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TEN CENTS

Casner Tops Dean Griswold In Moot Case

A capacity audience in the James Barr Ames Courtroom saw Professor A. James Casner successfully argue against Dean Erwin N. Griswold in the case of *Sanders v. Bennett* on Monday, November 25. This was only the second defeat suffered by the Dean in eight Model Appeal arguments. Professor Casner appeared for the first time in a Model Appeal.

The appeal was heard by Stanley E. Qua, '04, former Chief Justice of the Supreme Judicial Court of Massachusetts, Calvert Magruder, Chief Judge of the United States Court of Appeals for the First Circuit and Visiting Professor Harry Street.

Killed By Bullet

The case arose over the death of the plaintiff's husband on May 30, 1956, as a result of a bullet injury sustained on March 1, 1955, during the course of a burglary in which the defendant participated.

Mr. Casner argued that the wrongful death statute gave the surviving spouse a right of action only if the decedent would have brought suit, and that the decedent would have been barred. Dean Griswold countered that it had been the intention of the Ames Legislature to give the wife a separate cause of action and that it would be unjust to limit her cause of action by the statute of limitations ap-

(See APPEAL on page three)

Demolition Ceremony Starts Local Redevelopment Project

Amid public ceremony, television cameras, and floodlights, the city of Cambridge began its first urban project by demolishing a six-family building in the Rodgers block area last Monday afternoon. This marked the culmination of some five years of concerted efforts by public officials and interested citizens.

Professor Charles M. Haar, a member of the Cambridge Redevelopment Authority, a state agency in charge of the urban renewal program in Cambridge, commented that the launching of the program was a first step in the development of a coordi-



Charles M. Haar

inated program for the revitalization of the city. "Undoubtedly," he stated, "both Harvard and MIT have vital stakes in the well-being of the city, and in the creation of a stable environment." The future growth of the Universities, he continued, and the construction of new facilities will in turn be of great assistance to the City both in terms of better re-use planning and in constituting the local contribution required by the Housing Act of 1949.

Thaddeus R. Beal, LL.B. '42 ('47) and currently vice president of the Harvard Trust Company, is also serv-



U. S. Satellite to Be Fired Next Week, Predicts Haley

Andrew G. Haley, president of the International Astronautical Federation, Monday evening predicted that the United States will launch a space satellite "about December 5, 6 or 7." He made this forecast at the first official meeting of the newly-organized International Law Club in the Harkness Commons lounge.

Mr. Haley announced that the next spatial venture of the Soviet Union would be to send a rocket to the moon. They could do so now, he stated, and so could the United States, if it so desired.

Mr. Haley, in an address at Sanders Theater earlier in the evening, declared that an upper limit to the sovereignty of the state should be immediately determined. All nations at present define their sovereignty and limit their jurisdiction to the "air space" above them, he said, but

Christianity & Law

The next meeting in connection with the discussion group on Christianity and the Law will be held next Monday in the Associated Harvard Club Room of Holmes Hall at 8 p.m. Professor Harold J. Ber- man of the Law School, and Professor J. L. Adams of the Divinity School will lead the discussion which will be centered around the essay "Theology and Jurisprudence", pp. 169-193, and section II of the essay "The Christian Lawyer as a Churchman", pp. 227-235, in the current issue of *The Christian Scholar*. Copies of this publication are now on reserve in the Law School Library.

the term "air space" has no standard definition.

The well-known authority on space law proposed that the sovereignty of a nation should extend 275,000 feet upward from its soil, a distance of about 55 miles. Above this point there is no more air, he said, no more atmospheric lift for space-craft.

Mr. Haley called for an allocation, by international agreement, of radio frequencies for the use of space satellites. He advocated reserving a band of wave-lengths for the exclusive use of interspatial communication.

The speaker warned that the question of the legal ownership of the moon will emerge as a very important problem in the years ahead. The situation is pregnant with danger, he maintained, because "whoever is master of the moon would go a long way toward being master of the earth."

Mr. Haley declared that the Soviet Union will be capable of sending a man-carrying satellite around the moon and back safely to earth again

(See SPACE LAW on page three)

"Perry Como Case" Awaits Ames Semi-final Decision

The first of the semi-final arguments in the third-year Ames competition will be heard at 8 p.m. Tuesday evening, December 3. Contestants will be the Casner Law Club and the Chayes Club. The hypothetical case of *Como et. al. v. Dackworth Shirts, Inc.* will be argued before the United States Court of Appeals for the Ames Circuit.

Presiding over the court will be the Hon. Sterry R. Waterman,

1922-'23, of the Second Circuit Court of Appeals. Associate judges will be Rudolf Callman, LL.B. '39, of the New York Bar, a specialist in the field of trademarks and unfair competition, and James Vorenberg, LL.B. '51 m.c.l., of the Boston Bar. (Mr. Vorenberg recently represented Irizarry y Puente, the appellant, in his \$3 million suit against Dean Erwin N. Griswold in the United States Court of Appeals for the First Circuit. The case was won by the appellee, Dean Griswold, on October 28.)

Attorneys for the plaintiff-appellants will be James M. Brachman, 3L of Milwaukee, Wis., and Paul B. Fir- stenbergh, 3L of New York City. Counsel on the brief include Joseph E. Bachelder III, 3L of Princeton, N. J., Truman S. Casner, 3L of Belmont, Mass., James S. Hostetler, 3L of Mas- sillon, Ohio, Richard C. Kohls, 3L of Melrose, Mass., William C. McAuliffe, Jr., 3L of Columbus, Ohio, and Mor- ton M. Winston, 3L of Forest Hills, N.Y.

The defendant-appellee will be represented by Emil W. Herman, 3L of Pittsburgh, Pa., and William Schurt-

Boston Attorney Charges:

Mafia Rule Undiminished In Boston's Underworld

Francis Juggins, eminent Boston criminal attorney, told a group of Student Bar members last Thursday afternoon that the notorious Mafia organization is behind \$5,000,000 worth of graft in the city of Boston. "And that's a conservative estimate," he added.

