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TEN CENTS

Paul A. Freund Is Appointed Loeb University Professor

Paul A. Freund, Royall Professor of Law since 1957, has been appointed the first Carl M. Loeb University Professor at Harvard. The appointment will take effect next summer.

The professorship was established in 1956 in memory of the famous New York banker with a grant of \$500,000 by his partners in Carl M. Loeb, Rhoades & Co., a New York investment and mercantile banking firm. Mr. Loeb died in 1955.

President Nathan M. Pusey noted that, in accepting the professorship, Dr. Freund will join a small group of



Paul A. Freund

distinguished scholars at Harvard free to work "on the frontiers of knowledge."

Other University Professors at the present time are: H. A. R. Gibb, authority on the Middle East; Werner Jaeger, classicist; I. A. Richards, literary critic; Summer Slichter, economist; and Paul Tillich, theologian. The last Law School professor to hold a University Professorship was the late Zechariah Chafee, Jr., who died February 8, 1957.

Professor Freund will continue to teach a course in Constitutional Law at the Law School. He is expected to teach also at the College and the Graduate School of Arts and Sciences.

Dr. Freund is editor of a projected seven-volume *History of the Supreme Court of the United States*, on which work is just beginning. The *History* was made possible by the will of the late Justice Oliver Wendell Holmes. Professor Freund is author of a book, *On Understanding the Supreme Court*, published in 1949. He is co-

editor of *Cases on Constitutional Law*, published in 1952.

He was the only living person referred to by name by Judge Learned Hand in his recent Oliver Wendell Holmes Lectures.

Dr. Freund is a graduate of Washington University in St. Louis. He holds an LL.B. *magna cum laude* (1931) and an S.J.D. (1932) from Harvard Law School. He possesses honorary degrees from Washington University and Columbia. He was law clerk to the late Justice Louis D. Brandeis of the Supreme Court in 1932-33.

Professor Freund joined the Harvard Law School faculty in 1939, became Professor of Law in 1940, Fairchild Professor of Law in 1956, and Royall Professor of Law in 1957.

Third Year Class To Hold Elections

Nominating petitions in support of candidates for the offices of Class Marshal, Class Secretary and four Class Committeemen must be turned in by third year students and graduate and special students who have never voted before in a Harvard Law School Class election before 5 p.m. on Friday, March 28.

According to paragraph 3 of the Election Rules for the 1958 Election, "Any member of the Class will be a candidate if, by 5 p.m. on Friday, March 28, 1958, he submits a nominating petition bearing the signature" (See ELECTIONS on page six)

Frankfurter

Felix Frankfurter, Associate Justice of the United States Supreme Court, will deliver the 22nd Gay Lecture Upon Medical Ethics at the Harvard Medical School tomorrow afternoon at 5 p.m. His topic will be "A Lawyer's Dicta on Doctors." The lecture will be held in Amphitheatre D.

Justice Frankfurter is scheduled to preside over the finals of the Ames Competition at the Law School later in the evening.

Students Hear Patent Lawyer

Dr. Robert H. Rines, noted patent lawyer, recently delivered the fourth in a series of five lectures scheduled for delivery before the Harvard Department of Engineering on the subject, "Patent Law and Its Relation to Science and Engineering." Dr. Rines devoted his talk to the obligations of an employee to his employer in regard to inventions.

He declared that it makes no difference that an agreement between the inventor and his employer is in writing so long as it can be proved that there is some sort of agreement that inventions produced during employment will be the property of the employer. In such a case there is a legally enforceable agreement. The statute of frauds, he explained, would not operate to defeat such an agreement and it would be specifically enforceable in equity.

Dr. Rines stated that a key to determining whether the rights to an invention belonged to the employer or the employee lies in the answer to the question, "Is the scientist being paid for making inventions?" If the invention is created within the

(See LAWYER on page six)

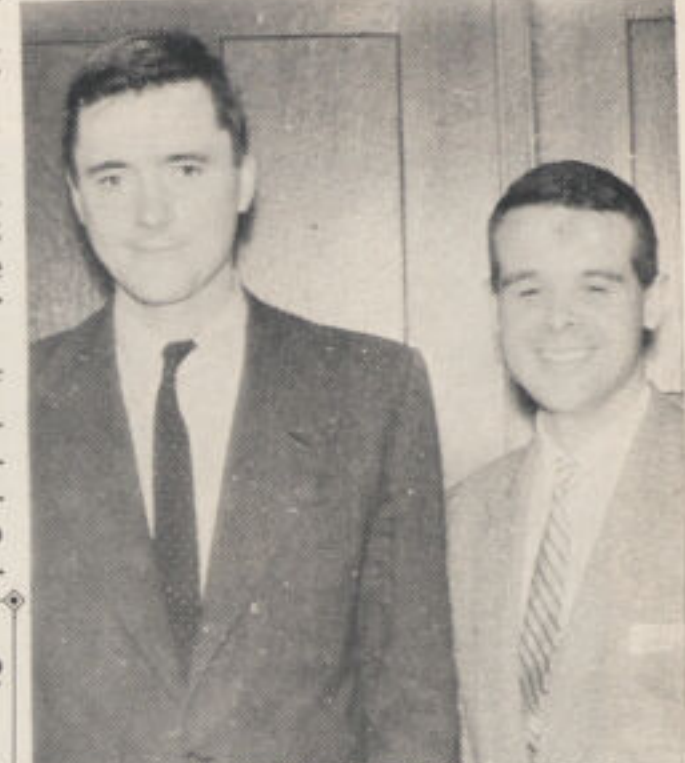
Schools for Gifted Children Is Subject of Ames Finals

Tomorrow evening at 8 p.m. the Griswold Club and the Chayes Club will argue for the Ames competition championship in the James Barr Ames Courtroom. Oralists for the Griswold Club are Julian W. Atwater, 3L of Batavia, N. Y., and James W. Venman, 3L of Bridgeport, Conn. Attorneys for the Chayes Club are William B. Mallin, 3L of New Kensington, Pa., and William Schurtman, 3L of New York City.

Felix Frankfurter, LL.B. '06 *cum laude*, Associate Justice of the United States Supreme Court, will serve as Chief Justice. George T. Washington, Associate Judge of the United States Court of Appeals for the District of Columbia Circuit and Robert B. Williamson, LL.B. '23, Chief Justice of the Supreme Judicial Court of Maine, will be associate justices. John J. Parker, originally scheduled to be an associate justice, died suddenly last Monday. He was Chief Judge of the United States Court of Appeals for the 4th Circuit (see below).

The case to be argued, *Van Cleef et. al. v. Digby et. al.*, is a purely hypothetical one. It concerns a Congressional enactment providing for financial aid to all states which agree to establish special programs of education for gifted children within the state.

To qualify for the aid states are required to adopt an approved plan

Julian W. Atwater
and James W. Venman,
Griswold Club Attorneys

4th Circuit Judge Visited by Death

John Johnston Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, died suddenly in Washington, D. C. last Monday at the age of 72. Judge Parker was to have sat as an associate justice at the final argument of the Ames Competition tomorrow evening.

Born in Monroe, North Carolina, the late jurist graduated from the University of North Carolina in 1907 and received his LL.B. from the same institution a year later. After his admission to the North Carolina Bar Judge Parker became active in state

(See JUDGE on page six)

Musmanno Replies To Learned Hand, Defends Value of Dissenting Opinions

by
MICHAEL A. MUSMANNO
Associate Justice
Supreme Court of Pennsylvania

On February 6, 1958, the celebrated and justly revered Judge Learned Hand delivered at the Harvard Law School an Oliver Wendell Holmes lecture in which he deplored the filing of dissenting opinions in our appellate courts. A lecture bearing the title of Oliver Wendell Holmes which condemns dissenting opinions is indeed startling. It could only be compared to a Theodore Roosevelt lecture on the advantages of a life of sloth and indolence.

Oliver Wendell Holmes wrote beautiful Majority opinions for the Supreme Court of the United States. For three decades he was spokesman for the Court in innumerable decisions, but his greatest fame rests on the fact that when he believed the majority of the Court to be wrong he dissented. He never regarded the Court as a choir in which it was necessary, in order to preserve the impression of harmony, that one should sing off-key because the majority of the singers had failed to catch the musical pitch.

If Holmes in spirit returns to earth from time to time, it can be assumed that, in addition to frequenting the courts in which he made so much history, he visits the fond scenes of his youth and particularly the Harvard Law School and the Civil War battlefields. It is to be hoped that at the hour Judge Learned Hand was delivering the lecture which is the subject of this disserta-



Michael A. Musmanno

tion, the specter of Holmes was not at Harvard but was perhaps wandering over the battlefield of Antietam where he had been wounded in the sanguinary engagement between the Blue and the Gray. I do not believe that the pain he must have felt when a musket ball tore into his body could in any way approach the agony he would sense in hearing so universally recognized an authority on the law as Judge Learned Hand declare that a dissenting opinion "cancels the monolithic solidarity on which the authority of a bench of judges so largely depends."

If there is one thing that a Court should not have, it is monolithic solidarity. Boulders which are fused together with time-defying cement

form a wall which could some day obstruct the passage of a needed road to the City of The Realized Hope of Man. If Oliver Wendell Holmes and other dissenters had agreed with their colleagues to form at all times an impenetrable solidarity, much of what is now humane, progressive, and convincing in the law would have remained petrified in an unyielding monolithic pile of stiff-necked, self-assumed superiority. Let me offer several illustrations, of which, of course, there are hundreds, perhaps thousands, in the federal and state reports of the nation.

