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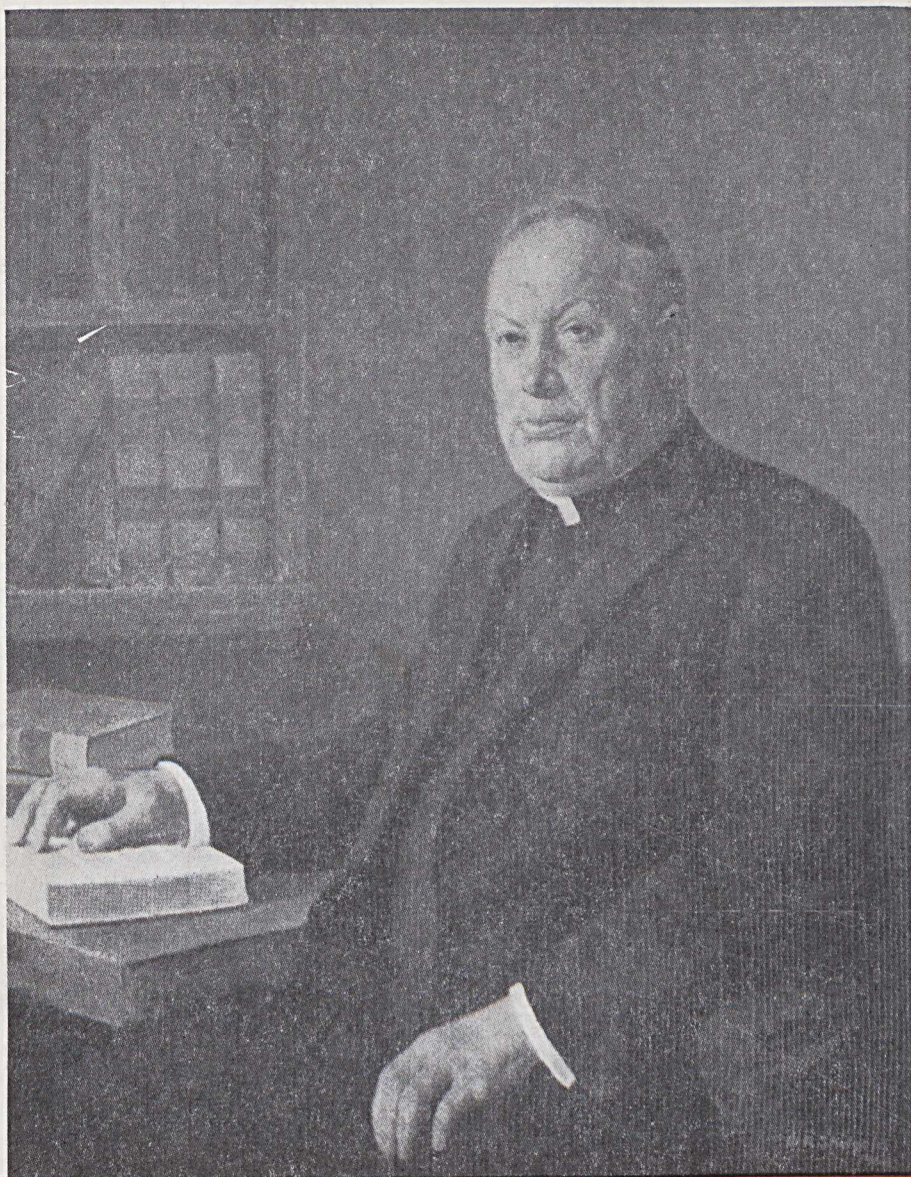
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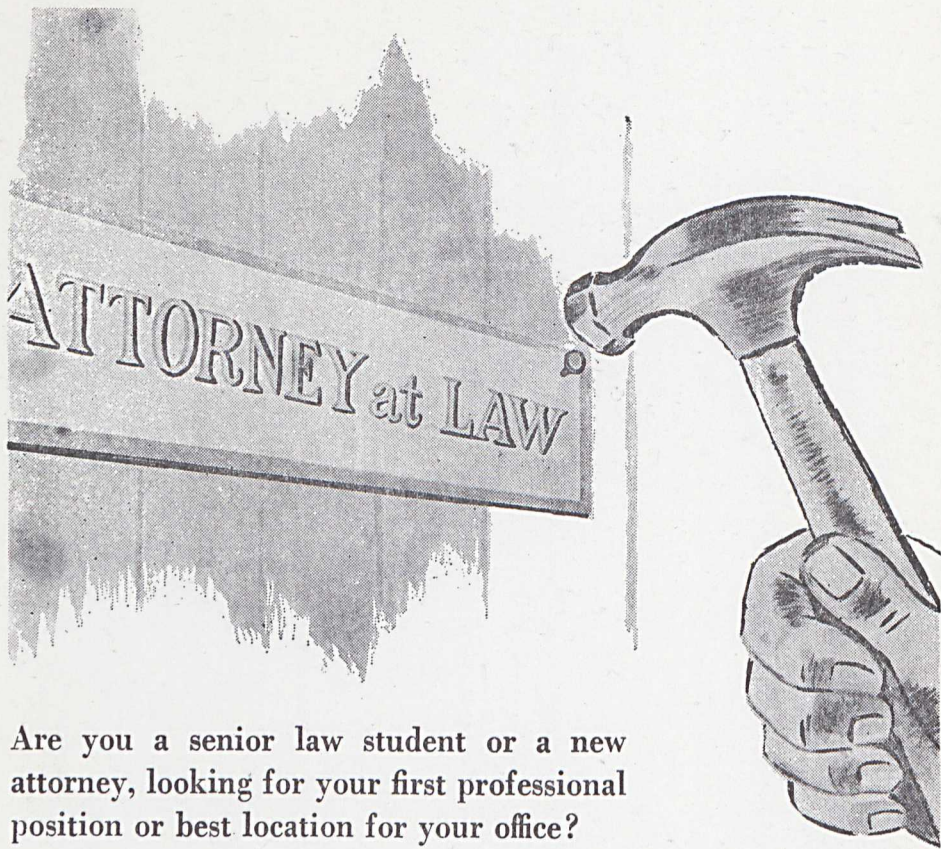


LOYOLA DIGEST

*LOYOLA SCHOOL OF LAW
LOS ANGELES*

Volume 1, Number 2
N.S.*

Spring—1966



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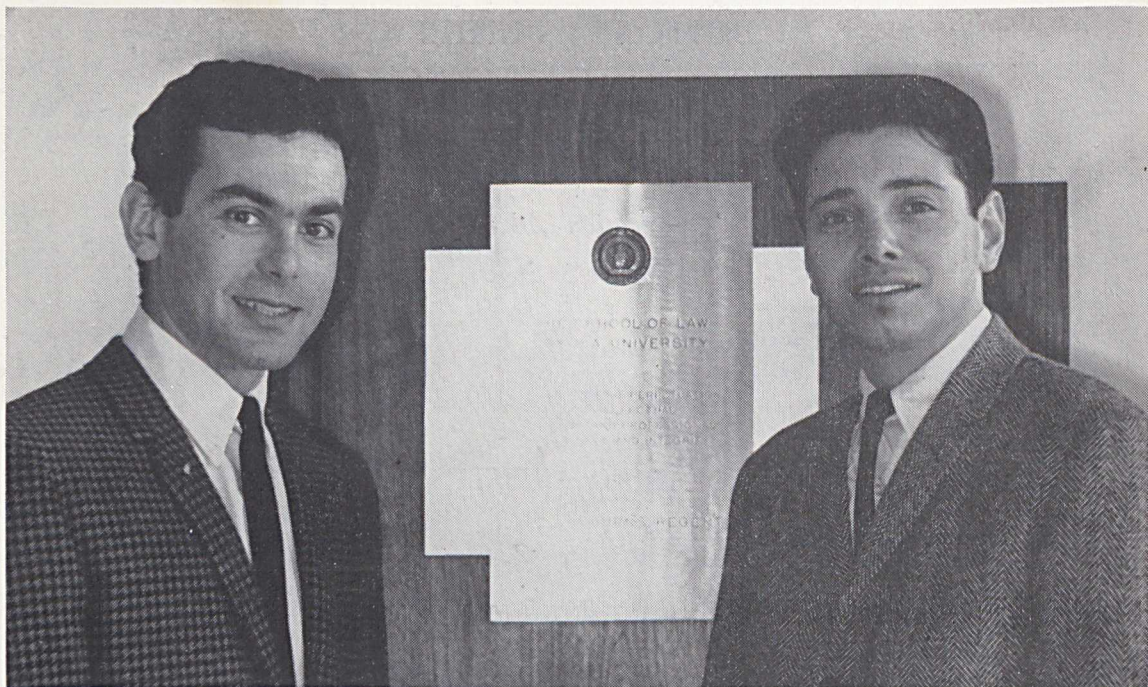
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Presented to Loyola Law School by the Alumni at Testimonial
Dinner51

**Editors Note:* Due to the change in the publication format we felt it necessary to revise the volume indexing system. The Loyola Digest is not a new publication, but was brought into existence several years ago. The Editors wish to acknowledge the contributions made by past graduates of the law school to the progress of the Digest.



Digest Editors Roger A. Franklin, Joseph E. DiLoreto

Editorial

During our matriculation through Loyola Law School we have witnessed many important and vital changes. Among the most important has been the construction of a new and magnificent edifice which houses the Law School. The expansion of the law library to a collection of over 70,000 volumes has been none the less important, and the addition of new service and clerical facilities to aid the students in their study and leisure hours has been welcomed. In keeping with this dynamic under-current the *Loyola Digest* has endeavored to expand and improve the calibre of its publication. Most evident has been the change in the Digest's appearance from a loose-leaf paper to a hard cover publication. Greater emphasis has been placed on student and faculty participation, and finally the advent of advertising has helped defray the immense cost of publication.

Looking realistically into the future we can envision the birth of the Loyola Law Review, a hope which is shared by many students and faculty members. But this goal can only be achieved through the continued perseverance among the students in bringing it to fruition. Continued emphasis must be placed upon the quality of the *Digest*, the foundation upon which a law review can immerge.

As we look in retrospect upon the past year, we have mixed emotions of success and failure. But we sincerely hope that our efforts have created the momentum among the students who follow in achieving this goal of a law review.

DEAN'S MESSAGE

It was in 1960 that Professor J. Rex Dibble was named Acting Dean of the Law School. At the time I was in private practice and teaching part time at Loyola. I can recall my pleasure over his appointment because I was sure that he would fill the position of Dean with distinction. As a former student of Mr. Dibble's, I was well acquainted with the thoroughness of preparation and careful analysis he displayed in the classroom. It was predictable that these qualities would be reflected in his work as Dean.

In late 1960 Mr. Dibble was kind enough to invite me to join the full time faculty. I did so at about the same time as my classmate Professor Ogren, another member of the part time faculty, made the same decision. This was at the beginning of the spring semester in 1961. Mr. Ogren and I brought the full time faculty up to seven members.

In the years that followed, Dean Dibble pursued his plan to increase the full time faculty. When Brigadier General Nathan J. Roberts, U.S. Army Retired, joins the faculty next summer, there will be fourteen full time members of the faculty. Eventually there should be between eighteen and twenty. This growth reflects Dean Dibble's plan and purpose, with which I fully agree, that the principal part of the students' legal education should be committed to the full time faculty.

From the start Dean Dibble pursued a plan to involve the faculty in policy-making. He instituted the practice of regular monthly faculty meetings at which the affairs of the Law School are discussed and decisions reached. The processing of applications for admission became the responsibility of a faculty committee, requiring long hours of work each spring and summer. The difficult and painful task of passing on student petitions for re-admission after disqualification became a faculty function. The faculty, responding to the

SPRING, 1966



LLOYD TEVIS
Dean

Dean's leadership, willingly undertook these and many other jobs.

Since 1960 a number of curricular changes have occurred. One of the most notable has been the increase in the number of elective courses. In addition Dean Dibble came to emphasize more and more the Legal Writing program. Initially there was a first-year course. Then a second-year course was added. Three years ago the program was revised radically by using Student Teaching Fellows. Finally, the Honors Writing Program was added. This increasing emphasis on writing points up the need felt by Dean Dibble and the faculty that the students should be given considerable assistance in improving their writing skills.

Today there is substantially more scholarship money available at Loyola than was the case in 1960, thanks to the Alumni Scholarship Fund. This is another of Dean Dibble's accomplishments. It took an enormous amount of work to organize an annual

drive for contributions from the alumni. Mr. Dibble would be the first to acknowledge that no amount of work would have made these drives successful were it not for the efforts of the Alumni officers and class captains. Over the last four years the Dean and these alumni leaders have created an organization known as The Advocates, whose members contribute \$100.00 per year to the Alumni Scholarship Fund. Two years ago The Junior Advocates came into being. Its membership is confined to members of the last five graduating classes who contribute \$25.00 per year to the Fund.

Yet another scholarship award was originated by Mr. Dibble—The Faculty Honor Award. This is a \$500.00 award made annually by the faculty, from its own funds, to the person chosen as the outstanding student in the School who is beginning the senior year.

Throughout the deanship of Mr. Dibble, Loyola has tightened noticeably both its admissions requirements and academic standards. This has in many ways been a painful process, but there is no doubt that the School has been benefited. What makes the feat more remarkable is that it was accomplished in a period during which the School's total enrollment rose from 362 in 1960, to 520 in 1965.

Of course, the most apparent achievement of Mr. Dibble, as Dean, is the new law school building. With faculty assistance, most notably the late Professor A. Marburg Yerkes, the Dean and several Regents and officers of the University undertook the planning of the new building. It would be impossible to recount the hours that went into the evolution of a dream into reality. The principal witness to the success of these planners is the building itself, which is widely acclaimed as one of the finest in the country. No one who did not work or attend school in the old building can appreciate what a change Dean Dibble hath wrought!

This has been a short summary of some, but by no means all, of the highlights of the administration given to the School of Law by my predecessor. I trust that it reflects in some way my appreciation of

his accomplishments. I would not attempt in this column to express my admiration for Dean Dibble as a person. He would not thank me for the attempt. All of us at Loyola are indeed fortunate that Mr. Dibble's resignation as Dean does not deprive Loyola of his presence. His counsel will be an aid to me, the faculty, and the students in the months and years ahead.

"A FUNNY THING HAPPENED TO ME ON THE WAY TO THE BAR"



RONALD COHEN
President Board of
Bar Governors

At this time of the year throughout the land each college yearbook and student paper rings with the promise of graduation and senior farewells. We shall be no different!

It has been three years and for some four since we first entered Loyola Law Schools' hallowed walls of adobe. The beginning weeks of our legal education foretold of the exciting experiences which were to come, and to which we can now look back with a smile and a tear. The temperature reached an all time high that first week and the chairs stuck to our clothing like glue for there was neither air conditioning nor cross ventilation. The "Tort Burgers" at the greasy spoon up the block nourished the body so that an afternoon of Torts became mere child's play. And who will ever forget the lone Palm tree which graced the exterior of the campus; it marked the only bird cemetery in downtown Los Angeles. Before we knew it, finals were at hand and we approached them with the same calm attitude shared by the classes which had gone before and which have since followed. The casualty rate was high, but the second year started with nary a backward glance to-

ward our old Alma Mater turned parking lot.

We found ourselves in a new building with renewed vigor. The first year had passed quickly and the second year hit us with unexpected force. The classes were tougher, the professors more demanding, the work load was discouraging. The Second Year Doldrums became an epidemic and each day grew longer. The doubts of whether it was all worth it plagued our thoughts as the clocks in the classrooms never seemed to find the next minute. But this too came to pass, and now we are on the last lap of our education. There are those of us who never thought it would be over, there are others who are sorry to see it go. For no matter what each feels now that law school is almost a memory, it has been three years of growth and enrichment.

A school must be out of necessity more than its campus, or its professors; a school must be a heritage. The Student Board

of Bar Governors in its role as student spokesman and faculty liaison has tried to bring to the students a feeling of pride in accomplishment. The Scott Moot Court Competition reflects on the excellence of skills developed at Loyola as demonstrated by the caliber of preparation. The Orientation Programs achievements can be measured by the acclimation of the first year class to the demanding requirements imposed by the legal curriculum. The *Loyola Digest* has achieved its deserved distinction as a periodical of importance in the legal community. The Annual Spring Dance gives us the opportunity to meet in friendship and good natured mischief.

When each of us has reached the status of Alumni, we should be able to look back and say thank you Loyola for the opportunity you have given us and for your guidance and counsel during our years of education. The Graduating class of 1966 can say this wholeheartedly!

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REAL ESTATE TRANSACTIONS AND THE SIX MONTH HOLDING PERIOD

By James K. Herbert*

A mania for long-term capital gain has come to be a hallmark of our system of tax law, with immeasurable effort being spent by both taxpayers and their counsel searching for situations which will generate this prized commodity. To achieve the desired goal, a taxpayer must find a situation in which profit will be realized "from [1] the sale or exchange of [2] a capital asset [as defined in the Code] [3] held for more than six months."¹ Real estate, and especially California real estate, presents the ideal situation for many taxpayers. Because of the state's burgeoning population which is resulting in the rapid urbanization of rural areas, real estate values in California are rising at a fair pace. Assuming a taxpayer has not been too exuberant and is not tainted with the status of a dealer, profit received from the sale of real estate is subject to long-term capital-gains treatment, if the real estate has been held for more than six months.

The holding period requirement is commonly regarded as the least complicated of the three elements necessary to qualify a transaction for long-term capital-gain treatment. Nevertheless, it can pose some intriguing problems, especially to the taxpayer who has just acquired control over a parcel of land (whether it be by option, contract or obtaining actual title) and is presented with an offer to sell that land at a tidy profit by a developer who demands immediate possession. The problems and some suggested solutions may be discussed with reference to the following short factual situation:

On January 1, 1964, Taxpayer acquires from Farmer options good until December 30, 1964, to purchase Orangeacre, Lemonacre and Limeacre, three one-hundred acre citrus groves at \$10,000/acre. The contracts

which will arise upon Taxpayer's exercise of his options are subject to conditions that soil tests show each grove to be suitable for residential development and, of course, that the title is marketable.

On October 1, 1964, having satisfied himself that there is or soon will be an opportunity to resell the three groves at a good profit, Taxpayer exercises his options and an escrow is opened with the local title company to complete the purchase and sale. Because of unforeseen problems in curing title defects and in obtaining the necessary data to determine the soil bearing capacity of the groves, the escrow remains open for nine months and does not close until July 1, 1965.

