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TEN CENTS

\$250 Award Awaits Winner

The last day of registration by second year students in the Williston Competition will be tomorrow. Students must register by 5 p.m. to participate in the first round, which begins with the issuance of facts on March 5. The completed draft will be due March 19.

The final round of the Competition begins on February 28 with four teams vying for the \$250 first place prize. Other awards are \$150 to the second place team, \$100 to the third place team, and a \$50 book credit to the fourth place team.

The problem to be issued involves the drafting of a stock purchase-sale agreement. The fact situation is based on an actual case that Milton Bordwin, Faculty Assistant in Charge of the Ames Competition, has worked on. He will act as the client of the participants and will meet with them to discuss the problem.

The drafts submitted will be judged by Howard Rubin, LL.B. '35, a member of the Boston firm of Guterman, Horwitz and Rubin. The awards will be presented at a dinner sponsored by the Boston Safe Deposit and Trust Co., which provides \$500 of the prize money.

Jaffe Previews FCC Scandals

The current seething congressional investigation of the Federal Communications Commission together with the charges of politics, favoritism and misconduct being hurled at the body were foreshadowed five months ago



Louis L. Jaffe

by Professor Louis L. Jaffe, Byrne Professor of Law, in an article entitled "The Scandal in TV Licensing," published in the September issue of *Harper's*.

In that article Professor Jaffe, who is now on sabbatical leave from the

(See JAFFE on page four)

DRIVE

The Harvard Law School Combined Charities Annual Drive began yesterday and will run until Feb. 28. Dorm Council members will solicit students living in the dormitories and letters will be sent to all other students. It is hoped that law students will contribute an average of \$4 per person.

Bull & Bear Club Hears Anderson

Outstanding opportunities for lawyers exist in the insurance business, the president of New England Mutual Life Insurance Company told the Bull and Bear Club Friday, February 14.

O. Kelly Anderson, president of one of the country's largest insurance companies, pointed out that his home office alone employs 10 lawyers in its legal department and 17 lawyers in other positions.

Opportunities for lawyers interested in banking and finance are particularly good, he said. The five largest insurance companies have combined assets of more than 47 billion dollars.

Mr. Anderson presented a general survey of his company's investment procedures. Most of the investments are made in industrial properties and other real estate, long term bonds, or direct loans to industry. However, he added, about 8% of the company's investments are now in common stocks and the percentage is increasing.

Particularly in the investment field, Mr. Anderson said, the legal position of an insurance company is always changing. An insurance company is required to comply with the insurance investment regulations of every state in which it does business. Substantial investments in common stocks were not possible by the large insurance companies, for instance, until the relaxation in 1952 of New York State regulations.

Mr. Anderson described the corporate lawyer as falling into one of two categories. The first, he said, merely passes judgement on a proposal, expressing a well documented opinion as to why the proposal can or cannot be carried out under existing statutes. The second type, he said, will present alternative proposals to bring the idea within regulatory and legal bounds. The second type, Mr. Anderson concluded, is an essential member of the "management team" and doubly valuable to his company.

In addition to being president of New England Life, Mr. Anderson is a director of Gillette Company and the United Fruit Company, and a trustee of the Real Estate Investment Trust of America, Wellesley College, and Boston University. He is an alumnus of the University of Iowa (1927), and the Harvard Business School (1929).

— E. McIntosh Cover

BERMAN TO EUROPE

Professor Harold J. Berman will leave the Law School today for Rome, Italy, where he will serve as chairman of a Conference on the Legal Aspects of Trade Between Planned and Free Economies, to be held February 24 to March 1 under the auspices of UNESCO and the International Association of Legal Science. The twelve other participants in the conference have been chosen in equal numbers from Communist and non-Communist countries. All except two are law professors, those two being a practicing lawyer and a banker.

The conference will be concerned primarily with trade agreements between countries of planned economy and countries of free economy and settlement of disputes arising from trade between such countries. Working papers have been prepared by the participants on a variety of subjects relating to these problems, such as the most-favored-nation clause, clearing agreements, immunities of state trading organizations, and arbitration of disputes.

After the conference, Professor Berman will depart for Sweden to lecture on "Socialist Legality and the Rule of Law" at the law schools of Stockholm, Upsala and Lund Universities.

His itinerary includes stop-overs in Paris (February 21-22), Milan (March 1-2), Geneva (March 2-4), and Copenhagen (March 7). He will return to Boston on March 8.



Albert Gore

Nuclear Energy Is Discussed by Sen. Albert Gore

The struggle between government and private power groups was characterized by Senator Albert Gore of Tennessee as a "millstone around our necks" when he spoke last Thursday evening in the James Barr Ames Courtroom. The Senator's topic was, "Nuclear Energy Tomorrow," and he proceeded to discuss the many problems which face this nation if the United States is to maintain leadership in this field.