The dreaded society of Sicilian gangsters, murderers and extortioners (also widely known as the "Black Hand") is operating smoothly, quietly and profitably in the underworlds of Boston, New York, Philadelphia and other cities, Mr. Juggins declared. They have a hand in almost every gangland activity that pays off. They are mixed up in labor unions, take payoffs from night clubs and race tracks, and dominate the narcotics racket in the New York and Boston areas.

Mr. Juggins stated that he has never represented anyone, in his long career, who admitted that he was a member of the secret society, but that he is "satisfied" that he has defended members of the notorious group. "You can't get these people to admit their connection with the organiza- tion," he added, "but it is easy enough to reason out."

The noted attorney, in a talk be-

Students Warned To Guard Health

Good sound advice, advice that should, but won't, be heeded by the majority of students at the Law School, has been offered in a new book written by Dr. Dana L. Farnsworth, Director of University Health Services. The book, entitled *Mental Health in College and University*, has been published by the Harvard University Press.

Dana Farnsworth is not only a medical doctor but also a psychiatrist, and formerly directed the student health programs at Williams College and at the Massachusetts Institute of Technology. In his work Dr. Farnsworth offers many guides to students to aid them in the maintenance of both good mental and good physical health. His advice includes:

1. Sleep — "The generally accepted standard of eight hours of sleep as

(See FARNSWORTH on page four)

fore the Student Bar Association in the Harkness Commons Lounge, took a firm stand against the use of capital punishment by the state. It is a "relic of barbarism," he charged, and has a "negligible deterrent effect." There are other methods of coping with murderers and a sentence of life imprisonment in a state penitentiary adequately protects society from them, he said.

Recalled Cases

Mr. Juggins reminisced about many of the more interesting cases he has handled in his 54 years of practice. He told of young Arthur Devlin, one of three men recently convicted of first-degree murder in the slaying of Merrill Lovinger. Devlin, Mr. Juggins said, was a man of intelligence and ability. He had a conscience and took it very hard when he learned that his sentence had been commuted to life imprisonment, but that one of his two partners in the unhappy affair, Arsenault, was still slated to die. Devlin was a truly relieved man when Governor Furcolo finally com- mitted Arsenault's sentence, the criminal advocate said.

Mr. Juggins stated that in his opinion public defenders, voluntary de- fenders and the legal aid organiza- tions were "doing more harm than good." He said that most of the "in-

(See MAFIA on page four)

New Location For Chancery

This September the Chancery Club moved into its new house at 9 Chauncy Street. The old house, on Massachu- setts Avenue beside the Kendall House, is expected to be razed within the year to make way for the pro- jected International Legal Studies wing.

Formerly a private dwelling and containing 16 rooms, the Club's new residence was built in the late 19th century. Seven law students pres- ently reside in this building.

One obstacle to the Club's acqui- sition of the building consisted in neighbor resistance when the rose garden to the right of the house seemed threatened by Club plans for a parking area there. With the at least temporary abandonment of this plan the neighbors acquiesced in the purchase of the property by Chan- cery.

Now, with some co-operation on the part of the local constabulary, Chancery should dwell peacefully and comfortably in its new home.

Buglers Bow

The Law School did not escape the general gloom which settled over Cambridge as a result of last Saturday's activities in New Haven. The previously unbeaten *Law Re- view* touch football team was de- feated by *The Yale Law Journal*, 30-18. The three Bugle touchdowns were scored by Dave Dorsen, 2L of New York, on passes from War- ren Wertheimer, 2L of Brooklyn.

The *Review* went into the game unbeaten, untied, and unscored- upon, as a result of victories over the Board of Student Advisors (19-0) and the Legal Aid Bureau (20-0).



Abram J. Chayes

man, 3L of New York City. Counsel on the brief include Donald E. Bieder- man, 3L of Rockville Centre, N. Y., Robert E. Fleck, 3L of Cuyahoga

(See AMES on page four)

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Dirty Hands

Elsewhere on these pages a prominent
 Boston attorney is reported as having made
 some very interesting comments concerning
 that fascinating society known as the Mafia,
 or the "Black Hand." In the light of recent
 developments in New York City, public at-
 tention has once again been directed to the
 fact that such an organization does exist, and
 does at present have a hand in illegal activi-
 ties involving unknown millions of dollars.

The roots of the Mafia can be traced back
 many centuries, to the days when the island
 of Sicily was constantly under the dominion
 of hated foreign rulers. Since law was, so to
 speak, a symbol of foreign domination, re-
 sistance to the law became the chief instrument
 of native rebellion. The Mafia took the lead
 in these activities.

It was then, as it is now, a secret society
 with all the trimmings: ritual, passwords, etc.
 Its romantic character wore off when the
 foreigners were expelled from the island, but
 the hostility to law remained, and the Black
 Hand became a clan of the criminal element.

The presence of the Mafia in the United
 States was early felt. At the turn of the cen-
 tury a New Orleans police chief began to
 "turn on the heat" in his investigation of a
 group of Sicilian extortionists. Unfortunately,
 he made the fatal mistake of underestimating
 them. One evening as he was returning home,
 a fourteen-year-old boy walked in front of
 him and started to whistle. As they passed a
 dark alley, stiletto flashed and there was one
 less police chief.

The extortion ring was arrested, and a good
 bit of evidence was gathered concerning their
 connection with the murder. The trial, com-
 plete with the bribing and threatening of both
 jurors and witnesses, was a satire on the ju-
 dicial process, and the defendants were
 acquitted. Before they could be released, an
 angry mob lynched five or six of them, and an
 international incident with the Italian govern-
 ment was provoked.

The subsequent history of the Mafia in the
 United States shows that after their early
 dabbling in extortion, they turned to boot-
 legging, and when that became no longer
 profitable, they cornered the dope market.
 This constitutes their largest single source of
 income at present, although they probably
 control most of the illegal gambling in the
 country.

Sicilian Domination

The head of the society resides in Palermo,
 Sicily, whence he more or less directs the in-
 ternational activities of his cosmopolitan
 group. At last word "Lucky" Luciano, a resi-
 dent of Naples, is heir apparent, but the rules
 of succession employed by the Mafia have
 never been made quite clear. Only Sicilians
 qualify for bona fide membership in the so-
 ciety.