So long as Taxpayer disposes of the three groves anytime after January 1, 1966, his profit will be eligible for long-term capital-gains treatment. January 1, 1966, is, however, some twenty-four months after Taxpayer acquired the right to purchase the groves at the bargain price of \$10,000/acre. If Taxpayer's judgment has been good and the groves are in the immediate path of expansion, obviously offers from developers may come in much sooner than January 1, 1966. Assume Taxpayer receives offers to buy the respective groves as follows: (1) Orangeacre—subsequent to the execution of the option but prior to its exercise; (2) Lemonacre—subsequent to the exercise of the option but prior to the close of escrow; (3) Limeacre—immediately after the close of escrow. Developer is willing to pay Taxpayer \$13,000/acre, but because he wants immediate possession to begin building houses, he states each time that, unless he can have the one hundred acres that he needs, he will look elsewhere for land. How can Taxpayer complete each deal and still preserve long-term capital-gains treatment for each of his \$300,000 profits?

A. The Offer Subsequent To The Execution Of The Option But Prior To Its Exercise (herein of the sale of an option):

An option to purchase what would be a capital asset is itself a capital asset, and if held for more than six months, the gain from sale of the option is eligible for long-term capital-gains treatment.² Thus, anytime after July 1, 1964, Taxpayer may sell his Orangeacre option to Developer and receive the same low tax rate on his profits as he would have received had he exercised his option, taken title to Orangeacre and held it until January 1, 1966.

*Member California Bar, Lecturer in Law, Loyola University School of Law.

Even though the rules are plain and simple, taxpayers have more than once failed to follow the form necessary to achieve the desired results.³ The asset being sold is an option to purchase, not the property itself. Unless this is made abundantly clear in the papers documenting the transaction, the Commissioner will assert that it is Orangeacre, not the option, which has been sold and that the gain, having resulted from the sale of a newly acquired asset (the property itself) held for less than six months, is taxable at ordinary income rates. It will not suffice that the net result of the transaction is a deed running directly from Farmer (the optioner) to Developer (the third party offeror). Taxpayer (the optionee) must do more than merely see that title to Orangeacre never passes through himself. The papers documenting the transaction with Developer must in no way indicate that Taxpayer is exercising his option or selling Orangeacre to Developer.⁴ The transaction with Developer involves only the sale of an option. The papers should so state and this intention should be manifested in the mechanics of the transaction.

The transaction between Developer and Taxpayer probably can be effectuated best by an escrow separate and apart from the escrow involved in the actual sale of Orangeacre. Developer will obviously not wish to pay Taxpayer any money until he is assured of obtaining marketable title to Orangeacre. On the other hand, Taxpayer will not wish to give Developer the right to exercise the option until he is sure Developer will give him his bargained for \$3,000/acre override. The safest way to accomplish the goals of both parties would be to deliver the option to an escrow holder under instructions that it is not to be exercised until Developer has placed into that escrow all the papers and money necessary to comply with the contract of purchase and sale which will arise upon the exercise of the option. Once Developer has complied, the escrow holder may exercise the Orangeacre option, complete the transaction between Farmer and Developer in a separate escrow and upon transfer of title to De-

veloper pay \$1,000,000 to Farmer and \$300,000 to Taxpayer. Because Taxpayer has sold a capital asset (the option to purchase Orangeacre) which he has held for more than six months, his \$300,000 profit will be eligible for long-term capital-gain treatment.

B. The Offer Subsequent To The Exercise Of The Option But Prior To The Close Of Escrow (herein of the sale of an executory contract):

Although not expressly stated in the Code, an executory contract to purchase what would be a capital asset is, like an option, a capital asset.⁵ Consequently, Taxpayer may sell his executory contract to purchase Lemonacre and still receive long-term capital-gains treatment on his \$300,000 profit just as in the sale of the Orangeacre option. What was said in the previous section with respect to the mechanics of the transaction involving the Orangeacre option applies equally to the sale of the Lemonacre executory contract. The asset being sold is not Lemonacre, but the executory contract to purchase Lemonacre, and the papers documenting the transaction should so state. As in the option situation, nothing should be done to indicate that Taxpayer is buying and then immediately reselling Lemonacre.

The date on which Taxpayer may sell the Lemonacre contract and still have his \$300,000 profit eligible for long-term capital-gains treatment presents some fascinating problems. Recall that the option in the hypothetical was exercised on October 1, 1964. Anytime prior to that date and subsequent to July 1, 1964, Taxpayer could have sold his Lemonacre option and unquestionably have received long-term capital-gains treatment on the sales proceeds. Can Taxpayer also sell his executory contract anytime *after* October 1, 1964, and also expect to receive long-term capital-gains treatment on his profit?

The Commissioner has taken the position, and has been upheld by at least one court,⁶ that an executory contract is an asset separate and apart from the option out of which it arises and as such has its own

holding period which commences with the exercise, not the execution of the option. Under this theory, Taxpayer could not sell his executory contract until sometime after April 1, 1965. While, admittedly there are differences between options and contracts to purchase, the case for declaring them to be two different assets each with its own holding period appears to be weak. First, in both instances the item being sold is no more than the right to buy Lemonacre. Although there are additional burdens attached to the contract (i.e., the duty to perform), these are burdens which ultimately must be assumed by Developer if he is to acquire the subject of both the option and the contract, i.e., Lemonacre. Second, in California at least, because of the interesting interaction of the rules involving the measure of damages for breach of a contract to purchase real property, the anti-deficiency legislation and the California Supreme Court's view with respect to the forfeiture of earnest money, as a practical matter there is little difference between the buyer-seller relationship before and after exercise of an option.⁷ It seems as though this is a classical situation for the courts to look through form to substance and hold that the option and the contract are for tax purposes one and the same asset, i.e., the right to buy Lemonacre.

Assuming for the sake of argument that the option and contract are separate assets, Section 1223(1) offers interesting possibilities for tacking the holding period of the option to that of the executory contract. Section 1223(1) provides in part:

"In determining the period for which the taxpayer has held property **received in an exchange**, there shall be included the period for which he held the property exchanged if, under this chapter, the property has, for the purpose of determining gain or loss from a sale or exchange, the **same basis** in whole or in part in his hands as the property exchanged. . . ." (Emphasis added.)

If the executory contract which arises from the exercise of an option is a separate asset, how was it acquired? Was it purchased? The option is purchased, but is the executory contract? The executory con-

tract comes into being only after the option is extinguished by exercise, and thus it does not seem illogical to argue that it was exchanged for the option. Now, one could argue similarly with respect to the fee simple estate in Limeacre which is transferred to Taxpayer once the executory contract to purchase it is extinguished at the close of the escrow; but as pointed out in the next section, the holding period of Limeacre is measured from the close of escrow, not from the date the executory contract to purchase it came into being. Note, however, that the fee simple estate has its own basis which is determined by the purchase price paid for it, thus Section 1223(1) by definition would not apply. On the other hand, the executory contract which arises out of the exercise of the option has the same basis as the option and thus, if the exchange criterion is satisfied, the transaction would appear to fulfill all of the elements of Section 1223(1).

Although at this point in time it would be imprudent to advise the sale of an executory contract less than six months after it was created, if in a situation involving a contract which has arisen from the exercise of an option there is no other alternative or if one is presented with the accomplished fact of a sale, the case for dating the holding period from the execution rather than the exercise of the option is certainly far from frivolous.

C. The Offer Subsequent To The Close Of Escrow But Prior To The Expiration Of The Six Months Holding Period (herein of the transfer of possession with option to buy):

In common understanding, according to the United States Supreme Court,⁸ to hold property is to own it; and under long-established rules, a taxpayer does not own property until he either takes title to it or enters into possession under an unconditional contract of sale.⁹ Unlike the commodity trader,¹⁰ the real estate investor cannot tack the holding period of the contract under which he acquired the real estate to that of the real estate. Consequently, if Taxpayer has let the escrow close on the Limeacre transaction, the clock begins ticking all over

again and his holding period dates from July 1, 1965, even though his right to purchase has existed since January 1, 1964. Under pain of losing long-term capital-gains treatment, he cannot close the sale of Limeacre until sometime after January 1, 1966.

The challenge to Taxpayer's counsel is to devise a scheme whereby Developer can take possession but Taxpayer can for tax purposes keep the transaction open until January 1, 1966. It is very clear that the desired goal cannot be achieved by merely instructing the escrow holder to keep the deed and money in escrow until the holding period has run, since the passage of title is not the sole criterion for determining the date on which a transaction is completed for tax purposes.¹¹ The transaction would be considered completed for tax purposes whenever Developer takes possession of Limeacre under an unconditional contract of sale. There is, of course, always the possibility of leaving one or two items of the deal at loose ends until the holding period has run, but the Commissioner and the courts are taking a close look at these transactions and have found transactions to be complete as soon as all material conditions are satisfied.¹²

Some practitioners have suggested that Taxpayer's problem may be solved by leasing Limeacre to Developer with an option to purchase exercisable only after Taxpayer's holding period exceeds six months. There is some authority to support this proposition.¹³ On the other hand, there is the danger that this type of transaction would be classified as a conditional sale, especially if the lease payments are applied against the purchase price. Furthermore, the rental payments will be treated as ordinary income which in part defeats Taxpayer's objective which is to maximize his long-term capital gains.

The better solution appears to have been suggested by the Commissioner in one of his own rulings:

"A delivery of possession under a mere option agreement, however, is without significance until a contract of sale comes into being through exercise of the option,

so that the holding period of the seller cannot end before that date."¹⁴

Under this rule Taxpayer could transfer possession to Developer and not be concerned with losing his long-term capital-gains treatment so long as no binding contract of sale came into existence prior to the expiration of Taxpayer's holding period. Query, however, whether the courts under the principle of looking through form to substance might not consider the commencement of Developer's building program as an exercise of the option, regardless of what the supporting documents, i.e., the option contract, stated. To add substance to the transaction, it would be wise not to transfer such burdens of ownership as property taxes and the risk of loss to Developer until the option is exercised.

Note also that thought must be given to aspects other than tax. It is possible that in six months time, Developer could so mutilate Limeacre with semi-completed improvements and leave it so burdened with mechanics' liens as to put Taxpayer in a worse position than if he had sold Limeacre outright and taken short-term capital-gains treatment on his profit. Certainly Taxpayer should take a sizeable option payment from Developer. Furthermore Taxpayer should have the right to approve all improvements which Developer contemplates adding to the property and Developer should be required to adequately insure that Taxpayer will be indemnified for any mechanics' liens which might be filed by a contractor or materialman.

Conclusion

Under the present state of authorities a real estate transaction which commences with execution of an option involves at least three assets: the option, the executory contract and the fee simple estate in the property which is the subject of the transaction. The astute investor will do everything in his power to make sure that, if necessary, each of these assets can be held for at least six months. Furthermore, both before the exercise of the option and before the close of escrow, the investor should make sure there are no advantageous sales

(Continued on page 68)

A PSYCHOLOGICAL VIEWPOINT OF THE LAW AND INSANITY

By Mel Berger*

I. The Problem

The connection between criminal and psychologically abnormal behaviour is made to lesser or greater degrees by most of those who have studied the field; few would deny that at least some correlation exists. "Criminality and mental illness are evidence of the insufficiency or breakdown . . . (of a person's) controls. Both are indicative of a losing struggle to maintain a controlled relationship with the social environment. Both are products of an inner conflict. Neither 'causes' an individual to do wrong; they are both processes reflecting the breakdown of psychic controls and the release of latent antisocial drives common to us all. One man resolves the conflict by acting it out in crime; another by living it out in mental illness. The mentally ill person who commits a crime is cursed with a double failure of adaptation."¹ All of us have some criminal tendencies; most of us are healthy enough to cope with them. Thus, criminals are looked on by social scientists and others as people who have deviated from the normal pattern of living for any number of reasons, including acute situational stress, a weak personality, or exposure to a criminal environment. Theoretically, the possibility for rehabilitation exists for most of these people if they are recognized and dealt with as being sick; in practice, some deviant types are more amenable to cure than others.

The prevalence of criminal insanity is borne out by research studies. Under a Massachusetts' law, which requires a psychiatric examination of those "indicted by a grand jury for a capital offense or . . . known to have been previously convicted for any other offense more than once, or to have been previously convicted of a felony," 6591 persons have been examined since 1921.² Of these, 81% had no men-

tal disease or defect affecting criminal responsibility, 1.2% were definitely psychotic, 5.4% were borderline, 5.5% were recommended for observation, and 0.8% had other abnormal conditions. In all, the percentages of mental deviation, defect, abnormality, and illness was greater than for the general population.³ In another more dramatic, but less systematic study, 59 men and 7 women charged with murder were given psychiatric examinations. Thirty were found to have no psychiatric abnormality, 18 were diagnosed as having psychopathic personalities, 14 had psychotic illnesses, and 4 were mentally subnormal. Of these, 17 were found insane by the court and 8 others were not convicted.⁴

Although the question of sanity is not uncommon in civil cases, it is rarely used in criminal cases and even then, generally, as the last resort. Why is it that the generally acknowledged level of criminal insanity is so much higher than the number of insanity pleas? First, the laws relating to insanity are often out of touch with psychiatric knowledge and present many difficulties in application. This aspect will be covered in detail in a later part of this paper. Secondly, it is usually very difficult to prove the linkage between insanity and the time of the criminal act. The mental state of the defendant at the time of the offense may change; the defendant is seldom aware of the connection of his unconscious mental state and his actions, and psychiatrists may have different theoretical orientations and make different kinds of judgments—this is why they sometimes disagree in court as to their diagnosis. Isaac Ray, in his classic *"Treatise on the Medical Jurisprudence of Insanity,"* further elaborates on the problem.

"In conversing with patients on topics foreign to their morbid delusions, you will generally find no difference between them and other people. They not only deal with common-place notions, but are capable of appreciating new facts and trains of reasoning. Still more, they retain their sense of good and evil, right and wrong . . ."⁵

Thirdly, there is still a considerable lack of understanding of mental illness by most

*B.S. U.C.L.A. 1963, M.A. U.C.L.A.: 1964, Currently in pursuit of Doctorate, Leeds University, England.

people. The insane are seen as people who are very unlike the rest of us, very strange and different. Just the word "insane" causes a strong negative emotional reaction in most of us—someone is either sane or insane, sick or not sick. Psychiatry has long ago rejected this rigid dichotomy in favor of seeing mental health along a continuum and of seeing different aspects of individual behaviour as functional or dysfunctional in a given situation. But these attitudes continue to have widespread impact on the lawyer, judge, jury, prosecutor, and defendant. The defendant, or someone acting on his behalf and with his consent, is the only one who can initiate an insanity plea. Whether he does so is probably based more on legal aspects of his case than on the medical reality of his mental health. That is, will his criminal punishment be substantially worse than hospital rehabilitation in terms of severity and length of time; also taking into consideration the impact of the idea of his being insane on both himself and those around him, such as his family, friends, and employers. Also, thought of prison life may actually evoke fewer fears of unknown terrors than life in a mental hospital.

II. What are the Goals of Law?

Before considering specific laws, it is necessary to think about the current goals of the law and about whether they are the best goals. Is the purpose to deter others, to attempt to rehabilitate the law breaker, to protect society, or to satisfy society's desire for revenge? The particular goals and their priorities are relevant in assessing current laws and thinking about the need for new ones. Some criminologists see punishment as an outstanding feature in the development of the law throughout the ages and still of utmost importance today. "Since man in primitive society believed that his behaviour was determined by fate or governed by divine guidance, there was no reason for him to find a motivation for his actions. Today, of course, we know that there is always some motivation behind criminal behaviour. When we do not find it too readily, it does not mean that none exists; rather, it is simply more unconscious . . .

"It is not surprising, then that the enormous quantity of legal records and texts collected from the earliest days contains little information about the criminal himself.

"What stands out in sharp contrast to this distinct lack of understanding the offender is the strong reaction of the people to the culprit. There is hardly any aspect of human life in which a people's emotions and hostilities have been more forcefully expressed than in their attitude toward the man who has broken the law. When law-abiding citizens react mercilessly toward a criminal and his deed, it is not only because they want to see the law obeyed or because they want retribution, but also because the offender acts out anti-social impulses which so many people would like to act out but do not dare to do so because they fear the consequences."⁶

Without going into a deep psychological explanation, I will put forth some evidence which would seem to suggest that the severity of punishment is more related to the emotional reaction of the public than to either the severity of the crime itself or to the individual committing the offense. In a large scale study in Philadelphia, it was found that the major factor in severity of sentences given was the specificity of the victim. If the victim was a private individual, the punishment was worse than if the crime was against the general public. Hence, felonious assault, robbery, and homicide is dealt with more severely than narcotics and fraud.⁷ Yet the former crimes are usually less premeditated, often "attributable to passion and to embittered, frustrated, or actually disordered personality." It would seem that punishment and threat is least likely to deter these crimes.⁸ In the south, capital punishment may be used in rape cases; however, "although 809 white men had been convicted of rape since 1909, not one had been executed. During the same period, 54 Negroes were executed on rape convictions."⁹ Could this most extreme case be anything but the reaction of society, based on the values and fears of that society? Further, the amount of publicity given a case also affects the severity of punishment, often by increasing public outcry and the need to set an example. Those caught who were involved

in the recent highly publicized "Great Train Robbery" in England were given unheard-of-30-year sentences.

Assuming this to be the situation, does punishment serve a useful and necessary function for society—that of an outlet for antisocial aggression? One hopes that this is not the case, or that, if it is, something can be done to rechannel this need into more human directions. Most legal and penal systems in Western Europe, outside of England, have been moving more and more towards the goal of "social defense;" that is, the protection of society as the most important aim of the law.¹⁰ Does punishment deter others in society? This probably depends on the type of crime. According to some studies, it is the certainty that punishment will actually result, rather than the severity of the punishment which is the most effective deterrent. ". . . The most ferocious penalties are ineffective so long as the prospective criminals believe they have a fair chance of escaping them . . ."¹¹ Does punishment cure the offender? Again, this probably depends on the type of criminal. A large-scale study defining different criminal types and the effect of different deterrents on them would seem a highly worthwhile project.

III. Insanity and Criminal Law

The law traditionally, and as set down in the M'Naghten Rule, has viewed insanity from only one aspect, that of intellectual knowledge. Did the offender cognitively (intellectually) know that he was doing something wrong? This ignores other aspects of knowing and of motivation—specifically, volition and emotion. "Psychiatry and current law have different concepts of this word ("know"). To the psychiatrist, to Know means to understand; that is, it is an *emotional* understanding, involving the ability to use knowledge and reasoning whereby a person can emotionally discriminate the essentials of the matter. Our psychological knowledge of today makes understanding a much more encompassing process than the law implied in the word "know" over one hundred years ago."¹² To give a few examples, a child

often does things which he knows are wrong or hurtful without being emotionally aware of the consequences. He does not completely understand that if he hits little brother, little brother will feel hurt; similarly, he must burn himself before he fully understands what "hot" is. People who drive recklessly don't connect this with having an auto accident. People don't wear seat belts because they don't really (emotionally) think an accident could ever happen to them. It is hard to react to someone dying unless it is connected to a person we know, then the consequences are much more fully experienced. Many smokers intellectually know that cigarettes are harmful to their health but don't connect it to themselves—"it could never happen to me." In all these examples, people "know" something in one sense of the word (intellectually), yet don't "know" in another sense. This is not to say that people shouldn't be held responsible for all their actions; rather that the criminal offender should be considered from more than one point of view in assessing his guilt and in determining how he should be dealt with in order to facilitate his rehabilitation and to protect society. The number of persons who take their punishment and go back to society and continue to commit offenses is a sad testimonial to the failure in dealing successfully with the criminal. The role of the unconscious has also largely been ignored by the law. A person may know he is doing wrong but thinks that he is acting on God's command, or he may believe that people are trying to kill him and he is only protecting himself when he strikes back at the imagined culprit.