He began his speech with the reminder that "electricity is the key to industrial development." Then figures were quoted to show the enormous growth in the consumption of electrical energy.

At the present time, the United States had more fossil fuels (coal, oil and gas) than any other nation, he stated, and in addition uranium is in great supply here. No longer are we forced to the expedients of about ten years ago when "we went to great extremes to tie up the uranium sup-

(See GORE on page four)

Teaching Career of George K. Gardner Reviewed by Maguire, Fuller, Braucher

By John M. Maguire

George K. Gardner is a sturdy old friend, who has my personal affection and respect, and my professional admiration. Nearly 44 years ago he came from Law School to the Boston office which employed me. We hit it off well. George — some of his friends call him Knowles, his middle name, but I never have — though not too much of a fellow for talk, showed his inner feelings otherwise. I did him some small favor, its nature now forgotten, and next day found on my desk a useful memorandum about a law point with which I had been struggling.

In 1915 our senior partner and I tried a long will contest involving for both sides a ticklish testimonial topic. George quietly prepared a triple schedule of questions to witnesses, duly documented by citations — the questions which the judge must allow, those he must forbid, and those on which he had free discretion. Armed with this schedule, we made life miserable for a less well-read opponent. Years later, when George was with another firm, one of their partners told me that George was their problem man. If a question stumped them, they put it to him. He would perch his feet on the window sill, look at passing pigeons and cogitate, and in due course give the answer.

This correctly indicates that George has never failed to think deep and independently. His is a tough mind, and when a student tells me that Professor Gardner has been his very best teacher, I know that student has a

(See MAGUIRE on page four)

By Lon L. Fuller

In joining in the tribute which the RECORD is properly paying to George Knowles Gardner on his retirement, I shall try to sketch briefly what seem to me to be his principal contributions to the law of contracts and to the training of those who share the responsibility for shaping that law.

Much of what he has contributed was in the classroom. This contribution did not lie so much in the enunciation of new theories (though these were certainly not lacking) but in a way of thinking. Though I have never had the privilege of observing him in the classroom, those who did have conveyed to me the vivid impression of a man who constantly urged his students to examine the familiar problems of contract law as if they were coming up for decision for the first time. He was ready to explore any view, however unsupported by precedent, that promised new insight and understanding.

This philosophy of legal education permeated his casebook, published in 1939. This work departed radically from the principles that had usually been observed in constructing casebooks. The standard practice had been, and still is, to arrange cases in a sequence that either represents the order in which they might appear in a treatise or in an order that represents, as it were, the birth and death of a contractual relation: offer, acceptance, consideration, breach, waiver, etc. Elements of these organizational principles are present in Professor Gardner's book, but the general

(See FULLER on page four)

By Robert Braucher

In a first-year class in Contracts some twenty years ago, it appeared from class discussion that the decision in *Phillips v. Moor*, now found at page 273 of the Fuller casebook, could be rested on any one of four grounds. Professor Gardner was about to go on to the next case, but one persistent student demanded which was the true ground. In his driest manner, the professor replied, "Mr. Braucher, will you tell me which leg of this chair I am sitting on?" The fact that the student remembers after twenty years, and cherishes the memory, is testimony to the impact.

On return to the School in 1946, I found myself teaching the same course, and I found myself again and again following the same path. Later, when I was inflicted on a course called Bills and Notes and a course called Sales — or vice versa — I found that Professor Gardner had been there before me, and had striven mightily to put them together. I sought his help, and found him unfailingly helpful, in the construction of the new course in Commercial Law. By then he had interested himself in Insurance, and he immediately offered to cede jurisdiction over problems which he persuaded me related more closely to Commercial Law.

It is a pleasure to acknowledge these intellectual debts. And it is proper for one whose main effort is cautious and conservative, even hesitant, to pay tribute to another who blazed the trail when it was new and untrodden, when the cowards never started and the weak died on the way.

Prof. Gardner Will Retire; Argued 'Flag Salute' Case

Professor George Knowles Gardner, who joined the Law School faculty in 1928, will retire this June. Professor Gardner taught a third year course in Admiralty last fall. His article "Remedies for Personal Injuries to Seamen, Railroadmen and Longshoremen" appeared in the January issue of the *Law Review*.

Born in Worcester in 1891, Mr. Gardner graduated from Harvard College in 1912, and received his LL.B. from the Law School two years later. He was admitted to the Massachusetts Bar in 1914, and practiced in Boston until 1928 when he was appointed to the faculty here. He had taught law for seven years at Northeastern University.

From 1942 until 1946, Professor Gardner was on leave of absence to practice law in Boston, and to act as assistant treasurer and secretary of the Taunton Coating Mills, Inc. During World War II he was a member of the Third Motor Squadron of the Massachusetts State Guard.

