

The Harvard Law School Record

VOL. 2 NO. 7

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PRICE TEN CENTS

CLUBS SET TO TRY TO QUALIFY

Judges Announced For Third Term Initial Arguments

The docket for this week's arguments in the qualifying round of the Ames Competition, and the judges for each argument, have been announced by the Board of Student Advisers. The judges for the arguments to be held during the following weeks have not yet been determined.

In accordance with the customary practice, the bench for each argument will be composed of a member of the Boston bar as Chief Justice, a faculty member as one of the Associate Justices, and a third year student as the other Associate Justice.

Because of the great number of arguments and the shortage of judges, the Board has decided that ex parte arguments will not be held. Instead, the briefs of counsel in ex parte suits will be submitted to a professor for grading, and the grade received on the brief will be doubled to give the final score.

The docket for this week's arguments, the bench for each, and the place of each argument are given below. Unless otherwise indicated, the listing of the bench for each argument gives the name of the Boston bar member first, the faculty member second and the student third. All arguments are at 8 P.M.

Arguments on December 4:
Braucher vs. Cardozo. Bench: Charles W. Bartlett, William J. Bowe, Jr., Mathew W. Bullock, Jr. Place: Austin East.

Casner vs. Cox. Bench: Kenneth W. Bergen, Warren A. Seavey, Sam Fahr. Place: Austin West.

Frankfurter vs. Freund. Bench: Ernest G. Angevine, John A. Maguire, S. G. Albion. Place: Langdell South Middle.

Gardner vs. Griswold. Bench: Roger Hardy, Henry M. Hart, Clarence H. Dicus, Jr. Place: Langdell South.

Grotius vs. Hall. Bench: Charles W. Blood, William E. McCurdy, John F. McKenna. Place: Langdell North.

Hamilton vs. Holmes. Bench: Robert V. Brown, Carl H. Amon (Boston attorney in lieu of faculty member), William P. Bundy. Place: Langdell North Middle.

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YEARBOOK STAFF

The Harvard Law School Yearbook is now accepting applications from men who wish to serve on its staff. Editorial, business, photographic and art positions are open. Interviews for these jobs will be held on Thursday, December 5th, at 2 P.M. in Gannett House, first floor. These are paying positions. Work will begin this week.

START WORLD LAW MEETINGS

Pound, Fuller Advise On Unification Of Law

For the past two weeks a group of about twenty students have been holding meetings to discuss the possibilities of development of a world legal system. Organized by the initiative of William S. Barnes 3L, who first outlined the project in the *RECORD* (see issue of October 20th), the group is focusing its attention on comparative law as a means to an eventual world law. Regular meetings are held on Wednesday at eleven o'clock in Seminar Room three.

Dean Pound was present at the first meeting and discussed the difficulty of reconciling the common law with the ideas of the continental codes. He advised the group to learn more about modern Roman Law and recommended Sohn's *Institutes* as a foundation. His experience on an international claims tribunal after the last war impressed him with the difficulty of common action among lawyers and jurists of sharply different legal backgrounds.

This project is not particularly interested in international law (in the sense of control of states), but at the second meeting Professor Fuller pointed out that there is no longer a sharp distinction between international and comparative law. He discussed the efforts which have already been made towards an international sales act, and indicated that there is a surprising uniformity in the policy behind the commercial law of various countries. Professor Fuller advised the students to go behind the formulations of law and investigate the purposes sought to be advanced by law, a level at which unification could best be sought.

The group is continuing its regular discussions, and several professors have been asked to come to meetings in the near future.

CHINA TO BE DISCUSSED BY FORUM

Solution In China Debated By Prof. Chinese Counsellor

Political and economic conditions in China will be given the spotlight at the fourth lecture sponsored by the Harvard Law School Forum this semester at Sanders Theater at 7:45 P.M. on Friday, December 6.

The discussion will center about the question of whether the Kuomintang has made satisfactory progress in rebuilding the country and establishing a representative form of government or whether the Communist group is correct in its claim to the contrary. Emphasis will be given to the role America might play in building a strong united China.

Discussing the topic of "What is the Solution in China" will be Chen Chih-Mai, Counsellor for the Chinese Embassy, and John K. Fairbanks, Professor of History, Harvard, recently returned from the Far East. Professor Warren A. Seavey of the Harvard Law School and formerly head of the law school of Pei Yang University in China will act as Moderator.

Mr. Chen Chih-Mai received the degree of Doctor of Philosophy from Columbia University. Upon his return to China, he taught public law in a number of universities. When the war broke out between China and Japan in 1937, he was called by the government to serve as Counsellor and Director of Division A of the Executive Yuan (the cabinet) a post which was roughly equivalent to administrative assistant to the President of the Executive Yuan, Generalissimo Chiang Kai-Shek.

In June 1944, he was appointed by the Chinese Government to serve as Counsellor to the Chinese Embassy in Washington. He was on the Chinese Delegation to the Conference at Dumbarton Oaks and in San Francisco. He now serves also as China's representative to UNRRA and to the Emergency Food Council.

Professor Fairbanks was chairman of the Regional Committee in Charge of Chinese Affairs during the war and also chairman of the Information Division of the Far Eastern Bureau of the Office of War Information.

NEW APPOINTMENTS MADE TO LEGAL AID, BOARD, RECORD



Above are shown eight of the new members of The Harvard Legal Aid Bureau. A picture of Cunningham was unavailable.

"Magnificent Yankee" Reviewed; Seen As Caricature Of Holmes

"The Magnificent Yankee" written by Emmet Lavery and played by Louis Calhern is another example of the American theatre's ability to provide an evening's pleasant entertainment based upon competence and flair as a substitute for depth and power.

The play concerns itself with Holmes' Washington period opening when the justice is about sixty and spanning a thirty-one year stretch. It is interesting that both the author and Mr. Calhern are least impressive when their character is at the peak of his intellectual, and within the frame work of the play, physical powers. It is only in the last act when Holmes, aged and infirm, feels death like a shadow on the wall, that the play becomes moving, and Mr. Calhern's portrait takes on stature. More than half of the play is an amusing succession of scenes with both the playwright and the players leaning toward caricature.

The entire action takes place in the home library of the Justice and mainly deals with his domestic existence, but this legitimate setting offers no excuse for the comparatively shallow character created and portrayed by Messrs. Lavery and Calhern. It is true that this period in the life of Holmes did not have the kind of conflict and physical activity

that makes for dramatic intensity. The more necessary, therefore, for the author to have harnessed the intellectual force, because precisely there should have been the kernel of the drama.

Almost traditionally the average American author, playwright and novelist fails here, seeming to lack the tools to create the thinking man as a vivid and passionate force. Thus the Holmes of the first three-quarters of the play is a vigorous, lovable fellow, who at certain moments bears a disquieting resemblance to Calhern in "Life with Father," and again to the Colonel in "Jacobowsky and the Colonel." The loveable Fanny Holmes is coy and courted at sixty-odd, and the perpetually smiling law clerks bear a strong resemblance to certain mistaken notions of Harvard sophomores. Mr. Justice Brandeis is played as only a benign, considerate and hopeful man. The range of his power and perception is never made evident.