In 1912 the Supreme Court of the United States, by a vote of 5 to 3, upheld the right of a patentee to attach certain conditions to the use of his patented article. (*Henry v. Dick Company*, 224 U.S. 1). The dissenting justices were Chief Justice White and Justices Hughes and Lamar. Five years later the views of the minority in this case became the decision of the majority in the case of *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502. Justice Clark, speaking for the Court, on a vote of 6 to 3, said:

It is obvious that the conclusions arrived at in this Opinion are such that the decision in the *Henry v. Dick Co.* must be regarded as overruled.

Had the decision in the *Henry* case come down with monolithic unanimity, lawyers would have reasonably assumed that the Court would never yield a pebble from its granitic stand, and, as a consequence, a seriously

(See MUSMANNO on page five)

Ames Argument Involves Deserter

The first of the quarter-final arguments in the second year Ames competition will be held at 8 p.m. Tuesday evening, March 25, in the James Barr Ames Courtroom. The case of the *United States ex. rel. Max Miller v. Shaven* will be argued before the United States Court of Appeals for the Ames Circuit. The contestants are the Toepfer Club (representing the relator-appellant) and the Holmes Club (representing the respondent-appellee).

The Hon. Edward T. Gignoux, LL.B. '40 *m.c.l.*, of the United States District Court of Portland, Me., will preside over the court. Associate Justices will be Warren F. Farr, LL.B. '30 *m.c.l.*, of the Boston bar, and Charles C. Worth, LL.B. '40, also of the Boston bar.

The case involves a wartime desertion and consequent loss of citizenship and exclusion from the country suffered by the appellant, Max Miller, while a member of the U. S. Army in North Africa in 1943, was imprisoned for a breach of discipline. He escaped from his place of confinement in Casablanca and attempted to rejoin his outfit in Italy. As a result he was convicted by a court martial of wartime

(See DESERTER on page six)

classifying certain children as "superior," provide separate educational facilities for these children, prescribe specified percentages of science or mathematics courses for these children over the age of 11 years, and provide instructors having a specified minimum of training.

The statute further provided that any state would receive an additional grant if it increased the number of school hours in its schools for "superior" children by at least 20% over the hours maintained in its common public schools.

Consequently the State of New York adopted the Superior Children Act under which the class of "superior" children was determined by means of an established IQ test (150 or above on the Stanford-Binet scale), separate facilities were provided in central locations, and all children were required to attend Superior Schools,

(See SCHOOLS on page six)

Fed. Tax Institute To Meet Saturday

The Federal Tax Institute of New England will conduct an all-day Saturday forum on March 22 at John Hancock Hall, Boston, on the subjects of current developments in pension and profit-sharing plans and estate and gift taxes. Dean Erwin N. Griswold, president of the Institute, will serve as chairman of the meeting. A separate panel will present each subject.

The morning session (9:15 to 12:15) will take the form of a consideration of a hypothetical employer and his installation of an employee benefit plan. Among the points discussed will be the increasing popularity of profit-sharing plans, the respective advantages and disadvantages of pensions and profit-sharing plans, the comparative merits of insured and trusted plans, and current federal and state "disclosure" legislation. Attention will also be given to the recent proposal of organized labor for three-way profit sharing among employer, employee and customer.

The afternoon session (2 to 5) will deal with current developments of major significance to the general practitioner in substantive estate and gift tax law. Recent court decisions, rulings and regulations will be discussed.

Field and Keeton Discuss Sections on Trial Practice

In this, the second of a series of articles explaining selected third year courses currently being published by the RECORD, Professors Richard H. Field and Robert E. Keeton describe the four sections now offered in Trial Practice. They also describe a fifth section, an innovation in next year's curriculum, which will be open to an unlimited number of students.

The course is scheduled for two hours a week during the spring semester. The textbook to be used in the course is *TRIAL TACTICS AND METHODS*, authored by Professor Keeton.

by
RICHARD H. FIELD
and
ROBERT E. KEETON

Problems of Trial Practice is a course in proving facts. A minimum proficiency in courtroom skills is hopefully one product of the course, but the more significant objective is developing an understanding of the essentially rational nature of effective trial advocacy. To the uninitiated, layman and law student alike, the trial lawyer's methods often



Richard H. Field

appear unplanned and haphazard. Unhappily they sometimes are. But most things done by good trial lawyers have a sound basis in reason. In this course we try to articulate the reasons for conduct which to the experienced trial lawyer has become second nature. We try to develop not merely a crutch for the neophyte but rather a habit and capacity for critical evaluation which can be useful to the graduate throughout a career of trial practice. If this can be accomplished, the course will contribute to the student's training in trial advocacy one important quality which more often than not is neglected in an apprenticeship at the trial bar.

The course meets in weekly two-hour sessions through the spring semester. Approximately the first half of each class session is an exercise in which several students perform as counsel in some phase of trial or preparation for trial. There are exercises in interviewing

prospective witnesses, taking statements, taking depositions, discovery practice, jury summation, pre-trial and post-trial motion practice, preparation of requested instructions and objections to the charge, and several exercises in examination and cross-examination of witnesses at trial.

The remainder of each class session is devoted to a critique by the entire class of the conduct of those participating in the special exercise. The same basic materials as those given to counsel are handed to all the students in the class, and each is expected to consider in advance how he would handle problems likely to confront counsel during the exercise. Along with the materials, the students are given a reading assignment in the text (Keeton, *Trial Tactics and Methods*). Inevitably the exercises in the earlier weeks of the course raise incidentally some problems considered at points in the text outside the special reading assignment for the week, and students are therefore expected to read the entire text through once before the first class meeting.

The candid, reasoned criticism by students and instructor in the latter part of the class session is the heart of the course. It is here that merits and mistakes are exposed, and competing interests that pose the difficult choices facing the trial lawyer are analyzed and appraised. Hopefully, again, the potential lessons from the day's experience (both personal and vicarious) are more fully appreciated, and in the process is developed a capacity and method of self-criticism by use of which a trial lawyer can continue to improve himself as additional experience is gained in years to come.

About seven of the fifteen assignments in the course involve direct and cross-examination. In these assignments, the instructions will indicate the stage of trial at which the witness is called, or will require student counsel to indicate whom among the available witnesses they would call before using this witness. Though the distributed materials may contain a statement from the live witness, he is also available for counsel on one or both sides to interview before the class session. Sometimes one of the instructors serves in the role of witness; at other times a visitor serves. Occasionally an actual witness will be used, particularly in assignments on preparation for trial, and will tell about his own observations of actual happenings.

We insist that student criticisms be specific and concrete, and ordinarily give the victim opportunity to meet the criticism. We constantly urge, also, that counsel and critics consider whether the conduct in question fits into a sound overall plan for counsel to use



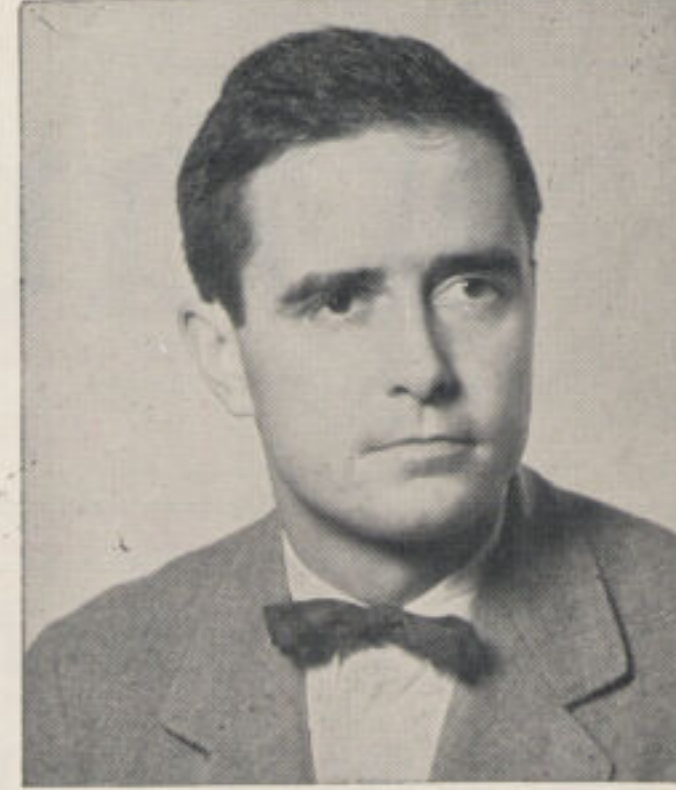
Robert E. Keeton

in trial of this case. If a student observer is critical of a line of questioning, or an omission, we commonly put the witness back on the stand and invite the critic to frame the questions which he thinks should have been put. Sometimes the answers of the witness demonstrate the validity of the criticism, but often they expose its weakness. As witnesses, we have been accused of taking malicious delight in producing the latter result, especially during cross-examination. To provide realistic balance, however, we also plan in the role of witness to give testimony that includes certain answers very favorable to the cross-examiner if he proceeds properly.

Though our instruction is primarily concerned with an understanding of tactics and methods of trial advocacy, we also consider ethical problems wherever they arise naturally in the context of our problem cases. We are conscious of the risk that such discussion may be considered instruction in what the



Milton Katz



Kingman Brewster, Jr.

New Course Will Be Offered In International Law Field

This is the third of a series of articles explaining selected third year courses, which is being published by the RECORD. Milton Katz, Henry L. Stimson Professor of Law and Professor Kingman Brewster, Jr. describe *The Law of International Transactions and Relations*.