In recent years, progress has been made, though slowly, in broadening this traditional approach. In the specific case of the M'Naghten Rule, there have been a number of different approaches to its modification. The most important of these is the Durham Rule of 1954.¹³ Its main feature was to change the test of insanity from "the ability to distinguish right from wrong" to "was the criminal act the *product* of a mental illness or defect?" A most important feature of the product is that it does not de-

fine insanity in a rigid way (as the ability to distinguish right from wrong). It does not "attempt to write into law *any* psychiatric dogma, no matter how sound it may appear today. It would not define mental disease or defect, but would leave the law free to incorporate new content into those terms with the advance of scientific knowledge. Nor would it dictate to the psychiatrist any artificial formula for determining whether the act was the product of the disease or defect."¹⁴ But because of this open-endedness, the Durham Rule is also open to justifiable criticism. It "does not clarify sufficiently the casual connection between the mental condition and the act. For instance, how much a product of mental illness must the criminal act have been?" . . . (To) establish the connection between a criminal act and a person's mental condition is extremely difficult in many cases. This difficulty is magnified when presented to a jury . . ."¹⁵ Each criticism seems to have something to offer, and it would be sad if one were sacrificed for the sake of the other.

Another approach was taken by the Model Penal Code drafted by the American Law Institute. It deals with mental responsibility as follows:

"A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."¹⁶

"The substantial capacity to conform his conduct to the law" has been brought into some state recommendations for changes, as in California and New York.¹⁷

Whether this is an improvement over the product rule is unclear. Both approaches, however, are a great improvement over M'Naghten as they narrow the gap between the legal and psychiatric definitions of insanity. The Diminished Responsibility Rule represents another, somewhat different, approach to broadening the traditional view.¹⁸ The question now arises, will any of these approaches gain widespread formal legal acceptance and, if they

do, will they actually be used? Many fear that they will lead to too many uncertainties and difficulties in application. But, yet, this is an accurate reflection of the reality of the situation; it is difficult to assess insanity, but surely this is no reason to ignore its existence. Besides, much of the current broadness and uncertainty of the law is of considerable value. "Many fundamental principles of criminal and civil justice are expressed in broad phrases such as 'due process,' 'unreasonable,' and '*mens rea*.'"¹⁹

There are a number of other related issues which will be considered, briefly, for want of time and space:

(1) Who should initiate insanity proceedings? There are a considerable number of offenders who would be recognized as being mentally abnormal had they undergone a psychiatric examination.²⁰ The previously mentioned Massachusetts law is a response to this situation. Also, as mentioned, not all mentally abnormal criminals will claim insanity. Therefore, if society wishes to deal with them as insane, either the state, or some other neutral body, must seek them out. It would seem reasonable to have this examination only after conviction and would be a determinate of sentencing. Under a New York law passed in 1950, sexual psychopaths were given "an indeterminate confinement (by which was meant from one day to life) with psychiatric treatment . . ."²¹ A number of other states, including California, Minnesota, and West Virginia, also have enacted progressive sex offender laws whose aim is both to protect society from premature release of a mentally dangerous individual and to rehabilitate.²² Why can't these laws be extended to other types of offenses?

Voluntary commitment, such as in California, is also an important step. Where insanity is an issue in a plea, as in "diminished responsibility," psychiatric treatment should be mandatory. It makes little sense to plead insanity and then not be given treatment or, occasionally, to be released outright.

(2) Who should give evidence as to insanity? How should it be given? Surprisingly, "in many states there is nothing to

prevent practically any licensed physician from testifying as an expert on any condition, be it a mental or an organic one."²³ A majority of both lawyers and psychiatrists believe that only a professional psychiatrist should give testimony in court.²⁴ Whether the psychiatrist should be considered an impartial expert called by the court or whether each side should call their own witnesses is a subject of great disagreement. As it stands now, the jury may be subjected to clashing views with the implication of partiality attached to each.

As to the second question, the psychiatrist "should at least be given the right . . . to present his views fully and coherently, instead of being forced to take part in a play of questions and answers . . . Having presented his views, he should, of course, be subject to examination and cross-examination."²⁵ On both of these points, fuller utilization of the psychiatrist seems possible. One way of achieving this might be to have him testify as *amicus curiae* (friend of the court)—an objective, impartial expert.

(3) Who should decide questions of insanity? According to a survey taken, half of the lawyers sampled thought that a panel of psychiatric and legal experts, or psychiatric experts alone should decide.²⁶

In 1838, Isaac Ray made the following plea which is still most appropriate: "It is one of those wise provisions in the arrangement of things, that the power of perceiving the good and the evil, is never unassociated with that of obtaining the one and avoiding the other. When, therefore, disease has brought upon an individual the very opposite condition, enlightened jurisprudence will hold out to him its protection, instead of crushing him as a sacrifice to violated justice."²⁷

1. Weihofen, Henry, *The Urge to Punish*, Victor Gollancz Ltd., London, 1957, p. 92.

2. Abrahamsen, David, *The Psychology of Crime*, Columbia University Press, New York, 1960, p. 263 (citing Briggs Laws in Massachusetts, Chapter 123, General Laws, Section 100A, Sept. 1921).

3. *Ibid.*, p. 264.

4. Gillies, Hunter, *British Journal of Psychiatry*, No. 480, p. 1087.

5. Ray, Isaac, "A Treatise on the Medical Jurisprudence

(Continued on page 68)

RECIPROCAL DISCOVERY: AN IMPORTANT REFORM IN CRIMINAL LAW

By Loyola Debate Team,
William Watsman, President

"We have long known the administration of criminal law to be antiquated and barbaric, yet reform, under the influence of sociologists, has occurred only in the theories and practices of post-conviction treatment."¹

A fundamental purpose of any trial is the ascertainment of the truth. This goal is particularly significant in the criminal trial, where a decision based upon inadequate knowledge of all the relevant facts may free a guilty person or send an innocent man to jail. A procedural reform which seeks to promote the ascertainment of the facts should be given extensive study, and if it proves feasible, should be universally adopted.

Pre-trial discovery is such a procedure, and it has already been widely used in the civil courts for some time. The philosophy behind discovery, a fuller presentation of the facts, is as applicable in criminal cases as in civil cases, yet criminal discovery is virtually non-existent. When discovery procedures were initiated in the civil courts they were denounced as a watering down of the adversary system. Their subsequent success in enhancing "the ability of counsel to contest the factual issues in controversy"² supplementing rather than hindering the adversary system, has proved how well it can work.

If its efficacy in one area has been demonstrated, why has it not been applied in the other? First because until very recently, criminal law has been a neglected area of American jurisprudence. The small number of criminal law courses offered in even the major schools is evidence of this problem. Second, most of the discussion of the procedure has centered on granting discovery to either the prosecution or the defense, but seldom to both, as is the case in the civil courts. Yet it is precisely in establishing reciprocal pre-trial discovery

that the procedure can be used to its fullest advantage, for the prosecution, the defense and the trial courts.

An example of the difficulties caused by concentrating on a one-sided approach to discovery is the article which appeared in the Fall 1965 issue of the *Loyola Digest* "The Case Against Prosecution Discovery." The article was an expression of concern about the implication of the recent case of *Jones V. Superior Court* where California Court upheld prosecution discovery. In support of his position against prosecution discovery, the author turned to several previous cases in other states. Learned Hand was quoted in *U.S. V. Garrison et al*³ as being opposed to prosecution discovery because "... Under our criminal procedure the accused has every advantage, while the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense . . ." However, further reading of that decision discloses that Hand was not supporting the *status quo*, but making a complaint about it:

"Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution crime."

Among the other often quoted dicta is Chief Justice Vanderbilt of New Jersey in *State V. Tune*.⁴ "... in view of the defendant's constitutional and statutory protections against self-incrimination, the state has no right whatever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him." Once again, Vanderbilt's statement in its full context cannot be viewed as a condemnation of pre-trial discovery:

"... the state is completely at the mercy of the defendant who can produce surprise evidence at the trial . . . and generally introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor's whole case against him would make the prosecutor's task almost insurmountable."

Rather than a condemnation of discovery per se, the statement was against one-sided

discovery and unrestricted defense discovery:

"Liberal discovery procedures in preparation for trial are essential to any modern judicial system in which the search for truth in aid of justice is paramount and in which concealment and surprise are not to be tolerated."

Even if a proposal only called for some form of prosecution discovery, it might still be a valuable addition to the criminal trial, provided that it did not violate the privilege against self-incrimination. The most extensive prosecution discovery procedure that is in use today is found in the alibi laws of fourteen states, including such large jurisdictions as New York, New Jersey, Ohio and Michigan. These laws, which vary greatly from state to state, in general require five days notice prior to trial of intention to rely upon a defense of alibi. Several require a list of witnesses the defense intends to call, and these have proved to be the most effective. Chief Justice Earl Warren, while a prosecuting attorney, expressed his approval of the alibi provision:

"I am heartily in favor of the provision of law which requires the defendant to give five days notice of intention to rely upon the defense of alibi . . . I can see no reason why a defendant who was not present at the time of the commission of the alleged offense should hide the fact from the prosecuting officer or the court, I am sure a law of this kind will have a salutary effect."⁵

More recently, two surveys, by the California State Law Revision Commission in 1961 and David Epstein, Chief Researcher for the Pennsylvania Committee on Criminal Procedural Rules, studied the workings of these laws, and both issued reports approving them and suggesting their adoption.

These alibi laws are beneficial for three basic reasons. First, they serve to eliminate the element of surprise. "the bane of prosecutors,"⁶ from the criminal trial. The California Commission reported on the situation without the alibi provision:

"The testimony concerning the alibi may take the prosecution completely by surprise and result in an unjust acquittal because the prosecution has little or no opportunity to investigate the credibility of the alibi

witnesses and their statements.”⁷

Precisely the same sentiment has been expressed by the Superior Court of Queens County in *People V. Schade* (1936),⁸ Leona Esch, Operating Director of the Cleveland Association for Criminal Justice,⁹ and Los Angeles Deputy District Attorney W. C. Waddington.¹⁰ With pre-trial notice, the prosecution has an opportunity to investigate prior to the actual introduction of the testimony. Otherwise, everything the defense claims in his trial may come as a complete surprise to the prosecution. The false alibi had been successfully used to such an extent that it is “one of the main avenues of escape of the guilty.”¹¹ The hip pocket alibi, produced in the final hours of the trial, has also been a favorite defense for organized criminals. “Before the prosecution has an opportunity to investigate and demonstrate the falsity of the alibi, the trial is over and a dangerous menace to society may have been set free.”¹² With the alibi statutes, however, the fraudulent defense is less successful, and there is a significant increase in convictions.

The pre-trial investigation gives rise to two other advantages, the saving of time and money, and the deterring of perjured testimony. This form of prosecution discovery can result in such savings because with the investigation, 1) if the alibi is true, the costly trial process is unnecessary and the case can be dismissed; and 2) if the alibi is false, the prosecution is prepared at trial to refute the claim and there is no need for a continuance within the trial. The need for a continuance to search out rebuttal evidence may be detrimental to the prosecution because its case may become stale in the jury’s mind, and the continuance may not be sufficient to find new evidence. More important however, may be the psychological impact that a well engineered surprise will have on the jury, “the reaction which follows tends to operate as an immediate conviction that the side which has achieved a perfectly executed strategic surprise is right.”¹³

In its effect as a deterrent to perjury, the alibi law makes its greatest contribution to the administration of criminal justice.

Chief Justice Vanderbilt wrote in *Tune* “the presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice . . .” W. C. Waddington writes “Quite clearly the alibi is a legitimate defense but too often our trial courts stand mute witness to falsified evidence of alibi.”¹⁴ Discovery is an effective deterrent because the witness knows that his story will be investigated beforehand, and an alibi discredited in court is worse than no defense at all. The conclusion of the California Commission was that “in most cases the accused would not have offered perjured alibi testimony if the prosecution had investigated the alibi and the witnesses who were called.”¹⁵ The Epstein survey reported a reduction in the number of alibi defenses offered with the passage of the statute.¹⁶

Discovery for the defendant is also found in some jurisdictions on a limited scale, by informal arrangements where the defense attorney is known by the prosecutor, and occasionally by statute. On the federal level, discovery is granted only in isolated cases, and *U.S. V. Murray* interpreted the Federal Rules of Criminal Procedure as meaning that the accused had no right to inspect his own confession prior to trial on the ground that he had no property right therein. Under the “Jencks” statute 18 U.S.C. 3500, the accused is prohibited from obtaining documents obtained from third persons other than by seizure or process.¹⁸ The overall picture remains as Judge Jerome Frank wrote in *Courts on Trial* “In most jurisdictions, discovery in criminal cases is denied even where permitted is narrowly limited.”¹⁹

Discovery for the defense offers some very obvious advantages to the defending attorney, for in the typical case, the prosecutor will be in possession of the physical details of the crime. It is sometimes possible for the defense to inspect the evidence against him, but it may require a court order which is seldom granted. Only when the defendant is charged with a crime where the sentence may be death do all

American courts require the government to supply the defendant with the names of witnesses.²⁰ Most suspects of major crimes are tried upon an indictment from a grand jury after listening to the state's witnesses. Once the case is in the grand jury's hands, it is shrouded with secrecy and "only under the most extraordinary circumstances may the defendant obtain the minutes of that body though the government may use them for many purposes."²¹ This is not the case in California, where minutes of the grand jury are not considered as classified secrets and a defendant can obtain copies. In New York, only a district attorney or a judge may see them.

Supreme Court Justice Brennan is of the opinion that pre-trial disclosure of defendant's statements is not a privilege "but his absolute right,"²² and the Massachusetts Court held in *Commonwealth V. Stepper* that the accused is deprived of due process if he is not permitted or afforded "all legitimate means to present his case fairly to the tribunal . . . we would remove any obstacle to a fair trial *before* the trial, rather than have it removed later and double the expense of difficult and protracted proceedings."²³ However, the United States Supreme Court held in *Cicenia V. Lagay* (1957) "Although it is better practice for the prosecution to grant the accused's attorney pre-trial inspection of the confession, the due process clause of the Fourteenth Amendment is not violated when the accused in a state court is denied inspection of his own confession prior to trial."²⁴

Additionally, a discovery measure for the defense would be of great assistance in the preparation of the case because often the accused is an unreliable source of information. Defense discovery also offers advantages to the prosecution. The late Attorney General Thomas McBride of Pennsylvania, wrote of defense discovery: "Where counsel is informed of the real strength of the commonwealth's case, he is better enabled to give the proper advice to his client and trials are shortened, issues are met more fairly, guilty pleas are very often made, particularly in homicide cases, and the administration of justice

not only is speeded up but made more fair and exact."²⁵

1. Fletcher, Stan. L.R., March 1960.
2. Mich. L.R. March 1963.
3. 291 F. 646, 649 (S.D. N.Y. 1923).
4. 13 N.J. 203, 98 A. 2d 881 (1953).
5. Warren, *Calif. Crime Comm. Report* p. 10 (1931).
6. Mich. L.R. March 1963 p. 991.
7. *Calif. Law Rev. Comm. Report*, p. J-5 (Oct. 1960).
8. 161 Mi c. 212, 292 N.Y.S. 612 (1936).
9. Esch, 9 Panel 42 (Sept.-Oct. 1931).
10. Waddington, L.A. Bar Bulletin, p. 7 (Nov. 1961).
11. Miller, #11 J. Crim. L. (1920).
12. Stassen, 20 Minn. L. Rev. (1936).
13. Savay, *The Art of the Trial*, p. 42 (1929).
14. Waddington, L.A. Bar Bulletin, p. 7 (Nov. 1961).
15. *Calif. Law Revision Comm.*, p. J-9 (Oct. 1960).
16. Epstein, *Penn. Comm. on Crim. Proc. Rules*, J. Crim. L. March 1964, p. 33.
17. 297 F. 2d 818 (1962).
18. Traynor 39, NYU L.R. (Nov. 1964).
19. Frank, *Not Guilty*, p. 123 (1957).
20. Frank, *Courts on Trial*, p. 99 (1950).
21. Goldstein, 69 Yale L.J. 1149, 1184-5 (1960).
22. Brennan, Wash. Univ. L.Q. 279, 287.
23. 54 Lack Jur. 205, 2120213, Pa. 1952.
24. 357 U.S. 503 (1957).
25. In Re Di Joseph, p. 11 (1958).

THOMAS MORE MEDAL TO BE AWARDED

The Thomas More Medal will be presented to an outstanding alumnus, faculty member or friend of Loyola Law School at the Thomas More Award Breakfast to be held on May 22. The Thomas More Medal is presented by the Thomas More Law Society on behalf of the students and faculty of the law school on the basis of achievement in and service to the legal profession. The recipient is to be selected by a five member panel of alumni whose affiliation with Loyola and position in the legal profession equip them to make a selection representative of the opinion of the law school community as a whole. At the present time, members of the Thomas More Law Society are conducting a poll of a cross section of the alumni to prepare a list of names for the panel's consideration.

Past recipients of the award are Hon. Thomas P. White, Assoc. Justice Cal. Supreme Crt. (1960), Hon. Lewis H. Burke, then Presiding Judge of L.A. Sup'r. Crt.,

now Assoc. Justice Cal. Sup. Ct. (1961), Hon. Marshall F. McComb, Assoc. Justice Cal. Supreme Ct. (1962), Hon. Howard Ziemann, Judge Sup. Ct. (1963), Hon. Otto Kaus, then Judge L.A. Sup'r Ct., now Justice Cal. Dist. Ct. of Appeal. This will be the first year in which the award is presented in the form of a medal, and also the first in which the recipient will be named by a panel of alumni. It is intended that these procedures will be installed permanently, and that the Thomas More Medal will ultimately complement the Aggeler Award by recognizing the achievement of an alumnus who in the opinion of the law school community has been outstanding.

In accordance with the tradition, the Thomas More Medal will be presented at a breakfast for alumni and students to be held on Sunday, May 22, 1966. The affair will convene at 10:00 a.m. and adjourn at noon; the location will be announced shortly.