The most flagrant example of misuse of character in the play is the pitiful wraith of Henry Adams. If to the Holmes's and the other philosophical optimists on the Washington scene, Mr. Adams was a bit of a nuisance; and if it is indeed true that they and not the playwright missed completely the significance of the man, but took him on his own word as a failure, both in the Adam's tradition and in any sort of standard of worldly success, then the

(Continued on page three)

AMES STARTING ON QUARTER-FINALS

The first quarter-final round of the Ames Competition to be held since the war will be opened next Monday at 8 P.M. in the Langdell Hall Court Room, when counsel representing the Casner and Grotius clubs will argue a case involving the construction of a will and problems in class gifts.

The clause of the will to be construed provided a trust fund, the income of which was to be paid to the wife of the testator for life, and then to all of the children of a daughter and her named husband until the youngest child reached the age of 21. At that time the principal was to be divided among the children, or their issue *per stirpes*.

The first question to be decided is whether a child born to the daughter and her second husband after the termination of the wife's life estate, but before the time of distribution, should be included in the gift to the children. The second question is whether the estate of a minor child which died without issue before any child had attained 21 should be entitled to demand immediate distribution of the principal.

Arguing on behalf of the Casner Club will be Malcolm R. Wilkey and Clendon H. Lee. Opposing them in the oral argument will be Harold F. Olsen and Jerrold Scoutt of the Grotius Club.

Of counsel on the brief for the Casner Club will be Robert J. Cahall, John R. Carr, Mitchell K. Disney, Melville N. Collins, James H. Walker, and Clyde O. Martz.

Grotius Club counsel on the brief will be John R. Baylor, Nicholas J. Bur, Frank J. Hammond, Lowell Head, and Charles H. Oldfather, Jr.

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Hellmuth Picked To Head Record; Nine Put On Legal Aid

The Harvard Legal Aid Society announced this week the appointment to the Society of nine honor men from among the second termers who took their first year exams last October. Also announced were the appointments of one fifth termers to the Board of Student Advisers, and the election of four men to new positions on the *RECORD* board.

Those who won the coveted positions on the Legal Aid Society, in alphabetical order, were:

Bernard Axelrad (C.C.N.Y. '40), New York City; Roger A. Cunningham (Harvard '42), Kent, Ohio; Sidney M. Glazer (Washington U. '43), University City, Mo.; Wilfred G. Howland (Bates '40), Concord, N. H.; Frank N. Kern (Ohio Wesleyan '41), Seymour, Ind.

Richard H. Kuh (Columbia '41), New York City; Richard G. Mintz (Harvard '43), Brookline, Mass.; Francis D. Murnaghan, Jr. (Harvard '41), Baltimore, Md.; and William W. Winter (George Washington U. '41), Washington, D.C.

The fifth termers named to the Board of Student Advisers was Paul M. Ryan (Yale '40) of Forestville, Conn.

Elected as President of the *RECORD* board was Paul F. Hellmuth (Notre Dame '40), of Springfield, Ohio, to succeed Charles G. Sweet, who was graduated last term. Hellmuth, one of the founders of the paper, has been business manager since its inception.

Rinaldo A. Capone (Harvard '40), Wellesley, Mass., who has been circulation manager of the *RECORD*, was named to succeed Hellmuth as business manager. David Kallman (C.C.N.Y. '41) of New York City was elected to succeed Capone as circulation manager.

Nathaniel B. Tepp (Fordham '40) of Elmsford, N. Y. was named as advertising manager.

CRIMINAL LAW GRADES

The results of the October examination in Criminal Law have provided further evidence of the superior grades achieved by the post-war classes.

The following records were released by Professor Hall:

Out of a total of 361 papers there were 46 A's, 69 B's, 135 C's, 85 D's and 26 with a grade below 27.5. Those 26 are not recognized as failure because the Criminal Law grade is added to the grade in Agency and it is not until this grade falls below a 55 that it is deemed a failure. On the percentage basis this figures out to be 12.7% A, 19.1% B, 37.4% C, 23.5% D and 7.2% below 27.5. The average for the class was not figured but the middle man in the class (i.e. the 181st man) had 33. The highest mark in the class was a 43.

DEAN OFFERS U. N. USE OF LIBRARY

The possibility of use of the Harvard Law School Library has been offered to the United Nations Sub-committee on Permanent Headquarters. In a letter to Dr. Eduardo Zuleta-Angel, President of the Sub-committee, Dean Griswold expressed confidence that suitable arrangements could be made, on a mutually agreeable basis, to facilitate the use of this library by the United Nations if its seat were established in the Boston area. He pointed out the potential value of these facilities to the work of the Delegates, both in the international law field and in the internal law of the individual member nations.

The United Nations is already collecting a library for its ordinary needs, and the Harvard Law Library would afford a valuable supplement. Its 625,000 volumes represent outstanding collections on Anglo-American law, the law of Europe and Latin America, and Japanese and Indian law. The Olivart Library of International Law, numbering about 65,000 volumes, is the world's largest in this special field.

Professors Manley O. Hudson and David Cavers were active in preparing the invitation to the United Nations.

British Poet Deplores Loss To Literature Of Critical Interest Of Modern Professional Men

Literature, and art in general, has suffered greatly in the loss to it of the trained minds of lawyers, doctors and other professional men and women, says Ralph Hodgson, British poet now living in this country. These men didn't need the literary critics to tell them what was good or bad. They brought intelligent, skilled faculties to their consideration of the arts, and their judgments were highly valued by the artists themselves. It appears that such people do not take the interest in the arts which they once did.

Mr. Hodgson was born in England and published his first poetry there at the age of thirty-six. His poetry is among the most lyrical in the English language. In 1924 he took a position as Professor of English Literature at Sendai University in Japan and remained there until 1938 when he came to the United States. He now lives on a wooded farm near Minerva, in north eastern Ohio.

"I am especially interested in young lawyers with relation to literature and art," Hodgson began, sitting down at the large round table in the kitchen, lighting a sliver of wood at the small pot-bellied stove and applying it to the tiny bowl of his pipe. "I can remember that the young men at the Temple Bar who were awaiting to be qualified spent a great deal of time in reading and discussing literature. The older men, too, took a great interest in the arts. They did it because they liked it and were interested in it. They knew poetry and literature well. They might read a poem and like it despite what the critics said about it." Then they would exercise their faculties to see why they liked that poem and it was with the greatest delight that they made their discoveries."

He paused and relit his pipe.

"You know," he went on, "a trained professional man, a good lawyer, can take up a book and before he has read three pages will realize whether the author knows what he's talking about. There's too much dependance on critics these days; you young men are better able to judge for yourselves what a work is worth to you. And if you aren't enjoying it, it isn't worth anything."

Mrs. Hodgson set the tea on the table and sat down. The last rays of the sun fell across the table. There was a short silence while the tea was being poured.

"I think that we have lost a contact with literature that we once had," Hodgson began again. "In the nineteenth century, both in England and in America, wherever there was a gathering of serious men and women, and I refer in particular to people such as lawyers, doctors, teachers and stockbrokers, too, they were interested in serious things. They talked of art and poetry and drama, and they knew what they were talking about. Oh, yes. They knew what they were talking about. In such a gathering, the discussion would often throw a spark of light on something that had not been known before. These people were taking part in the literature of their day. You know, if a man can write a poem to hold a stockbroker's attention, he has really done something."

"I think, too, that you men can learn much from art and literature that you won't find anywhere else. The artists, those most sensitive of people, forty or more years ago gave warning of the tragedies of our day. It showed in their work."

