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Cases Before Court Involve Interpretation

The United States Supreme Court has decided to hear arguments on two cases involving construction of federal statutes. Certiorari was granted for each on October 22nd.

Black v. Magnolia Liquor Co., Inc., rests upon an interpretation of the Federal Alcoholic Administration Act, 27 U.S.C. §201 *et seq.* It was decided below as *Magnolia Liquor Co., Inc. v. Cooper*, 231 F.2d 941 (5th Cir. 1956), as an appeal from an order of the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service which suspended Magnolia's permit to act as a liquor wholesaler.

Scope of Statute

The Act in question provides that "It shall be unlawful for any . . . wholesaler . . . of distilled spirits to require by agreement or otherwise, that any retailer engaged in the sale of distilled spirits . . . purchase any such product from such [wholesaler] to the exclusion in whole or part of distilled spirits . . . sold or offered for sale by other persons in interstate or foreign commerce." (27 U.S.C. § 205).

Magnolia was exclusive distributor for the Seagram Distillers Corporation in New Orleans. It was alleged that Magnolia was making "tie-in" sales; that is, it would sell scarce liquors to retailers only if the latter bought other liquors which were in greater supply.

In an opinion by Circuit Judge Warren L. Jones, the court noted that the statute was ambiguous at best in covering such transactions; since the law is penal in character, it was construed strictly against the Government. Only a year ago, the Second Circuit in *Distilled Brands, Inc. v. Duni-gan*, 222 F.2d 867, held that the Act does cover "tie-in" sales.

Proof of Negligence

The second case which the Court will hear arose under the Federal Employees' Liability Act, 45 U.S.C. §51 *et seq.* A woman employee of a railroad was injured while loading heavy sacks of mail on a mail car from a truck. The trial court refused the railway's motion for a directed verdict, and the jury found the plaintiff.

Reversing the judgment, Circuit Judge Ben F. Cameron wrote, "[Appellee] pitched her case entirely on the assertion that she asked for additional help to handle the unusually large amount of mail on that particular day. . . . Appellee failed entirely to offer any evidence to support that charge of negligence and her proof failed to sustain any other theory of possible recovery." *Thomson v. Texas Pacific Ry.*, 232 F.2d 313, 318 (5th Cir. 1956). The court held that a directed verdict for the railroad should have been entered.

Prizes Increased In Drafting Contest

Prizes awaiting winners in the Drafting Competition have been substantially increased, according to Maurice S. Binkow, 3L of Miami Beach, Fla., Drafting Chairman of the Board of Student Advisers.

The Boston Safe Deposit and Trust Company will donate prizes of \$250, \$150, and \$100 to the top three teams in the Competition. The Board's prize, formerly awarded to the winning team, will now be divided among the losing semi-finalists.

Three problems have been distributed to six teams of four men each, who will participate in the semi-finals. One of the problems is the drafting of a Maryland libel statute.

Forum

Three expatriates from Eastern Europe will discuss "The Satellite Revolts" at the Law School Forum on Friday evening, November 9th at 8:00. They are Leon Volkov, a former colonel in the Soviet air force; Bela Varga, vice premier of Hungary in 1947; and Merek Korowicz, until 1953 a member of the Polish delegation to the United Nations.

Judge Taft of Ohio Court To Preside at Semi-Final

Kingsley A. Taft, LL.B. '28, associate justice of the Ohio Supreme Court, will preside over the first Ames semi-final argument in the James Barr Ames Courtroom on Monday evening, December 10th at 8:00.

Justice Taft, a graduate of Amherst, was elected to the United States Senate in 1946 for a two-month term to fill the vacancy caused by the appointment of Harold H. Burton, LL.B. '12, as Associate Justice of the United States Supreme Court. Two years later Justice Taft was elected to the Ohio Supreme Court.

Other members who will sit on the United States Court of Appeals for the Ames Circuit have not been announced. The Court will consider *Local 688, Electrical Workers Progressive Society v. Ames Electrical Supply, Inc.*, which involves a labor-management dispute. The Kaplan Club will present arguments on behalf of Local 688 in an appeal from a judgment in favor of Ames Electrical Supply, represented by Casner Law.

Dispute over Contract

The union and the company signed a contract in 1952 which was to be effective for a period of two years. All questions regarding a new contract which could not be settled in 1954 by conciliation were to be arbitrated under a clause of the contract setting up a union-management arbitration committee. Another clause provided that other means of arbitration were excluded.

A few months before expiration of the contract in 1954, the union notified the company of its desire to negotiate a new contract. Eventually all terms were settled by conciliation except those relating to the dismissal of employees and provisions for a sickness and accident program. In June, 1955, the union asked the defendant to arbitrate the unresolved differences. The company refused, and it further re-

fused to participate in the arbitration committee under the old contract, and the union filed this suit in the United States District Court for the District of Ames.

The court held that "such a quasi-legislative type of arbitration agreement is not specifically enforceable under the Arbitration Act" (9 U.S.C. §1 *et seq.*) and dismissed the complaint.

Paul T. Guinn, LL.B. '56, Faculty Assistant for the Ames Competition, states that several issues are expected to be raised on the appeal. The Court of Appeals must decide whether granting of a decree of specific enforcement of an agreement to arbitrate is an injunction forbidden by the Norris-La Guardia Act (29 U.S.C. §101 *et seq.*); and if so whether an employer can take advantage of that fact.

The case also presents an issue raised in *United Electrical Workers v. General Electric*, 233 F.2d 85 (1st Cir. 1956), whether a collective bargaining agreement is a contract of employment which is denied coverage under the Arbitration Act.

Complicating the situation is a local Ames statute which provides that "Agreements to arbitrate shall never be specifically enforceable in the Courts of this State."

In the second semi-final argument on the evening of December 12th, the Blackstone Club will speak for the petitioner-appellant and the Griswold Club will represent the respondent-appellee in *Ames Hotels, Inc. v. Commissioner of Internal Revenue*.

Maguire Plans Retirement in June, Taught Evidence Thirty-Four Years

John MacArthur Maguire, LL.B. '11, Royall Professor of Law, will retire from the faculty on June 30, 1957. Professor Maguire, who is best known for his third year course in Evidence, will have taught for thirty-four years at the Law School. Asked by the RECORD to comment on his approaching retirement, which was compulsory under University regulations, he declared, "Approaching? Why, it's staring me in the face!"

"I won't do any more teaching," Professor Maguire declared. "But I'll be keeping myself busy. Nobody can afford to retire these days, with inflation prowling around like the troops of Midian to prey on people with fixed incomes. I suppose someone in my position could knock off now," he continued, "and cash in on Social Security. Then one could resume working at 72. But a four-year layoff would be very bad at this point."

During most of his years here Professor Maguire has taught Evidence. "I'll bet I have taught Evidence more often than anyone else in the history of this School," he recalls. "Professor J.B. Thayer gave the course about twenty-six times; I've given it at least fifty times, counting on the basis of giving and grading an examination."

Teaching methods have changed somewhat over the past few decades, he feels. "They are more diversified now; when I began here, we taught almost wholly by the case method and strictly Socratic lectures. Now, there must be forty different teachers with forty ways of teaching."

Compares Casebooks

Changes in casebooks may run in cycles, Professor Maguire feels. He compared Professor Warren A. Seavey's casebook on Agency with the volume which replaced it last spring, edited by Mr. Seavey and Vice Dean Livingston Hall. The former book was a collection exclusively of cases, while its successor is interspersed with textual material. "In a way, it's 'back to Methuselah,' Thayer's casebook on Evidence, published a half-century ago, had great, long sections of text. His casebook on Constitutional Law also had a great deal of textual material."

A 1908 alumnus of Colorado College, Professor Maguire graduated from the Law School in 1911, and was admitted to the Massachusetts Bar the same year. During World War I he was a member of



John M. Maguire

the firm of Hale, Grinnell and Swaim, and worked with the War Emergency Division of the Department of Justice.

In 1923, he was appointed to the Law School faculty. Royall Professor of Law since 1950, he also acted as Law Librarian in 1942 and 1943, and was vice chairman of the American Bar Association's standing committee on jurisprudence and law reform the following year.

Mr. Maguire was co-editor, with Professor Edmund M. Morgan, of *Cases on Evidence*, first published in 1934, and wrote *Evidence: Common Sense and Common Law*, which appeared in 1947.

Evaluates Students

His many years of teaching have inspired Professor Maguire to express some opinions on students themselves. "Students today are more adroit than ever at finding work-saving methods. I don't mean to imply that this is necessarily bad; in fact, it will doubtless make better lawyers out of them."

Law students are of a higher caliber than ever, he feels, due to better methods of selection. "But the advance of mental science has furnished people with more excuses for failure than previously were available to them. For example, semantic difficulties."

"When I was a young man, the excuse you heard most often from students who didn't do well was 'sore eyes,' or something like that. Now, the tendency is for them to holler 'kill the umpire,' or mumble something that sounds like 'the sun was in my eyes.'"

