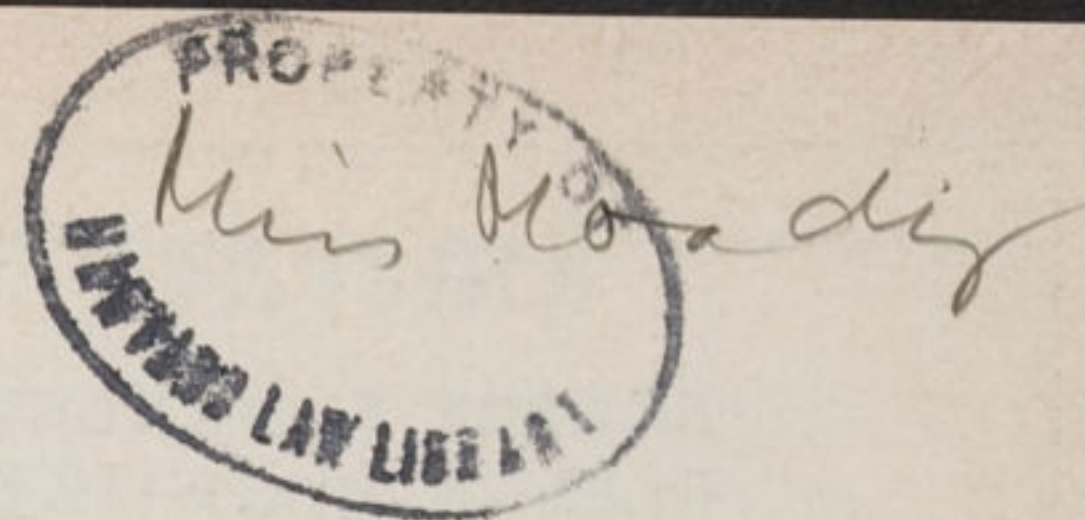




Harvard Law Record

Politicos Discuss Party Future

Democrats Aid Legislature

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Ave Atque Vale

From Swift to Erie

Harvard Law Record

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CALENDAR

Notices for publication in the Calendar should be in the RECORD offices not later than noon the Friday before the date of publication.

Thursday, April 16

Professor Leo Gross of the Fletcher School of Law and Diplomacy (Tufts University) will speak on "Competence and Powers of the United Nations General Assembly" at a meeting of the INTERNATIONAL LAW CLUB in the Pound Room at 8 p.m. Election of new officers will also be held at that time.

Saturday, April 18

The Dormitory Council Formal Dance will be held in Harkness Commons at 8 p.m.

Sunday, April 19

Ambassador Daniel Chapman will speak on "Ghana's Role in the New Africa" at the FORD HALL FORUM, Jordan Hall at 8 p.m.

Wednesday, April 22

Professor A. James Casner will speak to the HARVARD LAW WIVES on "What Every Wife Should Know," a discussion of a wife's rights in her husband's property. Husbands are cordially invited.

The Rev. Joseph Obieta, S.J., will lead an INTERNATIONAL LAW CLUB group discussion on "The Legality of Nationalization of Suez Properties" in the Wheeler Room, Holmes Hall at 4 p.m.

FUTURE EVENTS

Saturday, April 25

Fidel Castro and other Cuban government officials will speak in Cambridge at the HARVARD LAW SCHOOL FORUM. His topic will be "The Cuban Revolution."

CHERCHEZ A FLAMME BARBER SHOP

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Politicos Discuss Party Future

"In the old days, political bosses used to operate out of back rooms," said Arthur M. Schlesinger, Jr. However, Carmine De Sapio, Democratic National Chairman for New York State, speaking with Mr. Schlesinger and Massachusetts Lt. Governor Robert F. Murphy, abandoned the "back room" and took to the public platform before the Harvard Law School Forum last Friday evening in the new Lecture Hall.

The recurring theme of Mr. DeSapio's address was the 1960 nominations for the presidency. He predicted victory in the Republican convention for Richard Nixon. His reasoning: Nelson Rockefeller has promised to serve his full term as governor of New York ("In the course of my political career, I have developed the habit of accepting the public statements of office holders at their face value."); and no other Republican would disturb the "inevitable political symmetry of the Republican National Assembly." On the Democratic side, Mr. DeSapio stated that there will be no predetermined candidate, that the names of perhaps a dozen men will be placed in nomination, and that the rank and file of the Democratic Party will determine who the candidate will be.

Mr. DeSapio stressed the importance of organization in the two-party system ("Organization is the most important word in the entire lexicon of American politics."). He criticized the "small minority of so-called liberals" who would withdraw from partisan organizational activity and divide the Democratic Party. When asked whether the majority of New York's Democrats were represented by Tammany Hall or such dividers as Mr. Harriman and Mrs. Roosevelt, Mr. DeSapio answered that his remarks were not intended to refer to any individual or small group of individuals and that he would prefer not to engage in "semantic pyrotechnics". When asked why Averell Harriman was defeated for Governor of New York, Mr. DeSapio answered that the major factor was Nelson Rockefeller's personal appeal. ("He was just a 'jazzy' candidate.").

Mr. Schlesinger challenged the idea that organization was the Democratic Party's greatest asset ("The great natural resource of the Republican Party is, of course, money. The great resource of the Democratic Party is, I would like to think, brains."). Program, ideas, and purposes transformed the Democratic Party into the majority party in the 1930's, said Mr. Schlesinger, and the ideals that made it the majority party are the only resource that will keep it the majority party.

Mr. Schlesinger agreed, however, that organization is important. He also conceded that as long as political parties exist, there will be political bosses, both good ones and bad ones. A good boss, according to Mr. Schlesinger, is defined in terms of honesty (a good boss will neither accept nor allow graft) and the quality of the candidates he backs for public office. Mr. Schlesinger did not feel that Mr. DeSapio backed the right candidate for U. S. senator from New York in the last election.

Mr. DeSapio and Mr. Schlesinger were followed by Lt. Governor Murphy. Mr. Murphy called on his Democratic Party in Massachusetts to live up to its platform promises (e.g. no sales tax). Campaigned Mr. Murphy, "Either we have constructive policies and live up to them or we are nothing. Is that such a shocking position to take? . . . We shouldn't even fool the people some of the time."