This course is scheduled for two hours a week throughout the year. It is not only open to third year students, but second year men may substitute it for Commercial Law. Second year students making this substitution will normally be required to take Commercial Law in their third year.

The book that will be used in the course is: Katz and Brewster, *THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS: CASES AND MATERIALS* (Preliminary offset edition).

by
MILTON KATZ
and
KINGMAN BREWSTER, Jr.

This is a new course, offered for the first time in 1958-59. It is designed as a basic introductory course to International Legal Studies as understood at the Harvard Law School. It is intended to serve as: (1) A reasonably comprehensive survey of the subject matter of International Legal Studies for students planning no further work in the field; and (2) A foundation for the more advanced courses and seminars in Legal Problems of International Business and Economic Development, International Law and Organization, Comparison of Legal Systems, or any other aspect of International Legal Studies.

The course will examine transactions and relations which extend to more than one country. The examination will be in two parts. Part I will survey a typical range of such transactions, beginning with comparatively simple activities and proceeding in a sequence of increasing complexity. It will explore such matters as entry into a foreign country and residence, communication and security of the person within a foreign country; the acquisition, retention and use of property abroad and business or professional activity and employment in a foreign country; doing business abroad as a foreign corporation; doing business abroad through a foreign subsidiary or affiliate; sales, licensing and financial arrangements among business entities and investors in different countries; dealings with corporations or other enterprises in which foreign governments may have a controlling or substantial interest; and problems of foreign exchange.

Part II will cut several cross-sections through the same range of problems. The theme of Part II will be the reach of legal systems — interaction among them, duplication, mutual support and conflict. This theme will be applied through a consideration of the legal aspects of overlapping or conflicting taxation; overlapping or conflicting regulation; and problems of nationalization and expropriation in relation to international investment and trade and human rights.

The pattern of analysis will be derived from the experience of law in a federal sys-

tem. It is second nature with American lawyers to think simultaneously and continuously in terms of several legal systems. This is true whether they act as litigant, negotiator or draftsman, or architect of new legal arrangements. When a client in Boston complains that he has been defrauded in a sale of stock, his counsel instinctively canvasses a choice between suing under the common law of deceit or the federal Securities Act of 1933, and a similar choice between proceeding in a Massachusetts or federal court. If counsel in Boston is called on to form a corporation, he canvasses a choice between incorporating in Massachusetts or Delaware or New Jersey; and if the corporation is to be an electric utility or an investment trust, he also takes into account the implications of the federal Public Utility Holding Company Act of 1935 or the Investment Company Act of 1950. If new legislation is required to rectify a general unsatisfactory condition, a choice must often be made between uniform state legislation (like the Commercial Code and its predecessors or the proposed uniform code of state security regulation) and national legislation (like the Securities Act of 1933 and the Securities Exchange Act of 1934).

Interacting System

In the new course this experience is projected on to an international plane. In such a projection lawyers must think and act simultaneously in terms of three legal systems: the system of the home country, the system of the foreign country and the system of public international law. The implications of the transactions surveyed in Part I, and the problems in Part II, are explored in these terms. The pattern of analysis consists of an inquiry into the rights, opportunities and capabilities which may arise under each legal system, and the duties, risks and points of vulnerability which must be confronted under each.

A by-product of this approach will be the nature of the student's introduction to public international law. He will see it as one legal system among several which determine the legal consequences of a set of facts and relationships; as one system among several within the scope of which he must make the choices which are his professional job. In such a context it is hoped that the American law student will be better able to appraise the relevance of international law to his professional concerns and responsibilities.

Perhaps a word should be said about a question likely to arise: does this approach involve an attempt to teach a score or more of legal systems? We think not. The essence of the approach is to identify those aspects of the transaction or relation which exist only because of the international factor or the factor of "foreignness," i.e., only because more than one country is involved. These aspects will be distinguished from those which would have been quite the same even if everything had transpired within an exclusively domestic context. The relevant aspects will then be explored in an effort to find or develop applicable principles and doctrines, and a pertinent sense of lawyership.

Commencing in 1958-59 the present course in International Law will be replaced by a one-semester (Fall) two-hour course in the same subject, concentrating upon aspects of public international law not covered in the new course.

The course in Problems of Doing Business Abroad will be continued as a third-year course, but its more advanced and intensive treatment of selected problems will be facilitated by the existence of the new course.

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'Bishop of Prato Case' Causes Turmoil in Italy; Spotlights U. S. Defamation, Church-State Issues

Slander From The Pulpit

by
DAVID F. BINDER

How far can a clergyman in the United States make slanderous statements about a man, statements which may be true according to the doctrine of his church, without rendering himself liable to a suit for damages by the man maligned?

There are very few cases dealing with this subject in the United States. Perhaps the one which comes closest to the Bishop of Prato situation is *Morasse v. Brochu*, 151 Mass. 567 (1890). This was an action of slander brought against a Roman Catholic priest by one of his parishioners, a medical doctor.

The priest had told his congregation from the pulpit that a civil marriage by the physician, who was divorced from his first wife, excommunicated him from the church; that it should debar him from employment as a physician by the members of the parish, under penalty of loss of the ministrations and sacraments of the church in case of their illness, and that anyone needing the priest should not send for him when the doctor was present, as he did not wish to be under the same roof.

The trial judge's instructions permitted the jury to find that the words were actionable per se. The jury rendered a verdict for the plaintiff for \$1,500.

Economic Injury

On appeal the Supreme Judicial Court of Massachusetts affirmed the verdict. Although the action was one for slander, the court, in its opinion, talked primarily of injury to the complaining doctor in his profession, rather than of injury to his good name and reputation.

The court said that the words of the defendant amounted "virtually to an instruction that the plaintiff was an unsuitable and improper person to be employed as a physician, and a direction not to employ him . . ." (at page 577).

The court declared that the words did not have to be slanderous to sustain the verdict. "These words . . . proceeded to impart against the plaintiff that such marriage . . . should debar him from being employed as a physician in the parish . . . such an imputation, whether defamatory of the plaintiff or not, will support an action." (at page 574).

Morasse v. Brochu, then, does not actually determine whether a clergyman has a privilege to defame a man's character at all. But it does hold that he has no privilege intentionally to injure a man in his business or profession.

A refinement of this rule may be garnered from the case of *Kuryer Publishing Company v. Messmer*, 162 Wis. 565 (1916). Here the defendants were bishops of the Roman Catholic Church who issued a pastoral letter to all the churches in their dioceses where Polish Catholics worshipped, forbidding them to read or subscribe to plaintiff's Polish newspaper on pain of sin and sacrilege.

Right of Clergy

The court said, "Recommending to the members what they should read under pain of expulsion from the church communion is within the jurisdiction of every pastor and prelate of every church which professes to leave such matters to the determination of its clergymen. . . . It might be otherwise if they attempted to forbid social or business intercourse with the plaintiff in respect to trade or commerce or something which ordinarily could not affect the faith of the members." (at page 568).

The Court, then, while agreeing that the clergy ordinarily have no privilege intentionally to injure a man in his business, extends the privilege when the particular business would "effect the faith of the members."

The *Kuryer* case should be interpreted to mean that a clergyman may exhort his congregation to boycott goods produced by a man, but only for the reason that these goods, in themselves, may have a detrimental effect upon a man's faith, not because any particular individual produced them.

On March 1 Msgr. Pietro Fiordelli, Roman Catholic Bishop of Prato, was convicted by a civil court, consisting of three judges, in the city of Florence, Italy. He had been charged with criminal defamation of character. Bishop Fiordelli was fined 40,000 lire (\$64), ordered to pay costs totalling 420,000 lire (\$672), and was held liable to pay damages to the plaintiffs.

The plaintiffs were Mauro Bellandi, a baptized Catholic but now a professed atheist, and his wife, Liorana, a practicing Catholic. The couple had been legally married in a civil ceremony, rather than before a priest. The Bishop, in a pastoral letter, had branded them "public sinners" living in "scandalous concubinage."

The success of their action resulted in an automatic excommunication from the Roman Catholic Church for the plaintiffs. All those involved in bringing the Bishop to trial, including the three judges, the public prosecutor and counsel for the prosecution, were also automatically excommunicated.

The result of this highly unusual lawsuit (this was the first time that a Roman Catholic bishop had been brought to trial before an Italian civil court since the signing of the Lateran Pact in 1929 regulating relations between the Church and Mussolini's government) so incensed the Pope that he cancelled ceremonies celebrating the 19th anniversary of his coronation "in bitterness, sadness and outrage." They had been scheduled for March 12.

The Church has contended that the Italian courts have no authority to try a bishop for words uttered within the framework of the church's "divine rights." For the Bishop's words were all true, according to the doctrine of the Roman Catholic Church.

The RECORD considers, in a two-part article, (1) the extent to which a clergyman in the United States may slander an individual, when acting within the scope of his religious duties or enunciating church doctrine; and (2) the Church-State question of the jurisdiction of ecclesiastical courts according to the Canon Law of the Roman Catholic Church, and the risk of excommunication which a Catholic who involves himself in law suits instituted against clerics in a civil court in the United States may face.

This principle applies to the blacklisting of "obscene" or "blasphemous" books and movies and the urging of boycotts against them.

Courts in the United States take the position that when a person voluntarily becomes a member of a church, he impliedly agrees to submit himself to church authority and discipline, and, generally, they will not review the action of any church or religious society to determine whether in disciplining or expelling members they acted justly or unjustly.