He took down an album and pointed out the enduring qualities of Rembrandt and Whistler as compared to some of the more modern painters.

"You see the terrible distortions in their work. They were expressing what they foresaw, and they were right. What they warned of then has come true."

Hodgson folded the album and replaced it on a shelf, then sat down again. The light was failing in the kitchen. A large gray tom-cat leaped into his lap and settled down to sleep. He lit another sliver of wood applied it to his pipe and then went on.

"You students can combine art and law if you give yourselves a chance. The present forces of life affect the lives of men while they are young. The reader of poetry must find his taste and learn to exercise his judgment while he is young. Once he sets his finger on it, it will develop rapidly, given the chance."

"I have noticed that when artists in Chelsea have worked for a long time at their tasks and have had their fill of art they will take a few days off to play billiards or do something unrelated to art. After a few days they return much refreshed to their work. So with you men in the law. There comes a time when you have had too much law. You ought to leave it for a few days, read poetry, go to an art gallery, listen to a few concerts. You'll do better at your work when you get back."

Mr. Hodgson laughed heartily at the notion that poets and their readers are people who wear their hair long and are slightly effeminate.

"That's the influence of the cinema. I suppose," he said. "Poets are just

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Application for entry as Second Class Matter at Boston, Massachusetts, is pending

Editorials

Harvard has frequently proclaimed its responsibility to the academic world flowing from its possession of rare books and manuscripts. The results of the recent first-year examinations suggest another and much more serious responsibility: having in its classrooms a uniquely talented group of students, the Law School is under a serious obligation to prepare these youths to meet the serious problems which face our nation with menacing urgency. In view of the prominent part which our graduates have always played in public life, it would be naive to suggest that their future needs can all be satisfied from casebooks. But the primary function of a professional school must remain that of making proficient specialists, and this will always be a limiting factor on the breadth of the training which can be acquired here.

We can, however, question whether the possibilities of adapting legal techniques and materials to a solution of public problems have been fully exhausted. It is not suggested that such an effort should supplant the attention which students ordinarily devote to their course work, but a pre-occupation with some vital public problem might well provide an integrating theme for one's entire course of legal study.

An excellent example has been set by the group which has been organized to explore the possibilities of a world legal system. (See page 1). Their weekly meetings are directed towards awakening a consciousness of the problems involved in any attempt to develop a single legal system for the entire world. They are not attempting to be code-makers, but are merely acquainting themselves with the international obstacles afforded by differences in national law and with the avenues through which those obstacles may some day be overcome. The thread which they spin is one which they can run through the entire fabric of the law.

Equally interesting and valuable projects still remain to be exploited. Labor-management relations immediately come to mind as a field much broader than the scheduled course on labor law can afford to be. The need for constructive work in this area is sufficiently evident. Other possibilities exist in the field of administrative procedure.

The initiative in forming the group on world law came from a student, and so it must with any other new project, for one of the unfortunate consequences of the present overcrowding is the heavy burden which has fallen on each member of the faculty. It is apparent that their cooperation can readily be enlisted, but the organizational work must come from interested students. The columns of the *Record* are open to anyone who wishes to advance any plan for relating the study of law to the broader problems of our times.

T. J. O.

Letters to the Editor

To the Editor of the *Record*:

... I find your student *Record* lively, intelligent and well made up. The size seems unwieldy, but I assume that is determined by mechanical factors or perhaps custom in law newspapers.

Congratulations on it and best wishes for its continued success.

Sincerely,

THOMAS L. STOKES
National Press Building,
Washington, D. C.

To the Editor of the *Record*:

I was somewhat irritated at the intolerant viewpoint expressed by reader Bracken in the November 20th *Record*, and I feel that he should be at least mildly chastised for being so virulent against the poor, defunct, Democratic Party and what he calls its "evil philosophy of government." After all, I doubt that either of our major parties is really evil, but I do suppose that one group gets a bad name because of its noisy radicals, while the other gets its bad name from the undue influence of those reactionary Tories born with silver spoons in their mouths, and mis-educated at some exclusive, eastern, snob schools where they are fed a constant diet of "damn true unionism, damn the CIO, and damn everybody who disagrees with the sacred beliefs of the Republican Party."

And yet if we purged ourselves of either type, I wonder if this wonderful country of ours would be the really great democracy which I think it tries to be. Both Senator Taft and Reader Bracken have a perfect right to believe and practice that both the rich and poor shall have the equal privilege of begging for bread, or sleeping under the bridge at night, but that belief should not induce another to call their philosophy of government evil. In fact I believe that the harshest term I should employ for belief in this latter philosophy is the word "ignorant." If reader Bracken keeps this up for his remaining six and a half terms, he may even find himself eligible for membership in the Chancery Club.

KENNETH W. HAAN, 2nd Term

To the Editor of the *Record*:

I have read the article in the Harvard Law School *Record* announcing the appointment of Miss Mentschikoff to the Harvard Law School Faculty.

I have been wondering what Professor "Bull" Warren would think about this. Once upon a time he made the statement that if the Harvard Law School would ever permit women to enter its doors as students, he would cease to be a pedagogue. And now the announcement comes that a new addition to the faculty is a woman.

In my opinion, formed after a number of years of experience, it is wrong for women to vote and to sit on juries, for the reason that they are by nature emotional beings and not competent enough to render judicial verdicts. If they are happy, they are guided by their husbands, and if they are unhappy they are usually guided by their emotions. On a jury a woman will vote for the best looking lawyer (and that is why I win so many cases), and in politics she will vote for the best looking candidate. She usually likes a glamour boy and a Beau Brummel; that is why Roosevelt and Tom Dewey have been good vote getters.

And now we have a new addition to the Harvard Law Faculty, A WOMAN. IT'S WRONG.

Sincerely,

ELERY MAHAFFEY, LL.B. '21

Off the Record

In the November 20 issue of the *Record* a headline read "Howe To Edit Homes Diary" as a result of which Editor Charles Sweet prostrated himself at the entrance to the *Record* office while members of the staff ceremoniously walked over him. As was to be expected, the *Record* was deluged with humorous comments, the least profane of which is printed.

HOMES, SWEET, HOMES

Oiver Wende Homes was the greatest jurist
so they tell,

Because, among other things, he figured
what the "T".

—PUBLIS

.....

R. W. C., quite enthralled with the crystal-clear logic of Future Interests sends us this scholarly note: "On page 287 of the Future Interests Casebook in the course of the stirring opinion in the landmark of Real Property Law, *Phipps v. Ackers* occurs this statement '... and I agree entirely in what fell from Sir William Grant in ... 16 Ves. 491,' which reminds me:

I agree that Grant could pick 'em

When in 16 Ves he dropped that dictum,

"... that the right is not affected by the direction to convey but that the conveyance must conform to the right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made."

But my trouble is

Agreeing

Isn't

Seeing."

.....

Comes now the genial Professor Leach, expert on Property and poetry, together with his friend McNeil "Man Saturday" of *Langdell Lyrics* fame to point out a defect in our humble versifications:

Some day I hope you'll find a man
Who writes his verse and makes it scan.

I feel the same about the wife

Who wails that Ames has wrecked her life.

Your authors can produce a rhyme,

At least a fair part of the time,

But when they write some lines with four feet

and some with five with the accent all over

the place it's nothing but hash;

And no one in the world can get away

with this sort of thing except Ogden Nash.