Argued Gobitis Case

Always interested in the problem of academic freedom, Mr. Gardner argued the cause of the schoolchildren in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). In that case, some students in the public schools of Pennsylvania refused to salute the national flag on grounds of religious principles. In the Third Circuit Court of Appeals, the late Judge William Clark, LL.B. '15, had upheld the right of the pupils. 108 F.2d 683 (1940).

On appeal, despite Mr. Gardner's presentation, the United States Supreme Court reversed the lower court. The majority opinion by Associate Justice Felix Frankfurter, LL.B. '06, affirmed the right of the state to require the salute. "It is not our province," Justice Frankfurter wrote, "to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyn-



George K. Gardner

crasies among a people so diversified in racial and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it." (310 U.S. at 598).

At that time some of Mr. Gardner's students, learning of his participation in the case, decided to present him with a flag. They arranged to have a Western Union messenger-boy march down the aisle during one of his classes, and hand him the stars and stripes. The flag was later given to the Law School by Mr. Gardner, and now hangs in Langdell Hall.

Three years later, however, the Court overruled *Gobitis* in *West Vir-*

(See GARDNER on page four)

Athletic Depletion

In last Monday's *New York Times*, Arthur Daley in his sports column restated the often advanced plea that professional athletes be given some sort of tax relief because their earning capacities are confined to a brief period of time. He adopts the argument of Austen Lake, of the *Boston American*, that athletes have as persuasive a reason for deserving a 27½ per cent depletion allowance as the "Texas oil millionaire."

Ted Williams and his \$135,000 salary are the main objects of concern for the two sports-writers. The sad plight of Joe Louis and his tax troubles is also mentioned.

We do not propose here to delve into the merits of what might be known as the "Great Southwestern Windfall." However the fact that some tax relief for the men and women earning their living from sports may well find receptive Congressional ears calls for some reflection upon this proposal.

Ad Infinitum . . .

The gist of the Lake-Daley thesis is that since the oilmen enjoy a neat loophole in the Internal Revenue Code, so should the professional athletes. But why stop there? What about sponge divers or female models? Their earning spans are crowded into a brief period of time. Then there are trapeze artists, steeple-jacks, and shark-walkers. Television comedians exhaust their usefulness quickly. Child actors might grow up to be just ordinary folk.

On the other hand, baseball players may potentially enjoy up to fifteen years of productive activity. Professional wrestlers sometimes go on forever.

Pugilistic Problem . . .

Professional boxers present the most sympathetic case for tax mitigation. A combination of the large element of physical risk plus the fact that income is received per match rather than over a period of time prevent the good fighter in his prime from fully utilizing his earning potential, since several big fights during the taxable year under the present tax set-up would not be worth the effort. Also many present day boxers are toiling in the ring because they are incapable of earning a decent living any other way, whereas many

Sub Judice

Judicial notice has been described as a judicial short cut, a doing away in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it. Even allowing for the cautions of context and proper request however, obdurate examples of judicial unnotice leave puzzled more than laymen.

Take the Georgia court in the gay nineties: it dourly refused to notice judicially that beer and wine are intoxicating. *Bell v. State*, 91 Ga. 227, 18 S.E. 288 (1892); *Loid v. State*, 104 Ga. 726, 30 S.E. 949 (1898).

Georgia hesitated until 1881 to formally admit through an expression of judicial knowledge that Sherman's itinerary included the Peach state on his partisan march to the sea. *Williams v. State*, 67 Ga. 260 (1881). Mississippi never affirmatively conceded even the existence of a War between the States until 1905. *Day v. Smith*, 87 Miss. 395, 35 So. 526 (1905).

One writer has suggested that a kind of interstate *stare decisis* should operate when a court takes judicial notice of matters peculiarly within its province. For instance, when the Missouri court takes notice that a mule is an inherently dangerous instrumentality, *Borden v. Falk Co.* 97 Mo. App. 566, 715 S.W. 478 (1903), the matter should be regarded as settled, and no other court, e.g. that of Virginia, *John T. Griffin Truck Corp. v. Smith*, 150 Va. 95, 142 S.E. 385 (1928), should be so presumptive as to take a contrary view. After all, one doesn't find the Missouri court not taking notice of Smith-field hams.

Similarly when the Texas court takes notice that numerous people believe that heaven is a place in reality, *Rodgers v. Fleming*, 295 S.W. 326 (Tex. Civ. App. 1927), or when the Utah court takes notice of the principles of celestial marriage, *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660 (1902), let no agnostic or heathenish tribunal hold otherwise.

Those who advocate more frequent acceptance of scientific facts by the bench may be heartened by such beacon holdings as California's taking judicial notice of "the rules of mensuration by which the cubic contents of an irregular prismoidal body are ascertained." *Scanlon v. San Francisco & S.J. Ry.*, 55 Pac. 694 (1898). — Nader

THE HISTORY OF THE RUSSIAN REVOLUTION

By Leon Trotsky
Michigan, 1,333 pp. \$12.50

by
Jeremy R. Azrael*

THE HISTORY OF THE RUSSIAN REVOLUTION is a monumental work. It portrays brilliantly and forcefully the events of the eight tumultuous months which separated the overthrow of the Romanov Tsar (March, 1917) from the seizure of power by the Bolsheviks (November, 1917). Surely a more detailed history will never be written, but, happily, Trotsky recognized that no amount of mere factual precision can convey the essence of a society in ferment, the mood of a country emerging from an archaic social and political structure through anarchy toward a new order.