May Sue for Slander

But this refusal to review expulsions from religious societies forms no bar to the entertainment of an action for libel or slander based upon statements made in the course of such expulsion proceedings, or upon comments uttered afterward.

In the case of *Servatius v. Pichel*, 34 Wis. 292 (1874), the plaintiff, an excommunicated member of the Roman Catholic Church, brought an action for slander against a priest who announced the excommunication to his congregation.

The court announced that a clergyman has a "conditional privilege" to slander a man. The condition is lack of malice. After declaring that the words were defamatory, the court stated that if they "were spoken by the defendant in the proper discharge of his clerical and pastoral duty and without malice, no action for the speaking thereof can be maintained."

The issue on appeal was the sufficiency of the complaint. It had alleged malice and was upheld.

Hellstern v. Katzer, 103 Wis. 391 (1899), takes the same view. Here a complaint brought by a Catholic priest against the Roman Catholic Archbishop of Milwaukee charging slander was upheld. The court declared that the Archbishop had a qualified privilege but the complaint alleged malice, which would defeat the privilege. See also *Landis v. Campbell*, 79 Mo. 433 (1883), and *Piper v. Woolman*, 43 Neb. 280 (1895).

Libel in Magazine

The New York case of *Moyle v. Franz*, 267 App. Div. 423 (1944), was an action for libel based on libelous statements which appeared in a semi-monthly magazine, *The Watchtower*, published by a corporation owned by the Jehovah's Witness Society.

In upholding a verdict for the plaintiff the court said, "The qualified privilege of a religious society to publish matters of interest to its members may be destroyed by showing excessive publication or other evidence of malice." (at page 425).

The court found that there was excessive publication because *The Watchtower* was distributed to all persons willing to pay its subscription price and was "a magazine of general circulation rather than one restricted to persons having mutual interest in the statements published."

Justice Carswell, however, in a dissenting opinion concurred in by Justice Johnston, declared that the Soci-

ety should have, not a qualified, but an absolute privilege.

Brewer v. Second Baptist Church of Los Angeles, 32 Cal. 2d 791 (1948), was a somewhat similar case. Here libelous statements about the plaintiff were printed in the *National Baptist Voice*. The court said that statements appearing in such a paper, published for circulation among members of a particular denomination, are "conditionally privileged." The condition, again, was lack of malice. The court affirmed a verdict for the plaintiff upon a finding of malice.

The conclusion one might draw from studying these cases is that in the United States a clergyman has a qualified privilege to slander or libel an individual, within the scope of religious doctrine, if he doesn't (1) act with malice, or (2) cause an "excessive publication" of the statements.

Price We Pay

Professor Mark DeWolfe Howe, editor of a casebook entitled *Cases on Church and State*, has declared his opinion that the clergy should have,



Mark DeWolfe Howe

and in most states do have, this "qualified privilege," when acting officially and enunciating church doctrine. "Part of the price we may have to pay for the separation of church and state is that the clergy may inflict injury without being held accountable."

While a clergyman may have a privilege to make slanderous statements before his congregation, such as in a church sermon, Professor Howe would consider it an "abuse of the privilege" if the clergyman were to make the same statements in a sermon broadcast over radio or television. In this case there would be "excessive publication," much as in *The Watchtower* case.

A very important caveat to be observed in this area is that the clergy apparently have no privilege deliberately to injure a man in his business or profession. A clergyman may, as the *Kuryer* case should be interpreted, exhort his followers to boycott goods produced by a man, but only because these goods, in themselves, may have an injurious effect upon a man's faith,

(See SLANDER on page four)

Canon Law Poses Problems

by
JOSEPH A. PAGE

Render therefore unto Caesar the things which are Caesar's, and to God the things which are God's.
—Matt. XXII, 21.

The recent Church-State controversy in Italy over the trial of the Bishop of Prato arose within the framework of a society 99% of whose members are nominally of the Roman Catholic faith, the established state religion under the Lateran Concordat of 1929 between the Vatican and the Italian Government.

Yet the potentialities of such a situation are very apt to give rise to grave concern in the United States among Catholics whose knowledge of Canon Law is scant, as well as to a substantial number of non-Catholics who still entertain a traditional suspicion of "Papism."

Hence at a time when a Roman Catholic is prominently mentioned among potential candidates for the Presidency of the United States, it is especially appropriate to examine the status of the Catholic clergymen under Canon Law in the United States vis a vis the civil and criminal law courts, and that of Catholic jurists, lawyers and jurors in regard to actions instituted against clerics. Such a discussion, it is hoped, will eliminate possible misinformation and speculation which is so often rampant in discussions on religious matters.

In the United States, less than one-fifth of the total population is Roman Catholic. Against a background of the strife and bloodshed marking religious wars waged in so many European countries, the relatively peaceful development of a pluralist society in the United States stands out in marked contrast. Strains there were, when the great masses of European immigrants made their way across the Atlantic during the nineteenth century, but assimilation into the new environment became the rule rather than the exception.

As a result, the religious outlook of the newly arrived Irish, Germans, Poles and Italians gradually changed, and the Roman Catholic Church in the United States took on a uniquely American character.

In addition, the constitutional prohibition against laws "respecting the establishment of a religion" was construed by the courts to establish a separation between Church and State which presented such peculiar problems to American Catholicism as religious education, and the protection of its members' morals.

Status of Clerics

Among these problems was the position of the clergy. Although in many European countries there is some sort of agreement between the Government and the Vatican in regard to the status of the Roman Catholic Church, no such arrangement exists in the United States.

Here the general position of the courts has been that in purely internal matters involving no alleged deprivation of property or civil rights, final decisions of ecclesiastical courts will not be questioned.¹ But when property or civil rights are involved, or when someone outside the religious organization is affected, secular courts have taken jurisdiction.² No distinction in treatment has been recognized between the Roman Catholic Church and other religious organizations.

This discussion will center upon the position which the Church takes in this matter. This position is defined by Canon Law, which governs all ecclesiastical affairs. Revised by a special commission under the direction of Peter Cardinal Gasparri, the Code was approved by Pope Benedict XV and promulgated on May 27, 1917. By reason of Canon 1, the rules set forth in the Code are applicable to the entire Latin Church. Hence the same laws applied in the "Bishop of Prato Case" in Italy would be in effect if a similar situation should develop in the United States.

Canon 120 par. 1 sets forth the basis of the jurisdiction of ecclesiastical courts:

Clerici in omnibus causis sive contentiosis sive criminalibus apud iudicem ecclesiasticum conveniri debent, nisi aliter pro locis particularibus legitime provisum fuerit. (Clerics in all law suits, whether civil or criminal, must be brought before the ecclesiastical court, unless provision has otherwise legitimately been made for particular countries. [All translations by Ed.]

This exemption from suit is known as the "Privilegium Fori," or Privilege of the Forum.

Canon 120 par. 2 provides that high officials of the Church, including Cardinals and Bishops, may not be called before a secular court without the permission of the Holy See, (the supreme governing body of the Church, located in Rome). Further,

ceteri privilegio fori gaudentes, sine venia Ordinarii loci in quo causa peragitur; quam tamen licentiam Ordinarius, praesertim cum actor est laicus, ne deneget sine iusta et gravi causa, tum maxime cum controversiae inter partes compendias frustra operam dederit, (others enjoying the Privilege of the Forum may not be brought before secular courts without the permission of the Ordinary (usually a Bishop) of the place where the action is brought; however, especially when the plaintiff is a layman, the Ordinary ought not deny this permission without just and grave cause, especially when he has in vain endeavored to work out a settlement between the parties.)

Finally Cn. 120 par. 3 provides that if an action is brought by one who has not been given permission, the cleric in such a situation may appear before the secular court to avoid greater evils, although he should immediately inform the superior from whom permission should have been sought.

Thus it would seem from Canon Law that since there is no agreement between the United States and the Holy See on this matter, the position of the Church is that the Privilege of the Forum is enjoyed by the entire clergy (including men and women living in religious orders) in the United States, and in order to bring a suit against a cleric in a lay court, the plaintiff under Canon Law is required to obtain permission from the cleric's superior. This would apply to both civil and criminal cases, to both Catholic and non-Catholic plaintiffs.

Effect of Custom

Since the United States Government does not recognize the Privilege of the Forum, a difficulty at once arises. However there is a way out of the problem. As certain commentators on Canon Law have pointed out, the Privilege seems to have been abrogated by custom in the United States.

Thus Father Matthew Ramstein says: "In the United States . . . custom . . . permits a layman to sue a cleric in a civil court, provided spiritual matters are not at issue."³

Father H. A. Ayrinhac writes: "In the United States such a custom has been in existence for many years, allowing laymen to have their controversies with ecclesiastics decided by lay judges . . ."⁴

Father Charles Augustine also seems to support the existence of such a custom in his commentary on Canon Law.⁵

However this view is not universally shared. In the commentary by Fathers Abbo and Hannan it is stated: "In the United States . . . the privilege of the forum does not seem to have been abrogated by contrary custom . . ." This conclusion is shared by Fathers Bouscaren and Ellis.⁶ Father P. L. Lydon says:

Some writers teach that the custom [italics his—Ed.] by which laymen have often brought suit against priests and bishops in the civil courts in the United States is valid and hence the Privilege of the Forum does not apply here . . . The custom is not legitimate. Toleration is not equivalent to the positive consent of the Holy See.⁷

Thus in relating these observations to Canon 120, one might draw the conclusion that in matters dealing with spiritual issues, the Church does not recognize the right of lay courts to entertain such suits without the permission of the Holy See. This is especially provided for in Cn. 120 par. 2.