The Mafia operates in most of the world's
 large cities and has its own farms for the
 cultivation of the weeds from which dope is
 made.

The whole thing sounds pretty fantastic.
 In fact, there are many people who sincerely
 believe that the Mafia does not exist. Most
 of the statements above would be impossible
 to prove in court.

However it would seem that the prevalent
 attitude in this country concerning the Mafia
 is to ignore its existence altogether. After all,
 its members are more behaved nowadays, and
 very seldom resort to messy killings. (When
 they do, it is usually the result of an intra-
 family squabble, and nobody gets too excited
 over that!) They drive around in big cars
 and even hold meetings in mansion-type

The ancient rule that the doctrine of caveat
 emptor must be applied strictly to sales of
 real property was followed recently by New
 Jersey in *Levy v. Young Construction Co.*,
 — N.J. Super. —, 134 A.2d 717 (App. Div.
 1957). In 1952 Levy purchased a newly con-
 structed house from the Young Construction
 Company, the builder. About a year later,
 Levy's cellar began to collect water. This was
 corrected, but after another year further
 work was required to halt seepage. In 1955
 the cellar filled, and this time plumbers dis-
 covered serious defects in the construction
 of the foundations which required extensive
 repairs to be made on the sewer pipes.

Levy brought an action in the Bergen
 County District Court against the builder-
 vendor, and recovered damages measured by
 his expenses in repairing the defects, plus
 costs. Levy had claimed that the builder-
 vendor was under a duty to construct the
 house in a good and workmanlike manner;
 that the sewer pipes were not properly laid;
 and that as a result, he had been compelled
 to bear the expense of extensive repairs.

By a 2-1 vote, the Appellate Division of
 the New Jersey Superior Court reversed the
 judgment, holding that Levy had no remedy
 against the construction company.

Judge Knight first disposed of any conten-
 tion that the company was liable in tort; and
 he further noted that there was no express
 warranty in the contract of sale or in the
 deed, by which the company guaranteed that
 Levy was buying a well-constructed house.
 This left only an implied warranty as a basis
 of recovery by Levy.

But the court held that in the absence of
 any express warranties in the deed, or fraud
 or concealment on the part of the vendor, a
 builder who sells a completed house is not
 thereafter liable to the purchaser for damages
 resulting from latent defects. "Although the
 doctrine of caveat emptor, so far as personal
 property is concerned, is very nearly
 abolished," Judge Knight wrote. "it still re-
 mains as a viable doctrine in full force in the
 law of real estate. Absent any covenant bind-
 ing defendant to sell a well-constructed house,
 plaintiffs cannot sue on an implied war-
 ranty." (134 A.2d at 719).

The court then distinguished cases cited
 by Levy in his brief, saying that all dealt
 either with contracts for construction, which
 do impose a duty on the builder to perform
 his work properly, or with the concealment
 of known defects. These were not in point
 here, since Levy's house was already finished
 when he bought it, and there was no evidence
 to indicate that the construction company
 knew about the defects when it consummated
 the sale.

Dissent Saw Representation

Writing a strong dissent, Judge Waesche
 said, "The defendant is a developer, and
 erected the house involved in this suit to sell
 to anyone who would want it for a home. The
 plaintiff was such a person. . . . [The] rep-
 resentation was impliedly made to whomever
 purchased from the defendant a house
 erected by it for the purpose of selling. . . .
 A person in the business of building houses
 to sell is fully aware that a purchaser relies
 upon such an implied representation." (134
 A.2d at 720).

Judge Waesche continued, "The acceptance
 of the deed for the house did not waive or
 impair plaintiff's right to claim and obtain
 damages for latent or hidden defects in the
 construction of the house." (134 A.2d at
 720). The judge felt that the implied rep-
 resentations of the construction company
 that the house was erected in a proper and
 reasonably workmanlike manner were col-
 lateral to the deed of conveyance, and did
 not merge in that deed so as to be waived if
 not expressly set forth therein.

It must be conceded that the majority of
 the court was following an almost unanimous
 line of judicial precedents on the question of
 recovery against a builder-vendor for latent
 defects in construction. In support of its
 position, the court was able to cite *Berger v.*
Burkhoff, 200 Md. 561, 92 A.2d 376 (1952)
 (water in cellar); *Allen v. Reichert*, 73 Ariz.
 91, 237 P.2d 818 (1951) (leaky roof); *Cam-*
bow v. Kansas City Ground Investment Co.,

houses in upstate New York. Perhaps the
 New Orleans incident has taught them the
 value of good public relations.

The efforts of law enforcement agencies to
 destroy the Mafia have obviously failed to
 date. Perhaps the Mafia is just too well or-
 ganized. Still, one would think that something
 could be done. It is surprising that with all the
 concern for national security prevalent during
 the last few years someone might have voiced
 the view that the Mafia constitutes a bit of a
 threat to the well being of the country. Then
 again, the only solution might well be to copy
 the English and establish both a national lot-
 tery and a legal means by which addicts might
 obtain dope from physicians.

Whatever course is to be adopted, it is
 clear that efficient organization on the criminal
 level, despite any exotic history or nomen-
 clature, is something without which the United
 States can do very well. It is quite enough to
 worry about the Russians.

Current Case

358 Mo. 934, 218 S.W.2d 539 (1949) (falling
 plaster); and *Otto v. Bolton & Norris*, [1936]
 2 K.B. 46 (falling plaster). The court failed
 to mention, however, that there was no indi-
 cation in the *Berger* and *Allen* cases that the
 vendor was also the builder.

The majority could find strong support as
 well from the writings of Professor Emeritus
 Samuel Williston. In 4 WILLISTON, CON-
 TRACTS §926 (Rev. Ed. 1936), the author
 states flatly that "There are no implied war-
 ranties in sales of real estate." He notes a
 few exceptions in the cases involving defecti-
 ve title, but concludes "Still more clearly
 there can be no warranties of quality or con-
 dition implied in the sale of real estate and
 ordinarily there cannot be in the lease of it.
 It is generally true also that any express
 agreements in regard to land contained in a
 contract to sell it are merged in the deed if
 the purchaser accepts a conveyance."