A special Mass for those attending the breakfast will be celebrated at Loyola High School Chapel beginning at 9:00 a.m., anyone wishing to attend is welcome. The Thomas More Law Society is hopeful that interested alumni and students will plan to attend this event. For further details, phone 383-8521 or write to the society at the school.

LOYOLA REGENT HONORED AT DINNER

Educational, industrial, and civic leaders honored Rev. Joseph J. Donovan, S. J., Loyola University School of Law Regent, at a dinner honoring his 75th birthday held in the Grand Ballroom of the Beverly Hilton Hotel, Wednesday, Feb. 16, 1966.

Father Donovan, who has been associated with the School of Law since 1927, has been the guiding force in the development of the School which has graduated more than 500 attorneys into the legal profession throughout California and the Western states.

Active cooperation of leaders of the Bench and Bar started Loyola's School of Law on its way as a contributing factor in the educational development of the community. The late William Joseph Ford, its first dean, assembled key legal figures of the era to train professional aspirants in the then young college.

It was not long before Loyola graduates were represented in Congress, in the Legislatures of California, Arizona, and Nevada, judges of the Municipal and Superior Courts, on the staff of the Attorney General of the State, the District Attorney and Public Defender of Los Angeles County,

and the City Attorney of Los Angeles and neighboring municipalities.

The Law School moved to the downtown area of Los Angeles, first to Third and Broadway in 1929, and five years later to a location on Grand Avenue. In 1930, it offered a full-time day session and gradually introduced other changes to keep pace with its development.

A year and a half ago the School of Law moved to its modern facility at 1440 West Ninth Street, Los Angeles.

The late Joseph Scott, who succeeded William Joseph Ford as dean in 1929, became dean emeritus in 1934.

The dinner honoring the priest was organized by five alumni of the Law School: Attorneys John Andersen, Robert Nibley, Frank Gray, Michael Clemens, and Frank Hourigan.

The major address was presented by attorney Herman Selvin, past president of the Los Angeles County Bar Association.

California Supreme Court Judges Marshall McComb and Louis Burke presented the Law School with an oil portrait of Fr. Donovan.



ADDRESS DELIVERED BY HERMAN SELVIN HONORING FATHER DONOVAN'S 75th BIRTHDAY

Having regard to the clerical habiliments of Father Donovan and the distinctive cast of his and my features, so clearly revelatory of our respective origins, the thought may have occurred to some of you that to put me in this part of the program was, Vatican II notwithstanding, carrying the ecumenical principle too far. But to speak of that principle of and concerning Father Donovan is not a matter for jesting, for he is in his own proper person a splendid embodiment of the principle, as the varied character of this congregation attests. Deeply imprinted upon those who are here as upon the institution whose destinies he has so long and ably guided, is the catholicity of his spirit, the universality of his humanity. Under his leadership there have been admitted to the faculty and the student body of the Law School of Loyola University all who could qualify, regardless of class, creed or race.

And so it is that we meet tonight, not
SPRING, 1966

as Catholic or Protestant, Jew or Gentile—not even as denizens of that wonderful menagerie of collegiate symbology, Trojan or Bruin, Indian or Golden Bear, Don or Lion—but as members of a more exclusive order, the Friendly Society of Loyal Donovanians. For in his house, too, there are many mansions.

It was over 40 years ago that Joseph Jeremiah Donovan, after baccalaureate and magisterial degrees at Gonzaga, and in the course of theological and canon law studies at the University of Innsbruck in Austria, and a doctorate from Gregorian University, was ordained a priest. It was nearly 40 years ago that he came to the law school of the University we now know as Loyola. The institution to which he then came and the one over which he now presides had little in common save the name, and even that was not so in the beginning.

Statistics are seldom enlivening or even enlightening. But these are—and so I give



**Seated—Mr. Justice Marshall McComb—Calif. Supreme Court; Father Donovan—S. J. Regent; Mr. Justice Louis Burke—Calif. Supreme Court.
Standing—Father Casassa—President Loyola University; Herman Selvin—Past President Los Angeles County Bar Association.**

them to you. When Father Donovan came to the Law School, it was one for evening students only. It is now, as we all know, an institution for those devoting their full time to study of the law and thus in the class of U.S.C. and U.C.L.A. here, Santa Clara, S.F.U., Hastings, Stanford and Boalt elsewhere in the State. It was then a school with no real home of its own; now a school with a physical plant at the least the equal of, and superior to some of the seven I have mentioned. It was then a school with a faculty of 26 part-time teachers, now one with 14 full and 20 part-time instructors. It was then a school of 195 evening, but no full-time students. In 1930 it had 15 day students, now it has 287 full-time and 243 part-time students. It had then no library at all, now it has 65,000 volumes. Then 9 of its students took the bar examinations and 5 passed—a percentage of 55½%. In the past three years, 159 of its graduates have taken and 111, a percentage of 70%, passed that examination—a percentage that puts it only a few points below Hastings, U.S.C., U.C.L.A. and

Stanford, and just a few more than that below Boalt. [You may guess from the way in which I have presented these last figures, my own alma mater.]

It is, you will agree, not merely a coincidence that this great advance and Father Donovan's administration as Regent were coterminous. And so it is that we take advantage of the fact that, like ordinary mortals, he has annually a birthday, to pause and let him know that we too know and are grateful.

It is not to be supposed from what I have said that the Law School—principal and fruitful though it has been—has been his only preoccupation. You will find in *Who's Who in America* the fact noted that, among other things, he is a member and a one-time officer of the Irish History Society. Since the biographies published in *Who's Who* are in fact autobiographical, it is a safe inference that Father Donovan thought this fact important. That being so, and the occasion being what it is, I should never forgive myself if I did not take ad-

vantage, I hope you will forgive me if I do take advantage of the occasion for a personal offering of my—I should say our own, as it was Mrs. Selvin's inspiration to do this. She, as some of you may know, is in nearly constant communication with Shannon Airport, joyfully oblivious to the fact that its being a free port means only free of Irish, not American, import duties. In any event, through her status as one of Shannon's preferred mail-order customers, I am able to present, and after these remarks will present to Father Donovan, a reproduction of The Dublin Correspondent for April 6, 1808; (the date is not sig-

nificant—that was the available issue); and a reproduction, printed from the original type, of the Proclamation that began the Easter Uprising of 1916 in Dublin, "The Troubles" as ever were.

But these are only a side issue. In case some of you were beginning to doubt, this is *our* not just my party. And so, in all of our behalfs let me say, begging the Father's absolution for what I am sure must be a perfectly atrocious Gaelic pronunciation:

LAW BREH-EH SUNNAH GHEEV.

And then turn it over to you to sing in English, Happy Birthday to You, Dear Father Donovan, Happy Birthday to you.

AN EXAMINATION OF PROBATE CODE 41

*By Joseph Reynolds**

California has long been considered a frontier of legislative innovation and development. Indeed, critics have often complained that the Legislators, in their attempt to be progressive and flexible, have too quickly abandoned the established and tested ways.

For better or worse, the policy of the State Lawmakers has always been to meet the ever changing needs of the people with reform and invention. The irony of Section 41 of the Probate Code is that, in a bastion of legislative foresightedness, the law is throttled with an archaic and inequitable refuge from the Middle Ages.

Probate Code 41 is entitled, "Restrictions: Passage of property contrary to law." Basically it has two parts. The first prohibits passage of *any* property devised to a charity by a will, executed within thirty days of the testator's death. The second *limits* such devises to one third of the estate, if the will is executed within six months of the testator's death.

This type of statute is generally grouped within the so-called "Mortmain Statutes." Just when the "Statutes of Mortmain" were enacted depends upon the preference of writers, but they are commonly dated

from the Magna Carta to 9 George II. (Rollisons on Wills.)

The heart of the Mortmain Statutes was not the improvident gifts of testators, but the struggle between the Church and the State. Certainly the greatest single impetus of any series of these acts was the conflict between Henry VIII and the Pope.

With the demise of the influence of the Church in England, the original motive for these Statutes has disappeared. Nevertheless, they form such an integral part of the mainstream of the Common Law, that all fifty States, as well as common law jurisdictions other than England, have variations of one type or another.

In 1874, the California legislature enacted Civil Code 1313 (later Probate Code 41) restricting charitable bequests. Although grounded in a struggle between a jealous king and a corrupt church, the California courts rationalized the Law in this manner: "The Statute recognizes the validity of charitable gifts, but imposes restrictions to prevent improvident gifts by will to charity to the disherison of lawful heirs, similar to the Mortmain Act of 9 George II." (Hinckley Estate 58 C. 457) (1881).

Or, as was said in Lennon Estate (1907) (52 C. 327) (92 P. 870), "... the reason for the law is so that man's fears of super-

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stition, or his deathbed hope of purchasing a blissful immortality, shall not be allowed to influence the disposition which he may make of his property, to the injury of his heirs."

However, this legislative control of one's right to bequea property as one sees fit, does not always serve the testator as might be thought. Although there will always be cases of an over zealous cleric or perhaps an unscrupulous "minister" who will play upon the dying person's hope for "salvation" to the detriment of his heirs, these will be the isolated cases.

The average man of today is not as easily persuaded or intimidated by pressure or signs as he was during the centuries of the Church's domination in England; nor for that matter, one hundred or even fifty years ago. In any event, an heir may always contest a will because of *undue influence*, and the behind-the-scene's activity of some "charities" have repeatedly been disposed of on just that ground.

A more realistic evaluation of the effect of Probate Code 41 is this: rather than "protecting" the decedent from foolishly squandering his estate in a vain attempt to buy a grace, it gives a complete wind-fall to one whose only claim is an accident of blood.

Hence, we have the heir at law (defined by the section). This entitles one who, during the life of the testator, may have been indifferent or even antagonistic toward him, to receive a percentage of the decedent's estate.

This legacy is possible despite the testator's clearly defined intentions to the contrary, and comes about only by an arbitrary right granted by the legislature.

In *Estate of Haines*, 76 Cal. Ap. 2d. 673, the court allowed a testator to bypass the thirty day clause of Probate Code 41 by means of a substitutional clause.

Justice Peek speaking for the court held that, "... it may be stated that generally speaking, a testamentary gift to charity is valid, even though made within thirty days of the testator's death; however, such a gift may, nevertheless, be avoided at the instance of an aggrieved heir of a designated

class, but such heir is not aggrieved unless he would have been entitled to take property had it not been willed to charity, as in a case where the will provides an alternative disposition to one other than the heir." (Page 679).

In other words, unless an heir at law would take "but for" the charitable bequest, there is no effect to Section 41.

In an unanimous opinion, the California Supreme Court cited with approval the *Haines Case*. In *Estate of Sanderson*, (58 C. 2d. 522, 527) (25 Cal. Rptr. 69), it was held that, "under the terms of Section 41, a relative of the enumerated class may avoid a charitable legacy or devise only if, and to the extent he would have taken the property but for such legacy or devise; where there is an otherwise effective disposition in the will of the portion of the estate represented by the charitable gifts, the claims of the relatives are ineffectual."

Hence, by an alternative clause in favour of a Bishop, (it was Bishop Bundy in the *Sanderson Case*) or some other *stranger in blood*, (Davis, intra) a competent lawyer or a knowledgeable individual can effectively by-pass Probate Code 41.

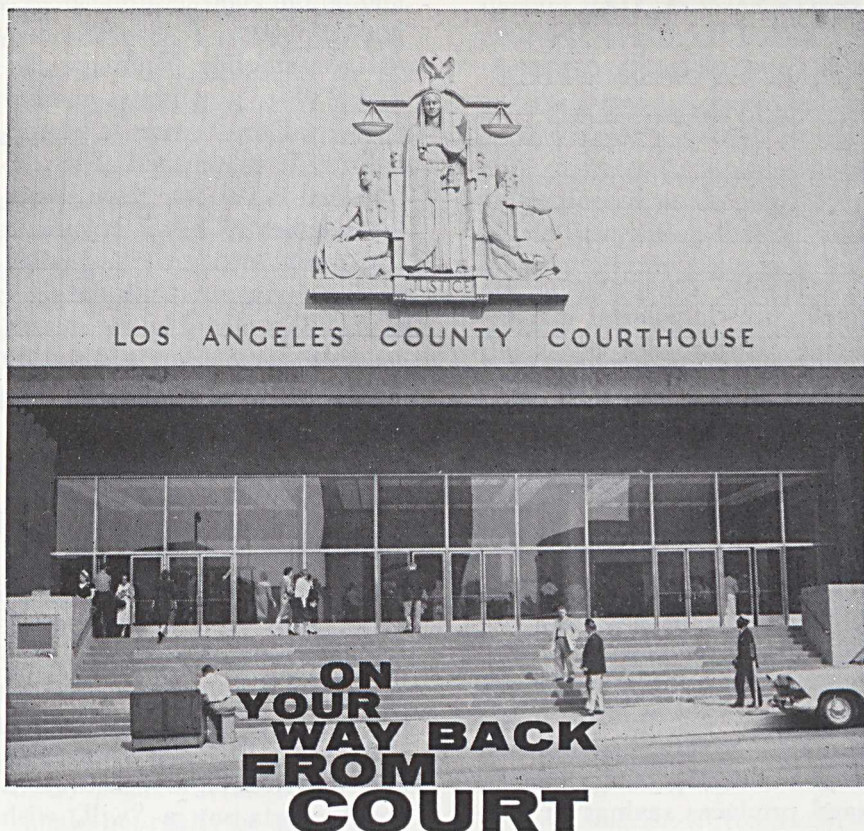
The anomaly of this state of the law is that in a jurisdiction which allows an individual to dispose of property by a holographic will (Probate Code 58), and where, "gifts for charitable purposes are highly favoured and bequests of such kind will be liberally construed to accomplish the intent of the donor," (*Estate of Davidson*, 96 Cal. App. 2d. 264, at 270), such a *trap* for the unwary and unskilled should continue to exist.

To be sure, an analysis of the code and a review of the cases will enable one to avoid the effect of this Section.

The difficulty is this: the law is allegedly designed to protect the "improvident" and "superstitious", and it is not likely that these people will understand the intricacies of effective Probate.

On the contrary, it is this class of people who write a fully valid holographic will to the effect that, "I leave five dollars to my brother, Harry, who will be glad that I

(Continued on page 68)



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REQUIREMENTS AND OUTPUT CONTRACTS IN CALIFORNIA UNDER THE UNIFORM COMMERCIAL CODE

*By Mitchel J. Ezer**

Generally speaking, requirements and output contracts are long-term arrangements envisaging performance by installment deliveries over a period of months or years in which it is commercially infeasible to specify numerical amounts. Quantity is therefore expressed in terms of the buyers ability to purchase or the seller's capacity to produce.

REQUIREMENTS CONTRACTS

Probably the more important of these two "open quantity" arrangements is the one which measures goods in terms of the buyer's needs. From the seller's standpoint, such contracts are advantageous in that the assured demand produces savings in marketing, advertising, storage, transportation and credit costs besides facilitating production scheduling; to the buyer, a requirements contract means an assured source of supply without the need to predict production demands, as well as price advantages, purchasing economies and, sometimes, standardization of equipment and financial and technical assistance.¹ A requirements contract can be for a fixed term, or of indefinite duration; in the latter case, the agreement is binding so long as the buyer has requirements.² Requirements can be measured by a specific factory,³ or by a given job,⁴ or for a specific area.⁵

Legally, such arrangements present two basic problems. First, whether they are sufficiently certain to be valid and enforceable. Second, the liability of the parties when the buyer's requirements either expand, contract or disappear. It has been universally assumed by every Code commentator who has dealt with the subject that section 2306(1)—the requirements

and output contract proviso—grapples with both problems. This writer must challenge that presumption. Nothing in the text of Section 2306(1) validates requirements contracts; rather, it seems to presume that their validity is established. That the draftsman intended to validate them seems clear from his comments,⁶ but it is submitted that his singularly inept text has failed to accomplish its purpose. Only the second problem is actually treated by the statute, and therefore the issue of initial validity must be dealt with as a common law question under the Code's "savings clause."⁷

Validity

Nowhere in the law of contracts are semantics as important as they are in this area. If the quantity clause is expressed in terms of all that the buyer "will take" or "demand" or "wishes" or "wants" or "desires" it is denominated illusory, and the agreement in which the phrase is included is labelled as lacking in mutuality and insufficient to constitute a contract.⁸ Some courts say a "will, wish or want" agreement is void from its inception.⁹ Others regard them as a continuing offer from the seller to sell as much as the buyer wishes or wants, converted into a contract for the quantity ordered each time the buyer places an order.¹⁰ Should the felicitous phrase "requirements" or "needs" be used, however, the validity incantation is immediately pronounced.¹¹ Then, the contract is deemed to impose mutually binding obligations, for not only is the seller required to sell but the buyer is obliged to purchase so long as he has requirements.¹² Having surrendered his right to purchase elsewhere, which legally is a detriment, the buyer is deemed to have given sufficient consideration to support a bilateral contract.¹³

Such an analysis, standard though it is, leaves much to be desired. It is too formalistic, leaving too much hinging on a mere choice of words. Enforceability of complex business arrangements is determined by rote application of such commercially unfamiliar concepts as "illusory bargain," "consideration" and "mutuality," triggered

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by the use of a phrase which the parties probably regarded in an entirely different light than that in which it is cast by the courts. If the accepted framework is not to be discarded entirely for a standard based on intent, as the Code does with open price contracts, then more discerning analytical tools are needed. Mere use of phrases such as "wish" or "want" should not automatically produce a pronouncement that the understanding is void or only a continuing offer to sell. First, the phrasing itself should be examined. Has the buyer agreed to purchase "whatever" he wants or "all" that he wants? If the latter, it can be read as obligating the buyer to buy all that he wants from the seller, or all that he wants of the commodity. Reading it as an obligation to buy all that he wants of the commodity, which is a reasonable construction, the conclusion is reached that the buyer has surrendered the right to buy elsewhere.¹⁴ An "all wanted" agreement, when this construed is so similar to a "needs" arrangement that its validity should not really be questioned. Where the buyer has agreed only to take "whatever" he wants, still the rule of automatic invalidity should be discarded. The buyer, had he been sufficiently sophisticated, could have made such a contract valid by giving the seller a peppercorn (whatever that may be), or by agreeing to make a present purchase in consideration of the seller's promise to sell whatever the buyer may want in the future. Clearly, his failure to follow this formalistic legal procedure should not produce the dire result of automatic invalidity. A buyer who has agreed to purchase whatever he wants at a fixed or determinable price must be deemed to have promised not to order unless willing to pay that price, which in turn should be regarded as sufficient legal detriment to constitute consideration.¹⁵ To the argument that such a rule would permit the enforcement of "uncertain" contracts there is the answer that if formal consideration such as the mystical peppercorn had been given, the courts would have had to enforce the agreement based on some objective determination of the buyer's wants, and to

declare the agreement invalid because formalities were not observed is a coward's way of avoiding the struggle. Unless there are other reasons for invalidating it, such as the buyer's attempt to exploit a favorable agreement, wants should be deemed and enforced as the equivalent of needs.¹⁶ To the contention that a wants contract is inherently unfair because the seller is at the buyer's mercy, there is the reply that mere potential for unfairness is not sufficient grounds for invalidity.¹⁷ Under the Code, each party to any commercial agreement is expected to act in good faith.¹⁸ Therefore, if the buyer is using the wants contract only to fill his current needs, invalidity due to prospective unconscionability should not result.¹⁹ Only the buyer's exploitation of the seller should be deemed grounds for negating the contract, and even then if the buyer's exercise of capricious power can be curbed by reading into the wants agreement a "normal wants" standard that should be done in lieu of invalidation.²⁰

The Established-Nonestablished Business Distinction: It has been held that a requirements contract is valid only if the buyer has an established business.²¹ A needs arrangement entered into by a nonestablished firm, even if the right language is used, is deemed in mutuality since the buyer's requirements at the time of formation are nonexistent.²² This rationale runs counter to economic reality, for a requirements contract is most useful to the nonestablished business; the established enterprise, whose numerical quantity needs are reasonably predictable, has far less use for such an arrangement.²³ It is submitted, therefore, that declaring such a requirements contract invalid is unwarranted. The seller has entered the arrangement voluntarily, hoping to gain the benefit of increased patronage. Since his is a voluntary act which has created an expectation interest for the buyer, that expectancy should be protected unless the buyer is exploiting the seller.²⁴ The requisite consideration for the seller's promise to sell can be found in the buyer's promise, express or implied, to go into business unless he finds himself unable to do so de-

spite a good faith attempt at entry.²⁵ Or, the contract can be construed as making the buyer's entry into business before the first scheduled delivery date an implied condition precedent to the seller's obligation to deliver.²⁶ Under either theory, validity should be found.