Trotsky's approach to history is almost impressionistic in the artistry with which it recreates the atmosphere of revolution. Indeed, at times his view of the process of history seems almost Tolstoyan — and this despite the fact that for him the logic of history is always Marxian. The Russian masses, anonymous hordes of workers and peasants and soldiers making a revolution almost without organization or leadership, come to life in Trotsky's prose. The Bolsheviks won power only because of all the multitude of parties and factions on the scene they came closest to expressing (or were more skillful in discerning) the irresponsible demands of these masses.

Trotsky never tires of reiterating his own and Lenin's belief that the masses were far more radical than the Bolsheviks at the culmination of the revolutionary period. The Bolsheviks formulated mass sentiment, but, at least during the period under discussion, they never really structured mass action. Conversely, the masses were never Bolshevik in the sense of being party members or even of having a clear conception of the Bolshevik program. They knew the Bolsheviks primarily as the symbolic representatives of opposi-

professional athletes in other fields have the benefit of college degrees. However the clamor which has been raised so far does not seem to have recognized these distinctions.

Thus, like the camel who poked his head into the tent, the depletion allowance could be extended over a vast area without doing injustice to the rationale which inspired it. To allow single pressure groups to procure tax advantages in this ad hoc fashion is to work inevitable injustices to those not specifically mentioned. If relief is deemed necessary, it should come in general terms.

tion to the various ineffective and temporizing coalitions which tried to stabilize the Provisional Government which replaced the Tsar.

The Provisional Government sought to direct attention away from its own paralysis and policy of moderation (which in a revolutionary situation is tantamount to paralysis) by identifying as Bolshevik all who wanted a fundamental social alteration to follow in the wake of the March political alteration. Moderation was a meaningless policy to present to a mobilized and aroused population which had no training in and no ability to comprehend the niceties of legalism and parliamentarism. Contrary to the expectations of the Provisional Government, its application to all opponents of the title "Bolshevik" as a definitive "smear-word" resulted only in the masses automatically identifying themselves with the Bolsheviks.

Important Lesson

In this phenomenon there lies an important and all too often disregarded lesson for those who today (and particularly in underdeveloped and politically immature countries) seek to deceive themselves and immobilize their opponents by identifying all expressions of dissatisfaction and all assertions of mass aspirations with Bolshevism (or, as contemporary usage would have it, Communism). The symbol, derogatory in its intention, tends to be accepted by the masses, and, once accepted, tends to lend inestimable strength to the Bolshevik-Communist Party — a party which in the technical organizational and numerical sense may be weak. Trotsky himself argues that, "history would have no value if it taught us nothing."

The function of the masses in history, however, can at best be destructive, and Trotsky's history is concerned primarily with eight months of destruction. It ends with the seizure of power in Petrograd by the Bolsheviks. The great job of reconstruction remained, and Trotsky shows no awareness of the inevitability of the Bolsheviks in their turn alienating the great peasant masses of Russia and having to fight a shattering civil war and impose a totalitarian system of control in order to prevent the expression of this alienation.

Here the thing which most distinguished the Bolsheviks from their predecessors was not their willingness to represent mass aspirations but their willingness to utilize oppressive force and, even more, their ability to maintain (thanks to the iron will and dominating personality of Lenin) their own tight-knit organization. Also important is the fact that when the Bolsheviks began their consolidation of power, the country was many

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months closer to total exhaustion and the masses were once again subsiding into weary apathy and resignation.

The atmosphere of perpetual intense crisis which was the Russian Revolution could not maintain itself indefinitely. Spontaneous revolution had to give way to the imposed and artificial revolution which is Communist totalitarianism. It is of the atmosphere of intensity and spontaneity that Trotsky himself had such an inspired grasp. Here lies the greatness of his HISTORY OF THE RUSSIAN REVOLUTION, but here also lies the weakness of Trotsky as a historic figure.

In this also lies the origin of the compelling intuitive insights into mass psychology and the nature of revolution which mark Trotsky's work and make it possible to forgive some of his longer and more abstract dialectical and polemical digressions. His biting caricatures of the members of the Provisional Government ring true because they arise from the very revolutionary atmosphere which Trotsky is recreating. Caricature is the portrait-art of revolution. Trotsky is "unfair" to Kerensky, but then so was history. However, history was also unfair to Trotsky, and part of the reason for this becomes apparent in the very brilliance, the sense of total commitment, which inspires Trotsky's book. Trotsky was a figure of crisis, an ideal leader of a revolution. His forte was polemic, his skill an intuitive understanding of and ability to crystallize mass action. This makes his book come sensually alive, and, since it is the history of a revolutionary epoch, this makes it good, even "objective" history.