— Levinson

Religion

The Harvard Law School Forum will present a panel discussion on the topic "Unification of the Christian Church", Friday, April 17, at 8 p.m. The Reverend Douglas Horton, Dean of the Harvard Divinity School, will represent the liberal Protestant view of the ecumenical movement. Dr. Gustave Weigel, S. J., Professor of Theology at Woodstock College, Woodstock, Maryland will represent the Catholic viewpoint. It is expected that a third panel member and moderator will be announced.

Joyce Tells Republicans How To Get Legislation

The lawyer as a legislative advocate was the subject of an address by Thomas M. Joyce, Esq., of Joyce & Fisher, Associates, of Washington & Boston, before the Harvard Law and Graduate School Republican Club at a meeting held in the Mallory Smith Room on Wednesday, April 8.

Mr. Joyce described the work of the lawyer who represents citizens whose interests are likely to be affected by legislation. "I am a lobbyist, and well aware of the connotation this label usually has," he said. "But the professional politicians respect persons who advocate a certain view and stand by it. To be known as a supporter of certain interests is an advantage, and not a hindrance." Mr. Joyce explained that one of the most distrusted of all political creatures among professional politicians is the fair-weather party member who switches affiliations after each election. By analogy this also applies to those who deal with legislators.

The lobbyist who does not have a reputation for complete truthfulness will always lose out because those he deals with will literally not trust him, Mr. Joyce pointed out. The tremendous number of bills that confront the legislator make it impossible for him to know about more than a few in any detail. He will often ask the lobbyist which interests oppose the views of his client, and rely upon his answer. The only possible course, from an ethical as well as a business point of view, is for the lawyer-lobbyist to give the legislator as much information as he can. Mr. Joyce said that he knows of no case where a lobbyist who indulged in intrigue or dishonesty was able to last more than a few months. "Sooner or later, these people drop out. You just can't operate that way." He stressed that the most vital requirement of a successful legislative advocate is a well-founded reputation for honesty and integrity.

"The day of high pressuring the legislators is long past, and it is questionable whether it ever was effective," he continued. "Legislation is rarely considered completely on its merits." Because of a feeling on the part of legislators that they must vote in accordance

with the feeling of their constituents on a particular matter, Mr. Joyce said they will often vote against measures which they personally approve. The best advocacy in the world cannot change this. Mr. Joyce said that the most effective approach is one directed to changing the attitude of the constituents so that they will in turn influence their representatives.

Before he will accept a client, Mr. Joyce insists that he be given complete control over all lobbying activity of the project. This is to insure that no undesirable outside activities are associated with clients he represents, or with him. In addition, he often rewrites the bill which is submitted to him, or will insist on certain changes before he will accept it. "If they have confidence in you, they will go along," he says. He will not accept any client whose point of view he feels is unreasonable.

As to the use of cocktail parties as a method of lobbying Mr. Joyce states emphatically that he would avoid them like the plague. "Drinking usually brings trouble, and discussion over cocktails generally does more harm than good. Besides, a million dollar fee couldn't keep me in Boston after five o'clock. I go home to a nice family and my farm. Our firm never does any of this mass entertaining."

— Kaiser

Crosby Traces Growth of Thiokol Chemical Corporation

James W. Crosby, president of Thiokol Chemical Corporation, last week gave the Bull and Bear Club an inside view of the company which grew in ten years from an unknown maker of a special type of synthetic rubber into a pillar of national defense as maker of solid fuel engines for such rockets as the Minuteman. Covering a range of topics from "how to deal with meddlesome senators" to "how not to pay dividends on a stock which has risen from 11 to 150 dollars per share in three years," Crosby illustrated that hard work, boundless self confidence — and luck — can still be the basis of the Great American Success Story.

Starting as a maker of a kind of synthetic rubber which cost a lot to produce and whose special characteristics very few people

seemed to want, Thiokol was still a company with only 165 employees when Crosby took over in 1944. When, in 1948, the Air Force expressed a rather tepid enthusiasm for Thiokol's product as a rocket fuel base, the company seized the chance. Even when the military decided, several years ago, that it was no longer interested in the project, Thiokol kept on with development, confident that there was a future for solid fuel in rockets.

Future planning of the sort needed is made harder by the bewildering number of day-to-day problems facing a rapidly expanding company on the frontier of technological advance. Where do you get 30 to 40 new scientists a month, trained in a field which didn't exist a few years ago? What do you do with an influential senator on a key committee who learns that you've decided not to open a plant for defense work in his state, and demands to know why? And finally, what will happen to a company like Thiokol, built on defense contracts, if "something is decided at Geneva" this summer? When asked the last, Crosby said, "That's what keeps me awake at night."

Thiokol, which still makes most of its profit from its old synthetic rubber and chemicals divisions, has demonstrated that one big gamble — in this case, on the future of solid fuel rocket engines — can lead a small company to remarkable expansion and success. Crosby sees it as his job to be sure that, at the next technological — or diplomatic — about face, Thiokol comes out ahead.

— Smart

Third Year Election

Andrew J. Casner, Jr., 3L of Belmont, Mass., has been elected Class Marshal by members of the third year class. He will be assisted by Leonard V. Quigley, 3L of Kansas City, Mo., who will serve as Class Secretary.

Four members of the Class Committee were elected: Robert M. Royalty, 3L of Danville, Illinois; Edward R. Schwartz, 3L of Clifton, N.J.; Jerome J. Sussman, 3L of Brooklyn, N. Y.; and Peter A. Tomei, 3L of Northfield, Ill. Three additional Committeemen will be named by present members of the Committee to complete the roster of nine members.

Democratic Students Aid State Legislature

Since last Christmas, 65 Harvard Law School students have been participating in a Legislative Assistant Program in conjunction with individual members of the Massachusetts Legislature. The idea for the program was suggested to the Law School Democratic Club by one of its members, David Adamany, 1L of Green Bay, Wisconsin. Mr. Adamany was familiar with a similar program, now defunct, that had operated through undergraduates at the University of Wisconsin.