(See CANON LAW on page four)

1. RAMSTEIN, MANUAL OF CANON LAW, 171 (1948).
2. AYRINHAC, GENERAL LEGISLATION IN THE NEW CODE OF CANON LAW 252 (1923).
3. AUGUSTINE, A COMMENTARY ON CANON LAW 64 (1918).
4. ABBO & HANNAN, THE SACRED CANONS 176 (1952).
5. BOUSCAREN & ELLIS, CANON LAW: A TEXT AND COMMENTARY 103 (1957).
6. LYDON, READY ANSWERS IN CANON LAW 271 (1934).

1. *Watson v. Jones*, 13 Wall. 697, 20 L. Ed. 666 (1872).
2. *Thomas v. Lewis*, 224 Ky. 307, 6 S.W. 2d 255 (1928).

Ames

Students can pick up records on appeal and briefs of the Ames final and quarter-final arguments on the afternoon of the day that the argument is to be held at the Board of Student Advisers' office on the first floor of Austin Hall.

SLANDER

(Continued from page three)

not because any particular individual produced them. But he may not urge a boycott of the plaintiff personally, in a manner which will injure him economically.

It is interesting to note that in none of the cases herein discussed did the question of "freedom of religion" under the First Amendment play a decisive role. Professor Howe wonders whether this Amendment may not require the recognition of a "qualified privilege" for the clergy. The point does not appear ever to have been officially determined.

Malice

The "malice" which, if present, will destroy the privilege that the clergyman possesses has been defined to mean nothing more definite than "bad faith," as distinguished from "good faith."

But the area of religion is a most difficult one in which to attempt to draw a line on such a basis. For religion is based not so much on reason as on faith, and to the more zealous believer it becomes a highly emotional experience. How can you know, for example, when a religious leader whips a few money-changers and drives them from the temple, whether his actions are motivated by "malice" or merely by righteous anger? Indeed, just how does one distinguish between malice and righteous anger or indignation?

Jury Question

The question of whether malice is present in any particular case is, of course, a question for the jury to decide. But it is not true that a jury member is much more likely to find that a defendant acted in mere "righteous indignation" if he believes the defendant was right in what he said, and is in sympathy with the defendant's religious beliefs? And isn't he more likely to find "malice" as the motive for the defendant's words if the defendant professes beliefs which he considers patently irrational and untenable?

It seems to the writer that "malice" operates as a poor guide to a jury in the determination of this type of case. It is, however, a convenient label to apply if the jury wishes to punish the defendant for his conduct.

But if a clergyman's defamatory statements are not excessively published and if he is acting within the scope of church duty or doctrine, would it not be a sound policy, consonant with "freedom of religion," to shelter his words from a suit for damages, discarding any attempt at a determination of the presence or absence of "malice"?

Pocketbook Protected

The defamed man is, apparently, adequately protected in his purse. If an economic boycott is urged against him by any member of the clergy he may sue without either alleging or proving malice. He must prove only a deliberate attempt to injure him in his trade or business.

If clergymen are to be given a privilege, because of the concept of "freedom of religion," to defame people when acting within the scope of their religious duties, it does not seem rational to place them in peril of a judgment for damages because of what can be, in the vast majority of cases, only an arbitrary finding of "malice" on the part of a jury.

As the situation stands today, however, a clergyman may speak openly and frankly, in the scope of his official religious capacity, and confidently expect a court to recognize that his words are protected by a "qualified privilege." But he can also confidently expect that he will have to defend any suit for defamation brought against him, if his words were in fact defamatory, for it is no trouble at all for a plaintiff to allege malice, which will, if proven, defeat his privilege. The question of his liability, then, will be placed in the hands of a jury, who may well be influenced by whether they are or are not in sympathy with the beliefs he professes.

CANON LAW

(Continued from page three)

2 regarding high Church officials. Ordinary clerics may be sued in a secular court on either spiritual or non-spiritual matters if the plaintiff has obtained permission from the Ordinary, or if custom has abrogated the privilege.

In ordinary non-spiritual civil (e.g. automobile negligence) or criminal cases, the better view seems to be that as to the ordinary cleric the Privilege of the Forum has been abrogated by custom, and although Catholic plaintiffs do run a risk of incurring sanctions by the Church if they should institute suits without permission, the general practice of the Church has been to acquiesce.

Witnesses

The generally accepted view on the question of summoning clerics as witnesses is stated by Fathers Abbo and Hannan to be as follows: "Per se, in view of the precise text [Canon 120—Ed.], the summoning of a cleric merely as a witness is not forbidden. This, however, is not seemly, especially in criminal cases, if the cleric enjoys high dignity in the Church."⁹ Father Beste, in his *Introductio in Codicem* adopts the same view.¹⁰

Apparently the only English-writing commentator who holds against this is Father Stanislaus Woywod. He says: "Though the Code punishes with censures those only who sue clerics before lay judges without the permission of the authorities of the Church, it is nevertheless sinful to force them to appear as witnesses without obtaining the permission of the Church in view of the exemption which the Church bestows on clerics in this matter."¹¹ This is quite an impractical view, and well deserves its lack of acceptance.

A cleric is not forbidden from suing a lay person in a lay court.¹² However in such a case canonical restrictions would not apply to any counterclaims which the lay defendant might advance.¹³ Another exception to the general rule is that a lay person may without permission sue a cleric who litempendente became an heir to a lay defendant who died.¹⁴

Ecclesiastical Courts

A brief description of the ecclesiastical judicial structure may be in order at this point. Canons 1552 to 2194 deal with canonical trials. The bishop of each diocese has the responsibility of setting up an ecclesiastical court. In the Archdiocese of Boston the court is composed of the Officialis, who is the equivalent to a Chief Justice, a Vice-Officialis, and twelve Synodal Judges. The court usually hears cases in rotation, each case being presented before a board of three to five of the judges.

Appeals from Suffragan Sees (dioceses in the same ecclesiastical province, such as Worcester, Springfield and Fall River) are heard by the Boston court, as Boston is a Metropolitan See (a See ruled over by an archbishop). The court of appeal for the Archdiocese of Boston is the Metropolitan Tribunal of New York. Cases may at any time be appealed to the Rota in Rome, which is the ordinary court of appeal for judicial cases appealed to the Holy See.

According to Catholic doctrine, the Church is supreme within its sphere of activity, which include both spiritual matters and temporal matters inasmuch as they pertain to spiritual matters, and hence ample provision for legislation, administration, and adjudication may be found within the Code. In its judicial aspect, the canons cited above cover rules of both substance and procedure for the ecclesiastical courts.

Excommunication

The next topic of inquiry relates to the sanctions which the Church may use against those who violate Canon 120. Canon 2334 states:

Excommunicatione latae sententiae speciali modo Sedi Apostolicae reservata plectuntur: 1. Qui leges, mandata, vel decreta contra libertatem aut iura Ecclesiae edunt; 2. Qui impediunt directe vel indirecte exercitium iurisdictionis ecclesiasticae sive interni sive externi fori, ad hoc recurrentes ad quolibet laicalem potestatem. (Those who 1. issue laws, mandates or decrees in opposition to the liberty or the laws of the Church, or 2. impede either directly or indi-

rectly the exercise of ecclesiastical jurisdiction in the internal or external forum, having recourse for this purpose to any lay power whatsoever, are punished by excommunication automatically incurred and reserved in a special manner to the Holy See.)

Canon 2341 provides that if anyone with full imputability violates Canon 120 par. 2, "contrahit ipso facto excommunicationem Sedi Apostolicae speciali modo reservatam . . ." (he automatically incurs excommunication reserved in a special manner to the Holy See). There is a slightly lesser degree of excommunication in the case of some of the lesser officials enumerated in Cn. 120 par. 2. There is provision for suspension of a cleric who brings anyone enjoying the Privilege of the Forum before a lay judge: "laicus autem congruis poenis gravitate culpae a proprio Ordinario puniatur" (and a lay person committing the same offense shall be punished with appropriate penalties in proportion to the seriousness of his guilt by the proper Ordinary).

In the "Bishop of Prato Case," the plaintiffs were excommunicated under Cn. 2341 because they brought suit against a bishop in a civil court without permission, while the members of the court incurred the same penalty under Cn. 2334 because they issued a decree "against the liberty of the Church" and impeded the exercise of ecclesiastical jurisdiction under Cn. 120.

Excommunication is a penalty by which one is excluded from partaking in any of the spiritual activities of the Church. Every excommunicated person lacks the right to assist at divine services, but can listen to the preaching of sermons. He may not receive the sacraments, and under certain conditions he is denied ecclesiastical burial. An excommunicated person does not share in the public prayers of the Church, and is excluded from legitimate ecclesiastical acts. (Canons 2257-67)

Must Repent

Excommunication differs from expulsion from many other religious groups because a believing Catholic thus afflicted cannot be saved unless he truly repents of the sin which gave rise to the sanction. If this sin stems from the exercise of legitimate secular authority, such a person is caught in the middle of a serious moral conflict. Thus as a weapon excommunication can be very effective.