He called this matter to the attention of Mr. Donald G. McNeil of *Langdell Lyrics* who felt disinclined to comment. But by happy chance McNeil had an appointment with Mrs. Nussbaum who had been troubled by the same thing and asked me to pass on to you the following:

Reading your publication is filling me with tansion
Because all of your poets stink when it's coming to scansion.

Rhymes can be made by bums like mine husband Pierre,
And he ain't a poet; he's working in ready-to-wear.

To which we reply: "Ah, now Bart, take heart." Our verse has now reached the bottom and can only improve in the future. Will some overworked Property II student come to the defence of "Off The Record's" doggerel?

Le Professeur Sans Merci

(With Apologies to John Keats)

"Oh, what can ail thee, student sad,

So wan and palely loitering?

The ivy's wither'd from the Yahd

To sleep till spring.

"Oh, what can ail thee, student glum,

So haggard and so woe-begone?

The football season's juicy plum

Has come—and gone."

"I met the postman at the door;

I looked for Evidence, withal;

And cried—'Le Professeur Sans Merci

Hath me in thrall!"

"And this is why I sojourn here,

Alone and palely loitering

Though ivy's wither'd from the Yahd

To sleep till spring."

.....

IT JUST DOESN'T STACK UP

Standards antiquarian

Measured Librarians

In minimum of decibles.

Now the standard seems to be

Maximum inaccessible.

R. W. C.

Gallery

ERWIN N. GRISWOLD



Housing for single students and for the extraordinary number of married students, was a very real and immediate problem.

Griswold came to the job, after a distinguished career as a student at Harvard Law School, a government official and a professor of law. Having graduated from Oberlin College, the traditional family school, in 1925 with an A.B. and an M.A., he came to Harvard that year. In 1927-28 he was president of the *Law Review*. In 1929 he received his S.J.D. and returned to Cleveland to practice law there for what he thought would be the rest of his life. But, after three months, the government called.

In December 1929 he accepted a position in the Office of the Solicitor General of the United States, rising to be a Special Assistant to the Attorney General. During his years with the government he worked on briefing and arguing cases in various federal courts, gradually coming to specialize in Federal Taxation cases. In 1933-34 he briefed and argued over twenty cases before the United States Supreme Court.

In 1934 Griswold came to Harvard as Assistant Professor; in 1935 was appointed full Professor and in 1946 was appointed to the Charles Stebbins Fairchild chair in law. In June, 1946, he became Dean, succeeding James M. Landis, now Chairman of the Civilian Aviation Board.

Dean Griswold's principal teaching has been in the fields of Federal Taxation, in which he is an outstanding authority and tax consultant, Conflicts of Laws and Trusts. He is editor of "Cases on Federal Taxation," the second edition of which is just out; co-editor of "Cases on Conflict of Laws," and author of "Spendthrift Trusts," which will appear in a new edition next January. He has also been an advisor for the American Law Institute's Restatements of the Law of Trusts, Restitution, and of Judgments.

The Dean spends as much of his time as possible, from his duties at the school, with his family. Mrs. Griswold's family and his were friends long before either was born; their mothers were roommates at Oberlin. They have two children, Hope, 14, and William Erwin, 9.

To "keep myself amused and as an excuse to get my nose away from the grindstone," Mr. Griswold has two hobbies: hunting up international and state boundary markers and collecting stamps.

He picked up the first hobby after having written a college paper on "Boundaries of Ohio." Since then, he has traveled all over the country seeking out boundary markers and photographing them. A thirty page article in *The Geographical Review* for July 1939 tells of many of the interesting discoveries he has made. He even has two markers in his back yard and proudly exhibits them to visitors.

"I got them quite legitimately," he assures them, but does not go into details.

In stamp collecting he specializes in United States revenue stamps, but also carries on what he calls a "hobby within a hobby," the collecting of envelopes bearing the mailing franks of president's widows. His collection begins with a Dolly Madison frank. He is seeking one of Martha Washington's but has not yet succeeded in locating it.

In his spacious, brightly lit office in Langdell Hall, Mr. Griswold sits behind a large desk covered with books and papers. His day is taken up with teaching, conferences with numerous visitors, dictating letters, making decisions and performing the countless tasks that are of the job of administering the affairs of a large organization. The cares of office have not visibly affected him. His voice is clear and sharp; he knows what he wants and expresses it in a minimum of words.

"The only real tradition of the school, as I see it, is to do the best job we can," the Dean says. "The school has, and accepts, the responsibility for giving the best education in the law which it possibly can."

Before the war, many third year courses were taught in a regular class and also in a seminar. Third year men were expected to take at least one seminar. In this way they could get something analogous to the training received by *Law Review* men.

"But that's not possible now, with the greatly expanded student body," he went on. "Some people have asked why we don't expand the faculty to take care of the situation. The caliber of men we want won't come here just for the emergency. That's understandable. We have to do the best we can. To help out, the members of the faculty have all assumed extra burdens during this emergency."

There is too much concern among students about grades, the Dean says. He would be in favor of one numerical average grade at the end of each year rather than a grade in each subject. And he knows as a fact it isn't true that only the high ranking men succeed in the law. Taking his own class as an example, he stated that many men who were in the middle grades have made outstanding careers for themselves and have played a very vital part in their community life.

Whatever their grades, there may be some real difficulties for graduates within the next few years. The bar, during the war years, became geared to working with fewer lawyers and it will take time to go back to the old ways. The problem is aggravated, of course, for married men who must make more money than many firms are willing to pay. One solution to the problem might be for graduates to strike out for themselves right after graduation, preferably two or three going into partnership, but that depends on local conditions. In the meantime, the school has expanded its placement service, feeling that

Sub Judice

MANN ACT & PLURAL WIVES****Moral: Travel across state lines with one wife at a time.

Petitioners are Mormons who practice polygamy. Each petitioner transported at least one plural wife across state lines either for the purpose of cohabiting with her or for the purpose of aiding another member of the cult in such a project. They were convicted of violation of the Mann Act, and this was affirmed in the court of appeals. On certiorari the Supreme Court affirmed the convictions. *Cleveland, et al v. United States*, U. S. Supreme Court, November 18, 1946, 15 U. S. Law Week 4005.

The Mann Act makes it an offense to transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." (Italics supplied). Mr. Justice Douglas for the majority held that polygamous practices were immoral purposes within the meaning of the Mann Act. Support was drawn from *Caminetti v. United States*, 242 U. S. 470 (1917) for the proposition that the Mann Act while primarily aimed at the use of interstate commerce for the purpose of commercialized sex was not restricted to that end.

Justices Black and Jackson voted to reverse the convictions. In a short statement they expressed the view that the *Caminetti* decision, *supra*, was a dubious rule and should be restricted to its particular facts. Mr. Justice Rutledge concurred in the result because he does not see how this conviction could be reversed without overruling the *Caminetti* case. The indications are that if the Court desires to correct the *Caminetti* case, Mr. Justice Rutledge will favor its reversal.

The only full length dissenting opinion was written by Mr. Justice Murphy. He began: "Today another unfortunate chapter is added to the troubled history of the White Slave Traffic Act. It is a chapter written in terms that misapply the statutory language, and that disregard the intention of the legislative framers. It results in the imprisonment of individuals whose actions have none of the earmarks of white slavery, whatever else may be said of their conduct." Justice Murphy pointed to the legislative debates and reports as showing that the Mann Act was aimed at the forcing of unwilling women into prostitution. No intent to ensnare polygamists could be found there.