In an interview for the RECORD last week, Michael Dukakis, 2L, who with Carl Levin, 3L, has been co-ordinating the program, said that the response of the legislators who have utilized the services of the students has been quite favorable. Mr. Dukakis indicated that much of the success of the program can be traced to the aid received from two particular legislators. Representative Sumner Kaplan, Democrat from Brookline, and State Senator Francis McCann, Democrat from Cambridge, lent their full support to the program from its inception. It was mainly through their efforts that the aids received official recognition. This recognition gives the students access to the drafting facilities, library, floor debates, and committee hearings of the legislature.

Although much of the work has been in the nature of routine letter writing and press releases, some of the duties have been exceedingly interesting. One such project was a Rent Control Bill proposed by Representative Kaplan. The bill was eventually beaten on the floor of the House of Representatives, but the public interest aroused by the press releases of the student aide working on this bill was sufficient to elicit an editorial response from the *Boston Herald*.

In view of the favorable reactions by both groups involved in the project, it is certain to be continued. Due to limited funds available, the legislature will probably never be able to furnish financial remuneration for the services. However, most of the students participating feel lack of pay is more than compensated by the opportunity to participate first hand in the law-making process.

— Gold

Judge Magruder: Ave Atque Vale

Janus was a highly respected Roman god with two faces. With one he gazed back at the past; with the other he peered out into the future. He used this special gift in the present. Janus was arbiter of the fortunes of mortals.

Judge Calvert Magruder also has the uncanny gift to see the past, relate it to the present, and project both into the future.

Sitting on the United States Court of Appeals for the First Circuit, he has earned deserved renown for his extraordinary scholarship. His opinions are faithful to the history and the development of the law; he weaves each case into its proper place in a logical and meaningful fabric, taking care to examine and explain the interrelation of principles and the force of precedents. Two very recent cases are exemplary:

In reviewing a judgment of indemnity to a joint tort-feasor found guilty of negligence from another who had been reckless and wanton (whereas in the ordinary case there is no contribution among joint tort-feasors), he found the meaning of this doctrine in its relation to the parallel intricacies of contributory negligence and in the history of these theories. *City of Boston v. Boston Edison Co.*, 260 F.2d 872 (1st Cir. 1958). He decided whether a shipowner was absolutely liable for damages because of so-called "transitory unseaworthiness" only after tracing and interpreting the development in the law of this indemnity for personal injuries of a seaman caused by unseaworthiness. *Mitchell v. Trawler Racer Inc.*, 1st Cir., No. 5429, decided April 7, 1959.

Backward and Forward

But this characteristic has not made Judge Magruder reluctant to recognize new rules of law or new applications of existing doctrines when they are appropriate. For example, as a new judge just come to sit on the bench of the circuit, it was not surprising that he was assigned to write the

opinion on a routine tort case arising out of an auto accident. On studying the case he found that it presented difficult problems of conflict of laws and of application of the then new rule of *Erie RR v. Tompkins*, 304 U.S. 64 (1938), which might have evaded many judges. His opinion, *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940), cert. denied, 310 U.S. 650 (1940), did not receive the blessing of a majority of his brethren: Judge Wilson concurred in the result, for reasons which, since unexplained, will forever remain a mystery; Judge Peters dissented, also without opinion. Judge Magruder's views were, however, confirmed by the Supreme Court in *Klaxon v. Stentor*, 313 U.S. 487 (1941), and *Palmer v. Hoffman*, 318 U.S. 109 (1943). Just the opposite career was enjoyed by his equally famous theory that federal maritime law is within the meaning of "laws of the United States" as a ground for district court jurisdiction under 28 U.S.C. §1331. His reasoning, suggested in *Jansson v. Swedish American Line*, 185 F.2d 212 (1950), and more fully developed in *Doucette v. Vincent*, 194 F.2d 834, 839 (1952), won the support of his colleagues on the First Circuit, but was followed by only four Justices in *Romero v. International Terminal Operating Co.*, decided by the Supreme Court February 24, 1959.

His willingness to squarely face and decide novel questions, and his recognition of the necessity for the principles of *stare decisis* in the ordinary case are complemented by his treatment of the unusual case in which a precedent must be re-examined and perhaps qualified. There is a strong temptation, to which judges sometimes succumb, in such a case to ignore the troublesome point and purport to pluck some novel wisdom from the heavens. In another recent case, *F.C. Donovan, Inc. v. United States*, 261 F.2d 470 (1958), it appeared that a step in the reasoning in *Newmarket Mfg. Co. v. United States*, 233 F.2d 493 (1956), cert. denied, 353 U.S.

903 (1957), had been unsound. Typically frank and deliberate, Judge Magruder's opinion faced the problem and confessed the weakness in the prior decision.

The foregoing citations merely illustrate some of the extraordinary characteristics and capabilities which he has brought to the bench. Judge Magruder's contributions to the corpus juris are the subject of articles by Professors Freund, Brown, Seavey, and Wellington in the May issue of the *Harvard Law Review*. It is not an exaggerated generalization that in deciding a given case, Judge Magruder, again like Janus, sees and understands the past and the future, in so far as the history of the law is fathomable and its future is predictable. Thus enlightened by studying all the cloth, he tailors each decision to fit the pattern as a whole. This approach in itself helps to render the future predictable, and to make a clear record of this era for the jurist of the future.

Double Life

To the classroom, where as Lecturer on Law he teaches Torts at the Law School, he brings his own common sense and his circuit judge's understanding of the judicial process. An example familiar to his students is his explanation of Chief Justice Rugg's famous distinctions among negligence, gross negligence, and recklessness as being the distinctions among a fool, a damned fool, and a god-damned fool. Calvert Magruder's double-edged career seems nicely symbolized by his traditional role as Chief Justice of Ames at the annual Model Appeal. He is justifiably pleased with his dual pursuit of the law. His comments in this regard in a recent speech at the Cornell Law School (44 *Cornell L. Q.* 1, 12-13 (1958)) both confirm this fact and suggest his refreshing outlook on life in general:

With all the perplexities one has to face in the capacity of judge, it is soothing and comforting to return from time to time to the classroom, where the law professor does not have the burden of coming down off the fence and deciding the case, but may pitch his difficulties to the students, with discussion of the considerations on the one hand and on the other, and an adjuration to the students to make up their own minds. Despite my appointment to the court in 1939, I have clung tenaciously at least to the



Bachrach

shadow of my former vocation, for I have continued to teach a section of Torts at the Harvard Law School. If it may be said that I am thus leading a sort of a double life, I must plead guilty. I can only say that this is the hand of cards dealt to me by an inscrutable Providence, and I have liked the hand too much to toss it in.