It is difficult to criticize any court for fol-
 lowing so strong a line of precedents and so
 distinguished an authority as Professor Wil-
 liston. But whereas the rule may merit re-
 tention in ordinary real estate transactions,
 there are many reasons why it should be
 modified in those cases where the vendor is a
 company constructing houses for the express
 purpose of selling them.

Court Feared Uncertainty

The present rule is so firmly established
 that courts usually do not bother to state any
 rationale for its existence. When they do, it
 is usually argued that great uncertainty
 would be introduced into the field of real
 estate transactions if vendors were subjected
 to liability after they had conveyed the prop-
 erty. As Judge Knight said in the *Levy* case,
 "They could not be certain as to the limits or
 termination of their liability." (134 A.2d at
 719). It has also been contended that a buyer
 has ample opportunity to protect himself by
 inspecting the property beforehand, or by ex-
 tracting warranties in the contract of sale
 and reserving them in the deed to provide
 against latent defects.

It might be said in rebuttal that mere an-
 tiquity is no argument in favor of a rule.
 The doctrine of caveat emptor was once rig-
 orously applied to sales of personal property,
 but its virtual abolition there has not seri-
 ously undermined our national economy. Nor
 did the decision in *McPherson v. Buick Motor*
Co., 217 N.Y. 382, 111 N.E. 1050 (1916) cause
 the collapse of General Motors by reason of
 uncertainty "as to the limits or termination
 of their liability" in cases of negligent man-
 ufacture. In most instances no opportunity for
 inspection will suffice to detect faulty con-
 struction of a foundation, and a low-income
 family purchasing a lot and house do not
 always find themselves in a position to ex-
 tract a warranty in their deed from a builder.

Those who have spoken out against the
 rigorous application of caveat emptor in these
 circumstances have found themselves in much
 the same position as King Canute. One who
 defied the tide of judicial decision was Allison
 Dunham, Professor of Law at the University
 of Chicago Law School. In his article *Vendor's*
Obligation as to Fitness of Land for a
Particular Purpose, 37 MINN. L. REV. 108
 (1953), Professor Dunham noted an excep-
 tion to the general rule, to the effect that a
 builder-vendor may be liable to a purchaser
 for defects known to the builder-vendor at
 the time of the sale. He commented, "There
 does not seem to be any justification in limit-
 ing the liability of a dealer in new housing to
 the defects known to him at the time of sale,
 if he is liable for the same defects in housing
 which he sells before completion." DUNHAM,
supra at 121.

This seems eminently sensible. When a
 vendor sells a house which he is building
 while it is still under construction, the con-
 tract normally imposes on him a liability akin
 to that of a warranty of fitness for a parti-
 cular purpose. Even in New Jersey, which
 is as strict as any other jurisdiction, a build-
 er-vendor has been held liable under these
 circumstances for defects causing water to
 accumulate in the basement after the buyer
 had moved in. *Weinberg v. Wilensky*, 26 N. J.
 Super. 301, 97 A.2d 707 (App. Div. 1953).
 Why, then, should recovery by the buyer
 hinge upon whether he closed the transaction
 before or after the house was completed?

It seems to be sheer sophistry to argue that
 in the former case he has no opportunity to
 inspect the finished product, whereas in the
 latter he does, and hence can be held to have
 taken the house "as is." In both New Jersey
 cases, *Levy* and *Weinberg*, the defects were
 present in the foundations of the houses, and
 though the house in *Weinberg* had not yet
 been finished, the foundation was already
 complete. In each case, the buyer in fact had
 an opportunity to inspect that which sub-
 sequently caused the trouble before he
 bought. The distinction drawn by the court
 thus seems to have utterly no application to
 reality.

No one has yet contended that warranties
 of quality or condition should be implied in
 every real estate transaction. Certainly,
 when a vendor sells an old house to another
 individual, it would be unfair to hold the
 vendor liable for latent defects which sub-
 sequently appear. When anyone buys an old
 house — and by "old" is meant any house

other than newly constructed houses offered
 for sale by the builder — he takes on notice
 that old houses are quite likely not to be in
 perfect shape. No strict liability should be
 imposed in such cases, except where fraud
 or concealment of known defects is involved.

But in the United States at the present
 time, the construction business is one of the
 largest parts of the economy. Large com-
 panies often undertake vast development
 projects, erecting houses in whole subdivi-
 sions and offering them for sale to families
 in the lower- and middle-income brackets.
 If the law is to conform to the actual needs
 of the community, a somewhat revised appli-
 cation of the old caveat emptor doctrine is
 called for.

Buyers Rely on Fitness

As Judge Waesche pointed out when he dis-
 sented in the *Levy* case, construction com-
 panies are well aware that individual buyers
 rely on them to construct a reasonably fit
 house. It is because individuals have this
 confidence in builders that the latter are able
 to sell their products, often without having
 to grant a warranty with the deed. Builders
 should not be able to enjoy this reliance to
 their profit, and then make use of it to escape
 the consequences of faulty workmanship.

Of course, the application of *McPherson*
 would probably subject the courts to endless
 disputation over what is and is not negligence
 on the part of a builder. And it might be
 further limited to cases of personal injury
 arising from the defective construction. But
 if the creation of an implied warranty is too
 revolutionary a step for now, a homebuyer
 should at least be compensated for injuries
 caused by a builder's negligent work.

Application of either rule to protect a com-
 mercial buyer, who is on a somewhat more
 nearly equal footing with a builder, is also
 not an urgent necessity.

An extension of the *McPherson* doctrine to
 apply to builder-vendors in the real estate
 field, and to extend at least as far as the first
 homebuyer, would remedy the situation. To
 be sure, the construction industry would ar-
 dently contend that it violates sacred prece-
 dents of Anglo-American law, and finds little
 if any support in existing authority. But it
 is just as easy to say that there *can* be implied
 warranties in the sale of real estate as to say
 that there *cannot*; and when social and
 economic realities call for modification of a
 rule, all the books on the shelves should not
 prevent a reappraisal of its worth. — Oliver

Letter to the Editor

TO THE EDITOR OF THE RECORD:

As a first year student, I have not as yet
 become accustomed to many of the Law
 School practices and traditions. One ques-
 tion in particular bothers me: Is it necessary
 to hold classes on Saturday? I presume that
 this question has been discussed before, but
 an occasional re-examination of our policies
 is good for all of us, from the lowest 1L to
 the United States government itself.