The degrees of excommunication relate mainly to its removal. In the case of excommunication reserved to the Holy See, the penalty is removed only by the Pope himself or one who has authority delegated to him. If the decree has been promulgated by a bishop, then the bishop or his agent may remove it. Decrees "latae sententiae" are automatically incurred on the doing of a particular act, while decrees "sententiae ferendae" are pronounced by an ecclesiastical judge. In any event the individual must be cognizant of the seriousness of his action to be eligible for excommunication.

Canon 2258 par. 1 differentiates between excommunicated persons "vitandi" (to be shunned) and "tolerati" (to be tolerated). Par. 2 states that no one is excommunicated "vitandus" unless the decree makes this explicit. The only exception to this is when someone lays "violentas manus in personam Romani Pontificis" (violent hands on the person of the Roman Pontiff), in which case the offender is ipso facto excommunicated "vitandus." (Canon 2343 par. 1)

Thus the *New York Times* was not correct when, in reporting on the "Bishop of Prato Case," it stated that "Strictly speaking they [people excommunicated—Ed.] should be strictly shunned and avoided by all devout Catholics."¹⁵ Since this was nowhere reported as appearing in the decree, and since such decrees have seldom been employed in modern times, it is clear that all the excommunicated persons involved came under the "tolerati" category.

Plaintiffs Excommunicated

It seems that in the United States a Catholic plaintiff who brings any kind of an action against a bishop or other high Church official, as opposed to an ordinary cleric, without proper authorization will be excommunicated. In 1911 Catholic plaintiffs sued the Bishop of Scranton, Pa., to have legal title re-vested in them as trustees under the laws of Pennsylvania.¹⁶ Title had been vested in the Bishop for a special purpose, which had been ac-

TRIAL PRACTICE

(Continued from page two)

as debatable as the tactical, and the discussions are thus inconclusive. Nevertheless, we hope some affirmative gain will come from thoughtful consideration of concrete ethical problems of trial advocacy.

When the course was first given four years ago, two sections were offered and both of us attended substantially all meetings of both sections. These last two years Messrs. Robert W. Meserve and James D. St. Clair of the Boston Bar have joined us in this undertaking, and four sections have been given. Though each of the four instructors is primarily responsible for one section, it is still our practice to have two instructors present in a substantial number of the class meetings. Invariably we follow this practice when one of the instructors is serving as a witness, since he is too fully occupied as witness to prepare adequately for the critique to follow.

Testing and grading have been a serious concern. We recognize that we cannot test the total potential of the student for trial work. But we can reasonably test the student's progress in some important aspects of trial work which are emphasized in the course. The examination given at the end of the course calls on the student to do in writing what he and other members of the class have been doing orally during the critique phase

completed. Since there was some sort of internal dispute about this, they were excommunicated. In 1928 the publisher of a newspaper in Woonsocket, R. I., brought suit against the Bishop of Providence to enjoin the teaching of English in parochial schools in the French parishes.¹⁷ Since no permission had been granted, the publisher and all the co-signers of the complaint were excommunicated.

The question then arises as to Catholic judges, jurors and lawyers in such situations. As far as this writer knows, there have been no cases of excommunication decreed against Catholics holding any of these positions in the United States.

Several practical considerations enter the picture at this point. A Catholic judge may disqualify himself if the situation permits. Then too, a plaintiff in such an action would surely object to the submission of his claim before a Catholic judge. The difficult case arises if it were absolutely necessary for some reason or another that a Catholic judge hear the case, and the jurisdictional claims of the State and the Church come into direct conflict. Mere decision on jurisdiction would not result in excommunication, but a final decree adverse to the Church would. It would seem that the Church, depending on the circumstances of the case and the general practice in the particular diocese, might well forego its jurisdictional claims. For sanctions against a judge placed in that predicament can be waived by the bishop under Canon 81 in an emergency.

Catholic Jurors

Where jurors are concerned, peremptory challenges might be used by the plaintiff to keep Catholics from serving on the jury. Self-disqualification might also come into play here. If the religious question were of an inflammatory nature, and Catholics refused or were not permitted to serve on the jury, a situation might develop where the jurors all had inclinations against the cleric being sued. Finally, in the hypothetical posed above, if it were unavoidable for Catholics to serve on a jury in a case where the Church and the State both claimed jurisdiction, under a close reading of Cn. 2334 (it is also a rule of construction in Canon Law that penal provisions are to be strictly construed), it might be argued that jurors really have nothing to do either directly or indirectly with the pronouncement of the final decree. They merely find the facts, and hence would not literally come within Cn. 2334.

In the case of ordinary lawyers, it would appear that they would be in the same category as plaintiffs, since they may accept or reject cases at their discretion. The situation of the public prosecutor is more analogous to that of the judges and jurors. He may be in a position to disqualify himself. If for some reason he must take the case (e.g. his job may depend on it), then there is doubt that excommunication would be visited upon him, since this impending loss of employment would decrease the imputability

Softball

The Law School Softball League is scheduled to open next week, weather permitting. Four teams have already entered. They are: the Slovak Seven, the Weitzel AC, the Charley Brown AC and the Pomona College All Stars. Veteran observers have rated the Slovak Seven slight favorites to take the crown.

All teams interested in entering the league are requested to contact Commissioner Richard Weber in Holmes 304. Phone EL 4-5910.

of class sessions. He is given a fact situation as it might appear in the files of one of the lawyers, and a description of certain of the lawyer's activities, both outside and inside the courtroom. His task is to criticize, commenting favorably or unfavorably as warranted, giving reasons, and giving arguments against his conclusions on points he considers debatable. He may also be asked to do something more like the student performance in the first phase of a class session; for example, to express, in the phrasing which would be recommended for use in court, the best form of objection which might be made to a given series of questions by opposing counsel, indicating also whether, from the point of view of tactics as well as the law of evidence, the objection is worth urging. The student's grade in the course is primarily dependent on the written examination, but we have customarily announced and followed the practice of raising or lowering this grade as much as two points because of the quality of the student's participation as counsel and critic during class sessions.

Heavy Demand for Course

The way the course has been planned and taught has dictated a strict limitation of numbers. Only a few more than thirty have been admitted to each section. This has resulted in an inability to meet the student demand. Our method has been to resort basically to a selection by lot, but in the last two years we have filled vacancies by picking applicants whose law school activities (Ames Competition, Voluntary Defenders, and the like), summer work, or jobs lined up for the next year have demonstrated a keen interest in oral advocacy. We know in fact that a not inconsiderable number sign up for the course without any deep interest in trial work, but merely to fill out their schedules. We also know that many of those excluded regard the course as of great importance to their future plans.

For the purpose of giving a preference to those most interested in the course, we have set up a one-hour examination on Saturday, March 22, 1958, based upon the text. In making our selection we will give priority to students taking this examination and performing satisfactorily in it. This does not mean that the man with an "A" or "B" Law School average will be favored over the "C" or "D" man. The grading will be either "Satisfactory" or "Unsatisfactory." If the sections are not completely filled by this method, other applicants will be selected, as heretofore, by lot. If there are more "Satisfactory" grades than (See TRIAL PRACTICE on page six)

necessary as a prerequisite to Church sanctions.

The reason the Church makes use of excommunication as a sanction against judges, lawyers and jurors is to prevent the exercise of lay jurisdiction when it interferes with ecclesiastical jurisdiction. In a predominantly Catholic country, this might be a very effective weapon. But in a pluralist society where the exercise of state functions does not depend upon Catholics, excommunicatory decrees against individual Catholics would have little effect on the end to be desired.

In the adjustment which the Church has made to the American social, political and judicial structure, the generalization can be made that wise restraint has been employed in the application of Canon 120. The impelling force behind the Canon, that in lay courts the Church will always come out on the wrong end, is nullified by the ideal of due process, which is a constitutional cornerstone of the American judicial system. There is no reason to believe that such restraint will be abandoned in the future.

9. ABBO & HANNAN, *op. cit.* supra note 6, p. 175.
10. BESTE, *INTRODUCTIO IN CODICEM* 177 (1958).
11. WYWOYD, *PRACTICAL COMMENTARY ON THE CODE OF CANON LAW*, Sec. 92 (1952).
12. ABBO & HANNAN, *op. cit.* supra note 6, p. 175.
13. *Ibid.*
14. BESTE, *op. cit.* supra note 10, p. 177.

15. *New York Times*, March 4, 1958, p. 2, col. 3.
16. *Mazanka v. Kraucunas*, 233 Pa. 138 (1911).

17. BOUSCAREN, *THE CANON LAW DIGEST* 855 (1934).

MUSMANNO

(Continued from page one)

needed reformation in the law would not have occurred.

In *Adkins v. Children Hospital*, 261 U.S. 525, the Supreme Court of the United States, by a vote of 5 to 3, declared unconstitutional the Minimum Wage Act of September 18, 1918, which fixed a minimum wage standard for adult women employed



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Holmes as a Civil War Officer

in the District of Columbia. Chief Justice Taft, Justice Holmes and Justice Sanford dissented. Fourteen years later, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, Chief Justice Hughes, writing for a majority of the court, held in effect that the dissenting justices in the *Adkins* case were right, and the Court accordingly overruled the *Adkins* ruling.

Dissent Becomes Law

In *Minersville School District v. Gobitis*, 310 U.S. 586, the Supreme Court held that a statute requiring a compulsory flag salute by school children did not constitutionally restrict freedom of religion. Mr. Justice Stone dissented. Four years later Justice Stone's dissent received a favorable reception in the case of *West Virginia Board of Education v. Barnette*, 319 U.S. 624, and the *Minersville* decision was overruled.