SALE OF LIFE ESTATE & TAXATION****Release of interest in life estate for lump sum payment is sale of capital asset and not receipt of ordinary taxable income.

Petitioner was the beneficiary of a life estate created in a testamentary trust. Pursuant to a settlement approved by the New Jersey Chancery Court petitioner released her life interest in consideration of a lump sum payment by the remainderman. For the taxable year 1940 petitioner reported a capital loss on this transaction which was the difference between the amount received and the basis of the life estate to her. The Commissioner of Internal Revenue disallowed the loss and assessed a deficiency on the ground that the amount received was merely an advance payment of income. A divided Tax Court sustained the Commissioner. The Second Circuit, one judge dissenting, reversed the Tax Court and held that the release of the life estate was a sale of a capital asset entitled to the treatment provided for in section 117 (a) (1) of the Internal Revenue Code. *McAllister v. Commissioner*, 157 F. (2d) 235 (C.C.A. 2d, 1946).

The court felt that clearly the assignment of a "fee" interest, if the petitioner had had such, would have been a sale of a capital asset. Therefore, the assignment of the lesser life estate should be regarded in the same way. A case which held the surrender of the contractual right to future rent payments (*Hort v. Commissioner*, 313 U. S. 28) for a lump sum taxable was distinguished. This distinction was made to turn upon the difference between "anticipation of income payments over a reasonably short period of time and an out-and-out transfer of a substantial and durable property interest such as a life estate at least is."

Judge Frank in dissenting thought that Congress did not intend to bring into the beneficial capital gains section this sort of transaction which he likens to a substitute for future payments which would be taxable as ordinary income. The trust in question was made a spendthrift one by the testator. From this Judge Frank reasoned that it was the testator's intention that the petitioner receive only instalments. With the advice of ingenious counsel she had frustrated the testator's intention and, in effect, procured a lump sum payment.

TENANCY BY THE ENTIRETY, CHICKENS & CONSTRUCTIVE TRUSTS****

Complainant's aged father lived with her and her husband in an unsatisfactory dwelling. The husband got the urge to raise chickens which was mildly profitable at first. For "know how" in raising chickens the husband was largely dependent on his wife and her father. Out of the first profits from the business the wife received \$1800 which her husband, in this litigation, claimed was a gift for the purpose of buying a new house. This claim made no impression on the Chancellor.

Out of her own savings the complainant-wife purchased a more satisfactory house. She was induced by her husband to have the deed made out to husband and wife as tenants by the entirety. Soon after moving into the new house the husband began a concerted campaign to get his father-in-law out of the house. The quarrel achieved such violence that the husband and wife were divorced. In this action the wife sought a decree that she was the real equitable owner of her husband's legal interest in this real estate which stood in their names as tenants by the entirety, and she also sought a conveyance to her of the husband's legal interest. Relief was granted as sought. A constructive trust was imposed and the husband was ordered to convey his interest to the complainant. *Greenly v. Greenly*, 49 A. (2d) 126 (Ct. Ch. Del., 1946).

"While we are not obligated to place every man in a job, we do feel we have an obligation to do everything we can to help him get one."

Dean Griswold is faced with a heavy burden in running the school during the next few years. Tiding over the present emergency and reverting to peacetime operation is in itself a complicated, trying task, even with the help of an outstanding faculty. In addition, there are other problems on which planning must be done now; permanent housing, expansion of the physical plant, faculty appointments, library. It takes a man of confidence in himself and faith in what he is doing to stand up to such a job. Erwin Griswold seems to have both.

The Witness Stand

The Question: Do you think a compulsory arbitration law would properly solve situations like the present coal crisis?

1. L. Lee, Jr., Augusta, Ga., 6th Term

I do not think that compulsory arbitration would add substantially to the machinery of the National Labor Relations Act, since we would still be confronted by the right of the miners to act individually. But the old machinery for settling disputes having been unsuccessful there might be a psychological, temporary appeal in the new.

2. G. Doner, New York, N. Y., 1st Term

I think it depends on the personalities doing the arbitrating. There probably should be a limit to the extent of the arbitration and after a reasonable period of arbitration there should be a reversion to the regular means of collective bargaining. The difficulties with the present court system are the general unfamiliarity with the labor problems by judges and the reputation judges have for being anti-labor which directly affects labor's attitude toward judicial decisions. I think labor leaders on the whole are responsible people and would listen to arbitration but I don't think it should be all conclusive.

3. L. McLean, Newbury, S. C., 1st Term

I think it is the only solution. I am not one wanting to see the rights of labor abridged but the country's economy has become so complex that one group should not be allowed to throw the nation into economic turmoil. Although I don't think compulsory arbitration is a good thing as such, it appears to be the answer here. It would be restricted to just those industries which affect the national scene directly and completely.

4. A. Greenfield, Miami, Fla., 7th Term

I can't see how the arbitration decisions should be final since so much depends on the personalities of the arbitrators. A truly impartial body would be hard to get at a straight bargaining level and it would have to be on a higher judicial level, at least as high as the Federal Circuit Courts of Appeals, to have a proper standing. The decisions shouldn't be final in all industries but should apply to those industries affecting the public interest and there should be a means of reopening collective bargaining even after the board's decision. The only real and lasting solution is nationalization of such basic industries as the coal mines.

5. N. Tryforos, New York, N. Y., 5th Term

Anything affecting the public interest in the sense of public utilities and basic industries should have labor disputes subject to compulsory arbitration so as to be binding on both sides. If that were done then labor would have to give up its rights to strike and management its lockout weapon. Both sides would then be bound morally and financially and subject to court action for non-compliance with the penalties attaching thereto.

6. H. R. Cluster, Baltimore, Md., 5th Term

I think we should have compulsory arbitration for labor disputes but it should be restricted to basic industries which affect the national welfare. The arbitrators board's decisions should be final and binding on both sides. It isn't a perfect solution and involves both labor and management sacrificing their respective bargaining weapons of strike and lockout but it is better than the present complete lack of solution.

7. J. DeClivens, Chicago, Ill., 3rd Term

I don't think labor has progressed sufficiently in their struggle to achieve their social gains. Because of that any submission by them to compulsory arbitration would involve their giving up much more than management would be surrendering. The right to strike is the only major weapon left to labor in achieving its gains. The government saw fit to load the dice in labor's favor by its various pro labor legislation during the past social era and not until labor is in a position nearer equality should it be ready to divest itself of its means of progress.

Alumni Notes

Alumni are especially invited to forward contributions to this column to the Records office, Austin Hall, Cambridge 38, Mass.

Ex. '91—Bradley W. Palmer died Nov. 9 at Topsfield, Mass. He began a long legal and business career by entering the firm of Story and Thorndike in Boston, which later became the firm of Story, Thorndike, Palmer and Dodge. For many years he served as counsel for the United Fruit Co. During the peace conference in Paris after World War I, he helped prepare the economic provisions of the treaties.

Nine years ago he gave 2000 acres of his estate to the Commonwealth of Massachusetts as a forest and wildlife sanctuary, and last year he donated the remainder of his estate to the Commonwealth, with the exception of his home.

Ex. '01—Henry Kelley Brent died in New York City September 15, 1946. He was an insurance broker, and had travelled extensively.