—Oliver

Political Groups To Watch Returns

Election night celebrations or wakes, as the case may be, have been scheduled by both Democratic and Republican organizations at the Law School.

The Law School Republican Committee and the Harvard Young Republicans plan to follow the returns at the Hotel Continental from 8:00 p.m. until about 1:00 a.m. Returns coming in on television will be posted on a blackboard while a dance band furnishes entertainment.

The Law School Democratic Club will convene in Harkness Commons at 9:00 p.m. and will watch the returns until the results become apparent. Beer and other refreshments will be served.

Non-members have been invited to each function upon payment of a small admission fee.

Presidential Incapacities Have Revealed Statutory and Constitutional Ambiguities

By RUTH C. SILVA

Because of President Eisenhower's two illnesses, presidential succession and disability have been real—although not greatly discussed—issues in the current campaign. There are actually three situations in which vacancy or disability might arise: the death, resignation, or disability of a presidential candidate, or a President-elect, or of a President in office.

Neither the Constitution nor law provides for the case of a presidential candidate's death or disability before December 3, when the electoral colleges meet.¹ Each of the National Conventions, however, has empowered its National Committee to fill a vacancy in the ticket.

A comparison of the Republican and Democratic resolutions reveals certain differences. First, the Democratic National Committee can substitute a candidate on the ticket if the Convention's nominee becomes disabled, whereas the Republican provision assumes that a disabled candidate remains the Party's standard bearer. Second, while the Republican resolution permits the National Committee to call a special convention to make substitutions on the ticket, the Democratic rule does



Ruth C. Silva

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not. Finally, both resolutions provide that the two committee members from a state shall cast a number of votes equal to that state's votes in the last convention. While the Republican rules make no provision

for a disagreement between the two members, the Democratic resolution provides that each member shall cast one-half of the state's votes.²

The provisions for presidential succession or inability from December 3 until January 20 are defined with more precision. The Constitution provides that, if at the time fixed for the beginning of the next presidential term (Jan. 20), the President-elect shall have died, the Vice President elect shall be inaugurated as President. It states further that if no President shall have been chosen by January 20 or if the President-elect has not qualified, then the Vice President elect shall act as President until a President does qualify.

The Constitution also empowers Congress to declare who shall act as President in case neither a President-elect nor Vice President elect shall have qualified by January 20. Such person is directed to act accordingly until a President or Vice President shall have qualified.³

Although the Constitution does not specifically cover the case of disability on the part of a President-elect, the President-

(See SUCCESSION on page five)

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The Fear Around Us

Six months after the Tensions Committee completed its work, the results of its endeavors have made but little imprint on the pattern of fear and uncertainty that shadows the Law School careers of many students.

Although the inception of occasional student-faculty teas for first year men, and the preparation of a picture book of students' faces for instructors are worthwhile steps forward, they are but small advances toward the goal of holding anxiety to a minimum while keeping legal education at a maximum.

The majority of the Committee proposals so prominently published in April have been quietly shelved—and the condition of insecurity that they were supposed to correct seems abated only by improving job opportunities rather than by Law School action.

For example, the "complete overhauling of the proctorial system so that proctors will function as semi-official advisors to first-year students" has turned into a hollow joke. There is no discernible difference between proctors' functions this year and in previous years, during which proctors served merely as holders of skeleton keys. Compensation for proctors has remained the same (one-half room rent for the year). The sum appears insufficient for any person expected to do advisory work.

A second reform, "creation of a student committee to help reorganize the orientation program," was nominally accomplished. Such a committee was set up. But the result of its work was largely rejected by the Administration, and incoming students were given even slighter acquaintance with student activities than in previous years.

A booklet scheduled to be published by the Placement Office on job opportunities has not yet appeared.

The Student Guide for first year men has also not yet seen print. Although a draft of this booklet was prepared, it was rejected for publication despite the wishes of a majority of its authors that it appear in preliminary form to benefit the Class of 1959.

This is the record of achievement on only those recommendations which were reported to have been accepted in April and were expected to have gone into effect this September. On the more far-reaching proposals to relieve tensions, the student body has yet received no word.

The failure to carry out proposals suggested by the Committee stems in large part from the fact that the only report it submitted was an oral one to Vice Dean Hall. It is almost incredible that a group of lawyers and students who met for months produced no more lasting testament than an oral report.

The RECORD is appreciative of the efforts made by those students and professors who are interested in reducing pressures at the School. But events indicate that the implementation of these reforms has fallen down badly. It is the responsibility of the School to go forward to carry out the program that has been undertaken.

Letters to the Editor

CHANGING TIMES

TO THE EDITOR OF THE RECORD:

The announcement of the increase in tuition to \$1000 and of the board rate to \$15.50 per week recalls that in my day the tuition was \$150 and the board rate at the old "H Club" on Trowbridge Street was \$2.75 per week. My room rent was \$37.50 per year.

But "tempora mutantur et nos mutamur in illis".

—ALFRED A. BENESCH, LL.B. '03.

PRE-GRADUATION CEREMONY

TO THE EDITOR OF THE RECORD:

Every June another class completes its three years of work at the Harvard Law School and graduates. However, many in the class are unable to attend the graduation ceremonies which take place in the middle of June.

What are the reasons? Upon the completion of examinations at the end of May, most students must hurry back to their respective states to take review courses in order to prepare for state bar examinations. These occur throughout the summer, some of them in late June or early July. It is not practical for these students to remain in Cambridge for two weeks in order to attend graduation.

Another reason is an economic one. A large number cannot afford to stay here nor can they afford to go home and return on graduation day. The problem is accentuated by the fact that Harvard is a national law school and many of its students live outside the immediate Massachusetts or New England area.

Is this desirable? Can this situation be alleviated in any way? It can be eased by a pre-graduation program which would come at the end of May, immediately following the third year examinations.

What are the advantages of such a program? The following seem to stand out:

1. It would permit students to take bar review courses and still attend some type of final ceremony.

2. It would provide a fitting program at the end of what most students would call three years of hard work.

3. It would also if so framed and worked out be nice for the parents and wives, many of whom have made sacrifices during the students' three years here. It would provide them with an opportunity to see the school, to meet other students and to possibly hear some of the faculty. Many parents enjoy and look forward to this type of thing.

4. It would help to develop and maintain a personal atmosphere which is not always found at a large professional school.

5. It could be used to emphasize alumni participation and assistance.

The details of such a program would have to be carefully worked out so as to be practical and so as to accord with the desires of the graduating class. This however, should not be difficult if such a program is desired, and much of the planning could be done by the students themselves. In addition, there would be questions of time, place, and faculty participation in the program itself.

It should be emphasized that the proposed program would not in any way interfere with the regular University graduation. Those that can and those that live in the local area will also be able to attend the University graduation.

It is suggested that some sort of final program be given serious thought. If the students do not want it in a positive way, then it should not be considered. If they do, and it is possible and practical then it should be considered. A final suggestion would be that a survey of student opinion be taken either by petition or by student organizations following an adequate time for discussion.

DONALD B. KING, 3L

ROBERT E. WILLARD, 2L

Sub Judice

LITTLE KNOWN CAUSES OF ACTION

Action of Oceanic Restraint. This action first arose in England under the reign of King Canute. *Rex v. Tidewater*, 3 Crown Cases 272 (1030). In these early cases the action was not recognized under the common law. Some authorities maintain that the true origin of the action can be traced to a dictum of ancient Persia. See *Xerxes v. Hellespont*, 42 Old War Stories 862 (460 B.C.).

In any event, the passage of time gave increasing recognition to the action. An important continental decision was *Dikes v. North Sea*, 32 Netherlands 442 (1570). Although the doctrine of this latter case has been generally accepted, the action was denied in a recent American decision. In *re Carol, Diane, et al.*, 357 Weather Reports 685 (1954).

Off the Record

Congressional investigator: Are you willing to take an oath to support the constitution?

Law professor: Why not? It has always supported me.