Called a Prophet

But the very masses who make revolutions demand stability, and this side of mass psychology remained hidden to Trotsky. Trotsky has been called a prophet, and, at least in one sense, he was. His voice was the voice of wrath, his soul, the soul of upheaval. He himself wrote with pride that, "What distinguished Bolshevism was that it subordinated the subjective goal, the defense of the interests of the popular masses, to the laws of revolution as an objectively conditioned process." Yet, Trotsky was a subjectivist. He came late to Bolshevism, only shortly before the masses themselves. The objective laws of the revolutionary process decreed the demise of Trotsky with the same breath that they decreed that revolution as a primarily destructive process can have only a limited existence.

Trotsky advocated "permanent revolution" as an objective law of history. However, "permanent revolution" was even more a subjective need of Trotsky himself. Bolshevism failed Trotsky because it subordinated the subjective to the objective, and, in this sense, Bolshevism (represented ultimately by Stalin) proved to have a more acute perception into history than Trotsky.

This fact does not prevent THE HISTORY OF THE RUSSIAN REVOLUTION from being one of the finest interpretive studies of a great historical event ever produced by a participant in the event. On the contrary, when considered in combination with Trotsky's colorful and dramatic literary style, his ability to capture the significance of the seemingly ordinary, and his skill in creating a mood, it insures it. Trotsky's character limited his historical understanding to those moments characterized by "swift, intense, and passionate changes," but in THE HISTORY OF THE RUSSIAN REVOLUTION Trotsky confined himself within those limits and produced transcendent history.

*Ford Foundation Fellow in Soviet Government at Harvard.



"If definite failure of issue, knock once; if indefinite failure, knock twice."

CANON 35. IMPROPER PUBLICIZING OF COURT PROCEEDINGS*

Present Text

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

*Adopted September 30, 1937; amended September 15, 1952.

CANON 35. IMPROPER PUBLICIZING OF COURT PROCEEDINGS

(Suggested Revision by a member of the Connecticut Bar)

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are permissible at the discretion of the presiding judge, either in whole or in part, and subject to such rules as he may prescribe. If in his opinion such action is not calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court or create misconceptions with respect thereto in the mind of the public.

CANON 35. CONDUCT OF COURT PROCEEDINGS

(Proposed text by a Special Committee on Canons of Ethics of the American Bar Foundation)

The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound-recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they should not be permitted.

Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges in open court, may properly be photographed in or broadcast from the courtroom with the permission and under the supervision of the court.

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Bar Foundation Report Criticized By Newspaper Media Representative



Herbert Brucker is editor of the *Hartford Courant* and chairman, Freedom of Information Committee, American Society of Newspaper Editors. He was Professor of Journalism, Graduate School of Journalism, Columbia University, from 1932 until 1944 and chief of the Media Division, Office of War Information during 1942-1943. Mr. Brucker is author of *The Changing American Newspaper* (1937) and *Freedom of Information* (1949), and a winner of the Kappa Tau Alpha Award.

In a recent 6,000-word report the American Bar Foundation Special Committee on Canons of Ethics recommended revising the language of Canon 35, but sustained its prohibition of courtroom news photography as well as radio or television broadcasts. The Foundation study, which was made at the request of the Board of Governors of the American Bar Association, will be presented for consideration of the House of Delegates of The American Bar Association at its meeting in Atlanta on February 24-25.

For the first time in its 21-year history, the House of Delegates will resolve itself into a committee of the whole and allow equal time for argument to proponents and opponents of the proposed new Canon 35. Representatives of the press, radio and television will be welcomed to present their views on a question so closely associated with the administration of justice.

It is unfortunate that the invitation to the media should come so late, so close to the hour of decision, when the minds of the Delegates have for the previous months been absorbing what should frankly be conceded as highly partisan, if competent, expositions by the Bar on retention of the Canon.

In an area where it is extremely difficult for the legal profession to take the balanced or total view, we should, because of our inevitable preconceptions, have opened the door earlier and wider to responsible representatives of the media. Canon 35 and the problems it raises cannot be decided by reference to past judicial decisions or by semantic maneuvers. The distinguished editor of the *Hartford Courant* clarifies the issues involved and presents some considerations which the Bar would do well to ponder before sealing the courtroom door for another decade.

by

Herbert Brucker
Editor of the *Hartford Courant*

A special committee of the American Bar Foundation consisting of "lawyers, judges, and legal educators" (but significantly excluding newspapermen and broadcasters) has recommended a change in Canon 35. This is, however, a change without a difference. Canon 35's blanket censorship of reporting court trials by camera and microphone remains intact. All that is new is the reason for maintaining it.