Many of us from other parts of the country
 chose an eastern law school partly for the
 reason that we might travel around the
 country on week-ends and see what another
 area is like. As it is, our week-ends are barely
 long enough to get beyond the first five or six
 traffic jams. It is unfair to expect us either to
 give up this aspect of our education or to skip
 classes.

I have heard many people complain about
 the alleged pressure found in this law school.
 Surely one contributing cause to this pressure
 is the fact that there is practically no break
 between one week and the next.

If weekends were free, those who still
 found it necessary to work 16 hours per day
 could work uninterruptedly for an entire
 week-end, and could then use Saturday morn-
 ings to prepare additionally for their classes.
 During Ames season, a large amount of
 steady work could be done without interrupt-
 ing our regular class studies to as great an
 extent as is done today.

Surely many of our professors, too, would
 appreciate the greater flexibility that free
 weekends would give their schedules.

Furthermore, Saturday classes violate the
 religious freedom of those who regard Sat-
 urday as the Sabbath, including Jews and
 Seventh-Day Adventists.

This policy seems particularly unjustified
 in that it is not necessary. In most cases,
 there are only a couple of classes on Satur-
 day. These could easily be held at some other
 time during the week. If the problem is
 utilization of classroom space, why not have
 8 a.m. classes? These are not uncommon in
 many colleges, and many of us would gladly
 get up an hour earlier in return for a free
 week-end.

In recent times the five-day week has be-
 come an American tradition. Few things are
 so symbolic of our way of life as the week-
 end excursion. And those of us who want to
 be human beings as well as lawyers find this
 particular policy oppressive, unfair, and not
 befitting the greatest law school in our
 nation.

HOWARD ENGLE, 1L

Interpretive Changes Necessary If Common Law Is Ever Codified

BY BERNHARD J. SCHAUB, LL.M. '57

(Dr. Schaub was one of the foreign graduate students here last year, and received his LL.M. degree from the Law School in June, 1957. A graduate of the University of Zurich, Switzerland, he is now working in the District Court in Zurich. This article was originally one chapter in a paper on "Selected Aspects of the Problems of General Common Law Codification" written in Professor Henry M. Hart's seminar on Legislation.)

It is an obvious proposition that the interpretation of a code will depend, among other things, on the way in which the code is written. On the other hand, a codifier will be influenced in his choice of expressions, his degree of generality and in the overall style of the code by the method of interpretation to which he knows the code will probably be subject.

This problem has two aspects: is there a method of interpretation at all, in the sense that the courts, when interpreting a statute or code, use consciously, constantly and rationally a certain mental process for getting at the sense? and secondly, is there a method of interpretation which can claim to be the "right" one, and if so, which one is it?

As far as the first question goes, it is clear that the method of interpretation, whatever it may be, must be uniformly applied in order to secure certainty and predictability and for the vindication of due process.

American Position

Let us try, then, to take stock with respect to the American approach to the interpretation problem. On the constitutional level we are faced with a comparatively simple situation. A combination of the fact that it is extremely difficult to change the Constitution and the lessons taught by Marshall (see *McCulloch v. Maryland*, 4 Wheat. 316 (1819)) has led the Supreme Court to a reasonable and responsive approach, taking into account the actual and present needs of society, not overestimating historical facts or sticking blindly to words.

It can be safely said that although the Supreme Court has never bothered to lay down its method of interpretation explicitly, that is to say, it has never clearly declared what its theoretical notions of interpretation are, the results have been very satisfactory.

However the moment one enters the realm of statutory construction, things change. The Supreme Court, and still more the state courts, not only indulge in an incoherent variety of ways of interpretation, but their basic principle, to the extent they have one, is basically wrong. It is the concept of the literal-historical interpretation, not only adhered to in practice but even openly advocated in doctrinal writings.

Strict Method

This literal-historical interpretation can be generally described in the following way. First the text of the statute is to be considered, and if the words have a clear and plain meaning, they must be given effect, no matter how unreasonable they are, since the court is not concerned with the wisdom of legislative enactments. Only in the case of ambiguous and unclear words is it necessary at all to resort to interpretation.

Then the "intent" of the statute (which, in any case, must be "within" the words of the statute) may be ascertained. This is done by attempting

to ascertain the historical intent of the legislature which actually enacted the statute in question.

This intent is taken as a psychological fact, something that once occurred in the past, so that all one has to know is what actually happened in the minds of the legislators.

In the absence of such an intent, or if one fails in tracing it, resort is had to all kinds of fictions as to what the legislature would have wanted if they had thought of the problem with which the court is faced.

This doctrine, in the main, is based on three assumptions:

1. That statutes, unlike the Constitution, are explicit enough so that adherence to their words is justified. In other words it is thought that because of their difference in structure, there must be a difference in interpretation between statute and Constitution.

Assumption of Intent

2. That a legislature had an intent and that this intent is decisive, short of clear words in the statute.

3. That words have "as such" a certain meaning, just on their face.

I am unable to agree with any of these assumptions. The first one does not take into account that a code by reason of its necessary generality is to some extent similar to a constitution.

The second assumption is also confusing to me. A legislature is composed of single members, but its products are made by the legislature as a body. The individual wills of the individual legislators cannot be relevant. A statute passed by a small majority is as good law as one passed unanimously. How can these irrelevant, individual wills be added up to a "collective mind"?

So the "intent of the legislature" is a personification; what we envision when we use this metaphor is a legislature composed of a single man, the well-known, somewhat abstract "reasonable man", projected into the past. Since one must rely on this fictitious person anyway, why not take the reasonable man of today?

The third assumption, which is really the crucial one in deciding whether this approach is tenable, seems also erroneous. Undeniably, there are words which have more of a fixed meaning than others. Yet it cannot be generally said that words have, as such, a certain meaning. Huber, the author of the Swiss Civil Code, has said: "The more the things are connected with human actions and interests, the stronger will be the influence of teleological considerations in the formation of words." (Huber, *Recht und Rechtsverwirklichung*, Basel, 1921, p. 383.)