Puzzle

1M	2X		3T	4L	5S	6J	7A	8G		9J	10W	11V		12R	13D
14T	15Z	16V	17I	18G	19J	20P		21U	22H		23T	24Z	25X	26W	27M
28L	29U	30V		31G	32S	33B	34L	35D	36K	37A	38C	39J		40I	41M
	42B	43M		44J	45Z	46L	47A	48N	49R		50E	51V	52W	53K	
54A	55S	56H		57Z	58I	59F	60H	61T		62N	63Q	64K		65Q	66R
67G	68M	69D	70W	71V	72Z		73R	74S	75T	76C	77A	78G	79Q	80J	81W
82N		83D	84H		85V	86S	87P		88O	89U	90Y	91A	92L	93Z	94S
	95Y	96J	97P	98D	99B	100X	101S	102V	103L	104O		105E	106C	107R	
108S	109A	110W	111N	112R	113E	114O		115D	116C	117O	118U	119Q		120C	121M
	122N	123D	124P	125O	126F			127Y	128T	129A	130B	131G	132J	133M	134S
135V	136L		137E	138P	139U	140T	141K	142V		143D	144C		145N	146I	147B
	148I	149K	150H	151P	152D	153Z	154U	155N	156A	157F		158H	159T		160K
	161N	162L	163P	164X		165R	166D	167K	168Y	169M	170G	171L	172O		173H
174Y	175R		176I	177Y	178J		179Q	180O	181W		182D	183Q	184A	185B	
186N	187A	188B	189E	190Z	191V	192S		193R		194W	195R	196L	197C	198I	
	199U	200M		201F	202H	203E	204K	205J		206O	207X	208M	209B	210F	BLB

A. Equitable remedy

129A 77A 184A 54A 109A 7A 47A 91A 37A 156A 187A

B. Dispossession

147B 188B 42B 33B 130B 99B 185B 209B

C. Wise king

76C 38C 116C 120C 197C 144C 106C

D. Civil law surrejoinder

98D 13D 152D 35D 166D 69D 115D 182D 143D 123D 83D

E. Composer

105E 113E 50E 203E 189E 137E

F. Multitude

126F 59F 163F 201F 157F 210F

G. Title of dignity

18G 78G 67G 170G 131G 31G 8G

H. Earth vent

150H 158H 84H 22H 56H 202H 173H 60H

I. Professionally right

198I 58I 146I 40I 148I 176I 17I

J. Conferrer

39J 44J 19J 132J 9J 80J 6J 178J 96J 205J

K. Will maker

167K 204K 64K 53K 160K 36K 149K 141K

L. Required

162L 28L 103L 196L 171L 34L 92L 46L 4L 136L

M. Accidental

121M 169M 200M 1M 133M 27M 41M 208M 68M 43M

N. Third part of a county

161N 62N 122N 155N 145N 111N 186N 82N 48N

O. Ship's trapdoor

172O 117O 114O 88O 125O 206O 180O 104O

P. Issue from

20P 151P 87P 97P 124P 138P

Q. Scotch quarter day

183Q 63Q 179Q 119Q 65Q 79Q

R. Came near

165R 73R 12R 195R 112R 193R 66R 49R 175R 107R

S. Pilothouse

108S 86S 5S 192S 94S 55S 74S 101S 134S 32S

T. Commanders

128T 23T 159T 14T 3T 140T 61T 75T

U. Preposterous

139U 21U 199U 29U 118U 154U 89U

V. Bleak

85V 51V 16V 71V 191V 11V 135V 30V 142V 102V

W. Rule by eight

81W 194W 110W 52W 70W 26W 10W 181W

X. Machine part

207X 2X 164X 100X 25X

Y. Straw roof covering

95Y 174Y 90Y 127Y 177Y 168Y

Z. Paying

153Z 24Z 190Z 15Z 93Z 45Z 72Z 57Z

Spell out the definitions by placing letters over the dashes. Copy the letters entered over the dashes into the diagram by reference to the numbers under the dashes and corresponding numbers in the diagram. It may sometimes be helpful to complete words in the diagram and

work back the definitions. Upon proper completion, the diagram will contain a quotation from a well-known law book and the initial letters of the defined words will spell out the title of the book. The answer will appear in the next issue.

Space Law and Metalaw — A Synoptic View

By Andrew G. Haley

Next year man will take his first step into outer space when an artificial satellite is launched from the eastern coast of Florida. Marking one phase of the International Geophysical Year, observations of the small sphere are expected to yield invaluable information to scientists concerning the outmost reaches of the Earth's atmosphere.

Slight as this beginning may seem, it is viewed as highly significant by thoughtful persons in fields other than science. In this article Andrew G. Haley, a former president of the American Rocket Society and a practicing attorney, considers a few of the problems which may arise when man's efforts to bridge space succeed. What law, he asks, will govern men when they leave this planet, with its "hodge-podge" of sovereign assertions?

Mr. Haley first cites the need for studying the question at this time, and proceeds to draw, from the past, principles applicable to the present and the future. Having concluded that our present system of international law is not founded solidly on natural law, he examines the need for regulating space travel, and suggests an organization for carrying out that task.

Earlier in his discussion Mr. Haley referred to a Spanish philosopher who lived four centuries ago and who called for recognition of the New World aborigines as equals. Subsequent generations of European colonists paid little attention to that advice. Mr. Haley ends by proposing two cardinal rules for space exploration. Had these rules been observed by man on his own world, the Empire of the Incas would still perhaps flourish, and Tasmanian aborigines might not be extinct.

In this first approximation of an approach to space jurisprudence there will be considered basic principles of anthropocentric law and metalaw. On the one hand we will consider the relationships of man *vis a vis* man in his ambit, and on the other hand the relationships of man with intelligent beings who may be different in kind and subject to different frames of existence.

Anthropocentric law is simply the law of human beings. Corpus Juris Secundum states that the term "law" is frequently employed as referring to a science of principles; and, specifically, a science or system of principles or rules of human conduct; "a system of rules and principles, in which the rights of parties are protected and enforced; a system of rules conformable to the standards of justice and on an enlarged view of the relations of persons and things as they practically exist; a mass of principles classified, reduced to order, and put in the shape of rules, agreed on by ascertaining the common consent of mankind; rules of civil conduct for the common good; rules promulgated by government as a means to an ordered society; the enforcement of justice among men." It is also said that the very definition of law is *sancto sancti jubens honesta et prohibens contraria*.

Many Definitions

The thinkers and the great works of history have variously defined the naked essence of anthropocentric law in one simple concept: Aristotle, "We should behave to friends as we would wish friends to behave to us"; the Babylonian Talmud, "What is hateful to thyself do not unto thy neighbor"; Epictetus, "Therefore if anyone would take these two words to heart and use them for his own guidance, he will be almost without sin. These two words are bear and forbear"; the New Testament, "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets"; Seneca, "You must expect to be treated by others as you yourself have treated them"; Ahikar, "According as I do to you so also to me"; Abdullah Ansari, "Treat others as thou wouldst be treated, dispense not to others what thou likest not for thyself"; Bidpai, "Men are used as they use others"; Mohammed, "Do good unto others as God has done unto thee"; Sadi, "Accept for thyself what thou wouldst accept for others"; Confucius, "What I do not wish others to do unto me, that also I wish not to do unto them"; Mahabharata, "This is the sum of all true righteousness; deal with others as thou wouldst thyself be dealt by. Do nought to others which if done to thee, would cause thee pain"; Sutra-Kritanga, "A man should treat all living creatures as he himself would be treated"; Rabbi Hillel, "Whatsoever is hateful unto thee, do it not unto thy neighbor. This is the whole of the Torah, the rest is but commentary." Thus it will be seen that all of the precepts of the Great Lawgivers, even that of the heterodox Hindu religion of Jainism, are, in each case, starkly anthropocentric.

Unconditional Concepts

Speaking specifically with respect to space law, Dr. Welf Heinrich, Prince of Hanover, in obvious philosophical concern over

the essential conflicts of law, states that our legal concepts must be as absolutely just as the concept of Kant's categorical imperative—a law that is unconditional and absolute, and whose validity does not depend on any ulterior motive or end. Kant states as one formulation: "Act only on such a maxim as you can will that it should become a universal law." Again Kant says, "So act as to treat humanity, whether in your own person or in another, always as an end, and never as only a means."

So far we have dealt only in pure definition of anthropocentric law. We have not considered rights or wrongs, nor the concept of the *fas* or *nefas* as in the Roman jurisprudence. In our later discussions we will deal broadly on these matters in connection with human exploitation of space. But before proceeding to such specifics we will define and distinguish metalaw.

Primary Maxim

To metalaw we can project only one principle of human law, namely, the stark concept of absolute equity. The natural law, as we know it, is anthropocentric in kind, and while such law must govern in space among human beings (as will be observed later) it nevertheless is the law of human nature alone. Under the concept of absolute equity we must project the possibility of an indefinite number of natures, and therefore of an indefinite number of frameworks of natural laws.

The fundamental discipline of metalaw may be stated in terms quite as simple as those quoted above from the great givers of the anthropocentric law. The maxim of metalaw which inexorably follows is "Do unto others as they would have you do unto them." These contrasting maxims express the Great Rules with such stark simplicity as to be perhaps the most beautiful of all ideas expressed by man.

During all the long centuries of human civilization no law giver has framed the Golden Rule in the language of the Great Rule of metalaw. This is probably due to some inherent necessity to relate all human law to oneself. It is a law for one frame of existence. But with equal positiveness the Golden Rule has no application whatsoever in the field of metalaw. In metalaw we deal with all frames of existence—with sapient beings different in kind. We must do unto others in different frames of reference as they would have done unto them. To treat others as we would desire to be treated might well mean their destruction. We must treat them as they desire to be treated. This is the simply expressed but vastly significant premise of metalaw.