Small wonder that a new reason should be sought. The original one, valid when Canon 35 was written in 1937, has long since been outmoded by the facts. The 1937 facts were that the mechanics of photography required flash bulbs, big cameras, and other mechanical paraphernalia that, in the words of Canon 35, detracted "from the essential dignity of the proceedings," and perhaps brought other evils in their train. The 1958 facts are that still photography especially, but also broadcasting — even of TV — can be so unobtrusive that participants or spectators in a trial are not even aware of it.

With the old reason gone, the proposed revision of Canon 35 gives this new reason for continuing Canon 35's universal prohibition: that photography and broadcasting "introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial."

Here is a flat statement. Photographing trials and broadcasting them does introduce extraneous influences that do tend to have evil effects. The test of this statement, like that of all others, is experience. And in recent years there has been considerable experience in photographing, broadcasting, and televising actual trials. I

of it, shall, like all similar matters of procedure, be left to the court. What we object to is the report's insistence that the sixth and fourteenth amendment's values must necessarily and always override the first amendment.

Parenthetically, on the matter of judicial discretion, one might add that there should be few differences between appointed and elected judges that do not exist anyway. The ABF report fears that, if Canon 35 is modified to permit discretion, the judge might become an exhibitionist. Other upholders of Canon 35 fear that an elected judge might ham it up before the microphone, or become a lens louse before the camera. There has not been enough experience to answer this question one way or another. But is it not really another matter — a part of the argument over elected vs. appointed judges, rather than over Canon 35?

The essential dignity of court proceedings (page 11). Again, agreed. By all means keep trials dignified. But once more the question arises, what has this to do with the issue? In actual experience in court trials, do photography and broadcasting introduce extraneous influences with bad effects, or do they not?

The effect on witnesses (page 14). Here again the report relies on its authors' opinions, to the exclusion of the experience that has already tested

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the validity of those opinions in court proceedings, even murder trials. First there is agreement with us that witnesses are distracted enough by court proceedings anyway. Then there follows the ex parte assertion that "it is at once apparent that witnesses must not be subjected to the further distractions necessarily incident to photography and broadcasting."

What distractions? Where, and in what form, have these distractions appeared in fact? Of all the trials in which there has been photography or broadcasting or televising, what detrimental psychological effects took place in the witnesses? Did the accused, his family, the defense attorney, the prosecutor, or the court itself find that harm followed? Or is this just a rationalization, projected from some of the circuses staged before TV for political purposes, where the restraining hand of a judge was conspicuous by its absence?

All the report says about this is that "it is not difficult to conceive" that harm might follow from allowing cameras and microphones in court. On the next page (page 16) it finds it "equally inconceivable" that a witness could act normally if photographed or broadcast. Consideration of this "compels some thought of their probable effect." The "conclusion seems

(See CANON on page four)

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The Harvard Law Wives' annual Spring Fashion Show will be held at 8:00 p.m. on Tuesday, March 4, in Harkness Commons. This year's show, centered around an "On Stage" theme, will feature fashions from The Gertrude Singer Fashion Studio, 54 Church Street, Cambridge, and children's fashions from The Brown Shop, 37a Brattle Street, Cambridge. Door prizes donated by Harvard Square merchants will be awarded; and refreshments will be served in the North Dining Room at the conclusion of the show.

GARDNER

(Continued from page one)

ginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Professor Gardner has never hesitated to take a position which may be unpopular at the moment when he felt that broader implications were involved. In 1956 Autherine Lucy was expelled from the University of Alabama for alleged defamation of its officers in a complaint filed in federal district court. In a letter to the editor of the RECORD which was published on March 15, 1956, Mr. Gardner wrote:

"[A]lthough defamation in the course of a lawsuit is not actionable, it remains defamation none the less.

"The allegations made in her behalf by Miss Lucy's counsel charged the Trustees of the University of Alabama with a cowardly attempt to evade a law which they dared not defy. By withdrawing these charges without a hearing they left the Trustees without any opportunity to reply. It is at least doubtful whether any institution of learning can profitably instruct a student who thus expresses contempt for those who govern it, or whether anyone in sincere pursuit of instruction would wish to attend an institution whose authorities he held in such contempt.

"Two months ago the issue was whether a Negro had the constitutional right to attend a tax-supported school. Today the issue is whether the Constitution guarantees to anyone of any color the right to insult his fellow citizens and then to demand instruction at their hands."

Though he has often been outspoken in his views on civil liberties, Mr. Gardner is known for his work in

Dining Room at the conclusion of the show.

Tickets are now on sale in Langdell Hall and at the Coop at \$1.00. Tickets will not be sold at the door. Proceeds from the show will help support the activities of the Harvard Law Wives.

The three pretty models pictured above are, from left to right, Mrs. Morton Winston, Mrs. Joseph E. Bachelder, and Mrs. Robert C. Shoemaker, Jr.

other fields of the law. He was general editor of the Massachusetts Annotations to the *Restatement of Contracts*, published in 1935 under the auspices of the Massachusetts Bar Association and the Bar Association of the City of Boston.