End Must Be Considered

Since the principal characteristic of the law is its purposiveness, the teleological aspect is even more important. It follows that in interpreting a statute, one has to start from its purpose and look for an interpretation which, above all, makes sense. This purpose cannot be the historical one, since the law is not concerned with the solution of historical problems.

No reliance should be placed on Latin formulae, such as *in majori minus, argumentum e silentio, expressio unius est exclusio alterius*, and the like. What is actually *major* and whether there is a *silentium* are questions which themselves may require different answers.

These answers can be derived by only one criterion, the purpose of the statute. Thus how can we know, in the abstract, whether a bull is *eiusdem generis* or not in a statute enumerating "horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep"? If "or other cattle" is tacked on, it depends on the teleological context

whether bulls are "other cattle" or not. If the statute forbids the beating and ill-treatment of the animals mentioned, a bull must clearly be included, since there is no reason why brutality against cows should be more obnoxious than brutality against bulls. However in *Ex parte Hill*, 3 Car & P. 225, 1827, the court held the other way.

Varying this example, how do we know whether cows are "more" or "less" than bulls for the purpose of the maxim *in majori minus*? A provision forbidding the feeding of certain chemical substances to cows may not apply to bulls because of the intent of the law to improve the quality of the milk. On the other hand, a statute ordering the erection of fences around meadows where cows graze may apply *a fortiori* to meadows with bulls if it aims at the protection of the public against irascible cattle. These formulae, as the examples show, are never "wrong" in themselves, but their applicability depends on the teleological context.

The fact that the importance of teleological considerations is not recognized by the adherents of the "plain meaning" test is also shown by their contention that the same rules apply to the interpretation of private contracts as to statutory law. (See Clarke, *The Science of Law and Lawmaking*, New York, 1898, p. 226.)

I cannot agree. In a contract the parties do not pursue objective aims as a statute does, but they are rather trying to realize what they think is a bargain, in other words, a purpose which is not necessarily reasonable. Furthermore, a party deserves some protection for the way in which he interpreted the utterances of the other party, even if the latter meant something different.

Differ From Contracts

In the sphere of statutory interpretation, no such considerations should enter, because legislative enactments, unlike contracts, are not the result of controversies between competitors with adverse interests who often are not dealing on an equal footing.

For all these reasons the plain meaning test must be rejected. A reasonable, purpose-orientated, essentially unhistorical interpretation for statutes is the most satisfactory one.

This, of course, does not dispose of the question. Problems of how to ascertain the objective purpose (here a resort to legislative materials can hardly be objectionable) and of fixing the limits arise. The primary intention here was not to dispose of the interpretation problem, but to show that the literal-historical approach is insufficient. Furthermore, quite often the courts talk in terms of plain meaning, yet in effect apply another method and reach a reasonable result. (See *Riggs v. Palmer*, 115 N.Y. 505 (1889).)

The literal (plain meaning) approach has done a good deal of harm, first, in that often statutes do not enjoy a reasonable interpretation, and second (which is worse) in that the legislatures accept the lessons taught by the courts. They are extremely specific, accumulate a tremendous heap of synonyms, and try to think beforehand of the most bizarre contingencies.

Subway Signs

A simple but telling every-day example can be found in the MTA subway, where it is forbidden "to walk on or across the track." This trivial instance is sufficient to show the fallacy of this attempt to beat, as it were, the courts with their own weapons.

It presupposed that a man would escape the threatened fine (if the words were only "to walk across the track") by saying "I walked not

Hockey . . .

A recently organized Law School hockey team has been practicing hard for the past three weeks to prepare for their opening game Friday evening with the Business School. The contest will commence at 9:30 p.m. at Watson Rink, located back of Soldier's Field.

Stiff competition is expected to be offered by the Business School squad which boasts two former Yale hockey team captains in their line-up, "Morty" Stevens (1951-52) and "Higgy" Gould (1954-55). Yale's goalie of last year, Morton Shapiro, 1L of St. Paul, Minn., will protect the net for the Law School.

The Law School team holds practices twice a week at Watson Rink, each Wednesday evening plus either Monday or Friday evening. All Law School players desiring a berth on the squad are requested to appear at Watson Rink for the game with the Business School or at one of the practices the following week.

Probable future opponents for the Law School squad include teams from the Medical School, Divinity School, the College houses and the heralded Lexington Minute-Men.

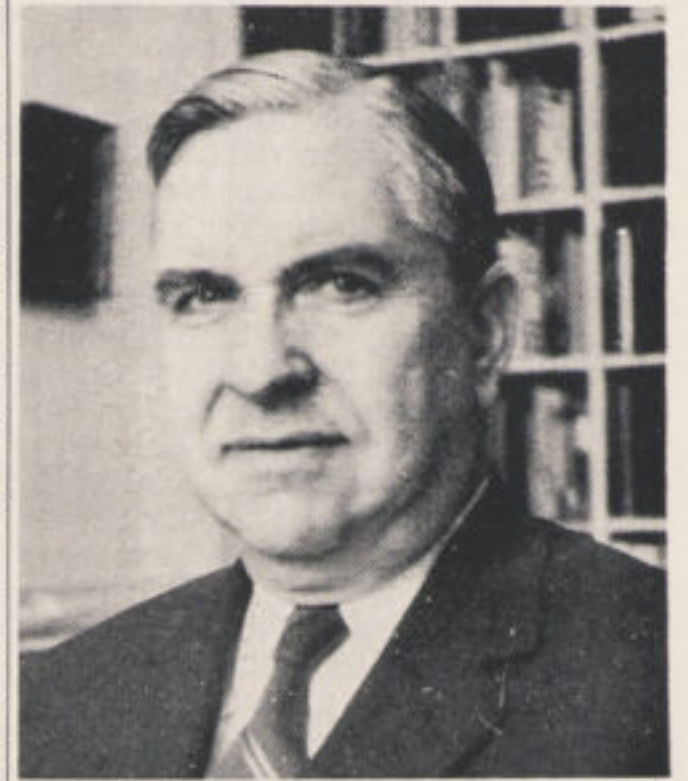
across but on it." However, no statute, if subject to this literal approach, can ever cover everything.