Ex. '01—John Wheeler Foster died at his home in Gardiner, Maine, on October 21.

LL.B. '10, S.J.D. '17—Judge Manley O. Hudson of the World Court was among the speakers who welcomed the United Nations site committee to Boston, following a reception at the Harvard Club last week. The committee was in Boston to inspect the Blue Hills area as the possible location of the United Nations headquarters.

Joseph B. Keenan, LL.B. '13, presented a written defense of the international war crimes trials in Tokyo, which was read before the American Bar Association's recent meeting in Atlantic City, N. J.

Keenan is Chief Counsel of the Tokyo prosecutions staff, and he vigorously upholds the principles of the prosecutions. His paper to the Bar Association emphasized that the trials are the only alternative to "lynchings and blood purgings" by the people of Japan. Prosecutor Keenan has no doubt as to which alternative is preferable. To many people who ask if we would think such a procedure just if applied against our own leaders, Keenan said, "If our leaders were guilty of what the prosecution charges these accused, they would deserve the same punishment that we are asking this international tribunal to impose."

In answering the objection that the prosecutions are based on *ex post facto* laws, Mr. Keenan pointed out that punishment for crimes of violence is as old as civilization itself, and that the Tokyo trials are carrying out these same principles and practices.

LL.B. '15—Francis C. Gray has been elected permanent chairman of the board of trustees of the Massachusetts General Hospital to fill the vacancy caused by the resignation of the Rt. Rev. Henry Knox Sherrill. He has been a trustee of the hospital since 1930, and served as secretary from 1920 to 1930.

Gray is president of the Fiduciary Trust Company, treasurer of Radcliffe College, and a trustee of Boston University.

LL.B. '31—A. Duncan Howlett became the minister of the 316-year-old First Church in Boston on September 29.

QUARTER FINALS—(Continued)

The Hon. Charles C. Cabot, Massachusetts Superior Court Justice, will be the Chief Justice for Monday night's argument. Associate Justices will be Mr. Mayo Shattuck and Mr. Guy Newhall, both members of the Boston bar.

The remaining arguments in the series will be the Taney Club vs. Wilson Club on December 12, Langdell vs. Thorpe on December 16, and Root vs. Scott-PowWow on December 19.

The four winning clubs in these arguments will meet in the semi finals next term, and the two surviving clubs will compete in the finals two terms from now.

succeeding the Rev. Dr. Charles E. Park who had held that pastorate for 40 years. Rev. Howlett received a B.A. degree from Harvard in 1928 and was graduated from the Law School three years later. He became a member of the Massachusetts Bar and practiced for two years in Holyoke and Springfield. He gave up the practice of law and returned to the Harvard Divinity School from which he was graduated with honors in 1936. He served as a Unitarian minister in Salem and New Bedford, Mass., from 1936 to the time he accepted the call to his new church. In 1943 he married the former Miss Carolyn Chance of Summit, N. J., a graduate both of Mount Holyoke College and the Yale Law School. She was an attorney at the time of their marriage.

Ex-'32—William Loeb and his associates in Ridder Publications, Inc., of New York, have purchased New Hampshire's largest daily newspapers, the Manchester morning *Union* and evening *Leader*. Loeb assumed control of the newspapers on November 1, and will serve as president and publisher of the company. He also controls the Burlington (Vt.) *Daily News*.

LL.B. '40—Leonard H. Mandel has been released from active duty with the armed forces. A member of the bar of New York and of New Jersey, he has opened offices for the practice of law at 2 Rector St., New York, N. Y., and 821 Bergen Ave., Jersey City, N. J.

HODGSON—(Continued)

like anyone else. Several have been lawyers. And, of course, all sorts of people read poetry and have had their lives enriched by so doing. I know one young man who very efficiently operates a very large business. Yet, his mind goes back to the 1820's. He knows Keats as few Professors of English know him. It has given him a passionate interest in life. That's the great thing about poetry. It widens—it broadens you in all sorts of directions, even in your interest in the law.

"And don't think that you have to like all poetry. Keep an open mind and an open eye. Some poetry you will like, other poetry you will not. If you like it and are touched by it then something very important has happened to you. You have discovered something that is part of you, that you've always had but never knew about until then. Those qualities vary with the individual. There is great variety in poetry; you must choose that which appeals to you and discard the rest when you are sure that it does not appeal to you. Trust your trained minds and your sensitivity to make the right choice; don't let anyone else tell you what to like or dislike."

The room filled with the dusk. Mr. Hodgson rose to lead the way back up the path to the main road. He shook hands firmly.

"I hope that we shall regain the trained minds of you young men now in the law schools," he concluded. "We sorely need them in poetry. Perhaps we shall even get some worthwhile poets from your ranks. But, that is not an invitation to give up the law in order to write poetry, unless a man is sure that it is his greatest interest in life. It would indeed be a great pity if a good lawyer were to be spoiled by a mediocre poet."

H. K.

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AMES HAS URGENT NEED FOR JUDGES

A plea for volunteers from among the upperclassmen to serve as judges for the Ames Competition arguments was issued this week by the Board of Student Advisers. Judges for first term and third term arguments are urgently needed, and those who are willing to serve as judges are requested to turn in their names to the Board offices immediately.

The shortage of judges, which has steadily grown more acute, is attributed to the fact that the number of judges needed has grown steadily because of the increased enrollment in the lower terms, while the growth of the second and third year classes has not kept pace. Also, more and more upperclassmen are participating in the competition, which reduces the number who are willing to judge.

In the fall term of 1945, there were only 37 first term clubs, and no clubs above the first term competed in the formal competition. The arguments in that term required only 444 judges, and all of the upperclassmen were available, since they were not competing themselves.

By contrast, the competition this term includes 448 first term clubs, 38 second term clubs, and 33 clubs in the third term. A total of 870 judges are required to handle these arguments. The shortage is magnified by the fact that 328 men out of the upper classes are participating in the qualifying round and quarter-final arguments, and some of these men are unwilling to compete and also act as judges during the same term.

The experience of the Board of Student Advisers has been that only about 45 per cent of the upperclassmen contacted are willing to judge. The fact that 55 per cent refuse throws a big burden on the ones who are willing to give their time.

Judges for the first term arguments are procured by the club supervisors, supplemented from the list of willing judges that the Board has on file. Therefore, the best way for an upperclassman to do his part is to say "yes" when approached by a club supervisor, or to turn his name in to the Board office.

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HOLMES—(Continued)

fault was a narrowness of insight on Holmes' part and Mr. Lavery most certainly should have so suggested. But in the fussy apparition of Henry Adams, not a breath of his significance is felt, neither as one of the most penetrating and lucid minds of his century, nor as a man who occupies a unique place in American letters. And if, as seems obvious, Mr. Lavery admired the Holmesian earthiness and gusto, he would be enlightened by Mr. Adams' reaction to the natives and culture of the South Sea Islands.

With the tired and infirm Justice resignedly awaiting his end, while experiencing deep fear and a questioning into basic beliefs in anticipation of the death of his wife, Mr. Calhern becomes moving and convincing. Moving, because only here at the end is he given a dramatic situation, for to the spectator the physical and mental decline of a great man is pathetic, and the passive readiness for death, albeit the common lot, holds its own muted anguish; convincing, because within the physically limited powers of the aged Holmes, Mr. Calhern submerges himself, and accepting a restricted range, creates his character.