The real issue enveloping these agreements should not be their validity but, rather, how to ascertain damages in the event the seller fails to deliver or the buyer fails to establish his enterprise. Under Section 2306(1), quantity (on which a damage measurement must be based) is tied to any stated estimate in the contract, or if there is none to "any normal or otherwise comparable prior . . . requirements." Assuming the nonestablished business does not contractually estimate its requirements, the question becomes how to determine "normal or otherwise comparable requirements." The language itself suggests a solution. There is nothing forbidding the use of evidence of the normal or comparable prior requirements of third parties, and Professor Honnold, probably the foremost living authority on the law of sales, has suggested that in the case of the nonestablished business this would be an acceptable means of determining what requirements would have been.²⁷ Counsel should of course also seek any objective indicia of the proposed size of the buyer's firm, but the third party standard seems by far the most facile solution to this difficult problem.

In the nonestablished business context, there is also the question of the length of time afforded the buyer to go into business, assuming of course the contract does not cover that point. How long, in other words, must the seller wait before he is free to contract for disposition of his production to other sources? The Code does not provide an answer, but it does provide machinery for obtaining an answer. Section 2609 permits a party who has reasonable grounds for believing himself insecure to demand adequate assurances of performance from the other party. If such are not seasonably forthcoming, the aggrieved party is allowed to treat the contract

as breached. A requirements seller faced with the problem of a buyer delaying the establishment of the enterprise can resort to Section 2609, thereby forcing the buyer into committing himself to a specific date for the opening of his establishment.

The Changing Requirements Problem

Brevity, Shakespeare tells us, is the soul of wit. If that be so, then gales of unrestrained laughter are in order upon reading Section 2306(1), for if it is anything it is abbreviated. Terseness, however, is not always a virtue in drafting statutes, as Section 2306(1) so aptly illustrates. For in attempting to resolve the highly complex problem of what to do in the event the buyer's requirements expand, contract or evaporate, that section states only that

"A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to one stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior **output or requirements** may be **tendered or demanded**." (Emphasis added.)

Problem piles upon problem as this section is dissected. First, there arises a serious question about the relationship of the words "output" and "requirements" on the one hand to "tendered" and "demanded" on the other. Does "output" relate only to "tendered" and "requirements" to "demanded," or is cross-ruffing permissible? The section could be read as stating that although under any output contract no quantity unreasonably disproportionate to any estimate or prior output may be tendered by the seller, nevertheless the buyer is not debarred from demanding a disparate quantity; while, conversely, in a requirements contract no quantity unreasonably disproportionate may be demanded by the buyer but the seller has not been forbidden from tendering such an amount. Or Section 2306(1) can be interpreted as providing that under either an output or requirements contract no unreasonably disproportionate quantity may be tendered by the seller or demanded by the buyer. Se-

mantic metaphysics? Let us see if it is. If the interpretation forbidding cross-ruffing is accepted, and it is a reasonable one, the difficulties which can arise are practical in the extreme. To illustrate, assume the following fact situation. The buyer has agreed to purchase his requirements of a certain unit from the seller for \$2.00 each; normal requirements established by a course of dealing or performance is 100,000 units per year; and a reasonably proportionate variation is 25% (25,000 units). Buyer's needs rise to 200,000 units per year, while the market price falls to \$1.50 per unit. Buyer, wishing to adhere to his contract, is willing to accept 125,000 units per year from seller at \$2.00 per unit, but since under Section 2306(1) he cannot demand more than 125,000 units from the seller he wishes to purchase the other 75,000 which he needs in the market at \$1.50 apiece. Under the circumstances, can the seller tender 200,000 units to the buyer at \$2.00 each and insist that the buyer accept them, or does Section 2306(1) not only prevent the buyer from demanding more than 125,000 units but also preclude the seller from tendering more than that amount. If the seller were free to and did tender 200,000 units, the buyer could not readily claim the seller was acting in bad faith; requirements was the contract standard, and requirements is what the seller is tendering, even though, because of Section 2306(1)'s "unreasonably disproportionate quantity" rule the buyer could not compel the seller to tender more than 125,000 units if, say, the market price had risen to \$2.50 per unit and the seller was totally uninterested in fulfilling more than his minimal contract obligations.

Construing Section 2306(1) as curbing only the requirements buyer but not the requirements seller creates still further problems. If the buyer can demand only a reasonably proportionate variance, but the seller can if he chooses (but is not required to) tender all of the buyer's requirements, seemingly the buyer would be in breach if he purchased his needs over and above a reasonably proportionate increase from another source before the time sched-

uled for the seller's performance. The buyer would have to wait and see how large a quantity the seller would tender, doing nothing to protect himself from a materials stoppage, for a precipitate outside contract would be deemed a breach if the seller elected to deliver the buyer's total requirements. In sum, it is submitted that in the interest of fairness to buyers, Section 2306(1) should be construed as limiting the seller's right of tender as well as the buyer's right of demand under a requirements contract. Even this construction would leave the parties with the miserable problem of determining what is an "unreasonably disproportionate quantity," but at least it would avoid statutory sanctioning of unconscionable exploitations along the lines described above.

Another linguistic stumbling block in Section 2306(1) is the meaning of "normal or otherwise comparable prior requirements." What is normalcy? Comparable to what? Does this language mean that the test is buyer's requirements at the time the contract is formed, or on the basis of the amount included in the preceding delivery, or the amount delivered during the preceding month or year, or an average based on a year's or two years' deliveries, or what? For example, assume that on January 1, when the requirements contract is executed, the buyer's requirements are 100,000 units per week, but thereafter they start increasing at a steady rate of 500 units per week. Each week's delivery is not unreasonably disproportionate to its immediate predecessor, but by the time a few months have elapsed the weekly deliveries are grossly disparate to the requirements at the time of formation, and are substantially out of line with the total delivered during the earlier months. Precisely such problems as this will be created by artificial demand stimuli such as a war, or depressants, such as a recession.

The only case in point holds that when demand is rapidly expanding or contracting due to artificial conditions, the seller is required to supply only an amount comparable to that being delivered at the time the contract was formed.²⁸

Nothing in Section 2306(1) suggests what the "normalcy" base is to be, or against what the "comparison" is supposed to be made. It is suggested, therefore, that rather than attempt to resolve the problem by torturing that obscure provision, reference instead be made to Commercial Code Section 2615 dealing with the doctrine of commercial frustration. In employing Section 2615, the theory would be that the occurrence of the artificial demand factor was a contingency the nonoccurrence of which was basic to the contract, so that the seller is excused from delivering more than the buyer's requirements before the artificial factor was introduced. In other words, it would be unnecessary to fix normalcy or comparability as requirements at the time of formation, as in *Jenkins*, but rather normalcy or comparability would be the amount that was being delivered before the artificial factor—such as a war or stock market collapse—intervened to cause demand to soar or plummet.

Expanding Requirements

Business Expansion: One reason for an increase in the buyer's requirements is an expansion of his business. Whether he will be able to compel the seller to fill his increased needs depends largely on the reason underlying the expansion. If it is a product of normal business growth, then beyond question the seller will be responsible for delivering the increased quantities.²⁹ This would be requirements which "occur in good faith" under Section 2306(1), and in a normal growth situation successive deliveries will rarely if ever be unreasonably disproportionate to those made in the immediate past. Expansion may also be caused by the general market taking a sharp inflationary upswing. Here, the problems become more abstruse and harder to solve. If the price is not tied to some market standard, but is fixed, a ballooning market will obviously enable the buyer to reap an advantage at the seller's expense, for his ability to buy materials at a price lower than that prevailing generally will permit him to undersell his competitors, thereby increasing his business

and concomitantly his requirements. His actions under the circumstances will largely determine the extent to which his contract will be enforced. Should sudden expansion be motivated by the buyer's advantaging himself under a favorable contract, a "good faith" or "normal requirements" standard will be invoked to curb his aggressive tendencies should he resort to law to compel the seller to comply with his exorbitant demands.³⁰ However, if the expansion was reasonably foreseeable despite the favorable contract, then the buyer should not be penalized for expanding even though he is in part motivated by his advantageous agreement.³¹ Similarly, if his expansion under pressures of an uptrending market is no greater than that being undertaken by his competitors, again his demand for increased requirements should be judicially enforced.³²

The Jobber-Manufacturer Distinction: If market price rises, a manufacturer holding a favorable requirements contract will not automatically expand his production. The agreement then affords him only lower material costs; he must still expand his plant, increase his labor force and obtain the various overhead elements attendant upon expansion. A middleman, however, is in a position to increase his sales substantially if the market prices rise even slightly above that stipulated by his requirements contract; he resells what he buys intact, and if he can price his goods lower than that of his competitors (because of his favorable needs contract) he obviously will enjoy huge volume increase at his seller's expense. For that reason, some courts have refused to enforce requirements contracts where the buyer is a jobber rather than a manufacturer, allegedly because the jobber has no physical plant against which to measure the unfilled needs.³³ This rule will be changed by the Code. Section 2306(1) refers to "buyers," elsewhere defined to include any person purchasing goods.³⁴ And the comments specifically note that the requirements contract section is intended to apply to nonproducing establishments as well as manufacturing concerns.³⁵ The middleman, like the manufac-

turer, is under a good faith interdiction not to speculate at the seller's expense should the agreement prove beneficial. If the jobbing buyer acts in good faith, he is entitled to judicial protection; when his conduct is maleficent, he has violated the Code's commands and his excesses can and should be curbed, although the contract itself should be recognized as valid.³⁶

In a jobber requirements contract, the real problem is how to compute damages should the seller breach. When an estimate is stated in the contract, as it should be if counsel rather than the parties has drawn it, the requirements base is established under the explicit provisions of Section 2306(1). If no estimate is stated but the jobber has a history of requirements, a past experience basis can be used in calculating damages. If, however, he is a non-established middleman, there will not even be available a prospective enterprise size on which to base an estimate of probable requirements. Clever counsel, though, should be able to produce some evidence—such as capitalization of the business, size of rented premises, or a listing of prospective clientel—on which some notion of at least minimal requirements can be founded. And, as has already been noted, the normal requirements of third parties can and should be used.³⁷

Decreasing and Disappearing Requirements

Reduced Requirements: On the one hand, Section 2306(1) announces that a buyer's requirements are those which actually occur in good faith; on the other, that a quantity unreasonably disproportionate to a stated estimate or established norm may not be demanded. What happens, then, if due to an unfavorable contract the buyer in complete good faith radically reduces his requirements? Does the fact that he has acted in good faith control over the fact that he is now demanding an quantity unreasonably disproportionate to the norm, or is his radical reduction in requirements, albeit in good faith, a breach because it is unreasonably disproportionate. It has been suggested that a breach can be committed by a dramatic requirements reduc-

tion motivated solely by a desire to escape an unfavorable contract.³⁸ Similarly, the Code comments indicate that reduction to curtail losses would not be permissible.³⁹ Neither conclusion seems acceptable. Under the Code, the Mandate that actions be taken in good faith permeates and supersedes every other provision.⁴⁰ Good faith means honesty in fact in the conduct or transaction concerned, and in the case of merchants,⁴¹ which requirements buyers invariably are, good faith also means observance of reasonable commercial standards of fair dealing in the trade.⁴² To argue that a buyer who reduces or eliminates his requirements in order to curtail losses is not acting in good faith is to deny reality. He is acting honestly in fact, and observing reasonable commercial standards of any trade, for no mercantile calling thrusts on anyone an altruistic responsibility to become bankrupt merely to sustain an unfavorable contract from which there is an escape. Professor Gilmore stated the proposition as well as it has ever been put when he said

The attempt by B to see that S goes bankrupt instead of himself may be thought to be an action taken entirely in commercial good faith . . . I see no convincing reason why buyers as a class, instead of sellers as a class, should end up in bankruptcy."⁴³

It is submitted, therefore, that the most sensible reading of Section 2306(1) is that a buyer is permitted to reduce his requirements disproportionately, providing his action is taken in good faith, which includes among other things the prevention of loss to himself.⁴⁴ Observe, though, that if the buyer does demand a disproportionately reduced quantity and the seller then refuses to deliver, it should not be deemed a breach by the seller.

Abandoning or Selling Business: Whether a buyer operating under a requirements contract can sell or abandon his business without incurring liability to the seller is a question to be resolved outside the Code; the draftsman specifically disclaims any intent to deal with the problem.⁴⁵ One article reports that the tendency

of the cases has been to impose liability for sale or abandonment on one of three theories: An implied promise to take normal requirements; lack of good faith; or a judicially imposed obligation requiring the buyer to remain in business.⁴⁶ Two other commentators state that the weight of authority holds the buyer need not stay in business and have requirements; if he quits in good faith, it is not a breach of contract.⁴⁷ California has a number of relevant decisions, though only one, *Langenburg v. Guy*,⁴⁸ is a requirements contract case and thus squarely in point; the rest involve output arrangements.⁴⁹ *Langenburg*, in line with the output contract cases, hold that a requirements contract does not impose upon the buyer any duty not to sell his business, and that if he "sells his business and thus reduces his requirements to the vanishing point he does not thereby breach his contract."

One article states that if sale or abandonment was totally or largely motivated by an unfavorable requirements contract the buyer should be liable for damages to the seller.⁵⁰ If abandonment or sale under such circumstances is deemed an act of bad faith, then their conclusion seems correct, but as has been noted⁵¹ there is nothing morally wrong about a businessman seeking a legitimate escape from an unfavorable deal, providing there are no other factors indicating liability should be imposed. If, for instance, the buyer reorganizes his enterprise in different guise to avoid a bad contract there would be clear bad faith and liability could and should be imposed. Similarly, if the seller has expanded his plant capacity in order to meet the buyer's anticipated orders, knowing abandonment or sale by the buyer of his business could well be deemed vis-a-vis the seller, warranting imposition of liability. But if the seller will not be seriously injured and the buyer has in fact totally abandoned or sold his business in good faith in order to avoid loss, such abandonment or sale should be damage free.

If the business is sold, whether the new owner can assume the rights and duties under the requirements contract depends

on whether the original agreement was dependent on the peculiar skill and judgment of the party who has sold his business. Generally, where a mere sale of goods is involved, it is held that anyone can deliver or receive the product, and that the contract can be conveyed with the business.⁵² Insofar as the Code is concerned, the only relevant point is that a sale by itself is not deemed sufficient grounds for a sudden expansion or reduction of requirements.⁵³

Availability of Substitutes: It sometimes happens that after a requirements contract is formed, a cheaper or more efficient product will appear on the market which the buyer can use in place of the goods covered by his needs agreement. Is he then free to terminate purchases under this contract with the seller on grounds that the advent of a substitute has reduced or eliminated his previous requirements? This is the same problem, with another face, as the abandonment or sale of business issue. Use of a legitimate substitute is an action taken in good faith.⁵⁴ Therefore, if good faith rather than unreasonably disproportionate quantity is the controlling standard under Section 2306(1),⁵⁵ the buyer's action should be sanctioned. If, however, he is absolutely bound for the term of the contract not to reduce his requirements disproportionately, irrespective of good faith, then his liability to purchase substitutes will be correspondingly limited. In an economy dedicated to principles of "free enterprise" and the "benefits of competition," the latter interpretation hardly seems supportable.

The Effect of Estimates

At common law, it was held that if any estimated quantity was specified in a requirements contract it would be ignored in favor of actual requirements.⁵⁶ This rule is changed by the Code. An estimated quantity used in a contract is employed by Section 2306(1) as a base against which variations in demand or supply can be measured to determine whether quantities demanded or delivered are becoming "unreasonably disproportionate."⁵⁷

Maximum-Minimum Contracts

Occasionally, requirements contracts specify a maximum and/or minimum quantity. It is then held that the buyer is obligated to purchase at least the minimum quantity, whether or not he has need for it.⁵⁸ Conversely, the contractual ceiling is viewed as a limit on the amount the seller can tender or the buyer can demand. Actual quantity, of course, depends on the buyer's requirements, but they must remain within the stated variations.⁵⁹ No comparable rules are found in the text of Section 2306(1), although the comments specifically indicate that maximums or minimums specified in the contract set the degree of elasticity for purposes of determining whether a quantity is "unreasonably disproportionate."⁶⁰

Breach and Related Problems

Decisional law indicates a number of ways in which a requirements contract can be breached. Foremost, of course, is the buyer making purchases from someone other than the requirements seller.⁶¹ Outside purchases include not only acquisitions of the commodity itself, but also purchase of a source of supply for the product which has the effect of reducing the buyer's former requirements.⁶² Other methods of breach have been indicated in the preceding discussion, such as, under certain circumstances, abandonment or sale of the buyer's business,⁶³ or increasing⁶⁴ or reducing⁶⁵ requirements disproportionately for unconscionable reasons. Finally, breach can occur by "bunching," i.e. some requirements contracts do not obligate the buyer to take 100% of his needs, but specify the percentage of the whole which he must purchase during the term of the contract—if he attempts to telescope his orders toward any one part of the contract term, purchasing his entire requirements elsewhere for the remainder of the contract period, this is deemed to be a breach; percentage of requirements means that percentage as it occurs during the ordinary course of business.⁶⁶

Once breach has been established, the aggrieved party must prove what require-

ments would have been in order to recover,⁶⁷ which can sometimes be an aggravating problem. Two basic types of evidence are admitted: Buyer's average prebreach purchases over a substantial period of time, or buyer's actual market purchases during the balance of the contract term following breach.⁶⁸ If, however, the contract specifies a minimum quantity, then even absent proof of actual requirements the buyer will be liable for not not having taken the accepted minimum, or the seller will be liable for not having delivered it, as the case may be.⁶⁹

OUTPUT CONTRACTS

Output contracts are those in which the quantity measure is expressed in terms of all or a given percentage of the seller's total production. Output agreements are the other side of requirement contracts coin, and the legal problems presented are in many instances identical with those discussed in connection with needs arrangements. For that reason, the discussion herein will be abbreviated, and reference made to the requirements contract analysis for full exploration of the ramifications of output agreements under both the common law and the Code.