Dealing with Aliens

But what of the problem of evil? We know that there are many sunlike stars, some older and some younger than our Sun. We may find inferior beings, and these we may keep from harming us by purely protective means. From superior beings we may expect wise tolerance of ourselves, because such tolerance would flow from their lack of fear. The habitat of evil will be the single frame of existence of the nefarious one and may be dealt with by his own community. In the human frame our law must be unconditioned and absolute in our control of the relationships of our own kind with all others. We must not set out to conquer—

if we do, we may find ourselves not the triumphant perpetrators of evil oppression, but the prisoners of the just.

At this point we must pause and ask, why waste time and energy in speculating on metalaw.

Why Discuss Metalaw

The activity would be fruitless if sapient life is unknown elsewhere in the universe and the reference to an indefinite number of natures would be meaningless. There is little evidence to indicate that there is other intelligent life in our Solar System. But our own galaxy, the Milky Way, contains *forty billion* stars, many larger and some smaller than our own Sun, and in Creation we know there are at least *forty billion* such galaxies. We know that the sun has numerous planets. We know that our planet teems with intelligent beings. We know that forty thousand sunlike stars have been catalogued. Is it probable therefore, that other stars have planets, and other planets are inhabited by intelligent beings? What are the odds on these propositions? We may inquire of the man who believes that a personal God is the Creator of all things. "You believe that all things were created by God for His own glory, but do you believe that the manifestations of God's glory are confined to this one world and to mankind?" The lawyer may ask the questions but he cannot answer them. Implicit in



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the very statement of the questions, however, is the possibility that the answers may be affirmative.

Life on Other Worlds

Some scientists take a more affirmative view on the existence of extra-terrestrial life. Shapley summarizes his views by stating that biochemistry and microbiology, with the assistance of geophysics, astronomy and other sciences have gone so far in bridging the gap between the inanimate and the living that we can no longer doubt whenever the physics, chemistry and climates are right on a planet's surface, life will emerge and persist. He adds that he is "not suggesting, of course, that *homo* is repeated. There are millions of variations on the animal theme."

The next logical question asserts itself: why not devote all this effort to developing our own world before going to other worlds?

Clarke proceeds to answer this question

by pointing out the numerous advantages of space exploration. These are, briefly, that the physical resources of our planet are limited; that the increasing pressure of population may force us to other worlds; that only through space flight can mankind find a permanent outlet for its aggressive and pioneering instincts; that the advent of space travel will produce an expansion of scientific knowledge unparalleled in history; and he concludes that even if there were not a single good scientific reason for going to the other planets man would still want to go there just the same.

Space Travel Near

Mallan justifies space exploration on similar bases. He mentions exhaustion of energy sources on the earth, the evolution of man to a considerably higher state than he has presently attained; the fact that some people may become dissatisfied with our present society and seek another, and the desire to make contact with other intelligent beings.

Haber states that the Universe is a laboratory in which nature performs her inimitable experiments and suggests that we cannot adequately observe them from the earth and that these experiments should be studied from all points of vantage; further, that we will have to make great strides in the future to be able to feed and contain the rapidly growing population of the world.

In a remarkable study Colonel Davis points out "History indicates that new scientific discoveries may reasonably be expected to make the conquest of space occur sooner and probably easier than presently predicted. . . . The progress of science is not linear, but rises exponentially at a very high rate. . . . I have come to the conclusion that our usual estimate of 25 to 50 years before man's first flight to the planets is probably much too conservative. . . . The problems in psychology and sociology related to the survival of a crew under the conditions of space flight are not simple, but they are highly analogous to certain present day problems in the operation of submarines, the manning of distant outposts, etc., and experience with present day problems will do much to provide answers to these serious questions. . . . We must see to it that research in the auxiliary problems is carried on so that when the necessary propulsion system has been given to us the auxiliary problems will also have been solved; and we can perhaps, much sooner than any of us think, actually embark on the first flight to the planets. As in the case of every new venture of man, the fundamental basis of space flight is thus creative imagination."

Is Speculation Premature?

Finally, we may ask—why deal with anthropocentric space law at this time.

Meyer agrees that the legal problems of outer space should be discussed now, although up to now no human being has entered outer space.

Hanover argues that the future alone will tell if the problems will ever become acute. Our present technical development, however, points to the possibility that the first attempt on a large scale at penetrating into space might be undertaken in the not too distant future. He states: "Let us hope that legal science will keep step with the technical development when this happens and that it will not be caught unprepared when confronted with the legal questions presenting themselves at such an occasion."

Cooper sums up the situation in which the world finds itself in regard to space law, "today neither lawyers nor governments are prepared to state the legal flight rules applicable to presently operating rockets and planned satellites . . . science and engineering have far outstripped the law. Such delay may be normal where legal rules must depend on known and accepted factual situations, but the gap between technological and legal progress must never be permitted to become too wide."

Effects on Aliens

Man has long speculated on creatures different in kind from man, such as angels,

genii, and so on, so speculation with respect to the disciplines of metalaw probably will become prolific as decades go on. The best the lawyer can do, however, is to list the manifestations of man and his artifacts of which we are not ignorant, and having listed them we may speculate with some justification as to their possible effects on other creatures.

Merely as an example let us very briefly consider the kind of phenomena associated with man's flight in space. Wherefore, what might be the effects on other creatures of (1) Communications system: (a) electromagnetic waves; (b) light signalling (photons); (c) in an atmosphere—of pressure waves (2) Propulsion: (a) infrared rays, from heat; (b) radiation from a nuclear process; (c) in an atmosphere—of pressure waves (3) Man's physical and mental properties; (a) parapsychological or telepathic impacts (b) body offenses and germ dissemination; (c) impact of ideas and customs of man.

Unexplored Field

The foregoing fragmentary thoughts serve to illustrate the vast field of speculation inherent in metalaw. We are now only at the sympathetic stage which may be illustrated by the despair of the Chinese in trying to stand the body odor of the white man on his first encounter.

In the not distant future, lawyers, scientists and sociologists will undertake studies of a substantive statement of metalaw and as a by-product of these studies our own anthropocentric law undoubtedly will be improved.

Even at this time we may postulate a profoundly necessary rule of space exploration, namely, in any instance where there is reason to believe that life exists on a planet, no earth space ship may land without having satisfactorily ascertained that (1) the landing and contact will injure neither the explorer nor the explored; and, (2) until the earth ship has been invited to land by the explored. But! the impatient one may say, this is like a requirement that man must make intelligible communication with an amoeba! The answer is that nevertheless the regulation must be adhered to without exception, or we will project into space the bleak and devastating geocentric crimes of mankind. Further, we must conquer certain problems of semantics before we are worthy of space travel beyond our Solar System. The regulation is so necessary that it would be better to destroy mankind than allow its violation.

Value of the Past

In considering the anthropocentric law as applied to space we may well examine the function of the surveyor's transit. We must have a means of looking back to get our bearing, or we will be unable to set a straight course in the future. Because such pursuit seems more useful, we will look more on the modicum of good thinking, and neglect the plethora of the bad. By searching the record of the past, we may find that no useful purpose was served by burning Socinus and Servetus for their alleged derelictions, so why burn Heisenberg or Yukawa for their doctrine of the principles of uncertainty to satify the cult of mechanical positivism. Or, more in point, we should take a look again at what happened to the Indians to fend against galacticide; we must consider colonialism to make certain such practices are never permitted in space, and so on. We must climb to a realistic and veracious plateau of evaluation.

Finding a Sound Basis For Space Law

Modern legal writers, largely influenced by Grotius, regard international law as nothing more than positive law, that is, law enacted by a government for the regulation of a society. In other words, the present day concept of international law recognizes only those rules of law which are adopted by governments, which are accepted by the judges of courts of justice, which are applied by them in decisions of cases, and which enter into the judgments and are executed. As Hackworth says, international law possesses the characteristics "common to municipal law." His meaning is illustrated by the law governing the

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air space of the earth. That law is based solely on each nation's absolute right of sovereignty over the space above its territory, a concept completely repugnant to the nature of our proposed travels in space, and more particularly to any possible interpretation of metalaw.

Natural Law Defined

In searching among the traditional philosophies of law for one more benign to space travel we may look to the writings of those publicists of the 15th and 16th centuries who believed that international law should come from the law of nature. The present pertinence of the "natural theory" of international law is all the greater when we consider that it received its most searching examination at another time when man was faced with the devising of a new system of law upon the discovery of a new world.

The school of international law which maintains that natural law should be the basis for international law is said to have been founded by Francisco de Vitoria. By his definition "the law of nations is the law which natural reason has established among nations."

Natural law, the keynote of Vitoria's philosophy, is a

"system of rules and principles for the guidance of human conduct which, independently of enacted law or of the system peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral and physical constitution."*

Natural law is not intangible and non-existent, as followers of the positive school of law insist. It is not imposed by a sovereign or a legislature; it grew up before either existed. It does not exist in code form and has never existed in statutory form. "It is a state of mind, which is however a fact, that certain rights and certain duties were necessary in any and every society composed of human beings."