On the whole, "The Magnificent Yankee" seemed to be only an echo of a great jurist and thinker, of a husband capable of deep and gentle devotion, of a man uttering an affirmative and passionate "yes" to life. Because the man himself was great, the play too has some substance.

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Calendar

THE LEGAL WORLD

Jobs

The War Dept. is interested in hiring men who are graduating in February or June and who would be willing to go to Germany as Assistant Trial Counsellors in trials of Nazis. A good civil service rating will be given any men who are selected. Those interested should see Mr. Dimmitt today.

Single Men's Rooms

There are a few vacancies in the Business School Living Halls available for Law students until the end of the present term, on a pro-rata rent basis. Students interested in such vacancies should consult Mrs. Cass at the Bur-sar's Office in Lehman Hall.

Third Year Men

Any third-year student who has the time and would like to work on a purely voluntary basis with the Regional Office of the N.L.R.B. should communicate with Mr. Samuel G. Zack, Old South Building, Boston, Mass. (Telephone: LIBerty 2892).

Class Change

Section 1 of Bills and Notes will meet on December 6 and 7 in the class rooms and at the hours scheduled for Section 1 of Equity (Fourth Term). Section 2 of Bills and Notes will meet on the same days in the class rooms and at the hours scheduled for Section 2 of Equity (Fourth Term).

Sections 1 and 2 of Equity (Fourth Term) will meet on December 9 and 10 in the class rooms and at the hours scheduled for Sections 1 and 2, respectively, of Bills and Notes.

Water Rights Course

The lectures on Water Rights will extend through the week of December 11 rather than through December 4 as previously announced. The lectures are given on Mondays and Tuesdays at 2 P.M., Wednesdays, Thursdays and Fridays at 4 P.M., and Saturdays at 2 P.M.—all in L.S.M.

All Dikes

The Delta Kappa Epsilon Alumni Association of New England would like the names and addresses of all Dikes in the Graduate Schools. The Fall meeting will be held at the University Club on December 7, at 12:30 P.M. All those interested should get in touch with Arthur G. Robinson, Telephone LAS 9765.

Forum

What Is The Solution in China is the topic of the discussion to be held this Friday evening, December 6, at 7:45 P.M. in Sanders Theater.

Ames Opinion Prizes

The competition for the best opinion submitted by a judge on a first term argument is again open. Opinions may be of any length and may be in support of the Court's decision or in dissent. The committee of judges will be composed of members of the Faculty and personnel of the Board of Student Advisers. The written opinions must be submitted at the offices of the Board not later than December 14.

THE UNIVERSITY WORLD

Lectures

There will be a series of three lectures on Music and The Universe given by Dr. Otto Kinkelley, in Paine Hall, Music Building tonight, December 4, Monday, December 9, and Wednesday, December 11, at 5 P.M.

Professor Reinhold Niebuhr of the Union Theological Seminary will be the guest speaker at The Memorial Church Sunday Service, December 8, at 11 A.M.

Play

The Veterans' Theater Workshop presents the world premier of William Gerhardt's new play, *I was A King In Babylon* at the Rindge Technical Auditorium, December 4, 5, 6, and 7. Tickets are priced at \$1.50 and \$1 and may be obtained at the cashier's window at the Coop.

THE OUTER WORLD

Music

Leo Litvin and his Concert Orchestra, with Alice Farnsworth, soprano, as soloist, will be at Jordan Hall, Friday, December 6.

The Icelandic Singers, the leading male chorus of Iceland, will present a recital of Scandinavian music at Symphony Hall, Sunday December 8, at 3:30 P.M.

Larry Adler, harmonica virtuoso, and Paul Draper, dancer, in a joint concert at Symphony Hall, Friday, December 6, at 8:20 P.M.

Ford Hall Forum

Langston Hughes, internationally-known Negro Poet, will discuss the question *Are We Solving Our Own Race Problem?* in Jordan Hall, Sunday, December 8, at 8 P.M.

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Before the Court of Ames

Of twenty opinions submitted by judges of first and second round arguments for the Ames Student Opinion Prize, the opinion written by Gene G. King in the case of *Commonwealth v. McGovern* was considered best by a committee of faculty and Board of Student Advisers' judges. The major part of the opinion is reprinted below.

KING, C.J. The indictment in this case was laid under Section 159 of the Criminal Code of the Commonwealth of Ames. Upon a plea of not guilty the case went to trial; the jury returned a verdict of guilty of murder in the first degree; judgment entered thereon sentenced the defendant to death by hanging.

The defendant brings this appeal to challenge the sufficiency of the indictment. The verdict is not attacked as being unsupported by the evidence. No question is raised concerning the admission or exclusion of evidence. No instruction and no refusal to instruct the jury is here challenged.

The indictment alleged these facts: On July 15, 1945 the defendant, Terrence McGovern, one Angelo Patri, and the deceased, John Doe, embarked upon a prospecting expedition and entered the Sandy Desert. By July 19 the party was lost; an expected source of water could not be found; each person's canteen of water was half empty; no other supply of water was apparently available; each knew that their total remaining water supply was not sufficient to bring them all out of the desert alive. Patri proposed and all agreed to draw lots to determine who would surrender a canteen to the remaining two; lots were drawn; John Doe lost. When John Doe refused to surrender his canteen, Patri forcibly took it from him. Thereafter Patri shared this canteen of water with the defendant. After four days without water, John Doe died of thirst on July 23, 1945.

The defendant's appeal raises two successive questions. First. Do the facts set out in the indictment establish or satisfy the requirements of common law murder? Second. If they do, do these facts disclose and establish a defense which the law recognizes or should recognize; justification of the defendant's self-preference under the compulsion of a fatal, inevitable and impending peril, provoking a "law of necessity" or a "law of self-preservation."

Under reasons set out herebelow the court is not driven to consider a third possible question: whether, assuming that the indictment does establish a common law murder, the alleged facts sufficiently establish "extreme atrocity and cruelty" to support a verdict of guilty of first degree murder as defined by Section 159, Criminal Code of the Commonwealth of Ames.

The defendant's participation, as alleged in the indictment, amounts to the following: (1) participation in a prospecting expedition, (2) participation in an unanimous agreement to draw lots, and (3) participation in the withholding and drinking of the water belonging to the deceased.

The relationship of partners in a joint prospecting expedition is immaterial. No duty flowed therefrom which required the defendant to return to the deceased the water taken by Patri. In this respect the defendant's position is that of a bystander. The case at bar may be distinguished from those cases where the parent withholds the means of life from the child by placing it out in the open exposed to the ravages of winter storms and starvation. The parent is guilty of murder because there is a duty of support owed to the dependant child. This rule exists for the protection of society's coming generations. No similar duty here exists.

The agreement to draw lots could be characterized as a suicide pact or an

agreement to commit murder. But it could also be termed a life-saving contract. Quite obviously it is an agreement in an attempt to preserve two lives out of three. It is a gambling contract. However, the effect, if any, that this agreement should play in this decision ought not to depend upon any label to be attached thereto. Quite clearly had John Doe retained control of his water in violation of the agreement, the defendant could not maintain an action in contract for damages. If this agreement would have no legal effect in a civil action, why should it have greater effect here? Since the agreement contemplates the survival of two members of the party, the agreement is not a suicide pact. The following may be distinguished: "One who counsels another to suicide who does it in his presence is, in every view, guilty as a principal. Accordingly where two persons agreeing to commit suicide together, employ means which take effect on one only, the survivor is a principal in the murder of the other." 1 Bishop, *Criminal Law*, (9th ed. 1923) sec. 652. Here the agreement was an attempt to avoid joint death.