He also edited *A Selection of Cases and Materials on the Law of Contracts*, which appeared in 1939. In a memorable introduction to this work, he asked how a promise is to be recognized, whether performance is to be a duty, and what remedies should be available for breach. In reply he wrote,

Result of Conflict

"The answers which history gives us to these questions cannot be expressed in Euclidean forms. They can be formulated only in terms of some such equations as those by which we express vibratory motion — the swinging of a pendulum, the orbits of the planets, the musical note of a plucked string. For the law of contracts, like all the phenomena of life, is produced by a struggle between balanced forces — in this case the struggle between the desire to organize the future and the desire to deal justly with the consequences of the past."

Professor Gardner's wide range of interests is best illustrated by some of his many articles which have appeared in legal publications. In *The Massachusetts Billboard Decision*, 49 HARV. L. REV. 869 (1936) he discussed the implications of *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 193 N.E. 799 (1935), appeal dismissed by request of appellant 297 U.S. 725 (1936). There, the Supreme Judicial Court of Massachusetts upheld a state law regulating outdoor advertising.

Constitutional Questions Raised by the Flag Salute and Teachers' Oath Acts in Massachusetts, 16 B.U.L. REV. 803 (1936) was written with Charles D. Post, LL.B. '34. The authors discussed two Massachusetts statutes requiring the filing of loyalty oaths by teachers, MASS. ANN. LAWS c. 71 §30A (1936) and a pledge to the flag in public schools, MASS. ANN. LAWS c. 71 §69 (1935).

Legal Education for the Needs of the Country after the War, 30 IOWA L. REV. 325 (1945) was part of a symposium on that subject, while he discussed private insurance in *Insurance Against Tort Liability — An Approach to the Cosmology of the Law*, 15 LAW & CONTEMP. PROB. 315 (1950). — Oliver

NOTE

For the benefit of the many readers and subscribers of the *Harvard Law Review*, the correct citation of the February, 1958 issue is "Vol. 71, No. 4."

Due, however, to a minor discrepancy the citation printed on the cover is "Vol. 17." It should read "Vol. 71."

CANON

(Continued from page three)

inevitable" that wholly unobtrusive photography and broadcasting "introduce extraneous influences" that have evil effects.

All this is a pure exercise in imagination, shutting out the experience that shows the opposite.

The responsibility of the court (page 17). Here we come to a fundamental clash. The report reduces photographs and broadcasting of judicial proceedings to nothing but a "commercial venture," to which no judge should lend his authority and dignity.

Certainly, coverage of trials by camera and microphone might help sell papers and might make good radio or TV programs. But why is this any more reprehensible, or relevant, than the undoubted commercial advantage gained by the winning lawyer in a trial?

This whole argument ignores the fact that the press serves another purpose beside a commercial one. It is indeed the only commercial enterprise that has a special protection in the Constitution. Why? Because there is more to it than making money. Freely reporting what goes on in the world — especially in government, of which the courts are a part — serves a deep public purpose. To dismiss the whole testimony of history as to the necessity for freedom of the press, on the ground that the press might make money, overlooks the point: that cameras and microphones are merely a new mechanical means of reporting that, under a court's control and in actual experience, have changed nothing except in bringing the right of public trial up to date.

Vital Omission

So much for the arguments the report brings up in its effort to put a new foundation under Canon 35. It remains to note that the report overlooks something else beside the courtroom experience that invalidates its assumptions. This is the fact that, granted modern techniques and judicial supervision, Canon 35 forbids the pressing of a camera-release button, or the flick of a switch. It is incontrovertible that these actions have taken place in court without participants being the wiser, unless informed. Why, then, has the court any more right to forbid releasing a shutter or turning on a mike than to forbid, say, silent gum chewing, or a surreptitious glance at a wrist watch, by one of the courtroom loafers whom Canon 35 does not banish from the scene? Thus we come to the heart of the matter: the real effect of Canon 35 is to forbid publication.

The fact that essential points like this are ignored by the report is a reflection of its structure. All its arguments, including a formidable battery of legal citations, run in a single direction: support of Canon 35's total and universal censorship of the camera and microphone in court. So it looks as though this were a brief for the prosecution, rather than an objective inquiry weighing the good and the bad on both sides.

In any case, until such a time as the supporters of Canon 35 discover at least a single example of the perversion of justice by photography and broadcasting, to measure against all the examples already in the record that show just the opposite, it is possible to believe that this report is not the last word on the subject.

MAGUIRE

(Continued from page one)

tough mind, too; the kind of mind that flourished in the brave old days of Ames, Beale, Bull Warren, and Williston. Stanchly maintaining himself as an individual centre of moral and intellectual freedom, Professor Gardner would allow the same perilously responsible liberty to others. That attitude has shown itself clearly in his opposition, ultimately successful, to the compulsory flag salute for school children, and more recently in his objections to externally coerced desegregation of Southern educational systems.