Nor have all his students been those in his classes at Law School. Twenty-one others as his law clerks, in working with him on cases, at luncheon with him daily, and in close personal association with him, have learned through word, anecdote, and example, much of the law of lawyer-craft, and the art of being human. They have since become professors of law, partners and associates in law firms, and corporation counsel. The Judge maintains close contact with them yet. Every five years they have returned for a reunion banquet. On such an occasion last January, the clerks established the Calvert Magruder Loan Fund, a very fitting gift to the Judge-teacher which they hope will grow, by their further contributions and those of other friends of the judge, into a scholarship fund in his honor.

Many a Legal First

The beginning of everything of significance was sacred to the god Janus: hence, for example, our first month is January. So also does it seem to have been with Judge Magruder. His "firsts" in legal theory have been alluded to above. He also served as the first law clerk to Mr. Justice Brandeis. He was the general counsel to the interim National Labor Relations Board established by Joint Resolution of Congress, and shared the work of finally revising the National Labor Relations Act and shepherding it through Congress. As the first general counsel to the Wage and Hour Administrator, his contributions, including the initiation of a series of interpretive bulletins, played a vital part in forming a workable and publicly understood body of law from the general terms of the National Labor Standards Act.

Again, when the Price Control Act of 1942 created an unprecedented Article III court called the Emergency Court of Appeals (56 Stat. 32 (1942)), Judge Magruder, together with his friend Judge Maris, was among the first three judges appointed to form that court. Among the many criticisms of the Price Control Act repeatedly voiced by its opponents was that the private party had to travel to Washington, D. C., to be heard by the Office of Price Administration. At least, they argued, jurisdiction to review price regulations should be vested in the local federal district courts rather than the one Emergency Court of Appeals. This objection was defeated, however, primarily by the wisdom of the Emergency Court in utilizing its authority to sit in such places as it chose and bringing the court wherever it was asked to go, usually to the town where the private litigant lived. Persons familiar with the problems of price control feel that review by the single expert tribunal was essential to the operation of the OPA and that therefore this wise policy adopted by the Emergency Court was a very significant factor in the success of the whole scheme.

Of course, Judge Magruder also made significant substantive contributions to the work of the Emergency Court as an expert on the fair price of various commodities, which cannot be recounted here. Another decision of

his which was most important to the success of the Price Control Act illustrates another type of "Janus two-faced-ness." In his alter ego capacity as a judge of the First Circuit (for all the Emergency Court judges were similarly schizoid), he upheld the constitutionality of the Act and the completely exclusive jurisdiction of the Emergency Court. *Rottenberg v. United States*, 137 F.2d 850 (1st Cir. 1943), affirmed sub nom. *Yakus v. United States*, 321 U.S. 414 (1944).

Caribbean Circuit

Judges Magruder and Maris carried over the principle of the traveling Emergency Court to another somewhat similar situation in which it has been equally well received. The First Circuit has appellate jurisdiction over both the federal District Court for the District of Puerto Rico and the insular Supreme Court of Puerto Rico, and the Third Circuit reviews the decisions of the District Court for the Virgin Islands. In 1950 Judge Magruder initiated the annual session of the First Circuit in San Juan and Judge Maris led the first corresponding journey to St. Thomas. Ordinarily two judges go from each circuit and each circuit borrows from the other; thus Judge Magruder sits on half or more of the Third Circuit cases. The annual sessions in San Juan and the Virgin Islands stand as eloquent tokens of the respect in which the United States holds the peoples of the Caribbean islands. They cut short the perhaps justified complaints against the cost and inconvenience of appeals taken two thousand miles. Moreover, the annual visits of the judges tend to create and maintain respect and friendship of these Caribbean peoples for the United States and to belie charges of American colonialism. Judge Magruder's *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1 (1953) is one of the most thoughtful and most frequently cited works on that difficult subject.

To these activities should be added others unfortunately too numerous to rehearse at length. For example, he served as Special Adviser and Adviser respectively on the Restatements of Agency and Torts. In 1943 he toured Bolivia with a special commission appointed by the President at the request of the Bolivian government to advise the latter

on labor-management relations in its industries. Some ten months after his appointment to the First Circuit on June 3, 1939, due to the retirement of Judges Morton (on September 30, 1939) and Wilson (on March 1, 1940) he became the presiding judge (now styled Chief Judge) of the First Circuit. He has excellently discharged the responsibilities of that office, and has participated fully in the work of the Judicial Conference.

Nor are all of his contributions to our law and society found in the Federal reports, his many law review articles, the casebook on partnership of which he is co-author, or even his Law School classes and his frequent speeches. He is fond of discussing questions of law, governmental and political theory, and public policy in conversations and correspondence with his many friends, including such diverse figures as Mr. Justice Frankfurter and Governor Muñoz-Marín of Puerto Rico.

One of the Noblest

The hundreds of words above have left undescribed what is probably the most remarkable and endearing characteristic of the Judge. The analogy to Janus breaks down because Calvert Magruder is no austere Roman god; on the contrary, he is a warm, sincere, and delightfully human person. Formality and artificiality are as alien to him as is any appreciation of his own greatness. This ingenuelike simplicity is as charming as it is unlikely in a man of his stature; and it is reflected in all that he does and says, and multiplies the warm regard in which he is held by all who meet him.

The esteem of the bar for Judge Magruder was summarized in a scroll presented at a recent banquet in his honor:

To Calvert Magruder, Chief Judge of The United States Court of Appeals for the First Circuit:

The Boston Patent Law Association presents this token of its profound respect for a distinguished teacher, an eminent judge, and a fine gentleman. Your penetrating, lucid, and scholarly opinions have made a notable contribution to the sound development and progress of the law in a period of changing social and legal concepts. Your unfailing patience and courtesy have endeared you to the bar. By your insistence on due process and a fair hearing, uninflu-

enced by popular prejudice or clamor, you have taken your place among the courageous protectors of our civil rights in a time of fear and confusion, when those rights were widely threatened.