Vitoria extended the principles of natural law and applied them to international law as a basis of cooperation in the world community. He was motivated to a great degree by the reports sifting back to Spain of the conditions in the new world and the shamefully bad treatment accorded the natives by adventurers interested only in gain. The success of the adventurers would have meant annihilation of the Indians. With this need, then, for a law to govern a nation's actions in new territory and in relation to other nations, Vitoria set forth his principles of international law.

Rights of Aborigines

The rule of the law of nations "that what belongs to nobody is granted to the first occupant," said Vitoria, could not be applied to America, for the land was held in lawful possession by the Indians. He stated further, that, "Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them." The law of nations, which is either natural law, or derived from natural law, constitutes the basis for this rule, said Vitoria. Citizens of one state, then, could not be prevented from travelling or living in other states, "provided this in no way enured to their hurt and the visitors did no injury." While these principles fairly state anthropocentric law, they cannot be reconciled with metalaw unless further qualified and distinguished as shown elsewhere in this paper.

Vitoria's system of international law is based upon association, a community of interdependent states, each possessing rights, and reciprocal duties. "Nature has established," Vitoria adds, "a bond of relationship between all men." He recognized the Indians as "States of the New World to which he would attribute the rights of States in the Old World." Hence, the dominant group could not appoint its leader as the leader of the New World without the assent of the populace. Irrespective of size, form of government, or religion, all states were equal and independent in Vitoria's system.

* *Black's Law Dictionary*, Third Edition, 1933, p. 1223. See also St. Thomas Aquinas, *Summa Theologica*, I-II, 97, 1 and 1: "The natural law contains certain universal precepts which are everlasting whereas human law contains certain particular precepts according to various circumstances."

Natural Law Universal

These principles were further extended by another Spaniard, Francisco Suarez. He accepted the basic tenets of Vitoria's work, but proceeded to make clear distinctions between natural law and law of nations. Writing after the death of Vitoria, he advocated an association of States and the adherence to laws in the association of States. The law of these States, Suarez says, comes about "in great part by natural reason, nevertheless not sufficiently and immediately for all matters; and therefore certain special laws could be introduced by the usage of these same nations . . ." But, Suarez said, the basis of these special laws should be natural law, founded on reason, "the law everywhere existing among human beings in society, regulating the simple needs of its members and the rights and duties of society towards its members and itself." Natural law was to be distinguished from law of nations, however, for natural law is immutable and universal and originates from natural evidence, while the law of nations is changeable, not common to all, and of positive and human origin. The law of nations, applicable as it may be to the world community, is still founded on "probability" and the "common judgment of men."

Suarez' great distinction was that natural law arises of "necessity from the nature of things by an evident and logical deduction from natural principles," its obligatory character being due to its natural source, and prohibits that which is evil *per se*, while the law of nations defines the evil in prohibiting it. The two legal systems, however, also have points in common. They are both "in a certain sense common to all people, . . . they apply only to human beings and they both include precepts, prohibitions, and also certain privileges and permissions."

Suarez envisioned, as did Vitoria, an international community composed of independent, perfect States bound by "a certain unity," with each "a member in a certain fashion of this universe, so far as it concerns the human race. Such an international community was an outgrowth of state government, based upon the natural impulse of man toward social relationships, urging them to unite. This concept furnished the basis for the more impressive international community envisioned by Vitoria and Suarez, founded on the same basic precept.

International Law Found Inadequate

Wars, colonialism, and strong nationalism throughout the world have overwhelmed the sound basis of international law for which Vitoria and others argued. Although phases of the law of nature and some principles of equity and morality are infused into it, international law today is largely self-serving municipal law.

Natural law, Aristotle said, ". . . is that which has the same authority everywhere, and is independent of opinion . . ." virtually the antithesis of natural law as thus defined. Since what is needed, above all, in evolving rules of conduct for the opening of the new frontier in space, even in the realm of anthropocentric law, is a set of principles which are beyond terrestrial disagreement, it is evident that our space jurisprudence must be based upon something other than present day international law.

The Just War

This conclusion is aptly illustrated by the "international law" relating to rights in air space. This law is not international—it is a hodge-podge of strong laws of individual nations which assert absolute sovereignty over air space. There are a few pious declarations of international organizations hinting at the need for some sort of freedom of the air. But there is really no such freedom.

In one's search for basic concepts on which to found space law one may look with some comfort on the writings of another publicist of the same period. St. Thomas More, Chancellor of England, postulates five situations in which the "Utopians" may fight "just wars": (1) "where a very just cause of war" exists, such as a needy nation taking over territory left idle by another nation; (2) wars to assist friendly neighbors to win back their freedom from tyrants; (3) wars against an aggressor to avenge injuries to friends; (4) wars to overcome an enemy outside one's own territory if an attack is

being mounted by the enemy; (5) defensive wars on the side of an ally. The Utopians hated war, and the very exceptions to the general philosophy against war further illustrate the hopelessness of borrowing from human application. Vitoria rejected the Roman principle of extension of empire "in the cause of allies and friends" as a basis for granting Spain any territory or rights in America. Thus we have rifts in the clouds, but the sky is not yet clear.

Who May Travel In Space

Having affirmatively examined the *jus gentium* for good and sound principles we will accept the wisdom we have found and because of the inevitable decision which must be made, we will not look now to the long and sordid history of power politics, the implementation of the evil principle that might makes right, the endless records of treaties of convenience or to unprincipled writings of certain publicists and law givers. Instead, we will take a short look at one more specific principle and then discuss the future.

Who may leave the Earth to travel in Space? The analogies derived from present law are of little help. Any discussion of the legality of restricting the egress of humans from the boundaries of the nation wherein they reside necessitates an understanding of the nature of the individual's "right" to depart from such confines. Grotius taught that in the absence of an express prohibition, or a custom to the contrary, having the force of a convention, the right to emigrate could be fully and freely exercised. He asserted that whoever submits to a government does so solely for his own good and based the rule of freedom of emigration on the natural obligation of preserving oneself. Puffendorf held that members of a society ought to be permitted to retire to any place in which they hoped to better their circumstances. Even before the times of these publicists, Vitoria taught that people have the right to travel to any lands they desire subject to the restriction that they must not do harm to the natives residing therein. Vitoria based his assertion on a recognition of "natural society and fellowship" and the idea that "everything is lawful which is not prohibited or . . . injurious or hurtful to some other being."

Historical Emigration Law

While authorities are divided on the question of the King's right in the earliest days of common law, to restrain a subject from leaving the realm, the fact remains that travelling abroad was one of the activities carefully supervised in early times to prevent subjects from becoming "infected" with foreign and new and hence presumably dangerous ideas. This policy was effectuated by resort to the writ of *ne exeat regno* by which the king commanded a subject not to go out of the realm. The writ under one name or another is used in many countries at this time but is generally restricted to cases of equitable debts and claims. An early English law proscribed the sending of children out of the country for the purposes of attending Catholic Seminaries. This law was subsequently broadened to prohibit such religious adherents from leaving for any purpose.

The doctrine of free egress was brought to America by the Colonists who adhered to Blackstone's theory that English subjects had the right to come and go as they pleased unless a royal injunction had issued against them. The Articles of Confederacy of the American Southern States provided for free ingress and egress to and from any state for all free inhabitants, excluding only "paupers, vagabonds and fugitives from justice." While the American Constitution says nothing explicit concerning freedom of international travel, Article IV, Section 2 does guarantee freedom of travel within the limits of the United States.

Some Restrictions Are Necessary

Who then should be denied egress to space? Paradoxically, the first to be excluded are those who would exclude others for any political reason, because their moral make-up obviously would be inimical to the concepts of fundamental justice upon which space law must be founded. We would also exclude the "nefarious" according to the original Roman law meaning of the word. As the welfare and happiness of all passengers must be of

paramount importance, the ultimate decision as to who might be included in the complement of any particular voyage would undoubtedly rest with the passengers as a body.

Another basis for restraining those who may explore space at least in the beginning might well depend on the purpose of the emigration.

Thus permission might initially be granted only to space technicians much in the same manner as permission to travel is currently restricted to various persons such as reporters, nurses and so on in time of unrest in the terrestrial areas sought to be visited. Also, travelers in Europe immediately after the war were restricted due to the shortage of food and overtaxing of transportation facilities. For a while it may be necessary to limit travel to planets for similar reasons, e.g., shortage of oxygen and food.

Uniform Principles Needed

The publicists and statesmen of the world must arrive at a new and uniform set of legal principles for space travel. The necessity for rudimentary solutions of initial problems is now on us. The launching by the USA and the USSR of earth orbiting unmanned satellites in connection with the International Geophysical year is legally possible for the sole reason that no nation has voiced objection, although the satellites in describing their orbits may violate the municipal law of half a dozen nations. Indeed, the International Civil Aviation Convention forbids the unauthorized passage of pilotless aircraft "over the territory of a contracting state."