Suppose someone did not walk but ran, crept or danced on or across the tracks. I take it that the courts would not shut their eyes but would still fine him, because here the purpose of the rule is (although not contained in the language) so flagrantly obvious that the most literal-minded court could not avoid seeing and enforcing it. In other words, the "on or across" philosophy is not only wrong but contradictory in itself because, if consistently and logically applied, it defeats its own purpose.

What then are the consequences for our problem? The "in or across" philosophy leads to statutes which are three times as long as they ought to be and which are hardly readable. But for the purposes of a general codification of the common law, its main disadvantage is that it creates a general legal climate in which codification cannot grow. Even if a code be made, it would not be workable so long as the courts on their part adhered to the plain meaning test and similar symptoms of a narrowly literal approach. If this approach does in fact prevail, then codification, whether deemed desirable or not, is hardly possible.

APPEAL

(Continued from page one)



Erwin N. Griswold

plicable to the decedent's cause of action.

As to the battery count, Professor Casner argued that in order to be liable for the act of another, the defendant had to have given some consent to the action taken, and since he was acting under compulsion, he could not be said to have consented.

The court held that the jury verdict as to the battery count must stand, and although neither count was barred by the statute of limitations, that there was insufficient evidence to go to the jury on the negligence count.

— Todd

SPACE LAW

(Continued from page one)

within 20 years. He stated that an international conference should be convened at the earliest moment to settle the jurisdictional problems raised by lunar conquest.

Dr. Welf Heinrich, Prince of Hanover, shared the platform with Mr. Haley. He explained and summarized the views of authorities on the subject of the definable boundaries of national sovereignty, comparing and criticizing them. He pointed out that although legal conceptions adapted to life on earth do not fit an inter-spatial situation, "moral principles follow men wherever they go."

Many of Mr. Haley's remarks were recorded by NBC and may be heard on its "Monitor" program this weekend.

— Binder

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Church and Labor Discussed by Cort

"Abuses such as are brought about by communist control or racketeering are not essential to the labor movement," declared John Cort, executive secretary of the Boston Newspaper Guild and labor writer for *Commonweal* Sunday morning.

Mr. Cort spoke at a communion breakfast held by the Saint Thomas More Society in the Mallory Smith Room of Harkness Commons. His subject was "The Church and Labor."

Mr. Cort described the social scene in a modern industrial society as one in which workers have lost legitimate pride in their labor. Until this is recovered, Mr. Cort explained, we shall not have "a truly Christian economy."

Mr. Cort declared that the Roman Catholic Church had largely lost the allegiance of labor in Europe because there it became associated in the popular mind with property owning and managing groups. In the United States, where the relationship between the church and labor is "uniquely cordial," the Catholic Church counts among its members large numbers of industrial workers. The Catholic hierarchy in America, he said, has been particularly outspoken in favor of unionization.

Praised Unionists

Mr. Cort praised the Association of Catholic Trade Unionists (ACTU), a religious, educational and social organization designed to develop leaders to oppose communists and racketeers within the ranks of established labor organizations.

The AFL-CIO, he asserted, lacks the power to oppose successfully union racketeering. It has no power to step in and clean up a racket-ridden local or international. The only weapon it possesses, outside of the right to expel from the AFL-CIO, is the threat of ouster.

Mr. Cort predicted that the Teamsters Union will be ousted at the coming AFL-CIO convention in Atlantic City. He said that even if the Teamsters would hold a legitimate election, James Hoffa would be again elected President. "Hoffa would be re-elected because he gets results. . . . It is one of the characteristics of our materialistic society that we respect people who get results."

As long as Jimmy Hoffa brings larger pay checks the members of his union are likely to remain apathetic about whether his means are good or bad, Mr. Cort said.

Fears Anti-Labor Laws

In response to questions from the audience, Mr. Cort expressed fear of anti-labor legislation. With regard to the right-to-work laws he said that their evaluation rests on a question of fact, viz., "Is the union shop necessary for effective unionism?" If the answer would be affirmative, "then the right-to-work law is bad."

But he explained that the great mobility of workers from job to job and city to city causes a very high turn-over in industrial union membership. This he concludes means that union ranks would soon be depleted without union security clauses in labor-management contracts.

— Manley

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FARNSWORTH

(Continued from page one)

desirable for everyone, with a margin of an hour or so each way, is a sound one." (The numerous lights which may be observed burning in the windows of the Law School dormitories well into the morning hours bear witness to the law students' compliance with this common sense rule.)

2. Drug stimulants — "Almost invariably the harm caused by the so-called cerebral stimulants far outweighs any temporary good they may do. Their use is a mark of bad judgment and of desperation." (The heavy consumption of No-Dose and other caffeine tablets by Law School students at examination time demonstrates wide disregard and disrespect for this rule.)

3. Extra-curricular activities — "The human organism thrives on balanced activity, on alternation of activity and rest; on change from mental to physical work and back again." (Tales of industrious hermits, of book-worms who have never seen outside the walls of Langdell Hall and their dormitories for a three-year period have been told about Harvard law students for years.)

4. Grades — "The price of an 'A' average paid by the man who must have it to maintain his good opinion of himself and who sacrifices many activities which he would have liked to enjoy, is far too great. . . . A man is judged by his associates and potential employers on things far more important than mere grades alone." (The Law School is notorious for the extreme competitive atmosphere which pervades its buildings.)

BULL & BEAR

(Continued from page one)

a stock at a given time. He discarded the theory of the SEC that the "insider," corporate officers and members of the board, determine trends. Mr. Bernhard suggested that for personal reasons and those of company interest, these "insiders" would not give a clear indication of what they considered the value of their stock to be. He claimed that this group did not in any way anticipate the recent break in the market.

He went on to discount the Dow theory that the majority of people have a prophetic instinct or knowledge and are thus able to anticipate business prospects. Mr. Bernhard said that though many groups consider the market as a good indicator of the value of stock it is not, pointing to the disparity between the Dow-Jones Average and business conditions in 1954.

Mr. Bernhard explained that the position of *The Value Line* is that the dividend determines the value of the common stock when it is considered in relation to the price-earnings ratio over the past ten or twenty years. He added that each company may have its own price-earnings ratio.