This June, the Judge's retirement will become effective after twenty years on the bench. He will then become a Senior Judge, privileged to sit as much or as little as he pleases in the First Circuit by designation of Judge Woodbury (who will become Chief Judge thereof) or elsewhere by designation of the Chief Justice. After he has dispensed the June fortunes of that inferior breed known as first-year students (regarding Torts examinations), he will also leave the Law School where he has taught for thirty-nine years. But his "two-faced" career will continue unchanged, since next year he will teach at Hastings Law School in San Francisco and sit on a substantial number of cases in the Ninth Circuit. This article — unlike Mark Antony's speech — comes to praise Magruder, not to bury him. Retirement for him is no doubt just another word for a cutting of ties on his still young spirit and mind, that they may seek new problems in new places. After next year in San Francisco, his geographic location in the future remains to be decided, but it seems certain that he will continue to enrich the legal profession as both a teacher and a judge for many more years.

Alumni News

LL.B. '40 — *Bernard Kaplan* is teaching a course on Legal Aspects of Marketing in the Evening Division, Boston University.

Mr. Kaplan is presently engaged in private practice with the firm of Kaplan and Katz, located at 1 Court St., Boston, Mass.

LL.B. '42(46) — *Alan Neil Schneider* announces the removal of his law offices to 209 South Fifth St., Louisville, Ky.

LL.B. '43(47) — *Irvin M. Kent* at a recent meeting of the Paris chapter of the Federal Bar Association was elected vice-president.

LL.B. '50 — *Harvey Greenfield* has published a McGraw-Hill book entitled "Sale-Leasebacks and Leasing in Real Estate and Transactions", of which he is co-author.

LL.B. '50 — *Frank Joseph Battisti* was elected Common Pleas Judge, Mahoning County, Ohio.

From Swift to Erie - - The Real Brooding Omnipresence

Part I

Mr. Dean catalogues the judicial history of the *Erie* doctrine. Justice Story in *Swift v. Tyson* held there was a federal law to be applied in diversity cases. This decision came under attack at the hands of dissenting Justices Stone, Brandeis, and Holmes in the *Black and White Taxi Cab* case. Finally their views were accepted in *Erie*. Mr. Dean discusses the backgrounds of these decisions and discusses the present doubts that shadow the problem.

by

HOWARD E. DEAN



"The most colossal error the Supreme Court has ever made."¹ Thus a recent critic has described the Court's spectacular rejection in *Erie v. Tompkins* (1938) of the doctrine it had established nearly a century before in *Swift v. Tyson* (1842): that, in diversity of citizenship cases, there is a federal commercial law.² This unexpected overruling of a precedent so long followed would have been enough, but its effect was greatly heightened by the Court's acknowledgment that it had been off on a frolic of its own for nearly a century, for the Court did not stop with a dramatic doctrinal about face: it chose to add a startling and probably unique "volunteer confession" that it had been following an unconstitutional course ever since 1842.³

Mr. Dean is Associate Professor of Political Science at the University of Oregon. A graduate of U.C.L.A., he holds a Ph.D. in Public Law from Columbia. He was at the Harvard Law School in the 1955-56 academic year as Faculty Fellow of the Fund for the Advancement of Education.

Certainly few Supreme Court decisions have called forth more critical comment and studied invective than has this antithetic pair. Even now, twenty years after *Erie v. Tompkins*, powerful currents still arc between these poles.

Few decisions illustrate so neatly the great problems which confront the Supreme Court as umpire of our vast continental federal system, or serve so nicely as jumping off places for forays into the tangled thickets and Serbonian bogs of conflict of laws. Few lead so swiftly into discussions of the role of dissenting opinions and *stare decisis* in constitutional cases, or the influence of law writers and law reviews on the courts, and few illuminate so well those opportune interstices within which the judicial process may move so creatively. Cases like these make plain that judges need not write for the anthologies in order to provide enticement to plunge headlong into the bramble bush. Oliver Wendell Holmes once reminded a group of lawyers that their business as thinkers was "to make plainer the way from some thing to the whole

of things; to show the rational connection between your fact and the frame of the universe."⁴ It would be hard to find transient facts more suitable for this high purpose than those which underlay *Swift v. Tyson* and *Erie v. Tompkins*.

But the technical legal meanings of the rise and fall of *Swift v. Tyson* have often been ably explored,⁵ and it is not the aim here to cover this ground again. Rather, our concern is with some of the quaint and dramatic features of the story, those curiosities and oddities of the law, which add to its lasting interest, and in particular with a seldom noticed common bond which linked its main characters. It was Holmes who pointed out that a lawyer does not need to mention that his client wore a white hat when he made a contract, but that "Mrs. Quickly would be sure to dwell upon it along with

Because of space limitations, footnotes are not printed. The RECORD will send them in mimeographed form to those readers who request them.

the parcel gilt goblet and the sea-coal fire . . . ”⁶ But he also reminded us to keep before our eyes “in the long battle the little flutter that means ideals, honor, yes, even romance, in all the dull details.”⁷ Those to whom the power is given can strike at kings and slay them;⁸ lesser breeds may also serve our mistress by dwelling upon the parcel gilt goblets and the sea-coal fires.

The National Commercial Law

It was said of Mr. Justice Joseph Story, with whom our account begins, that as Circuit Justice he “absorbed jurisdiction as a sponge took up water,” and that, “if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.”⁹ He had often expressed himself forcefully from the bench on the dangers of “state attachments, state prejudices, state jealousies, and state interests,” and on the consequent need for federal judges “to control jarring and discordant judgments and harmonize them into uniformity.”¹⁰ In *Swift v. Tyson*, a diversity of citizenship case involving a bill of exchange, Story saw and seized the grand opportunity to indulge his absorbing proclivities by proclaiming the existence of a national commercial common law. He announced for the Court that section 34 of the Judiciary Act of 1789, which provided that the laws of the several states were to be regarded as rules of decision in diversity of citizenship cases, meant merely that state statutes should guide the federal courts, but that the word “laws” did not include the decisions of the state courts. His sweeping conclusion was that the federal courts could decide such cases on the basis of a general commercial law which

they themselves found. Surely Mr. Justice Story would have applauded the following view of the common law, with its echo of the maxim, “*boni judicis est ampliare jurisdictionem* :”