Groups Sense Problem

A few of the government-maintained international organizations have displayed commendable interest in the problems of space travel. The International Civil Aviation Organization at Caracas in June 1956 recognized the need for the study of space law by that Body; the International Radio Consultative Committee only recently at its Plenary Assembly in Warsaw voted associated membership to the International Astronautical Federation on the basis of its petition to inaugurate a study of space communications; UNESCO has sent a representative to this IAF Congress; subject to the decision of the General Conference at New Delhi, November next, UNESCO has recommended Observer status for the IAF, and so on. Slowly, but surely, the international nature of space travel regulation is being recognized. The administrative groups of many of the private international scientific organizations look at astronautics with a certain amount of timid horror, but these groups are being shocked into interest by robust and learned members who recognize in astronautics one of the truly great challenges of civilization.

As there exists no body of statutory or case law appropriate for space travel, and as all problems in connection therewith are international in nature, an international formulation of space law must evolve.

Duties of International Body

This probably will come about in the usual hit and miss pattern. Finally, someone will object to the IGY satellites, or bigger and better non-IGY satellites will be launched and we will hear threats of war. The United Nations will have a look at the issues presented, or new multilateral treaties may be considered. In time piecemeal and stop-gap solutions will be adopted. But the problems will mount inexorably and the community of nations will be forced to take steps to create a body of space law.

At first we may hope only for an international body authorized to promulgate uniform regulations relating to take-off and landing procedures, and for the general safety of the people of Earth. Initially space vehicles will be owned by nations or groups of nations and extension of international regulation will be fought jealously. But gradually and inexorably traffic will increase, new propulsive systems will be found which will reduce the cost of construction and operation, commercial enterprise will demand access to space, emigration will commence, meteorite mining will become an industrial objective, and all the ancient problems of law will be reassessed under vastly more complicated circumstances.

Old Problems Return

Again there will arise in a new frame of reference problems of neutrality and belligerency, of nationality, domicile, statelessness, internment, asylum, sequestration, blockade, hovering, extraterritoriality, embargo, reprisal, boycotts, expropriation,

piracy, contraband, customs, prize proceedings, emigration, immigration, mandates, colonies, tortious violations, civil claims, venue, jurisdiction and so on.

It may be too much to hope that civilization will contain these matters, a view which is cynical in an ultimate sense, because lack of containment would project our destructive forces and philosophies throughout the Universe. We cannot share this view as we believe space exploration and settlement will dignify and enrich mankind, erasing forever devastating economic problems and affording vistas of the mysteries of creation immeasurably more challenging and interesting than we now conceive of, and so engender a measure of tolerance and compassion that man will rise above his past. The good solutions may come only after another great war which will arise over the very problems of containment.

Even as the great chancellor of England wisely speculated in "Utopia" on the attributes of a justly-governed community of civilized people, we have the temerity to speculate briefly on the source of space law during the coming Space Age.

Universal Organization To Govern Space

In time there may be created on earth an independent and sovereign Authority of which every human being would be a citizen by virtue of his existence and to which all nations would surrender their sovereignty to the extent that no nation as such might own or operate a space vehicle, free maneuvering, or otherwise, without a license from such Authority, and an agreement to conform to the regulations issued by such Authority. In no case might a license be unreasonably withheld. Private citizens and concerns would be eligible for similar licenses. The Board administering the Authority would be constituted on the fairest basis then known to mankind.

Rules for Exploration

The Authority would have the power and resources in space in cooperation with lunar and other planetary authorities to contain violence and to administer and enforce regulations relating to safety, sanitation, health, asylum, equipment, navigation, emigration and immigration, all of which regulations would conform to the most universal and enlightened principles of freedom and the use of property and the Authority would promulgate a code defining public and private liability for damage.

The regulations would be interpreted and justice administered by a court constituted within the Authority but answerable only to itself.

The Authority would provide positive safeguards for the protection of the inhabitants of other worlds, the basic principle being that there may be no visitation whatsoever of any inhabited area until intelligible contact will have been made and the Authority is satisfied that no physical or psychological hazard exists to either the explorer or the explored.

The jurisdiction of the Authority would extend over the surface of the earth and over earth space ships while maneuvering in free space. From the beginning colonialism would be forbidden, and the lunar and planetary communities would be independent—thus projecting into space, free and enlightened groups of human beings, spiritually conditioned to face the problems of carving out new living space from new land.

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Uncertain Presidential Succession Could Endanger Nation

(Continued from page one)

tial Succession Act of 1947 assumes that the Vice-President-elect would act as President until the disability were removed. The statute also establishes a line of succession headed by the Speaker of the House to act as President in case of vacancy or disability on the part of both the President-elect and Vice-President-elect.⁴

While the party resolutions for substituting a presidential nominee are important only until December 3 and the Lame Duck Amendment provides a rule of succession only from December 3 until January 20, the problem of death, resignation, inability, or removal of a President after his inauguration is a continuing question.⁵

The real difficulty is rooted in the assumption that, when a President dies, the Vice President becomes President and does not merely act as such. This makes it easy to claim that a Vice President supersedes the President whenever he exercises presidential power. Consequently, whenever a living President has been disabled, the Vice President did not act as President because of the fear that he would become President and thereby dispossess the incapacitated incumbent.

Therefore, actual disabilities were ignored out of personal loyalty to the disabled Presidents. In Garfield's case the Cabinet concluded that there was no disability. During Wilson's illness, his wife and personal entourage denied that a disability existed. Both decisions were contrary to fact. And on both occasions the public interest was jeopardized by having no active President.

Garfield's Incapacity

President Garfield did not die until eighty days after he was shot on July 2, 1881. During the period of his fatal illness he performed only one official act, the signing of an extradition paper. Although his mind was clear during the first weeks of his invalidism, the daily bulletins of his physicians show that he was physically unable to discharge the duties of his office.

During these eighty days a great deal of important business required the President's personal attention: there were postal frauds; officers did not perform their duty because they had not been commissioned; the country's foreign relations were deteriorating. Yet the department heads transacted only such routine business as they could handle without the President's supervision.⁶

Affairs of State Neglected

Nearly every day newspapers mentioned some important matter which was ignored merely because it requires the President's personal attention. At one time there was a rumor that action would be brought for a writ of mandamus directing Vice President Arthur to assume the President's powers and duties during Garfield's illness; but no action was taken. Instead, the Cabinet continued to conduct the affairs of government as best it could without an active Chief Executive.⁷

About the first of September, President Garfield's condition improved, and his physicians thought he would recover. The difficulty was that his convalescence was expected to require several months, and his extended disability had already caused the

suspension of most public business in every executive department. Consequently, the Cabinet was compelled to consider the possibility of calling on the Vice President to act as President during Garfield's recuperation.

Although there are reports that the Cabinet actually invited Arthur to act as President, none of these can be conclusively documented. In any case, Arthur did not undertake the discharge of Garfield's powers and duties for three reasons: First, Arthur was in an extremely delicate position. Garfield belonged to the liberal wing of the Republican Party. Arthur, who belonged to the Stalwart wing of the GOP, had been nominated for Vice President only in an attempt to heal the bitter schism in the Party. This situation made Arthur reluctant to intrude in what might seem like Garfield's domain.

Second, there was no agreement on the constitutional meaning of inability or on how such an inability should be established.

Finally, and most important, the Cabinet feared that, if Arthur exercised presidential authority, he might actually become President and thereby oust Garfield for the remainder of the term.⁸

Meaning of "Inability"

The answers offered to the constitutional questions involved were conflicting and confusing. Many legal authorities thought that mental inability was the only one covered by the Constitution. They held that physical disability, however severe, was not sufficient to devolve presidential power on Vice President Arthur.

Other equally competent legal authorities thought the word "inability" covered any case in which a duty should be discharged but which the President was unable to perform, whatever the reason. A number of lawyers and legislators held that a disability must be permanent and must extend throughout the entire term in order to be an "inability" in the constitutional sense.⁹

Doubts on Procedure

Whether Garfield's inability would prove to be permanent or not, nobody could predict. Mental disability probably did not exist during the early days of his illness. During the last days of his sickness, however, Garfield's mind was weak and he suffered from hallucinations. Whether the cause of Garfield's inability was physical or mental is relatively inconsequential. The important thing is that the Government was almost paralyzed for eighty days.

One cause for inaction was that no one knew exactly how the existence of inability should be established. Legal opinion on this question was also conflicting and confusing. Although some thought that the courts, the Congress, or the Cabinet should decide that the President was disabled, or even that the irrational President should do so, most informed opinions supported the position that the Vice President should determine that the President was incapacitated. But nobody knew how to compel the reluctant Vice President to take this action.¹⁰

Woodrow Wilson's disability was more serious than Garfield's, not only because it lasted longer, but also because it occurred during the Senate debate on the League of

Nations. There can be no doubt concerning Wilson's inability to perform the duties of his office during much of the time after his collapse on September 25, 1919.