He admitted that the theory of evaluation used by *The Value Line* might not be the absolute solution to the problem of evaluation, but he was emphatic on the point that some definite standard of evaluation was necessary, and that he felt it would be a blessing to the investor when he could do away with the various forms of witchcraft involved in such a process currently.

— Lambros

RENEWAL

(Continued from page one)

extremely important. New land techniques, the development of covenants and restrictions fitting into the local plan and federal requirements, and the development of financing to obtain FHA and tax advantages, lend a new dimension to real estate transactions. In helping achieve the Congressional aim of creating a more effective and pleasant physical environment, the challenge to the creative role of the lawyer is immediate.

— Page

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MAFIA

(Continued from page one)

igent" defendants that ask for court-appointed aid could raise the money for their defense if they really wanted, or had to. These court-appointed defenders do not, as a rule, do a good job, he added, and don't always have the interests of their clients at heart. We would be better off without them, he concluded.

In answer to a question, the attorney stated that in determining the proper fee to be charged in a criminal defense, the lawyer should take into consideration his experience in the field, the amount of work involved, and the result obtained. As you gain experience, and if you are successful, Mr. Juggins said, you get to the point where you can pretty much set your own price. If the client doesn't like it, he can go to someone else.

Start in Large Firm

The speaker had this advice to offer to any law school graduate aspiring to be a criminal lawyer. "It might be advantageous at first to you to go into a large law office, but after that you would be better off taking the bumps you must suffer while on your own." Mr. Juggins said that he wouldn't advise any young lawyer to work more than a year in a large office or as an assistant district attorney, but to strike out on his own early. The early years may be lean ones, he cautioned, but the experience they provide is invaluable. After all, he continued, "Experience is much better than money."

Anticipating the inevitable question of whether he would defend a man whom he knew to be guilty, Mr. Juggins answered that it is not for the lawyer to judge a man's guilt or innocence or the penalty he should suffer. That job is for the jury. The

AMES

(Continued from page one)

Falls, Ohio, Donald Hirsch, 3L of New York City, William B. Mallin, 3L of New Kensington, Pa., Carl M. Selinger, 3L of Oakland, Cal., and Zita L. Weinshienk, 3L of Denver, Colo.

Plaintiff Perry Como is a well-known entertainer and television personality. Plaintiff Gregory is a manufacturer of sportswear. He possesses an endorsement contract with Como granting the use of Como's name and picture in connection with advertising a sportswear model designated the "Perry Como Cash-Wool." Gregory has registered the designation "Cash-Wool" as its trademark for sportswear. They are labeled as containing 50% cashmere, 50% wool.

The defendant, a Georgia corporation, manufactures sweaters. In August, 1957, it began advertising two sweater models in national magazines patterned after the sweater worn by Perry Como on his television program. One model was designated "The Perry" and the other "The Como Casual." They were labeled as containing 50% cashmere and 50% wool.

Each advertisement pictured Como and was captioned, "This is Perry Como wearing the sweater in which you've seen him on his TV shows." On each advertisement appears the legend "Not Endorsed by Perry Como" in the same size letters as the name "Perry Como" in the caption.

Subsequently Dackworth received a letter from plaintiffs demanding that it cease using Como's name and picture in connection with the advertisement of its sweaters and that a simulation of Gregory's trademarks be discontinued. Dackworth did not reply to the letter or cease its advertising.

Plaintiffs then filed a complaint in the United States District Court for

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Domestic Relations Problems Tax Talents of Busy Legal Aid Bureau

In a recent divorce case, counsel discovered a material witness out in Hingham, where the owner of a boarding house swore she had seen the defendant husband living with the co-respondent. The affidavit furnished by the owner enabled the Law School's Legal Aid Bureau to bring the litigation to a conclusion favorable for its client.

This type of case, a domestic relations problem, typifies the bulk of Legal Aid's work. But landlord and tenant, installment contract, and small tort cases are also handled, according to Warren G. Miller, 3L of Brookline, president of the Bureau. Mr. Miller pointed out that the domestic relations cases include separation and support litigation as well as divorce proceedings.

Legal Aid, one of the Law School's three honor organizations, draws its membership from among approximately the top tenth of the second and third year classes, less members of *Law Review* and the Board of Student Advisers. The Bureau was organized to give free legal aid to indigent persons only; any client who has the means to pay a reasonable attorney's fee is referred to private counsel.

For this reason, a financial investigation is always first on the agenda when a client comes in and counsel begins interviewing him. It is essential that Legal Aid confine its activities to charitable cases, so that it will not interfere with practicing attorneys, and will maintain its purpose of filling a need rather than entering the practicing profession prematurely. (The Supreme Judicial Court of Mas-

sachusetts has held that gratuitous legal aid to the poor does not constitute the practice of law.)

Mr. Miller emphasized that in all domestic relations cases where the client is the moving party, he is first required to consult a recognized social agency. This agency must determine that his decision to seek the divorce or separation is a "socially desirable" step. Only then will the Bureau assist him. Although such referrals are not primarily for the purpose of effecting reconciliations, angry spouses often do "make up" through the medium of social or religious agencies.

May Appear in Court

The Harvard Legal Aid Bureau is one of the few such student organizations which may appear in court to argue and present evidence. In other jurisdictions the legal aid group is confined to out-of-court work, and at trial can merely assist regular counsel.

Professor Eugene Wambaugh made the first attempt to organize a legal aid group at the Law School in 1894. It failed, but the project was again undertaken in 1913 by officers of the Law School Society of Phillips Brooks House, and came into its own the following year under the chairmanship of Charles B. Rugg, LL.B. '14, son of a former Chief Justice of the Massachusetts Supreme Judicial Court.

Since then the volume of cases has continually expanded, especially since 1946 when the Bureau began to remain open during the summer months, staffed by volunteers and two regular members.

New members of Legal Aid receive preliminary orientation and advice, but they begin handling cases on their own at a very early time. Third year members are available for consultation, and there are treatises on Massachusetts substantive and procedural law available for their study. Edward J. LeCam, '19-'22, a member of the Boston Legal Aid Society, is legal advisor to the Bureau.

— Voss

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