Validity

As was the case with requirements contracts, semantics have, and because of Code silence on the point, will continue to play a large role in determining the validity of output arrangements. If the quantity is stated to be "all" or a percentage of the seller's total output from a given orchard, farm, factory or other producing unit, the courts unhesitatingly declare the arrangement valid.⁷⁰ So long as the seller is producing, he is under a binding legal obligation to sell to the buyer and to no one else; hence, there is sufficient mutuality of obligation. When, however, the phrasing is not as polished—as, for instance when the seller's duty is expressed in terms of all he "will deliver"—the agreement is deemed illusory and void for want of mutuality.⁷¹

Here, as with requirements contracts, more discerning analysis is needed. Mere

use of a phrase which a facile mind can construe as creating an illusory obligation should not be so interpreted where the intent of the parties to form a binding agreement is manifest.⁷²

The Changing Output Problem

Section 2306(1) grapples with the problems of a changing output situation, using the same murky language which it employs on requirements contracts. Certain problems of statutory construction arise from the text of the statute itself. First, the relationship between the words "output or requirements" on the one hand and "tendered or demanded" on the other, already discussed from a requirements contract standpoint earlier in this article.⁷³ From the output contracts viewpoint, if the word "output" relates only to the word "tendered," the seller would be limited to tendering to the buyer only a reasonably proportionate increase in his output, while the buyer would be free to demand any output increase if it suited his interest, but could decline requesting any disproportionate quantity if it did not. For instance, assume that seller has agreed to market his output of a given unit for \$2.00 each to buyer; that seller's normal output established by course of dealing is 100,000 units per year; and a reasonably proportionate variation is 25% (25,000) units. Seller's output rises to 250,000 units as market price increases to \$2.50 per unit. Seller, albeit unwilling to adhere to his contract, is willing to tender 125,000 units per year at \$2.00 per unit; but since under Section 2306(1) he clearly cannot validly tender—compel the buyer to take—more than 125,000 units, he wishes to sell the other 125,000 in the market at the higher \$2.50 price. The question then becomes, can the buyer demand that the seller deliver all 250,000 units at \$2.00 each, or does Section 2306(1) not only prevent the seller from tendering more than 125,000 units but also preclude the buyer from demanding more than that amount? If the market had fallen to \$1.50 per unit, the buyer beyond question would be grudgingly accepting only the minimum number the seller can com-

pel him to take (125,000), and Section 2306(1) would forbid the seller from tendering any amount in excess of that quantity. Hence, from a mutuality standpoint, it would seem that Section 2306(1) should be interpreted as limiting the buyer's right to demand an unreasonably disproportionate quantity as well as the seller's right to tender such in an output situation.

Another linguistic problem in Section 2306(1) relates to the phrase "normal or otherwise comparable output," the question being what constitutes the normalcy or comparability standard. This has been previously discussed herein from the requirements contract viewpoint,⁷⁴ and that discussion is fully applicable here.

Expanding Output

One reason for an increase in the seller's production is an expansion of his business. Whether he will be able to force the output buyer to take the product increase depends primarily on the reasons underlying the expansion. The discussion with respect to expansion in requirement contracts context is applicable here.⁷⁵

Decreasing and Disappearing Output

Output Reduction: The "requirements reduction" analysis is of equal force here, and reference is therefore made to that discussion.⁷⁶

Sale of Business: A fairly substantial body of law has developed in California on whether an output seller is free to sell his business, thereby eliminating his output, and thus walk away from his contract without liability to his buyer. Generally, it is held that sale of a business is not a breach.⁷⁷ In *Pratt Low Preserving Co. v. Evans*,⁷⁸ the court remarked that sale of business per se does not breach an output contract, but then held that where, as there, the output contract contained words of present sale ("hereby sells") rather than a phrase indicating future sale ("agrees to sell") title to the goods was vested in the buyer at the time of sale even though the goods were not then in ease, and the seller

must therefore respond in damages for failing to deliver. The decision hardly detracts from the rule that sale of a business is not a breach of an output contract, for it pays obeisance to the general rule in dicta, it relies heavily on the concept of "title" rendered obsolete by the Code,⁷⁹ and its rationale evolves from the now discredited doctrine of potential possession. Only the case of *Karales v. Los Angeles Creamery Co.*,⁸⁰ can be truly said to hold that a seller may not disable himself from performing an output contract by selling the producing unit, and *Karales* must be regarded as having been overruled sub silentio by later contradictory decisions.⁸¹

Under Section 2306(1), the question will be whether the language obligating the seller to sell only "such actual output as may occur in good faith" supersedes the clause refusing to permit a tender "unreasonably disproportionate to any stated estimate or any normal or otherwise comparable prior output," or whether the reverse will be true. A seller who conveys his business for a legitimate reason will in complete good faith have no output, but he will be tendering to his output buyer an unreasonably disproportionate quantity—zero. It is submitted that good faith should be the controlling standard, since it is the permeating omnipresence of the Code.⁸² Hence, a seller who sells or abandons his business, or curtails production in order to avoid loss, should generally not be held to have breached his output contract.⁸³ Only where the seller knows that the buyer has expended substantial monies in anticipating of the seller's performance, or where the seller is using the sale as a subterfuge to reorganize his business without the burden of the output agreement, should a breach be declared—not because an unreasonably disproportionate quantity is being tendered, but because under the circumstances the seller is acting in bad faith.⁸⁴

The Effect of Estimates

It has been held that if any estimated quantity is stated in an output contract it is to be ignored; the seller discharges his obligation by tendering his output, however

far that may deviate from the estimate.⁸⁵ California law is apparently altered by Code enactment. Estimates now will be used as a base in determining whether a seller is tendering an unreasonably disproportionate quantity."⁸⁶ It is suggested, though, that the Code's rule be tempered by a bit of statutory construction, for there are two entirely different situations covered by the general rule. First, where the seller is tendering an amount substantially in excess of the estimate; second, where the quantity tendered is substantially less. Section 2306(1) should be regarded as a police measure designed to prevent sellers from dumping quantities considerably greater than that which the estimate led the buyer to expect.⁸⁷ The seller is not harmed by such a rule; he can still market the excess quantity to other outlets. If, however, the section is interpreted as preventing the seller from tendering a quantity substantially less than the estimate, even though it is his entire output, inequitable results will flow. For instance, in *Biglione v. Bronge*,⁸⁸ the seller agreed to deliver his entire crop of grapes, contractually estimated at about 130 tons. Due to a crop failure, he was able to produce only 66½ tons, which he delivered. *Biglione* held this was not a breach, and it is submitted that the same result should be reached under the Code on grounds that this is the seller's "actual output as occurred in good faith" even though it is "unreasonably disproportionate to the stated estimate." Of course, where the seller has deliberately curtailed production for reasons other than the avoidance of loss, his conduct could be deemed bad faith and a breach declared, but where the quantity substantially below estimate is due to circumstances beyond his control delivery of the seller's entire output should be held sufficient. Any other rule, it is submitted, would place output sellers in an economically untenable position, for they are almost always small producing units who, when output is below estimate, will be suffering enough from a bad year and therefore probably unable to withstand the additional blow of a large damage award.

Performance and Breach

A seller performs his output contract only by tendering his entire production (or a percentage thereof, if the contract is so limited) even if, in the seller's opinion, some of the goods do not meet the quality standard established by the agreement.⁸⁹ The buyer is free to reject any part of the tender not conforming to the predetermined quality standard, but he must accept all of the seller's output which is of the warranted quality.⁹⁰ Deliveries must be made by the seller as often as they are reasonably demanded; he is not free to bunch his deliveries or make them whenever he chooses.⁹¹

Breach occurs most often when the seller fails to deliver his entire output.⁹² Another form of breach is what might be colloquially described as running in a ringer—purchasing goods in the market after a price drop and tendering them as part of output.⁹³ And under certain conditions breach can occur by the unreasonable expansion of reduction of output, or abandonment or sale of the output unit.⁹⁴

CONCLUSION

When more obscure statutes are drafted, doubtless they will be promulgated in California, but it seems difficult to believe that anyone will ever surpass the extraordinary incomprehensibility of Section 2306(1). It creates so many more problems than it solves that legitimate query may be made whether it should be kept on the statute books. So long as it remains, however, courts and counsel alike will have to regard it not as an aid to equitable results but as a barrier to be overcome in retaining reason as the touchstone of commercial contracts.

FOOTNOTES

1. McLaren, *Related Problems of Requirements Contracts and Acquisitions in Vertical Integration Under the Antitrust Laws*, 45 ILL. L. REV. 141, 142-43 (1950); Note, 102 U.P.A. L. REV. 654 (1954).

2. Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 Pac. 329 (1904).

3. Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 168 Cal. 140, 142 Pac. 46 (1914).

4. Webber v. Johnston, 214 Cal. 378, 5 P. 2d 886 (1931).

5. San Joaquin Light & Power Co. v. Costaloupes, 96 Cal. App. 322, 274 Pac. 84 (1929).

6. Com. C. § 2306, Comment 2.

7. Com. C. § 1103. This section provides that any problems not covered by the Code are to be resolved by application of common law and equitable principles.

8. Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671, 117 Pac. 934 (1911); Paterson, *Illusory Promises and Promisor's Options*, 6 IOWA L. BULL. 129, 130-34 (1921) (tracing the invalidity of "wants" contracts back to Roman law). *But cf.* Flint v. Guiguerre, 50 Cal. App. 319, 195 Pac. 85 (1920) (no challenge made to a contract, the quantity clause of which was framed as "all buyer might buy").

9. Schimmel v. Martin, 190 Cal. 429, 213 Pac. 33 (1923); Ross v. Frank W. Dunne Co., 119 C.A. 2d 698, 260 P. 2d 104 (1953).

10. Las Palmas Winery Co. v. Garret & Co., 167 Cal. 397, 139 Pac. 1077 (1914); Keller v. Ybarra, 3 Cal. 147 (1853).

11. Marin Water & Power Co. v. Sausalito, 168 Cal. 587, 600, 143 Pac. 767 (1914); Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55 (1909); El Rios Oils v. Pacific Coast Asphalt Co., 95 C.A. 2d 186, 193, 213 P. 2d 1 (1949); Lowell O. West Lumber Sales v. United States, 270 F. 2d 12 (9th Cir. 1959).

12. King-Keystone Oil Co. v. San Francisco Brick Co., 148 Cal. 87, 82 Pac. 849 (1905).

13. Long Syrup Refining Co. v. Corn Products Refining Co., 193 Fed. 927 (9th Cir. 1912).

14. See Patterson, *supra* note 8, at 228.

15. *Id.* at 215.

16. *Id.* at 220.

17. *Id.* at 223.

18. Com. C. § 1203. See discussion in text accompanying note 42 *infra*.

19. See Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. 851, 1, 10 (1932).

20. See Patterson, *supra* note 8, at 223; Navighurst & Berman, *supra* note 19, at 10.

21. Anaheim Sugar Co. v. T. W. Jenkins & Co., 274 Fed. 504 (9th Cir. 1921).

22. Navighurst & Berman, *supra* note 19, at 10.

23. Note, 36 VA. L. REV. 627, 632 (1950).

24. Havighurst & Berman, *supra* note 19, at 9; Patterson, *supra* note 8, at 225.

25. See Note, 102 U. PA. L. 851, 654, 657-59 (1954).

26. Havighurst & Berman, *supra* note 19, at 11.

27. 1 NEW YORK LAW REVISION COMMISSION, STUDY OF THE COMMERCIAL CODE 379 (1955).

28. Anaheim Sugar Co. v. T. W. Jenkins Co., 274 Fed. 504 (9th Cir. 1921).

29. *Ibid. Accord*, Anaheim Sugar Co. v. T. W. Jenkins Co., 274 Fed. 504 (9th Cir. 1921); Havighurst & Berman, *supra* note 19, at 5-6, 11-13; Note, 102 U. PA. L. REV. 654, 657, 661 (1954).

31. Havighurst & Berman, *supra* note 19, at 6.

32. See Com. C. § 2306, Comment 2.

33. See Note, 102 U. PA. L. REV. 654, 656 (1954).

34. Com. C. § 2103(1)(a).

35. Com. C. § 2306, Comment 1.
36. See Patterson, *supra* note 8, at 226; Havighurst & Berman, *supra* note 19, at 8.
37. See text accompanying note 27.
38. Havighurst & Berman, *supra* note 19, at 15.
39. Com. C. § 2306, Comment 2.
40. Com. C. § 1203; see Com. C. § 1102(3).
41. Defined in Com. C. § 2104(1).
42. Com. C. § 1203 (general good faith standard); Com. C. § 2103(1)(b) (good faith for merchants).
43. GILMORE, LECTURES ON THE LAW OF SALES, quoted at 73 YALE L. J. 21 (1963).
44. See Note, 102 U. PA. L. REV. 654, 664, 666-67 (1954).
45. Com. C. § 2306, Comment 4.
46. Havighurst & Berman, *supra* note 19, at 16-17.
47. Note, 36 VA. L. REV. 627, 633 (1950); Note, U. PA. L. REV. 654, 659 (1954).
48. 77 Cal. App. 664, 669, 247 Pac. 621 (1926).
49. See notes 77-81 *infra* and accompanying text.
50. Havighurst & Berman, *supra* note 19, at 16.
51. See text accompanying notes 42-44 *supra*.
52. LaRue v. Groezinger, 84 Cal. 281, 24 Pac. 42 (1890).
53. Com. C. § 2306, Comment 4.
54. See Havighurst & Berman, *supra* note 19, at 15.
55. See text accompanying notes 38-44 *supra*.
56. Hackett v. State, 103 Cal. 144, 37 Pac. 156 (1894); see Webber v. Johnston, 214 Cal. 378, 5 P. 2d 886 (1931); Havighurst & Berman, *supra* note 19, at 21-22; Note, 36 VA. L. REV. 627, 633 (1950).
57. Com. C. § 2306, Comment 3. For further discussion on the effect of estimates, see text accompanying notes 85-88 *infra*.
58. San Joaquin Light & Power Co. v. Costaloupes, 96 Cal. App. 322, 272 Pac. 84 (1929).
59. Havighurst & Berman, *supra* note 19, at 23-24.
60. Com. C. § 2306, Comment 3.
61. Webber v. Johnston, 214 Cal. 378, 5 P. 2d 886 (1931); Los Angeles Gas & Elec. Co. v. Almagamated Oil Co., 168 Cal. 140, 142 Pac. 46 (1914); Twomey v. Peoples Ice Co., 66 Cal. 233 (1884); Wilson v. Corrugated Kraft Containers, 117 C.A. 2d 691, 256 P. 2d 1012 (1953); Vath v. Hallet, 31 Cal. App. 290, 160 Pac. 1065 (1916).
62. Andersen v. La Rinconda Country Club, 4 C. 2d 197, 40 P. 2d 571 (1935).
63. See text accompanying notes 45-53 *supra*.
64. See text accompanying note 30 *supra*.
65. See text accompanying note 44 *supra*.
66. Lewis v. Shell Oil Co., 220 Cal. 80, 29 P. 2d 413 (1934).
67. Johnson Pie Co. v. Acme Egg & Poultry Co., 74 C. A. 2d 376, 168 P. 2d 762 (1946).
68. Alexander v. Shell Oil Co., 124 Cal. App. 607, 12 P. 2d 973 (1932).
69. San Joaquin Light & Power Co. v. Costaloupes, 96 Cal. App. 322, 274 Pac. 84 (1929); see Havighurst & Berman, *supra* note 19, at 25-26.
70. Woodbine v. Van Horn, 29 C. 2d 95, 105, 173 P. 2d 17 (1946); Tuck v. Gudnason, 11 C. A. 2d 626, 54 P. 2d 88 (1936); Andersen v. La Rinconda Country Club, 4 C.A. 2d 197, 199-200, 40 P. 2d 571 (1935); Oldershaw v. Kingsbaker Bros. Co., 53 Cal. App. 667, 200 Pac. 729 (1921); California Packing Co. v. Grove, 51 Cal. App. 253, 196 Pac. 891 (1921).
71. Foley v. Euleess, 214 Cal. 506, 6 P. 2d 956 (1931); see California Refining Co. v. Producers Refining Corp., 25 C.A. 2d 104, 76 P. 2d 553 (1938).
72. See text between notes 13-20 *supra*.
73. See the two paragraphs immediately following the textual quotation of Section 2306(1) in "The Changing Requirements Problem" section of this article.
74. See the paragraph immediately following the two paragraphs referred to in the immediately preceding footnote.
75. See text accompanying notes 29-37 *supra*.
76. See text accompanying notes 38-44 *supra*.
77. Globe Oil Mills v. Van Camp Sea Food Co., 52 Cal. App. 781, 199 Pac. 864 (1921); William S. Gray & Co. v. Western Borax Co., 99 F. 2d 239 (9th Cir. 1938); see Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1, 18 (1932).
78. 55 Cal. App. 724, 204 Pac. 241 (1922), noted, 10 CAL. L. REV. 352 (1922).
79. The Code contains a provision on passage of title, Com. C. § 2401, which generally links passage of title to change of possession, but this section is included only to accommodate certain bodies of nonsales law—primarily, imposition of sales taxes—which have come to rely on passage of title under sales law as determinative of certain incidents in these other bodies of law. None of the consequences which hinged on passage of title under the Uniform Sales Act—such as risk of loss and liability for the price—are determined by "title" under the Code; rather, each of these former incident of title are now governed by separate Code rules.
80. 36 Cal. App. 171, 171 Pac. 821 (1918).
81. See cases cited in note 77 *supra*.
82. Com. C. § 1203. See note 42 *supra* and accompanying text.
83. See Havighurst & Berman, *supra* note 77, at 19.
84. *Id.* at 19-21.
85. Biglione v. Bronge, 192 Cal. 167, 219 Pac. 69 (1923); Rosenberg Bros. & Co. v. Beales, 56 Cal. App. 212, 205 Pac. 18 (1922).
86. Com. C. § 2306(1).
87. *Cf.* Peterson v. Chaix, 5 Cal. App. 525, 90 Pac. 948 (1907).
88. 192 Cal. 167, 219 Pac. 69 (1923).
89. Rosenberg v. Rogers, 44 Cal. App. 196, 186 Pac. 366 (1920).
90. Di Fiore v. Bohnett, 54 Cal. App. 88, 201 Pac. 145 (1921).
91. Roach Bros. & Co. v. Lactein Food Co., 57 Cal. App. 379, 207 Pac. 419 (1922).
92. Rosenberg v. Rogers, 44 Cal. App. 196, 186 Pac. 366 (1920).
93. Garcia & Maggini Co. v. Sanfillippo, 56 Cal. App. 348, 205 Pac. 74 (1922).
94. See text accompanying notes 75-84 *supra*.