Judge Evans of the United States Circuit Court of Appeals, 7th Circuit, has compiled some interesting tables on the number of dissents in the Supreme Court of the United States.* He records that from October 8, 1929 to June 1, 1937 (22 volumes) 1,281 opinions were written. The dissents number 178, or 13.9% of the total. Speaking of Justice Holmes he said:

The public interest in Justice Holmes as a dissenter is great. It appears that during the first fifty volumes of decisions wherein Justice Holmes participated, he dissented or joined in 48 cases. In the next period covering forty-eight volumes of Supreme Court Reports he dissented 130 times and wrote concurring opinions in 20 cases. In other words, his dissenting opinions during the latter half of his career on the bench were approximately

2.7 times as many as during the first half.

If with age comes increased learning and certainly more experience, it would appear that the longer Holmes remained on the Supreme Court bench the more certain he was that the majority of the Court did not hold the only key to the vaults of wisdom and justice.

Not Infallible

Without intending any disrespect, I make the rather daring assertion that the Court, of which I am a member, has not always been right. Perhaps I do not need to be apologetic in what may seem to be a criticism of the Supreme Court of Pennsylvania because it has admitted that on occasion it has not heeded the signs on the highway of jurisprudence and has gone straight ahead when the road curved, or curved when the signs clearly pointed to a straight-ahead course. Let us take a recent illustration.

On September 26, 1955, the Pennsylvania Supreme Court extended the felony-murder doctrine in the following set of circumstances.

Henry Thomas and Henry Jackson entered a grocery store and committed a robbery, but as they were escaping, the grocer pursued Jackson and shot him dead. The surviving robber (Thomas) was indicted on a charge of murder under the statute which says that—

all murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary or kidnapping, shall be murder in the first degree.

The majority of our Court sustained the indictment. Three justices, of whom I was one, dissented. In my criticism of the Majority decision I used language which could scarcely be considered restrained. I said that the Majority's decision was "based on one of the most illogical doctrines ever announced in a criminal case. The decision was not a juridical conclusion but, in effect, a legislative fiat; it was not a decision founded on authority and precedent, but an arbitrary edict which declared an act to be murder which was never murder before."

I felt considerably disturbed about the Thomas doctrine because, as I saw it, the Court was legislating a new punishment for robbery, which it had no right to do. I felt reassured in my conclusion when the distinguished and venerable scholar, A. L. Goodhart, Queen's Counsel and Master of the University College, expressed great surprise over the doctrine announced in the Thomas case.

Case Overruled

Two years after the Thomas case was decided, our Court, having before it another case, with precisely the same set of circumstances as were involved in the Thomas case, overruled the Thomas case—by a vote of 6 to 1.

Judge Learned Hand fears that with the promulgation of dissenting opinions—

People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure that they will not be caught.

This observation attributes to the American people a wholesale disrespect for law of which I have not been aware. When a court of last resort speaks, its decision becomes binding on the entire population; and the vast majority of the population abide by the pronouncement. To say that people will ignore the ruling law (on account of the dissents filed against it) "if they are reasonably sure that they will not be caught" says nothing. All persons who defy the law do so because they are reasonably sure that they will not be caught! And those lawless persons will defy the law whether it is laid down by a Court speaking through a 9 to 0 majority, or a court speaking through a 5 to 4 majority.

In all my twenty years in the nisi prius courts I never heard an accused

person in a criminal case advance the defense that he was operating under the minority version of a decision, and not the majority version! And I would say that in two decades I heard every ingenious explanation that can be offered by the desperate and fertile imagination of those who have tripped over the very law they attempted to circumvent.

Nor can I accept Judge Hand's assertion that:

The reasoning of both sides is usually beyond their [the people's] comprehension, and is apt to appear as verbiage designed to sustain one side of a dispute that in the end might be decided either way. . . .

If the people of whom Judge Hand speaks are unable to understand the reasoning of both sides, then of course they do not know the issue and therefore cannot comprehend the decision at all. So far as they are concerned, therefore, the entire litigation is *terra incognita*, and no conclusion can be predicated on their erratic reaction, if any.

Up to this point Judge Hand is speaking of the possible reaction of people who look with glazed eyes and listen with stony ears to a controversy which they can only appraise with



Learned Hand

"blind and naked ignorance." Of such people, one would do well to hearken to Vergil who said to Dante: "Let us not speak of them; but look, and pass on."

Acrid Cynicism

However, Judge Hand does not stop here. He completes the above quoted sentence (two paragraphs ahead) with a cynicism of such disturbing acidity that one can only feel melancholy in reflecting that here is one of the great idols of the American bench speaking. I will repeat the whole statement, italicizing the venomous tail on which some day I trust the venerable jurist will step with a repudiating heel. He said:

The reasoning of both sides is usually beyond their [the people's] comprehension, and is apt to appear as verbiage designed to sustain one side of a dispute that in the end might be decided either way, which is generally the truth.

But is it really true that controversies which come into our courts can generally be decided either way,—that is, honestly? Is our whole system of jurisprudence then a fraud? Does it not matter whether the defendant is found guilty of murder in the first degree and hanged, or whether he is acquitted? Does it not matter whether an injunction seeking to prevent threatened destruction to a whole city is granted or not?

Moreover if we accept Judge Hand's assumption that a dispute may properly be decided either way, why must the decision of the Court be of a monolithic unanimity? If either side can be right, then, to the extent that the losing side is entitled to a recognition of that right in the Court's decision, the unanimous Court is speaking a lie.

Can any system of law survive, and should it survive, if it is founded on the proposition that a deciding court

(See MUSMANNO on page six)

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London 'Economist' Proposes Statutory Guidance of Unions

Senator John F. Kennedy (D) of Massachusetts has announced that the subcommittee which he heads will begin hearings on bills designed to curb evils in labor unions next Monday, March 24. His subcommittee comes under the Senate Labor and Public Welfare Committee.

Facts brought to light by recent investigations of the Senate Labor Rackets Committee have caused widespread speculation about possible enactment of new legislation designed to correct certain abuses discovered within unions. *The Economist*, London's noted economic and political weekly, has recently published a three-part study of abuses in British unionism and has presented its proposals for public control measures designed to eradicate them. (186 *The Economist* 464, 556, 640). The following is an abstract of its findings and recommendations, prepared by Robert E. Manley, News Editor of the RECORD.

Nearly ten million workers belong to British labor unions. This amounts to about 40 percent of the working population. Union power has been resting upon political support by members of the government and a steady level of high employment.

This power has recently been weakened by a two-year period of disinflation in England which has reduced the unions' bargaining position. Certain sectors of the economy, where employment has been high and working conditions good, have resisted organization. Notable examples of this are commercial and office workers.

British unions have low financial resources. This reduces their ability, and the ability of their members, to "wait out" a strike. Union funds, at the end of 1956, contained less than an average week's earnings per member.

Unions in England have ceased to be a center of social, cultural, and educational activity. Members hardly identify themselves more closely with their unions than they do with their employers. Though union leadership is socialist, 30 percent of the members vote for Conservatives at parliamentary elections. In union elections "it is not uncommon for over 90 percent of the membership not to vote at all."

Source of Abuse

The source of abuse is not in top level administration, but in a certain element of spare-time officialdom at the shop steward level. There are two types of these spare-time officials. The "old type" consists of people who disinterestedly devote much of their own time to the sincere service of their fellow workers or to further their political beliefs. But a "second type" has sprung up in a self-perpetuating body which is devoted more to its own interest than to the interest of rank-in-file members. Those who belong to this type "make a good thing for themselves in terms of power over their fellows . . . make a good thing in terms of not having to do hard work . . . [and] they have occasionally begun to make a good thing in terms of creature comforts, if not of hard cash."

This second type of spare-time union leader at the local level is the source of major internal union abuses.

The Economist proposes that corrective measures should "leave the unions with their present legal privileges, but in some way statutorily guide a codification of their own rules so that these local groups should come more under the control, not of their union leaders in London (for that would be dictatorship), but of their own members whom they are supposed to represent—with very specific safeguards for the rights of minorities."

Protection against "local bullying" is the main aim of the proposal. This is to be accomplished by three measures: (1) regulation of elections to insure their representativeness, (2)

the placing of checks on formal procedure for expulsion of members, which often results in loss of ability to earn a livelihood, (3) the encouragement of competition for membership among unions.

It is suggested that existing legal privileges possessed by unions be made contingent upon whether or not they register their rules with the Chief Registrar of Friendly Societies. The Registrar would be the union regulating officer. His weapon would be the threat of removal from his list.

Honest Elections

The Registrar presumably could cope with direct manipulation of election results, but would have greater difficulty in prevention of the more frequent practice "of so arranging matters that only a minority of zealots or (from the union's point of view) properly 'instructed' people turn up to vote." This second problem might be solved either by the Registrar's becoming the manager of union elections or by his refusal to accept the results of a union-conducted ballot that falls below a certain percentage of members.

Unjust expulsion from union ranks would be curbed by requirement that the central authority of the union give approval to each expulsion, with the hope that this will curb the grudge expulsions by local spare-time officials. Secondly, "those who take local action to hound an unexpelled union member out of his job should be laid wide open to legal action for damages and civil conspiracy against the individual." Rules for expulsion should be "formalized, rather than fundamentally changed."

Competition among unions for members, *The Economist* declared, "would not be a bad thing," though it admittedly would be hard to encourage.

SCHOOLS

(Continued from page one)

or other schools which matched the specifications laid down for the Superior Schools.