It is the duty of the judiciary not only to guard it with vigilance against incongruous innovations, but also to extend the operation of its principles, so as to embrace all the new and various interests, which arise among an active and enterprising people.¹¹

But Story’s bold effort to give federal judges an opportunity to emulate the work of the Roman *praeter peregrinus* in hammering out the *ius gentium*, or of Lord Mansfield in incorporating the law merchant into the common law (exemplars of whom Story was very conscious) was not to go uncriticized. Even some of his admirers might well have said of *Swift v. Tyson* what was said of another case by an English judge, “I accede to the authority of that case, although I think it is a very strong decision. It does not convince me: it overcomes me.”¹² His critics might have likened it to the case in which Chief Justice Belknap laid down “a certain proposition which ‘he swore to be law.’ ”¹³ And they might have called his attention to Lord Mansfield’s caveat: “The true text is ‘*boni judicis est ampliare justitiam*,’ not ‘*jurisdictionem*’ as it has often been cited.”¹⁴

Shakily grounded, as someone has said, on a Latin tag from Cicero and a reference to the law of nature,¹⁵ the *Swift* doctrine came

increasingly under critical fire in law books and law review articles. Criticisms of its application or extension had been made in dissenting opinions by Supreme Court Justices beginning in 1845. By 1893 a frontal attack on the entire doctrine was being launched from the Supreme Courts. Mr. Justice Field was unwilling to carry the burden of *Swift v. Tyson* any longer, saying in a dissenting opinion:

I am aware that what had been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine.¹⁶

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Brooding Omnipresence in the Sky

The attack was taken up subsequently, and with characteristic bluntness, by Professor John Chipman Gray of the Law School, in his *The Nature and Sources of the Law* (1909) in which he concluded that the *Swift* doctrine was a jurisprudential anomaly. Not content merely with a logical critique, Gray permitted himself an amusing and deflationary venture into judicial psychoanalysis:

Among the causes which led to the decision in *Swift v. Tyson*, the chief seems to have been the character and position of Judge Story. He was then by far the oldest judge in commission on the bench; he was a man of great learning, and of reputation for learning greater even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; he had had great success in extending the jurisdiction of the Admiralty; he was fond of glittering generalities; and he was possessed by a restless vanity. All these things conspired to produce the result.¹⁷

The destructive implements forged by Field and Gray did not long lie idle in the legal smithy, for they were soon used by Mr. Justice Holmes in his dissenting opinion in *Kuhn v. Fairmont Coal Co.* (1910),¹⁸ in which the Court decided that federal courts were not bound to follow a state court decision as to the effect of a deed of coal in the state. Discussing his dissent in a letter to his friend Sir Frederick Pollock, Holmes irritably explained that the rule followed by federal courts as to the con-

struction of state statutes and state constitutions was just the reverse of the *Swift* rule. He added this impatient comment: "They say we must use our independent judgment. I reply, as to what? The State law. But the State judges and the State legislatures make the State law — we don't . . ."; the Court, Holmes explained, had followed

an established though very fishy principle started by Story . . . I think I punched a hole in their bottom, though a very keen man might require a little further analysis than I thought expedient to go into as against old Harlan who simply rolled off the cases.¹⁹

Almost ten years later Holmes was to give Pollock this astringent evaluation of Mr. Justice Harlan:

. . . that sage, although a man of real power, did not shine either in analysis or generalization and I never troubled myself much when he shied. I used to say that he had a powerful vise the jaws of which couldn't be got nearer than two inches to each other.²⁰

The mining and sapping operations against the edifice raised by Story were resumed by Holmes in *Southern Pacific Co. v. Jensen* (1917), when he was joined in dissent by Justices Pitney, Clarke, and Brandeis, protesting that there is

no common law of the United States:

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.²¹

In this dissent Holmes also struck off another of his many memorable lapidary phrases: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to melocular motions."²² In a letter to Pollock in which, among other things, he expressed his pleasure with soft collars and his displeasure with long opinions ("Long wind hasn't given out on this side any more than on yours.") Holmes added a tart comment on the decision in *Southern Pacific Co. v. Jensen*:

I have been interested in some other questions . . . such as the power of the states to impose liability for death by accident two feet from a

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wharf on a gangplank over the water and so within the admiralty jurisdiction. Four of us dissented in favor of the state's power, and I can't understand the decision, *et superest ager*.²³

Subtle Fallacy

A few years later, the foundations of Story's venerable structure were visibly weakened by Charles Warren's notable *Harvard Law Review* article on the legislative history of the Judiciary Act of 1789, which argued that Story's crucial construction of that statute had been erroneous.²⁴ Warren had found the original draft bill and the amendments to the Judiciary Act in the Senate files in the attic of the Capitol, and had discovered the bill as passed by the Senate, in a cellar room under a heap of miscellaneous papers. These documents revealed that, as originally drafted, section 34 had provided that not only the statute law of the states, but also "their unwritten or common law" should be regarded as rules of decision. This section had later been amended by substituting the single phrase "laws of the several states" for the phrases "statute laws" and "unwritten or common law." Warren concluded that this change would have been meaningless unless the phrase "laws of the several states" had been intended to embrace state court decisions as well as state statutes, for had the purpose been to limit the rules of decision to state statutes, only the phrase "unwritten or common law" would have been stricken out.