REAL ESTATE TRANSACTIONS AND THE SIX MONTH HOLDING PERIOD

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to be made, for once an asset in hand is replaced by the next one down the line (i.e., the option by the contract, and the contract by the fee simple estate), the clock begins ticking all over again on his six months holding period.

1. IRC §§ 1202, 1222 (1), (2), (3) and (4)
2. IRC § 1234
3. See e.g., *Miller v. C.I.R.*, 295 F. 2d 538 (8th Cir. 1961); *Barber v. United States*, 215 F. 2d 663 (8th Cir. 1954); *Voeglin*, *Use of Options in Tax Planning*, 1965 So. Calif. Tax Inst. 729.
4. *Chemetron Corp. v. C.I.R.*, 299 F. 2d 644 (7th Cir. 1962).
5. *Turzilla v. C.I.R.*, 346 F. 2d 884 (6th Cir. 1965); *C.I.R. v. Ferrer*, 304 F. 2d 125, 130 (2nd Cir. 1962); *United States v. Guerini*, 296 F. 2d 33 (4th Cir. 1961); *Levenson v. United States*, 157 F. Supp. 244 (N.D. Ala. 1957).
6. *Goldstein v. Allen*, 306 F. 2d 711 (10th Cir. 1962).
7. See, *Hetland*, *Deficiency Judgment Limitations in California—a New Judicial Approach*, 51 Calif. L. Rev. 1 (1963); *Hetland*, *The California Land Contract*, 48 Calif. L. Rev. 729 (1960).
8. *McFeeley v. C.I.R.*, 296 U.S. 102, 56 Sup. Ct. 54 (1935).
9. Rev. Rule 54—607; *Boykin v. C.I.R.*, 344 F. 2d 899 (5th Cir. 1965); *T. F. Merrill*, 40 T.C. 66, *aff'd* 336 F. 2d 771 (9th Cir. 1964).
10. IRC § 1223(8)
11. Rev. Rule 54—607; *T. F. Merrill*, *supra* n. 10; *William Holden*, 6 B.T.A. 605 (1927).
12. *Boykin v. C.I.R.*, *supra* n. 10; *T. F. Merrill*, *supra* n. 10. For an example of a material condition see, *Howell v. C.I.R.*, 140 F. 2d 765 (5th Cir. 1944)
13. *Helverig v. San Joaquin Fruit and Investment Co.*, 297 U.S. 496, 56 Sup. Ct. 569 (1936).
14. Rev. Rule 54—607

A PSYCHOLOGICAL VIEWPOINT OF THE LAW AND INSANITY

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- of Insanity," in Shipley, Thorne (ed.), *Classics in Psychology*, Philosophical Library, New York, 1961, p. 1212.
6. *Abrahamsen*, *ob.cit.*, pp. 2 and 3. See also Beattie, John, "Rewards, Punishment, and Culture," *New Society*, London, Sept. 30, 1965, pp. 14-17.
 7. Green, Edward, "Sentencing Practices," in *The Sociology of Punishment and Correction*, Johnston, Norman, Savitz Leonard, and Wolfgang, Marvin (eds.), John Wiley & Sons, Inc., New York and London, 1962, pp. 70, 71.
 8. *Weihofer*, *ob.cit.*, pp. 156, 157.

9. *Ibid.*, p. 164 (citing Hartung, "Trends in the Use of Capital Punishment," 284 *Annals of the Am. Academy of Pol. and Soc. Science*, 1952, p. 11).
10. Ancel, Marc, *Social Defense*, Routledge and Kegan Paul, 1966.
11. *Weihofer*, *Ob. cit.*, p. 159 (quote from Moberly, Sir Walter, 32 *Can. Bar Rev.*, 485 at 499, 1954).
12. *Abrahamsen*, *ob.cit.*, p. 254.
13. *Weihofer*, *ob.cit.*, p. 61 (citing *Durham v. U.S.* (1954), 94 U.S. App. D.C. 228; in England the Royal Commission on Capital Punishment recommended a somewhat similar rule in 1953).
14. *Ibid.*, p. 78.
15. *Abrahamsen*, *ob.cit.*, p. 250.
16. *Weihofer*, *ob.cit.*, p. 62 (citing the Am. Law Institute, Model Penal Code, Tentative Draft No. 4, sec. 4.01, 1955).
17. *Abrahamsen*, *ob.cit.*, p. 256 (citing the New York Commission for the Definition of Criminal Insanity, Section 1120); see also De Coster, Larry, "Insanity and the Criminal Offender," in *Loyola Digest*, Fall, 1965, for a report of the recommendation by Governor Brown's Commission.
18. For a further discussion of Diminished Responsibility see De Coster, *ibid.*, pp. 14-16.
19. *Weihofer*, *ob.cit.*, p. 56.
20. *Abrahamsen*, *ob.cit.*, p. 263.
21. *Ibid.*, p. 265, (citing "New York's New Indeterminate Sentence Law for Sex Offenders," *Yale Law Journal*, 60:350, Feb., 1951).
22. *Ibid.*, p. 265-8.
23. *Ibid.*, p. 261.
24. Simon, Rita, and Shackleford, Wendell, *Public Opinion Quarterly*, Vol. 29, No. 3, p. 411.
25. Mannheim, Hermann, *Comparative Criminology: A Textbook*, Vol. I, Routledge and Kegan Paul, London, 1965, p. 336.
26. *Simon*, *ob.cit.*

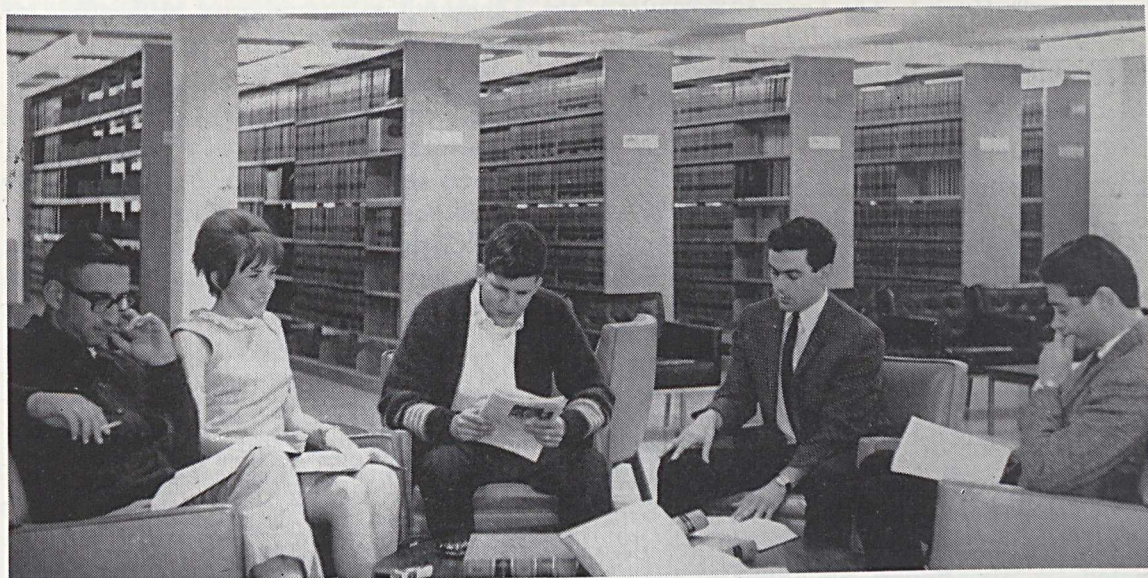
EXAMINATION OF PROBATE CODE 41

(Continued from page 54)

am dead. All the rest I leave to the St. Anne's Old Folks Home, where all the people were nice to me."

By a subtle and evil trick of the Law, "brother, Harry", becomes "aggrieved" and takes a share of this estate under Section 41. The record is rich with cases so holding.

The time has long fallen due for the legislature to act upon this archaic and unjust law. Probate Code 41 should be repealed.



NEWS FROM THE LAW LIBRARY

*By Professor Richard Rank,
Law Librarian*

By January 1, 1966 the Loyola University School of Law Library collection reached 70,000 volumes, thus passing into the category of the so-called "medium-sized" law school libraries.

According to a survey compiled by Mr. John G. Hervey, Adviser to the American Bar Association, Loyola University of Los Angeles School of Law Library has advanced from the 93d place, which it occupied as of July 1, 1963 to the 51st place by July 1, 1965 out of a total of 135 Law School Libraries. By January 1, 1966 our Law School Library advanced to the 54th place by reaching the 70,000 volume mark. Although the quantity of the collection does not necessarily imply the quality of the collection, still the number of volumes acquired is one way of measuring the progress of a library toward its goal of excellence.

During the Fall, 1965 the Law Library received three grants: one from Mrs. Anita S. Watson of Los Angeles, to build up our *Admiralty Collection*, one from Mr. Morris B. Pendleton, of Los Angeles, for the purchase of materials relating to business and

commerce and to develop our *Trade Regulation Collection*, and the third from Title Insurance & Trust Company to establish a collection in *Land Use Controls and Zoning*.

Loyola University School of Law is the host for the Conference of Western Law Schools April 15-16, 1966. In this connection, a special law librarians' meeting is planned at our Law Library. Speakers will include Professors Marian G. Gallagher, University of Washington, J. Myron Jacobstein, Stanford University, School of Law, and Riley Paul Burton, University of Southern California, School of Law.

Among some notable recent acquisitions of the Law Library during the Fall, 1965 are the following:

Bender's Uniform Commercial Code service. Albany, N. Y., Matthew Bender, 1963-65. 4 vols.

This is a looseleaf service. One volume is a reporter-digest; one covers forms and procedure; and two volumes cover secured transactions.

Cavitch, Zolman. *Business organizations with tax planning.* Albany, N. Y., Matthew Bender, 1963-65. 10 vols.

An extensive and important work covering many phases of corporation and partnership law, this is a treatise kept current by looseleaf supplements.

Sowards, Hugh L. *The Federal Securities Act; analysis, procedures, forms*. Albany, N. Y., Matthew Bender, 1965. 1 vol. looseleaf.

This volume is intended as an integral part of Cavitch's *Business Organizations*.

Simpson, Laurence P. and Richard W. Dusenberg. *New York contracts law*. Brooklyn, Edward Thompson Co., 1963. 3 vols. (Encyclopedia of New York law, vols. 6-8)

This work is a thorough treatment of the law by one of the outstanding authorities in the field of contracts, Loyola's own Professor "Larry" Simpson. The title was a gift to the School of Law Library donated by Mr. Robert Steinberg in honor of the appointment of Mr. Lloyd Tevis as Dean of the Law School.

Commerce Clearing House, Inc. *Trade regulation reports*. Chicago, Ill., CCH, 1965-. 5 vols. looseleaf.

This is one of the standard CCH reporters.

Benedict, Erastus C. *The law of American admiralty; its practice with forms and directions*. 6th-7th eds. revised and enlarged in scope by Arnold Whithman Knauth and Christopher R. Knauth. New York and Albany, Matthew Bender and Baker, Voorhis, 1940-41, 1958-59. 6 vols. in 9.

This is a classic work in the field kept current by pocket supplements. The latest set is comprised of the 6th ed. vols. 1-4 and index plus 7th ed. vols. 5-6A.

British shipping laws. London, Sevens & Sons. v. 1- 1961- .

This is a series of important publications in the field of British admiralty law of which some 11 volumes have been published to date. This series is supplemented by pamphlets containing current materials.

McKay, Robert B. *Reapportionment: the law and politics of equal representation*. New York, Twentieth Century Fund, 1965. 498 p.

The author, an authority in the field of constitutional law, has been one of the leaders in the effort for reapportionment.

California. Governor's Commission on the Los Angeles Riots. *Violence in the city—an end or a beginning?* Los Angeles, Jeffries Banknote Co., 1965. 101 p.

This is the text of the McCone Commission report on the 1965 Watts riots.

Cavers, David F. *The choice-of-law process*. Ann Arbor, Mich., University of Michigan Press, 1965. 336 p. (Thomas M. Cooley lecture series).

This book in the field of conflict of laws by an outstanding authority is one of the best of recent years.

Goldstein, Joseph and Jay Katz. *The family and the law*. New York, Free Press, 1965. 1229 p.

The work deals with problems for decision in the family law process and is concerned both with legal and psychoanalytical, with theoretical and clinical aspects of the problems. It is a gift to the Law Library by Dean Lloyd Tevis.

Slovenko, Ralph. *Sexual behavior and the law*. Springfield, Ill., Charles C. Thomas, 1964. 886 p.

This is a serious and documented study of the various problems of the subject by leaders in the fields of law, psychiatry and sociology.

Blashfield, De Witt Clinton. *Blashfield Automobile law and practice*. 3d ed. Editorial consultant Frederick D. Lewis. St. Paul, Minn., West Publishing Co., 1965-. To be complete in 17 vols.

This new edition presently has 5 volumes published. The work gives thorough coverage to the legal problems connected with automobiles which account for 75% of all litigation in the courts.

At the present time, the Law Library is featuring an exhibit of publications by various local, national and international bar associations and law societies.

INTERVIEW WITH NEW LAW SCHOOL DEAN

Lloyd Tevis has recently been appointed Dean of Loyola Law School.

It was barely two years ago that Loyola Law School was physically moved from its archaic quarters to its present modern edifice, and with this change of address came a change of attitude and vision. Increased enrollment, higher admission standards, expanded full-time faculty, and a host of other administrative problems greeted Dean Tevis when he took the reins of leadership upon the retirement of Dean J. Rex Dibble. Dean Tevis has accepted and welcomed these responsibilities in the same manner and style of retired Dean Dibble.

Shortly after the transposition from Assistant Dean to Dean, a question and answer period was conducted by the *Digest* in order to elicit the views of the new Dean on various issues concerning the School.

The following is an all too brief extract of that interview:

Q: Please comment on the case method.

R: Dean Tevis indicated that to some extent a reappraisal is being made of the case method as an effective tool of teaching. He specifically mentioned that it is his opinion that the case method is not especially useful for teaching third year law students.

At this point, Dean Tevis digressed into a project that he would like to see come about. He would like to see each student do a substantial piece of writing of law review quality before graduation. This would be in addition to the legal writing honors program now in force.

Q: Please comment on the possibility of a Law Review.

R: Dean Tevis indicated the idea is not dead. The problem he faces is twofold: a) a need for increased faculty and b) need for money. The first need is being somewhat fulfilled by Loyola's plans to ever expand its faculty. Dean Tevis was quite explicit in his desire that if there is a Law Review, it would not be viewed as an alternative to the Teaching Fellow program. Dean Tevis was also quite explicit as to the

character the law review would have. It would be completely intra-mural. That is to say, he does not want it to be conceived of as the usual faculty publication where a student article would appear as the exception rather than as the rule.

Q: Does Loyola have any future plans for offering a Masters Program?

R: Dean Tevis, reply was, "No." He mentioned a dream of retired Dean Dibble to have a Graduate Workshop. This workshop would strike a middle ground between on the one hand a post graduate program; and on the other hand, what is done by the California Continuing Education of the Bar program. There would be intensive research on a narrow topic. This idea of a graduate work shop in the possible future is not dead.

Q: Please comment on the topic of civil disobedience.

R: Dean Tevis indicated that as an Administrator naturally he would take a somewhat cautious approach. He distinguished between 1) violating a law for the purpose of testing its validity—this type of civil disobedience he approved of; and 2) violating a law simply to gain publicity or possibly to harrass or coerce conduct on the part of the rest of society—this type he disapproved of on two grounds. First, since *the goal was not to test the validity of the law in question*, the laws was being violated. Second, such conduct is a poor tactic. For example, the average citizen who is caught in a two hour traffic jam because of civil rights protest is probably going to view their cause less favorably than if he had not been so inconvenienced.

Printed By

Metropolitan News

LEGAL ADVERTISING

139 N. Broadway Los Angeles 90012
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THE VALUE OF PSYCHIATRIC EVIDENCE IN CHILD CUSTODY PROCEEDINGS

*By Robert L. Charbonneau**

The law in this country has traditionally reflected a pre-occupation with the life, liberty, and property of "individuals." Since 1791, when these freedoms were first articulated in the Bill of Rights, they have been zealously protected in our judicial tribunals. But this judicial zeal has been sadly lacking in a legal forum whose purpose is even more important than the protection of individual liberties. In child custody proceedings, a judicial determination transcends the rights of the immediate litigants and affects the very foundation of our society. A child custody proceeding is not only a legal dispute, but also a social problem. If the children of divorce are emotionally scarred by the litigious process, society suffers. If a decree does not reflect the best interests of the children, communities may later be burdened with mal-adjusted individuals who are unable to make useful contributions to society.

California Code of Civil Procedure, Section 138, provides that: "in awarding custody, the court is to be guided . . . (1) by what appears to be for the best interests of the child . . ." To accomplish this legislative mandate, it is imperative that all available sources of information be utilized that will aid the court in determining which parent should be awarded custody.

One source of information that can provide a penetrating insight into the personality of the parents and their fitness to raise well-adjusted children is psychiatric evidence. Such evidence is particularly valuable when it contains an analysis of a parent's personality in terms of the ability of that person to interact in a meaningful way with children.

In many divorce and child custody matters, there is no need for psychiatric evi-

dence because the court can readily discern who is better suited to raise the children without requiring psychiatric data. When a party is an alcoholic, drug addict, or prostitute, a proper exercise of discretion dictates that custody be awarded to the other parent. In these cases, psychiatric evidence has little to contribute. But there are others cases where both parents appear normal and capable of raising the children. In some situations, one of the parents may have previously suffered a nervous breakdown, or once been committed to a mental institution, and the court is interested in knowing whether a relapse is possible. In these cases psychiatric evidence should be considered unless it is unreliable and unable to make a worthwhile contribution to the proper disposition of the case.