This agreement to draw lots does not constitute a conspiracy. Therefore there is no ground on which to distinguish *Hand v. State*, 26 Ala. App. 317, 159 So. 275 (1935). If the agreement were not unanimous, then it would be a conspiracy to commit murder. While it is true that consent by the victim to the commission of a crime does not alleviate the offense, the consent of all to the present agreement does contradict the conspiracy argument. It is difficult to see how one can conspire against oneself. Faced with a clear and impending danger, the agreement was an attempt which reasonable men might make in such a situation to meet the danger. There is no evidence that it was unfairly executed. Therefore the defendant's participation in the agreement does not put him in the position of one who aided or abetted Patri in the commission of the homicide.

Nor does the defendant's subsequent participation in the drinking of John Doe's water place the defendant in the position of an aider and an abettor. He did not take the water from the deceased. He was under no legal duty to return, at the peril of his own life in a court of law, this water to its rightful owner. The defendant may be under a civil liability for conversion in an action in tort. But this civil liability does not extend into the criminal law. The situation is analogous to that of an over-crowded boat adrift upon the ocean. A violent storm appears. Members of the ship's crew assault some of the passengers and throw them overboard. The boat will not weather the storm if all remain in the boat. Are those passengers who passively remain in the boat while the others are drowning and pleading to be taken aboard to be held criminally responsible as accomplices of the crew members who threw the excess passengers into the ocean? These surviving passengers en-

joyed the life-sustaining benefit of the boat. The defendant here enjoyed the life-sustaining benefit of the water. The passengers thrown into the water had as much interest in a space in the boat as the deceased had in the water in his canteen. The drowning passengers had had possession of a space in a boat provided for their use in an emergency. Certainly the surviving passengers are not guilty of murder as principals in the second degree.

The defendant's acts and Patri's acts separate at one vital point. Patri forcibly took the canteen from the deceased. This act was the primary cause of the death of John Doe; nothing more save the lapse of time was necessary to produce the homicide. No allegations show that the defendant agreed to Patri's act. Nothing indicates that the defendant offered any assistance or any encouragement to Patri upon this occasion. Therefore, the defendant is not a principal in the second degree to a common law murder committed by Patri.

Nor may this conviction be supported upon the theory that the defendant was a principal in the second degree to Patri's commission of robbery or felonious assault and battery upon John Doe whose death resulted therefrom. As stated in detail above, the defendant did not aid or abet Patri in the commission of this assault. The robbery theory is likewise unsound. The defendant's subsequent receipt and drinking of the "stolen" water does not make him a principal in the second degree to the larceny or robbery. One who knowingly receives stolen goods does not thereby become guilty of larceny as a principal in the second degree. Such a one is guilty of the common law crime of knowingly receiving stolen goods. Moreover no robbery is alleged or established by the indictment because there is no allegation that Patri took the water from the deceased with felonious intent. Assault to take property from the victim of the assault in the *bona fide* belief of a lawful claim to the property does not constitute robbery. *Barton v. State*, 88 Tex. Cr. Rep. 368, 27 S.W. 317, 13 A.L.R. 147 (1921).

Turning to the Commonwealth's final reason why the conviction should be affirmed, two questions appear. May criminal liability of murder with willful intent and malice aforethought be established by negative allegations or by a *non feausance*? That is to say, does the defendant's withholding of the deceased's water constitute murder? And secondly, do the defendant's acts of drinking the deceased's water amount to murder?

In the absence of a relationship between the defendant and the deceased such as the relation of a parent to a dependant child, the defendant's *non feausance*, the withholding of the water from the deceased, cannot be made the basis of conviction of murder. Likewise the defendant's act of drinking this water cannot be a basis for such criminal responsibility. As before stated, the defendant's position is similar to that of the surviving passengers who were in the boat involved in the case of *United States v. Holmes*, 1 Wall. Jr. 1, Fed.

Cas. #15, 383 (1842). That case is distinguishable on the fact that Holmes was a sailor who not only owed a duty to passengers entrusted to his care but also actually threw the excess passengers into the sea. Patri's position corresponds more nearly with that of Holmes. Moreover no lots were drawn in the Holmes case. The dictum therein expressed to the effect that the result would have been different had lots been drawn tends to support our decision. Further support may be found in the fact that none of the surviving passengers were prosecuted. And finally, Holmes was not indicted for murder; this the grand jury refused to do; he was indicted for manslaughter; upon conviction he was sentenced to six months imprisonment.

The cases of *Brewer v. State*, 72 Ark. 145, 78 S.W. 773 (1904) and *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) are also distinguishable upon the fact that in both cases the acts of the defendants were actually directed against the victim, directly causing his death. Here the act of drinking was not directed against the deceased. The opinion of the Dudley case repudiates the dictum of the Holmes case, refusing to recognize as a legal justification for homicide any justification outside the scope of self defense. The convictions of Dudley and Stephens were affirmed and they were sentenced to death. But these death sentences were commuted to imprisonment for a term. This would indicate social disapproval of the result there obtained: this in spite of the fact that the two defendants killed a young cabin boy with a knife to eat of his flesh and to drink of his blood. Mr. Justice Cardozo expressed his disapproval of the dicta of the Holmes case in these words: "Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by killing another. There is no rule of human jettison." *Cardozo, Law, Literature and Other Essays*, (1931) 110-114. However, the remarks of Mr. Justice Cardozo were addressed to physicians. The title of the relevant chapter was, "What Medicine can do for the Law." The author was discussing the problem of whether physicians should be permitted to put painlessly to death people suffering from an incurable disease. Such a problem is quite different from the one before us. On the other hand the dictum of the Holmes case is approved by Mr. Justice Holmes. He

reasons that if the fundamental basis of the criminal law is revenge, then the dictum is wrong. But if the basic policy is prevention and deterrence, then the dictum is correct. It is correct because the purpose of prevention would not be served by inflicting capital punishment. It would not be served because a man faced with certain present death will not be deterred in seeking and taking the only available avenue of escape from the danger by a threat of future death at the hands of the court executioner. Mr. Justice Holmes suggests that the policy of prevention is the more important premise of the criminal law. The law attempts to meet the demand for social protection. Holmes, *The Common Law*, (1881) 47.

The law would go too far if it were to impose upon the defendant the duty of returning to the deceased, under the threat of a conviction for murder, what Patri had forcibly taken from the deceased. Surely the policy of prevention would not be served. Nor would it be served by imposing on the defendant, under a similar threat, the duty of refraining from drinking the water which Patri offered to him. This would amount to a holding requiring all the passengers of a life boat to jump into the ocean when the boat could not safely carry all originally and lawfully in it. The law must not be that unreasonable. Counsel for the Commonwealth has not shown how the decision here rendered will adversely affect the administration of criminal justice within this Commonwealth, nor how this decision will remove necessary protection to the property and life of the citizens of the Commonwealth of Ames.

For the foregoing reasons we hold that the indictment is insufficient in law to support the conviction rendered below. For these reasons judgment of the Superior Court is reversed.

JUDGMENT REVERSED.
Gene A. King
H. J. Vaas

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