In 1928, Mr. Justice Holmes found still another opportunity to

"strike at the jugular" of the *Swift* doctrine. Joined in dissent by Justices Stone and Brandeis in *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, he protested against allowing the *Swift* doctrine to "spread the assumed dominion into new fields." Emphasizing that the doctrine was based upon "a subtle fallacy" which had evidently dominated Story, Holmes noted that Warren's researches had shown that Story probably was wrong in his construction of the Judiciary Act of 1789, if, he added dryly, "anyone is interested to inquire what the framers of the instrument meant."²⁵ If Holmes were right, he said, "the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."²⁶

As he had done on occasion for nearly twenty years, Holmes once more unburdened himself in a letter to Pollock written only the day before the *Black and White* decision. Reminding Pollock that it was the time-honored practice of federal judges in diversity of citizenship cases "if so minded, to decline to follow the Supreme Court of the State," Holmes remarked, "I say that this is a pure usurpation founded on a subtle fallacy," adding, "I doubt if I can carry a majority,"

for the tradition is old, and some ex-circuit judges will not have forgotten the arrogant assumption to which they have been accustomed. This of course strictly between ourselves . . . Brandeis is with me on these points and we are so apt to

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agree that I am glad that he dissents from the only opinion I have to deliver. It will indicate that there is no preestablished harmony between us.²⁷

The story of the decline and fall of *Swift v. Tyson* is largely the story of the influence of dissenting opinions. One of the briefest, yet most eloquent, justifications of dissenting opinions was made by Charles Evans Hughes in a lecture on the Supreme Court delivered at Columbia University in 1928:

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.²⁸

The Swinging Car Door

A decade after Hughes had uttered these words, and three years after the death of Holmes ("We aim at the infinite and when our arrow walls to earth it is in flames."²⁹), the dissenting protests of Holmes and Field, and the criticisms of Gray and Warren had their triumphant vindication in the opinions of the Supreme Court in *Erie v. Tompkins*, delivered, fittingly, by Holmes' frequent com-

panion in dissent, Mr. Justice Brandeis.

While walking along the tracks of the Erie Railroad in Pennsylvania, Harry Tompkins had been struck by the swinging car door of a passing train. He brought suit in a federal district court in New York and recovered a verdict the circuit court of appeals, with of \$30,000 which was affirmed by both courts following the *Swift* rule and thus ignoring the Pennsylvania cases on which the railroad had based its claim that it was not liable. But this case, which must have seemed as ordinary and routine as any of the hundreds of cases which had followed the *Swift* rule, was soon revealed to be one of those turning points in the law, "a point of departure, from which new lines will be run, from which new courses will be measured."³⁰ The startling climax came on April 25, 1938, when the Supreme Court reversed, and remanded the case to the appellate court for a determination, this time not on the basis of general federal common law, but on the basis of state law, which the Court now held to be con-

trolling. The decision was indeed triply startling, for the Court had not only overruled the "oft-challenged" doctrine of *Swift v. Tyson*, but it had made the change on its own initiative "without even a demand by a litigant or argument of the point at the bar;"³¹ and finally, the Court had made its unique "volunteered confession of a century of error"³² and unconstitutional action by the Court itself. Not only had the earlier Court erroneously construed section 34 of the Judiciary Act of 1789 but, the Court now admitted:

the doctrine of *Swift v. Tyson* is,

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as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the courts of the United States" . . . We . . . declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.³³

One may well imagine the shade of Mr. Justice Story sadly exclaiming as he had once done earlier: the doctrines and opinions of the "Old Court" are daily losing ground . . . The doctrines of the Constitution so vital to the country, which in former times received the support of the whole Court, no longer maintain their ascendancy.³⁴

Perhaps the hopeful remark of a later-day federal judge, addressed to attorneys faced with the choice between federal or state courts in diversity cases, may be applied to judges too: "May your decisions always be wise ones. If not, may their folly remain undiscovered."³⁵

It has been suggested that it was unnecessary for the Court to have declared that it had followed an unconstitutional course ever since 1842, inasmuch as the *Swift* decision could have been overruled simply as a matter of statutory construction. Judge Charles E. Clark has thus argued that Brandeis had gone too far:

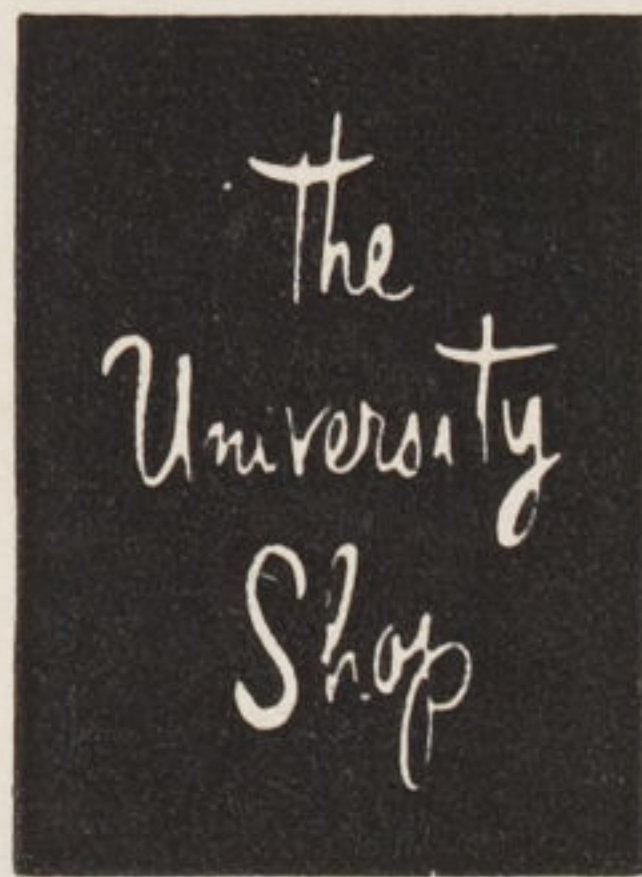
It is possible that a long period of minority decisions may have made him not fully cognizant of his own power, so that he failed to realize that an ancient doctrine, already tending towards decay and death, did not need the sledge-hammer blows he employed for its destruction.³⁶

But Brandeis had expressly stated in the opinion that the Court would not be prepared to abandon "a doctrine so widely applied through-

out nearly a century" if only a question of statutory construction were involved, but that, on the contrary, "the unconstitutionality of the course pursued has now been made clear and compels us to do so."³⁷ Indeed, it seems that the *Swift* doctrine was fated to come to a violent end, for had it not been finished off by the blows of a sledge-hammer, it might very well have perished by lapidation. Professor Alpheus T. Mason has recently pointed out that Brandeis had rested his opinion, as originally circulated, on the ground of statutory construction, and that it was Mr. Justice Stone who had persuaded him to revise it to include a statement concerning the unconstitutionality of the Court's action:

So vital did Stone regard this suggestion that he threatened to write a separate opinion if Brandeis did not acquiesce: "If you prefer not to make the change, or find it inconvenient to make it, I will concur with a sentence making plain my position that I come to the constitutional question only because otherwise I should, as Mr. Justice Holmes said, leave *Swift v. Tyson* undisturbed but without allowing it to 'spread the assumed dominion into new fields.' " In short, Stone now urged his colleague to reinforce the constitutional basis for deserting *Swift v. Tyson*.³⁸

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Weary Erie

Thus the wheel had come full circle: *Swift v. Tyson* had finally been overruled, and the "implements of decision"³⁹ fashioned by the dissents of Field, Holmes, and Brandeis, the criticisms of Gray, and the researches of Warren had at last become the weapons of victory. For Harry Tompkins, however, there was no rejoicing: on remand the appellate court held that by Pennsylvania law he was not entitled to his verdict and dismissed the action; subsequently, the Supreme Court denied certiorari and rehearing. As Robert H. Jackson, then Solicitor General of the United States, suggested, Tompkins doubtless had "little understanding of the nature of the judicial process which destined our jurisprudence to take a violent swing on the hinges of that loose

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car door,"⁴⁰ nor was it probable that he appreciated the honor of giving his name to a leading case at the cost of \$30,000: "he took a trip to the law, and there he got hit by a swinging Supreme Court . . ."⁴¹ His fate was perhaps reminiscent of that of two men killed in a coal mining accident, of whom the reporter observed: "Reid and McGuire were both victims of the same accident, which though melancholy, has settled the law."⁴²

And yet, it is conceivable that someday the judicial wheel *may* come about full circle once more. Criticism of the *Erie* decision has never been stilled and law review articles irreverently refer to "Weary Erie,"⁴³ and to "precedent in the *Eerie-Tompkins* manner."⁴⁴ Recently Professor Crosskey has proclaimed that Brandeis' opinion was "completely innocent of knowledge and understanding,"⁴⁵ and that the constitutional and statutory grounds for it were "totally imaginary."⁴⁶ Ringing the changes on Brandeis' own theme, he concluded that "the decision stands revealed, both in its manner and in its substance, as one of the most grossly unconstitutional governmental acts in the nation's entire history."⁴⁷ Judge Charles E. Clark has commented that Crosskey's study has helped to restore Mr. Justice Story "to his deserved pedestal among our juristic great," and has suggested that "perhaps, this presages that the inflexible dogma of 'Weary Erie' may be subject to some revaluation after all."⁴⁸

(Continued Next Week)

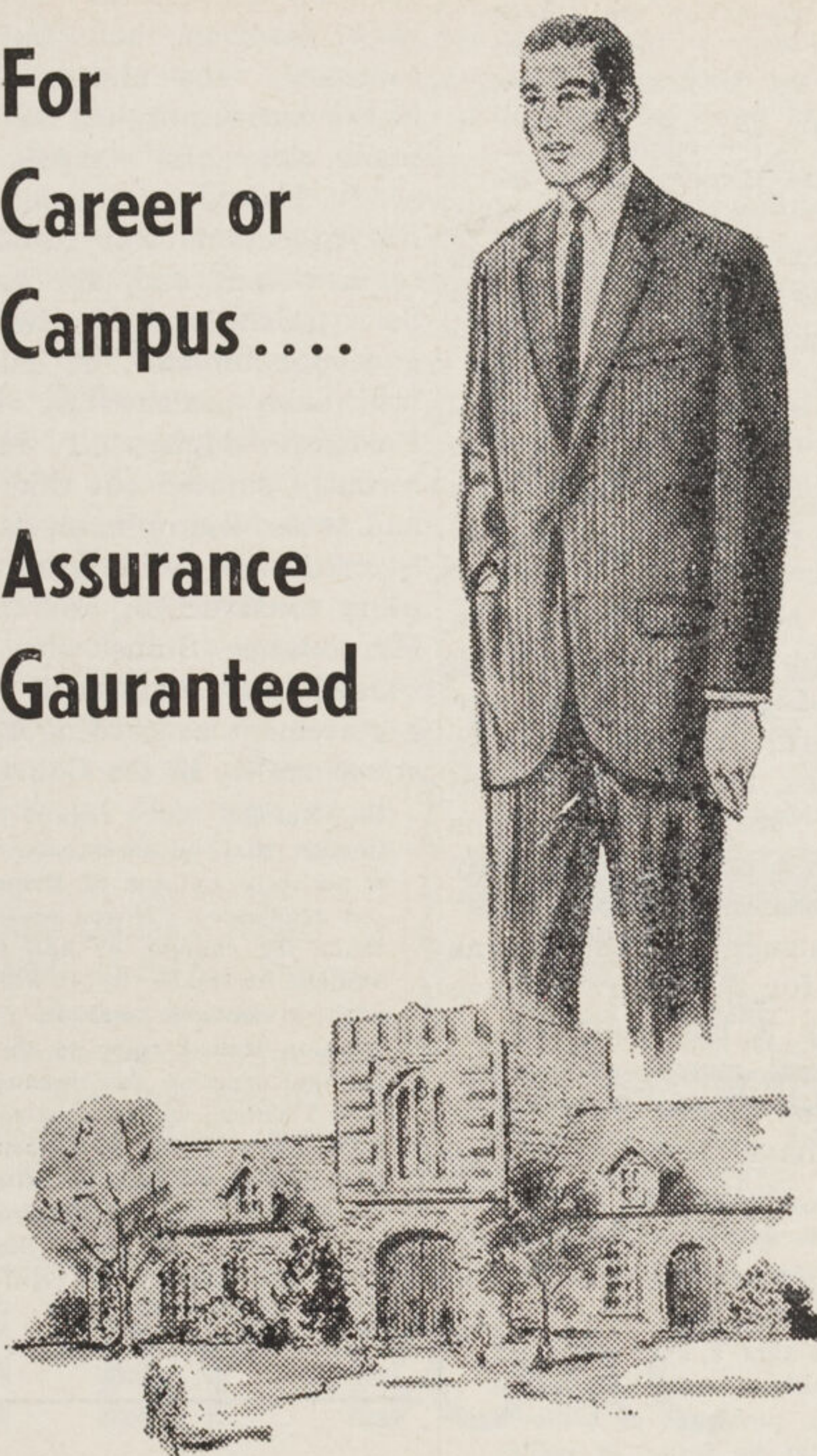
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