During the special session of the Sixty-sixth Congress, for example, twenty-eight acts of Congress became law because of the President's failure to sign them in the requisite ten days. He did veto the Prohibition Enforcement Act on October 27; but from October 28 to November 18 he passed on only one of the sixteen acts presented to him.¹¹ He did not meet his Cabinet for eight months during his illness.¹² The Senate Committee on Foreign Relations was unable to get action or information from him on the Shantung Settlement, a situation which caused Senator Albert B. Fall to suggest that the Senate should recess until the President became able to resume the responsibilities of his office.¹³

Wilson's Illness

Although the Constitution makes the President the chief of our foreign relations and says that he shall receive the representatives of foreign states, Edward Viscount Grey, the British ambassador, spent four months in Washington without seeing President Wilson even once.¹⁴ In November of 1919, Senator Gilbert M. Hitchcock, the Democratic leader in the Senate believed that he could get the Republicans to compromise on the Versailles Treaty. But the President's physicians would not allow Hitchcock to see the President. And, as Hitchcock said at the time, he had to consult with the President before the Democratic Senator could agree to any compromise.¹⁵

The exact degree of Wilson's disability is uncertain; but this much is known: Wilson had a stroke; his left side was paralyzed. It is uncertain whether his inability was only physical or both physical and mental during at least part of his illness. There is good evidence that he was unconscious or only semi-conscious over long periods. But there are also rather authoritative denials to this. Whatever his condition, the Vice President and the Cabinet were kept wholly ignorant of it. Mrs. Wilson and the White House entourage conducted the affairs of state in such manner and by such methods as they could devise.¹⁶

Actions of Mrs. Wilson

There was probably no foundation for the many rumors that Wilson's signature was being forged on official papers. Mrs. Wilson and Dr. Cary T. Grayson did determine many questions of public policy, however, by deciding whom the President might and might not see, by deciding how long he could converse with those whom he was permitted to see, and by deciding what papers should be presented to him and which should not.

State papers were usually given to Mrs. Wilson first. If she thought her husband was strong enough to see a particular paper, she gave it to him. If she was in doubt as to the effect it might have on him, she submitted it to Grayson. If Grayson thought that the President could pass judgment on the matter without excitement, the paper was shown to him. If not, the paper was put aside and passed on to Secretary of the Treasury David Houston or to someone else in whom Mrs. Wilson had confidence.¹⁷

Cabinet Carried On

Soon after Wilson's collapse the Cabinet joined forces with his personal entourage to keep the Government operating so that the constitutional question of disability would not be raised. The Cabinet's task was not an easy one because the White House group kept the President's condition a secret and because the Wilson Administration had been largely a one-man operation.

The Eisenhower Administration, in contrast, has been the work of a team and its policies have been so clearly defined by the team that the business of government could run more smoothly during the President's illness than in Wilson's time. Within a few days after President Eisenhower's heart attack, it was announced that the National Security Council and the Cabinet would meet on schedule and the Vice President

would preside at these meetings as he had on previous occasions when the President was absent.

The Lansing Incident

During Wilson's illness Secretary of State Robert Lansing called twenty-one Cabinet meetings to transact executive business. Although these meetings were held for nearly four months before the President even heard of them and although Lansing's action helped to forestall a congressional move to establish the President's inability,¹⁸ Wilson accused Lansing of usurping presidential power and asked him to resign.¹⁹ The press and members of Congress supported Lansing almost unanimously,²⁰ but Wilson appointed Bainbridge Colby in Lansing's place.

Another device for the discharge of executive business was to have others act for the President whenever possible. Many of the documents issued in the President's name during the last months of his term were actually prepared by Secretary of State Colby, Secretary of the Treasury Houston, and Wilson's two secretaries, Charles Swem and Joseph Tumulty.²¹ The important thing is that public policy was being formulated by people whose stand was not necessarily Wilson's, by persons whose capabilities were not always commensurate with their loyalty to Wilson, and by people who had no legal mandate.

It was common knowledge that, from September 25, 1919, to March 4, 1921, affairs of government were not conducted in the manner stipulated in the Constitution and laws, but still nothing was done to correct the situation. Congressional Democrats took no action to bring about Vice President Marshall's succession because they did not want to give more publicity to the President's illness than was absolutely necessary. The Republicans were not anxious to take the first step because they hoped for some disclosure which would show that someone was acting in Wilson's stead and forging his signature. Moreover, the Republicans realized that the President's continued inability embarrassed the Democrats.²²

Marshall Feared Assassin

The failure of Congress to declare the President's inability did not exhaust all possible remedies. In fact, it was doubtful if Congress had the constitutional power to take some action.²³ Since the Constitution devolved presidential power on Vice President Thomas Marshall, most constitutional authorities thought he should undertake to exercise presidential power and thereby indirectly determine that Wilson was disabled.²⁵

But Marshall refused to act as President, saying that he feared he would be assassinated. Therefore, the problem became one of compelling the reluctant Vice President to act. Although it was suggested that the Supreme Court might issue a writ of mandamus directing Marshall to act as President, the Supreme Court does not have original jurisdiction in such cases.²⁶ Moreover, it is at least doubtful whether the question of inability is justiciable.²⁶

Since the Congress, the Vice President, and the courts could not—or would not—make a move to declare the President's inability, the only remaining possibility was that the Cabinet or the White House circle take the first step. It seems that the Cabinet actually did consider asking Vice President Marshall to act as President; but the White House group opposed the idea.

Because of the precedent by which a Vice President becomes President when a President dies, asking Marshall to act as President during Wilson's inability was viewed as disloyalty. Wilson's friends did not seem to think that Marshall should remain Vice President and discharge the presidential functions only until the President recovered. Instead of looking on Marshall as one who could

lighten the President's burden, they viewed him with antagonism.²⁷

Need for Clarification

The Garfield and Wilson cases show the need for a means of supplying an active executive when a President is disabled. It is true that the Constitution provides that the Vice President shall act as President in such cases.²⁸ But the precedent by which a Vice President becomes President²⁹ has nullified this constitutional provision for the administration of the Government when a President is incapacitated. This problem is independent of the difficulty of determining a President's inability and would not be lessened by enactment of a statute providing a means by which such disability could be established.

Restrictive definitions of "inability" and proposals for a formal method of determining disability are based on the premise that a Vice President becomes President and thereby ousts a disabled President. If it were recognized that an acting President does not dispossess a disabled President, the matter would usually be settled by the disabled person's inviting his successor to act for him. The Constitution vests the power of decision in the successor, however, in case the disabled person cannot—or will not—recognize his own inability. Since the Constitution vests the power of decision in the successor, it is doubtful if Congress could divest him of this power or limit his exercise of it.

Congress could, nevertheless, relieve him of the embarrassing duty of taking the initiative. It could do this by a concurrent resolution requesting him to act as President, and also by empowering the Cabinet, the National Security Council, or some officer to inquire into the facts and advise the successor of the finding. The responsibility for the decision, however, would rest with the successor as provided in the Constitution.

Remedy up to Congress

In summary, the problem of presidential inability could be solved by a concurrent resolution declaring the following general principles: (1) One who acts as President because of the inability of the President does so only until the inability is removed. (2) Inability shall be construed to include any *de facto* inability, whatever the cause or duration, if it occurs at a time when the urgency of public business requires executive action. (3) The person on whom presidential power devolves is the judge of when inability exists.³⁰

Although this congressional declaration would add nothing to the succession clause, it would remove the doubt and confusion which now surround the clause. It would give the inability clause that practical interpretation which the framers of the Constitution intended. For this reason a concurrent resolution would be sufficient.

Because of our constitutional precedents, however, it may be desirable to declare these three principles by constitutional amendment. Once this is done, Congress should pass a statute providing a method whereby official notification would be sent to the successor in order to relieve him of the delicate task of taking the initiative. Congress should make it clear, however, that a successor's decision need not await such notification or be bound by it.³¹ Suffice it is to say that, in default of such congressional action, the inability clause of the Constitution will remain a dead letter. END

Footnotes . . .

Space limitations prevent the Record from printing the footnotes to Dr. Silva's article. However, the footnote references have been retained in the article, and mimeographed copies of the notes are available without charge from the Harvard Law Record, Cambridge 38, Mass.

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Alumni Notes

LL.B. '23—*Emmert Laurson Wingert* was sworn in as a Justice of the Supreme Court of the State of Wisconsin on September 10th.

LL.B. '34—*Stuart T. Saunders* appointment as Executive Vice-President of the Norfolk and Western Railway Company, was announced by the company's Board of Directors.

LL.B. '40—*John P. Fishwick* was appointed General Counsel of the Norfolk and Western Railway Company. The Railway's offices are at 1428 Suburban Station Building, Philadelphia.

LL.B. '51—*Norman J. Bergman* has announced the opening of his office for the general practice of law at 1 East Forty-Second Street, New York 17, New York.

George B. Gelman and *Wilfred W. Hollander* have formed a partnership for the general practice of law with *Pierre P. Garven* with offices at 24 Salem Street, Hackensack, New Jersey. Mr. Gelman was formerly associated with the firm of Paul, Weiss, Rifkind, Wharton and Garrison in New York City. Mr. Hollander is the former Assistant United States Attorney, Chief, Criminal Tax Division for the district of New Jersey.