The appellants are children within the "superior" classification and their parents. They are seeking an injunction against the various state and federal officials concerned with enforcing the two statutes. The lower courts have held that both acts are constitutional and that the plaintiffs have no standing to challenge the federal act.

The appellants contend that the New York Act violates both the "due process" and "equal protection" clauses of the 14th Amendment. They also contend that the religious freedom guaranteed by the 1st Amendment has been violated because one appellant has been prevented from attending a Catholic parochial school, another is being forced to specialize in a course of study repugnant to the tenets of his religion, and another is being forced to attend school on the Jewish Sabbath and is being prevented from preparing for his Bar Mitzvah.

It is also contended that the federal act is unconstitutional because Congress lacked the power to enact such a statute.

Attorneys Mallin and Schurtman (Chayes Club) are representing the plaintiffs-appellants. Counsel on the brief include Donald E. Biederman of Rockville Centre, N. Y., Robert E. Fleck of Cuyahoga Falls, Ohio, Emil W. Herman of Pittsburgh, Pa., Donald Hirsch of New York City, Carl M. Selinger of Oakland, Cal., and Zita L. Weinshienk of Denver.

Attorneys Atwater and Venman will represent the defendants-appellees. Counsel on the brief include Gordon G. Busdicker of Winona, Minn., John French III of New York City, Robert A. G. Monks of Cambridge, Charles A. Morrison of Mount Vernon, N. H., Edmund R. Schroeder of New York City, and William H. Thigpen of Evanston, Ill.

—Binder

Law Wives

The Law Wives will hold their next meeting in the Wheeler Room of Holmes Hall. Mrs. Arthur Irzyk, a Hart model who teaches at the John Robert Powers School of Modeling, will speak on "Making the Most of Your Looks." The Harvard Dames, Business Wives, and Medical Wives have been invited to attend this meeting on March 26 at 8 p.m.

MUSMANNO

(Continued from page five)

may be wrong, but no one dare say that it is wrong?

February 6, 1958, was a sad day for judicial independence. At the very same time that Judge Learned Hand was hermetically sealing the monolithic chamber of judicial unanimity, so that no possible light of dissent should escape to the outside world, Stanley E. Qua, former Chief Justice of the Supreme Judicial Court of Massachusetts was explaining to the Student Bar Association the policy of the Commonwealth of Massachusetts to discourage dissenting opinions on the ground that the majority statements are going to be the law and that dissents "merely detract therefrom."

It is indisputable that the "majority statements are going to be the law," but Chief Justice Qua does not say—for how long. Does Chief Justice Qua believe that there should never be a reargument in a case?

Sometimes Wrong

I do not believe that Chief Justice Qua would go so far as to say that the Supreme Judicial Court of Massachusetts is infallible; that it could never possibly be wrong. And if he admits the possibility of error, who would be in a better position to point out the error than the minority judges who sat with the majority and heard the arguments of the lawyers, who sat with the majority judges in consultation and listened to their views, who listened to everything the majority had to present in support of its position—and still disagreed with them? Who could be better qualified than those minority judges to inform the world of the errors and fallacies in the majority opinion?

If there are to be no dissenting opinions in the courts, then why should the *Congressional Record* carry the speeches of those who voted against the bill which has now become law? Once Congress acts on a bill, the majority view is going to be the law and, according to Chief Justice Qua, all contra speeches "merely detract therefrom." But does Congress never reverse itself? Is it forgotten that the dissenters against the 18th Amendment to the Constitution of the United States finally prevailed in the 21st?

Furthermore, in enforcing an enacted law the speeches which were made against the measure often shed considerable light on the law's purpose and objective. In the same manner, a dissenting opinion can serve an excellent purpose in revealing facts not covered by the majority opinion, thus contributing to a better understanding of what the Court intends.

Usually Best

Chief Justice Qua says that the majority opinion "is usually the best despite some piquant remarks that may catch the popular ear." The legal profession should have the right to hope and expect that the majority opinion would always be "the best." It is because of the very modification expressed by Chief Justice Qua in the adverb "usually," that dissenting opinions are not only proper; not only desirable; but, in certain cases, absolutely imperative. It is when the majority opinion fails to come up to the "usually best" that dissenting opinions should explain why it has failed in this indispensable requisite. A dissenting opinion which is more convincing than the majority opinion gains approval not necessarily because it is so good, but because the majority opinion is so bad.

Dissenting opinions are so integrally a part of our judicial system that the comments by the revered Judge Learned Hand and the distinguished Chief Justice Qua are in effect dissents from what is now the law and, therefore, they are entitled to great respect.

END

LAWYER

(Continued from page one)

scope of employment, the inventor is obligated to give the rights to his invention to the employer. However, if the invention is outside the scope of employment, neither the government nor any other employer has a right to it. If there is an agreement between the parties that the employer's facilities will be used to develop the invention, the employer will receive, not an exclusive right to it, but a royalty-free non-exclusive license for its use. This is called a shop-right license.

At the present time, asserted Dr. Rines, the law pertaining to patent rights does not favor the inventor. As an illustration of this, he mentioned the rule which allows an amendment to a filed patent to date back to the date of the original filing. In the case of at least one prominent inventor this acted as a detriment, the speaker stated, when the corporation to whom he had shown his discovery in the hope of their finding a use for it, rejected his idea, and then filed an amendment to a previous patent of their own which had little relation to that invention. This patent related back before the time of the real inventor's discovery and filing date.

Dr. Rines concluded his speech by pointing out, "Unfortunately, the situation is now such that the independent inventor needs the large corporations more than the large corporations need the inventor. Since so many scientists are of limited means, they cannot afford the costly litigation which arises when the little man fights the big corporation in the courts."

—Boal

TRIAL PRACTICE

(Continued from page four)

there are places, elimination will similarly be by lot.

Finally, on an experimental basis, we propose to offer a fifth section, which we will give jointly, without limitation as to number. We recognize that the methods of instruction used in the small sections will have to be altered. There will be significantly less opportunity for individual student performance in the techniques of trial work and accordingly less chance to benefit from criticism of such performance by the class and the instructors. On the other hand, we believe that the same basic materials can be used, probably with some modification.

It is our hope that the student who either fails of admission to a small section or does not seek it will derive sufficient benefit from this new offering to justify its place in the curriculum. If this hope is realized, we will be able to say that this School, which only four years ago gave no instruction whatever in trial practice, is giving every third-year student who wants it an opportunity to take such a course.

JUDGE

(Continued from page one)

politics, and was unsuccessful Republican candidate for Governor of the state in 1920. After 1922 he practiced in Charlotte where he headed the firm of Parker, Stewart, McRae and Babbitt.

During 1923 and 1924 he was a special assistant to the attorney general of the United States. In 1925 President Calvin Coolidge appointed him a judge on the Fourth Circuit Court of Appeals. It was from this bench that Judge Parker handed down the decision in *U.M.W.A. v. Red Jacket Consolidated Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927) holding it unlawful for union organizers to seek to induce employees to breach "yellow dog contracts." His ruling in that case is generally credited with costing him a seat on the United States Supreme Court. When President Herbert Hoover named him to the High Court in 1931, friends of labor blocked his confirmation in the Senate.

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DESERTER

(Continued from page one)

desertion and received a dishonorable discharge from the Army.

In December, 1956, he tried to re-enter the United States through the port of New York. He was refused entry on the ground that he was no longer an American citizen because of his conviction and dishonorable discharge for desertion in time of war. He was denied a hearing on the ground that the disclosure of the information on which his exclusion was based would be prejudicial to the public interest and safety.

On February 27, 1957, Miller instituted habeas corpus proceedings in the United States District Court for the Southern District of New York. The defendant, Edward Shawn, is the District Director of Immigration and Naturalization of Ellis Island. The appellant is in his custody.

A major issue involved is whether the word "desertion" contained in the Manual for Courts Martial means the same thing as the word "desertion" contained in the Nationality Act of 1940.

Other issues involved are whether the expatriation of the appellant is a "cruel and unusual" punishment, prohibited by the 8th Amendment, and whether the exclusion of the appellant without a hearing and without disclosure of the information upon which his exclusion is based is a deprivation of his liberty without the "due process of law" guaranteed by the Fifth Amendment.

Attorneys for the relator-appellant are A. Keith McClung of Hartford, W. Va., and Robert M. Royalty of Danville, Ill. The respondent-appellee will be represented by Joseph H. Head, Jr. of Cincinnati, and J. Wallace Hopkins, Jr. of Cambridge.

—Finley

ELECTIONS

(Continued from page one)

tures of 20 members of the Class, and if he signs a statement that he has read these rules, and that he agrees to serve if elected. Each candidate may run for only one post. Nominating petitions and these Rules will be available at the receptionist's desk in Langdell. The petitions are returnable to the receptionist."

In regard to the conduct of the "campaigning," paragraph 8 states: "The *Ad Hoc* Committee will display posters with photographs of candidates and with information about each candidate's college or colleges, his home town, and his Law School activities. No candidate shall display any other poster or employ any printed material promoting his candidacy. All candidates are required to submit this poster, size 5 inches by 8 inches, with the photograph and background material mounted on it, to the receptionist at Langdell Hall by 5 p.m., Friday, March 28, 1958."

Questions concerning the election, which will be held on April 7, will be answered by any of the members of the *Ad Hoc* Class Committee, composed of the following: Don D. Etter (Chairman), Janet S. Senderowitz (Secretary), Joseph A. Page, Philip S. Plexico, Harry R. Schumacher, Paul H. Tobias.

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