We may not always agree with George, but we must always respect his profound regard for the dignity of personal judgments. And let none believe that he falls short in the loyalties which are the backbone of this nation. On that let him speak for himself. I quote part of his contribution to a Faculty statement in support of the Langdell Hall Treasure Room as a memorial to the School's dead in two World Wars:

We do not presume to suggest that these men died solely in defence of a legal system — still less of the books in which it has found enduring expression from age to age — but we do believe that they spent their lives in the battle for justice fought by lawyers of all eras with the means coming to their hands. It was the destiny of these men to win their victory in the field, as other men have won theirs in the forum, in the council chamber, or in the cloister. Turning our eyes to the future, we may fittingly leave them together in the timeless companionship of the law.

FULLER

(Continued from page one)

mode of attack is to close in on the problems of contract law by concentric circles, each adding new insight to the student's conception of the subject as a whole. His selection of cases was guided generally by a similar principle. Cases were not picked to fit some doctrinal gap waiting for them, but for the light they shed on those facets of the subject that revealed most deeply its essential nature.

The most explicit statement of his philosophy of contract, and his most original contribution to a reformulation of its theory, are to be found in an article published in 1932 entitled, "An Inquiry into the Principles of the Law of Contracts." (46 HARV. L. REV. 1.) No one can read or reread this aptly named *Inquiry* without a feeling that he is visiting familiar ground that has suddenly become unfamiliar and at the same time more understandable and accessible. Two passages may serve to illustrate his style and mode of thought:

[Under term consideration] I mean to include . . . all acts or omissions on the part of anyone other than the promisor which, taken in connection with the promise, may be thought to afford a reason for granting a legal remedy upon its breach.

The essence of a breach of promise does not reside in non-performance. It resides rather in disappointment, in the promisee's discovery that he does not possess the power which the promisor told him he would have. This fact is freshly illustrated with every expiration of a fire insurance policy on which no loss has happened; it cannot accurately be said that the insurer has performed its promise, neither can it be said that there has been a breach.

In closing this inadequate account of what the law of contracts and teachers of that subject owe to George Gardner I shall quote a sentence from the introduction to his casebook, in which I believe his philosophy of the subject comes closest to being caught in a few words:

[T]he law of contracts, like all the phenomena of life, is produced by a struggle between balanced forces — in this case the struggle between the desire to organize the future and the desire to deal justly with the consequences of the past.

JAFFE

(Continued from page one)

Law School, charged that FCC decisions were interwoven with politics, prejudice and favoritism. "The purported criteria for making choices among competing applicants . . . have become spurious criteria, used to justify results otherwise arrived at."

After a three year study of FCC hearings and decisions, he concluded that "the FCC is dealing a heavy blow to good government."

Professor Jaffe wrote, in words strikingly similar to those appearing in today's newspapers, that "in our administrative, as in our legislative, life, compromise, camaraderie, and trafficking are eating away at the fabric of legal structure."

In that September article Professor Jaffe proposed the same remedy now being urged by reformers activated by the current disclosures and scandal; a more judicial role for the FCC, a more judicial aloofness from the many who exert influence upon its members. — Manley

GORE

(Continued from page one)

plies of the Belgian Congo," thinking that was the only source.

While it is to be noted that we have a vast reservoir of fuels, many of our allies are not so fortunate. For many years the British Isles had been depleting their coal supplies through exportation so that now they must depend on the Middle-East for oil, as must many other European nations.

It is an absolute necessity, stated the Junior Senator from Tennessee, that we maintain the leadership in the field of nuclear energy. If the Soviet Union fulfills its desire "to fasten a firm grip upon the oil reserves of the Middle-East," and this occurs before nuclear energy is developed for France, The Netherlands, Belgium, and the other European countries, we shall surely be in bad shape.

Senator Gore was in agreement with recent statements of President Eisenhower that we had failed to foresee the break-through of Russian science as demonstrated by the satellite launchings. We knew, of course, that Russia had been concentrating on rockets, but we paid little attention. When the first rocket was sent up, the Senator was in Europe, and two days later in Moscow. The feelings of the people were easily sensed, he said. There had been a disturbing effect on our prestige. If there is a showing of Soviet leadership in the field of nuclear energy, this feeling will be multiplied many times.

At the present time, Senator Gore has a bill in Congress which proposes that the government itself build some reactors. For a long time private power fought such suggestions, but now he feels that they must regret their former stand. The expense is too great for any one company or small group of companies to handle.

The speaker cited a recent article in *Time* (Feb. 10) as recognizing the problem at long last. "They have been fighting my program for years," he stated, and they have now done an about-face. The Senator added, "I never thought I'd be recommending that Republican sheet." — Finley

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