Ernest J. London, recently associated with the New York firm of Wickes, Riddell, Bloomer, Jacobi & McGuire has announced the opening of his law offices, Suite 825, Ingraham Building, Miami 32, Florida.

LL.B. '52—*Coleman Volgenau* has formed a partnership for the general practice of law with *Joseph C. Tisdall* with offices at 602 Brisbane Building, Buffalo 3, New York.

LL.B. '53—*Herbert C. Klein* has become associated with Budd, Larner & Kent, 60 Park Place, Newark 2, New Jersey, in the general practice of law.

LL.B. '56—*Martin Kramer* passed the New York State bar and is now associated with the firm of Paskus, Gordon & Hyman in New York City.

Frank A. Olson was admitted to the Illinois bar. He is an associate with Kirkland, Fleming, Green, Martin & Ellis, Chicago.

Women's Grades Hold Up, But Fewer Receive Degrees

On Sunday, October 9, 1949, news came that beginning in 1950, women would be admitted to the Harvard Law School, thereby ending a 133-year period of all-male attendance. So newsworthy was the event that the RECORD reported the announcement with the only banner headline in its history. Student and alumni comment was favorable to the move.

The decision to accept women was a final one. It was not conditioned on their future performance and in no sense have the last five years represented a "trial period" on the results of which depend the future policies of the school toward the admission of women.

On the contrary, the faculty recommendation to admit women reflected the feeling that the school had been delinquent in failing to accept women. The decision was a recognition that women had arrived in the field of law and deserved a place in the Law School.

Pursuant to the new policy, the Law School admitted 13 undergraduates in the fall of 1950 and in the following years each class has contained from eight to nineteen women. There are nine women in the present first year class.

Less Than Expected

The school expected the number of women to rise to about 5% of the total number of students and level off at that figure. However, the number has never exceeded about 3% of the student body. Interestingly, this figure closely corresponds with the percentage of woman attorneys in the United States—slightly over 2%.

Inevitably, the question of how well the women have done at the Law School has come up. Fortunately, statistics are available on their performance as compared with the entire student body. It must be borne in mind that, based as they are on a very small group, the figures are necessarily suspect. A very small numerical change in performance will result in a large percentage change.

From 1950 through the class entering in 1955, 82 undergraduate women have registered. Of these, 48 have already received LL.B. degrees. In addition, there are 14 women in the present second and third year classes, bringing the probable graduating figure to 62.

Restricting the figures to those years in which it has been possible for women to graduate—that is, the entering classes of 1950 through 1953—out of 63 registering undergraduate women, 48 received LL.B.'s. In addition, 9 women either withdrew or elected not to return. The remaining six, 9.5% of the total registered, failed to meet the stringent academic standards of the Law School. This figure compares

with a failure rate of approximately 9.6% of the student body as a whole over the same years.

Rates Not Reliable

That these percentage rates are too volatile to be regarded as reliable indices of performance is illustrated by the fact that if one of the four classes is excluded from consideration, the failure rate for the women is 6.8% as compared with an overall 9.6%, whereas if another of the four is excluded, the women's rate of failure is 11.3% as compared with an overall 9.4%.

These figures do not tell the whole story. Women have had their place in the honorary societies. To date, three women, *Priscilla Holmes*, LL.B. '55, *Nancy H. Goldring*, LL.B. '56 and *Nancy L. Boxley*, 2L of Richmond, Va. have been elected to the *Law Review* and one has served on *Legal Aid*. *Miss Goldring* worked on the Board of Student Advisors for one year before making *Review*.

Of the 48 graduating women, five were graduated *cum laude* and one was graduated *magna cum laude*; none has yet been graduated *summa cum laude*. Percentage-wise, 10.4% of the women in the years from 1953 through 1956 were graduated *cum laude* and 2.1% were graduated *magna cum laude*. In the same years, 13.2% of all students who were graduated were *cum laude* and 6.2%, *magna cum laude*. In addition, 6 men, or 0.3% of the total graduating students reached *summa cum laude* rank. Again, it is necessary to note the very small base on which the percentages of the women rest as contrasted with the large number of men involved.

There is, then, no statistically significant difference in the performance of women as compared with the student body as a whole at the Harvard Law School.

Attrition Rate Higher Than Men

It is true that, of those women who register, a relatively smaller number receive degrees than men. For example, for the years under discussion, 1953 through 1956, of 63 women who registered, 48 graduated—a drop-out rate of 23.8%. How much of this is attributable to the fact of their sex is speculative.

Unfortunately, no data has been compiled on what happens to the woman graduate of the Law School. 28 of the 48 graduates, so far as is known, are married, with one divorce already recorded. At least 24 of them are working, and some of these are married as well. There are no records available on the other 24; some may be working now and some may have worked for a time after graduation.

Marriage has no determinable effect on the schooling or career of the woman student, although presumably the rearing of a family would curtail professional activity.

—Vadimus

NEWS IN BRIEF

BULL AND BEAR

Royal Little, chairman of the board of Texttron, Inc., will speak tomorrow afternoon at 1:40 in Harkness Commons on the subject "Recollections of a Client," under the sponsorship of the Bull and Bear Club.

Third year students who have taken Corporations I will remember *Texttron, Inc., v. American Woolen Co.*, 122 F.Supp. 305 (D. Mass. 1954). Mr. Little, a controversial figure in that case and other managerial enterprises, has requested that members and guests of the club bring their wives to the talk. Mrs. Little will also be present at the meeting.

REPUBLICANS

The Harvard Young Republican Club has been chosen to co-ordinate publicity and demonstrations with respect to the November 5 appearance in Boston of President Eisenhower and Vice President Richard M. Nixon. Anyone interested in assisting to rouse public enthusiasm is invited to contact Dick Houlihan at 302 Story Hall, EL 4-6328.

STUDENT BAR

Judge Samuel S. Leibowitz of New York City will speak tomorrow evening at 8:00 in the James Barr Ames Courtroom in Austin Hall. The address, which is open to the public, will be sponsored by the Student Bar Association.

As a criminal lawyer for twenty-four years before his election to the Kings County Court in 1940, Judge Leibowitz defended 140 persons accused of murder. Of this group only one was executed. In his talk tomorrow, he will discuss "The Do's and Don'ts of the Criminal Trial."

LAW WIVES

On Wednesday, November 7, Ralph B. Dibble will speak to the Law Wives on "The Stock Market Today." Mr. Dibble is an Account Executive at the brokerage firm of Merrill, Lynch, Pierce, Fenner & Beane. The club will meet in the Large Meeting Room of Harkness Commons at 8:00 p.m.

ST. THOMAS MORE

The St. Thomas More Society will sponsor a mixer tomorrow evening in Harkness Commons from 8:00 until midnight. Girls from Regis, Wellesley and Simmons will be in attendance, while entertainment will be furnished by a dance band.

The admission fee will be 40c for members, 75c for non-members.

First Year Ames Sets Faster Pace

First year men will begin the first round of Ames arguments on November 20th, culminating several weeks of orientation activities sponsored by the Board of Student Advisers. By December 14th, 267 arguments will have been heard and judged.

According to Berton B. Subrin, 3L of Akron, Ohio, First Year Facts Chairman, eleven new fact situations are being employed this year, in addition to others retained from previous seasons. These replace previous cases which have been discarded as unsuited for first year arguments.

The Class of 1959 was introduced to legal advocacy by a series of activities which began on the evening of October 3rd with the premiere of the Board's new production of *Case in Point*. Frederick N. Young, 3L of Dayton, Ohio, chairman of the Board, has stated that the new technicolor film was viewed by an unusually large audience.

Library Tours

In the week after the showing of this film, supervisors of the 68 first year clubs took their groups on tours of Langdell, designed to demonstrate to the entering students the use of the library, not only for Ames work but for academic courses as well.

Last month Ellis E. Champlin delivered the annual West Lectures. Mr. Champlin discussed the proper utilization of the various law reporters, indices, and encyclopedias.

The Qualifying Rounds for Second Year students will begin on November 9th. George Adams, 3L of New York City, Administrator of the rounds, has announced that 64 cases will be argued by 32 clubs before the end of the rounds on December 5th. All arguments will be judged by a court consisting of a practicing attorney from the Boston area, a member of the Law School faculty, and a high-ranking third year student.

The eight clubs with the best Qualifying Round records will be eligible to participate in the quarter-final rounds next spring. The four surviving clubs from this round will compete in the semi-finals in the Fall 1957 semester.

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Important Reading

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A Free Man's Life

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When Louis D. Brandeis, son of immigrants, died in 1941, he had long been a revered and influential public figure, and had spent the last twenty-three years of a great career as a Justice of the United States Supreme Court. This first full-scale biography gives us the authoritative record; it gives us also a personal appraisal of his character, the influences that shaped him, and the impress that he made on law and life.

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