The word "psychiatry" evokes mixed reactions in the legal profession. There are those who accept psychiatry as a useful handmaid of the law, while others shun it as an unwelcome guest in our legal forums. The skeptics are vocal, but not convincing; the criticisms are many, but none are telling.

Some critics point to the contradictory testimony of psychiatrists in support of their contention that psychiatry is unreliable evidence. It has been said that;

The growth of psychiatry as a science is less than 100 years old, compared with other sciences and is responsible for much of the contention and contradictory testimony in the courts.¹

But the "battle of experts" is not peculiar to psychiatric testimony. Conflicting expert testimony will be found in every legal forum on practically every legal issue. The litigants and their witnesses, by the very nature of the adversary process, will invariably disagree with each other. Psychiatry should not be singled out as the scapegoat for the alleged abuses that have crept into the adversary system in the use of expert testimony. Some of the reluctance to rely on psychiatric evidence could be reduced if judges, as a preliminary question outside the presence of the jury, determined that the witness was not merely a disreputable charlatan motivated solely by

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mercenary reward, but highly qualified in his profession and able to make a contribution that would give the court a better understanding of the litigants.

There is another criticism that is more persuasive if the nature and purpose of psychiatric techniques are not properly understood. The brevity of psychiatric interviews has been criticized by people who believe that it is impossible to properly evaluate a person's personality without prolonged observation. These critics assert that a psychiatrist will often disguise his shallow understanding of the patient by the indiscriminate use of diagnostic labels, as psychotic, paranoid, or schizophrenic, without explanation. The charge that this is a substitute for ignorance is sometimes well-taken. But in these matters, "it is not the time spent, but the skill of the interviewer that is crucial."² Jules H. Masserman, an authority on Dynamic Psychiatry, stresses the experience of the interviewer.

"With empathy and experience the examiner will more readily sense the touchy apprehension of the anxiety neurotic, . . . the demanding self-pity of the depressive and the derelict withdrawal and impaired or eviant rapport of the schizoid or schizophrenic."³

In these matters, it is not the quantity of the interviews, but the skill and experience of the psychiatrist which are the significant factors.

The most significant criticism is made by those who repudiate the reliability of psychiatric evidence because the theories and hypotheses which support psychiatric findings cannot be scientifically verified. Critics assert that psychiatry is still enchanted by Freud's theories of behavior, with their pre-occupation on sex, and that the leading theorists who have broken away from Freud's influence are in hopeless disagreement. There is some basis for this criticism. Psychiatry is just emerging as a science and disagreement is inevitable. But even the law, in spite of its conservatism, has permitted the widespread use of psychiatric evidence in criminal and civil cases. The proponents of psychiatric evidence are only demanding that information derived from generally accepted hypotheses be more

widely used in the courts. One example is the psychiatric principle that a person's personality and behavior patterns are primarily formed by interpersonal familiar relationships in childhood. A rejected or neglected child will exhibit personality traits in later life that are attributable to lack of parental love when he was a child. Conversely, a person who receives love and affection in early childhood is better suited to interact amiably in society as an adult because his initial contacts with people were psychologically rewarding to him. Because of the general acceptance of this psychiatric principle, it assumes the characteristics of reliable evidence and should be considered in cases where the personality of the litigant is in issue.

For some people, psychiatry is a mysterious pseudo-science that is nothing more than witchcraft on a subconscious level. People are quick to criticize something they do not understand, and psychiatry is often misunderstood. To properly evaluate the reliability of psychiatric evidence, it is necessary to understand the nature and purpose of psychiatric techniques. The most widely used psychiatric technique today is the dynamically oriented psychiatric interview. Unlike organic psychiatry, which is closely affiliated with medicine and employ more standardized methods of assessing the patient, dynamic psychiatry is concerned with subconscious motivation for behavior.

Organic psychiatrists seek descriptive classifications of conscious behavior through the use of various intellectual tests, electro-shock therapy, and other procedures, while the dynamic psychiatrist is more concerned with probing the subconscious mind to seek explanations for consciously expressed behavior patterns. Because dynamic psychiatry is more concerned with motivation, it seems preferable in custody proceedings, although other tests can be used to supplement findings derived from a psychiatric interview.

Because interpersonal familial relationships in childhood are significant in the later development of the personality, the

psychiatrist seeks to elicit the patient's attitude towards his parents, brothers and sisters. Destructive character traits in members of the family, as physical brutality affect a young child. Such information will help to explain the litigant's personality and his suitability to raise children. Rejection by peer groups, as schoolmates, often has an enduring effect on a young boy or girl. The psychiatrist seeks to elicit such information and develops the "personal history" of the patient with skillful and probing questions. Jules Masserman stresses the importance of taking a skillful history of the patient.

"A psychiatric history is not merely a chronologic account of the patient's life, but an attempt to discern those characteristic patterns of behavior which constitute his personality and therefore possess psychiatric diagnostic and prognostic value. The aim, therefore, is not only to determine what happened to the patient, but also (a) his total response to what happened, and (b) perhaps how, consciously or not, he arranged for the repetition of similar experiences."⁴

The parent's present environment is also significant. Some people adapt well in one life situation and act neurotically in another where there is greater stress. There is some truth in the statement that "neurosis is situational." The religion of the litigant and the firmness of his beliefs are also important in custody cases because strong religious beliefs are indicative of emotional stability. The intensity of the religious belief can be measured in the psychiatric interview.

To ensure greater accuracy, the psychiatrist should consider transcripts of prior hearings, and statements of interested parties, relatives and teachers. He should separately interview both parents, and the children. In many cases a group interview is beneficial because the psychiatrist can observe the interaction of the parents with the children. Supplemental psychological tests can also be helpful. If the first interview is inconclusive, the psychiatrist should notify the court that more time is necessary before writing his report. Because the interviews are relatively short, these supple-

mental materials can be effectively used to compliment the personal observations of the interviewer and reduce the chances of diagnostic inaccuracies.

The "manic depressive psychosis" graphically illustrates the contribution that psychiatric evidence can make to the proper disposition of a child custody case. A psychosis involves the total personality of the individual, and loss of contact with reality. In manic depressive cases, suicidal ideas occur in approximately 75% of the cases,⁵ and actual suicide attempts are made by at least 10 or 15%.⁶ The largest number of patients are women between the ages of 20 and 35.⁷ The danger is compounded when the manic depressive psychotic is a mother.

"Young mothers who undergo psychotic depressions often plan to destroy not only themselves but their children, who are presumably considered by the patient as an extension of herself. Newspaper reports about mothers who have killed themselves and their little children in most cases refer to patients suffering from unrecognized attacks of manic-depressive psychosis."⁸

Such a person appears perfectly normal between seizures, and an unsuspecting judge could award custody to a mother with this major psychosis because he observed her during a lucid interval when she appeared to be a fit parent. In these cases, psychiatric evidence can make an invaluable contribution. In the case of *Bowler v. Bowler*, 355 Mich. 686, 96 NW 2d 129, (1959), the custody of the children was removed to the father after psychiatric evidence uncovered a manic depressive psychosis in the mother. The court held that the passing observations and testimony of friends and neighbors supporting the mother and mentioning her lucid intervals could not "challenge the clear, careful, and detached testimony of three reputable psychiatrists."⁹ The courts in child custody proceedings cannot afford the luxury of gambling that such a psychosis is not seething within a litigant. The children of divorce are wards of the court, and the law is remiss in its sacred duty if psychiatric evidence can make a contribution and is not considered in child custody proceedings.

THE COURT APPOINTED PSYCHIATRIST IS PREFERABLE IN CHILD CUSTODY PROCEEDINGS (subtopic)

The adversary process is the heart of Anglo-American jurisprudence. Its great redeeming quality is to maximize the probability that all the facts will be presented. The courts are perpetually in search of the truth, and the peculiar nature of the adversary process is best adapted to serve this purpose. It works admirably well in criminal and civil cases, but its function may be outweighed by other considerations in child custody proceedings. The adversary system does not have compassion for the children of divorce. Their pain and grief is the by-product of accusations and recriminations which fester within the framework of the adversary process in its most bellicose form. The system promotes evidential warfare, including the use of conflicting psychiatric testimony, in an inappropriate legal forum. The error is the misapplication of an otherwise invaluable judicial process into a legal proceeding where children are involved. The adversary process, in seeking to further the pursuit of truth, has a noble purpose, but the means employed are sometimes bestial in child custody proceedings. Psychiatric experts are paid to testify in open court that the other parent is unfit to raise children, and although their honesty may be unquestioned, their objectivity may be compromised. The parents usually end up being extremely bitter, and the verbal carnage often overflows to adversely affect the children.

Abolition of the adversary system in child custody proceedings is not necessarily the desired result, but the system surely can tolerate a 'modification' if the best interests of the children demand it. Concern for the children is primary, and other cherished notions must bend, if necessary, to effectuate this purpose. The welfare of the children demand that all available sources of information be utilized in child custody cases. This includes the use of 'court appointed psychiatrists' when necessary. Complete impartiality is unattain-

able when the human element is involved, but it is more probably present when the expert is not financially interested in the case. Such psychiatric evidence is not the exclusive evidence in such cases, and the value of the adversary process could be preserved by subjecting the author of the psychiatric report to cross-examination. It is beyond the scope of this short article to suggest the mechanics of this 'modification,' but the concern for the children seems to demand the utilization of impartial expertise in some manner.

The following quote is an appropriate conclusion to this article.

"A custody case is not only a legal matter. It is also a social problem. Moreover, in order to accomplish the avowed objectives of the law of custody—the furtherance of the best interests of the child and his placement with a fit person—it is imperative that social and psychiatric information be produced for the guidance of judicial discretion. These avowed objectives are bound to be frustrated if the contest is viewed as a determination of property rights and if the court continues to think in terms of rewarding virtue and punishing sin . . .

Where there is no family court, traditional procedure should be relaxed so that problem-solving rather than contest supervision becomes the principal aim. The court should think in terms of planning for the child's future and should seek guidance from the parties, counsel, its own experts, and experts provided by the parties.

The reports and testimony of such experts would not be used to usurp judicial responsibility, but rather to aid decision."¹⁰

FOOTNOTES

1. Leon Salzman, *Psychiatric Interviews as Evidence*, George Washington Law Review, 30:853, 859 (61-62).
2. Same as (1) P. 858.
3. Jules H. Masserman, M.D., *The Practice of Dynamic Psychiatry*, P. 114 Philadelphia, Saunders Co., (1955).
4. Same as (3) P. 11.
5. Silvano Arieti, (Maniac Depressive Psychosis, Chapter 22), P. 425 in *American Handbook of Psychiatry*, Vol. I, New York), Basic Books Co., (1959).
6. Same as (5) P. 425.
7. Same as (5) P. 425.
8. Same as (5) P. 425.
9. *Bowler v. Bowler*, P. 133.
10. Henry H. Foster Jr., Doris Freed, *Child Custody. Part II*, 39 New York Uni. Law Review 615, 627, (jun. 1964).

SPRING DANCE HIGHLIGHTED WITH LIBEL SHOW

Over forty years of law student frustration was finally unleashed and revealed at the "libel show" held during the annual Spring Formal. It marked the first such attempt by Loyola law students in the school's history. The *locus in quo* of the event was the Regency Room of the Sheraton West Hotel on March 26, 1966. Before a packed audience of students, faculty, and friends, the various classes unveiled their talents in a one hour satirical revue of the faculty and administration procedures. The room literally reverberated with laughter as the show roamed the spectrum of law school activities, punctuated with "folk" songs and costumes to emphasize the point. Messrs. McNally, Martinez, and Siracuse highlighted the show with their "warm and human" rendition of a Loyola "corporations lecture". There was nary a sacred cow left when the show was concluded. It

is hoped that there will be a "second annual" libel show next spring.

Music, drinks, and a campaign raffle preceded the show. The Board of Bar Governors presented Professor Dibble with an engraved ships' compass in gratitude for his years of service as Dean of the law school. Awards were also presented to the Scott Moot Court Competition winners.

GLADYS TOWLES ROOT TO SPEAK AT LOYOLA LAW SCHOOL

The Loyola Chapter of Phi Delta Delta is sponsoring Miss Root in the Kennedy Moot Court Auditorium at 6:30 Friday evening, April 22nd. Her topic will encompass recent developments in the area of criminal law, her specialized field. Refreshments will be served. All are invited to attend.

FRATERNITY ROW

PHI DELTA PHI

A delegation of Phi Delta Phis from the Law School attended Father Joseph Donovan's Testimonial Dinner to extend their warm congratulations. Along with Alumni and Civic leaders, the members of Aggeler Inn of Loyola Law School express their appreciation for Father's past services to the Law School and the legal community. Furthermore Loyola Phi Delta Phis are indebted to Father Donovan as one of the founders of Aggeler Inn.

This year's rush program has been the most successful in recent years. More than fifty outstanding men from the first, second, and third year classes pledged Phi Delta Phi. The fraternity actives are looking forward to the contributions that these future actives will make to the fraternity, Law School, and eventually the community.

On March 10th Phi Delta Phis hosted

the lovely young ladies of Delta Gamma sorority from U.C.L.A. This exchange should give the young single men, including some of the older and less successful actives, an opportunity to find dates for the "Ides of March" Cocktail Party. Greg Garat and Roger McKee, who have done an excellent job in organizing the Exchange, have given the membership a warranty of "fitness," excluding any latent defects. The Ides of March Party, with the fine planning of Dick Stewart and Bill Christopher, will be one of the best social events of the year.

Formal Initiation for all new actives will be conducted in the California Supreme Court Chambers, located in Downtown Los Angeles, on Wednesday, April 6th. Dinner will follow the formal initiation.

The final social event of the year will culminate at the home of brother Bill McAdam's parents. This Cocktail Party will

include honoring an outstanding member of the faculty and installation of newly elected officers.

PHI DELTA DELTA WOMEN LAW STUDENTS

As we look back on the events of Phi Delta Delta during this academic year, we can be proud that our fraternity has been re-activated. Our aim this year was to establish a closer association of the women on campus in both day and evening divisions and to provide activities designed to acquaint the women with the practice of law through discussions with prominent attorneys in various fields of legal practice. To some extent at least we attained those goals. There is a warmth in the relationship of the members as manifested in the "Pot Luck" dinner and the other "Get Togethers" which brought us together on several enjoyable occasions, carrying out the strive towards a closer association which it is hoped will continue to grow.

As to our second aim, we are sincerely grateful to our outstanding guest speakers. Justice Otto Kaus reviewed the course the California Supreme Court has taken on the question of the constitutional rights of the individual subjected to criminal prosecution. Miss Mary Creutz spoke on the procedural techniques to use in personal injury litigation. Mr. Arnett Hartsfield discussed the availability of the Neighborhood Legal Society's services for the indigent in civil suits, which would be unavailable otherwise in a majority of cases. With the aid of these able speakers, our dinner meetings were most enlightening.

As High Priestess I want to express my deepest appreciation to Patricia Philips, Priestess; Janet Chubb, Recorder; Patricia Lobello, Chancellor; and Marilyn Herzhaft, Chaplin. Having had the opportunity to work with such a tremendous set of officers made the year an exciting one indeed.

We are indebted to Miss Clara Kauffman who has been extremely generous in assisting us whenever she was needed in her role as our sponsor.

SPRING, 1966

For the accomplishments of Phi Delta Delta this year, one might look in the basement of the Law School there to find secluded among the many curves and corners a door marked "Women's Lounge." The Alumni Association of Phi Delta Delta has begun a large fund-raising campaign to furnish that lounge. To them we say, "thank you for being so kind." Incidentally, for supplying the air conditioning, a "thank you" goes to Dean Tevis and the University.

We are proud too of our seat on the Board of Bar Governors which we intend to continue using.

All in all it has been a wonderful and a most memorable year. To the High Priestess for the academic year 1966-67, "Best of Luck, and I hope you have a wonderful year too."

PHI ALPHA DELTA

On April 29, 1966, the brothers of PHI ALPHA DELTA will gather at the Ports of Call Restaurant for the fraternity's annual dinner-dance. Special arrangements have been made to insure that this year's dinner-dance will be a most outstanding affair. A boat ride will climax the evening's festivities with dancing being continued on board beneath the stars.

This will be the final social event of the year which began with a rush party in San Marino held early in September. Those in attendance at the party danced to the music of a fine combo and enjoyed hors d'oeuvres and cocktails.

Two affairs, sponsored by the Alumni, were held at the Mona Lisa Restaurant this year and were open to the brothers. The first such event was held to honor judges who are members of PHI ALPHA DELTA; the second honored PHI ALPHA DELTA alumni who had been members for over fifty years. The latter affair featured Goodwin Knight, former governor of California, as the guest speaker.

PHI ALPHA DELTA also wishes to con-

vey its gratitude to Bill Henry, Nick Micelli, Richard Montes, John Pulskamp, Al Ribakoff, John Chu, Don Cohen, Terry Rolbin, Nelson Paine and Al Loskamp for their fine assistance on the various affairs held this year. Our appreciation extends also to the officers of the fraternity who this year were Kevin Lewand, Justice; Myles Mattenson, Vice Justice; Richard Montes, Secretary; Ron Cohen, Treasurer; and Nick Micelli, Marshal.

Future events to be held this spring as well as the dinner-dance will be a luncheon at the Playboy Club, an Invitational Golf Tournament and the Activation of pledges.

Each successive year the fraternity has provided a greater number of quality functions and I am pleased to note that this year has been a part of that upward trend. It is with every confidence in the pledge class of 1966 that I say that the trend is sure to continue.

Blackstone's Commentaries

IN APPRECIATION

Time in its resistless March to Eternity halted momentarily only a day ago, as the fleeting hours are reckoned among the children of men, to salute the Regent of Loyola Law School on completing seventy-five years of his earthly pilgrimage. Jack Anderson, to the manner born, with four valiant aides, Mike Clemens, with his enduring sense of humor, Frank Gray, master of detail, Frank Hourigan, a pro in any project and Bob Nibley, the last word in know-how, agreed that something should be done about it lest it be lost in some half-forgotten hour. Noiselessly, with no sound of axe or hammer, not unlike the artisans of an elder day, bringing to high fulfillment a great cathedral, they created an image of rich fantasy ringing vibrant with loyalty and devotion, and aglow with a brother's hearty handclasp. Oldsters of the Law, paced by neophytes, hurried to pour out a libation on the Altar of Brotherhood and to lay a wreath of blossoms at the portals of remembrance.

Scholars in the Law, men who taught and teaching pointed out to eager youth the toilsome road to honors and tempered the climb with understanding sympathy . . .

and men who were taught and reflect the lore of educated centuries . . . Jurists of distinction, who are leaving their impress on the jurisprudence of California and the nation. All were recorded in the pledge of fidelity.

As a perpetual reminder of the happenings of this day, there hangs the likeness of a candid witness in the Law Library, from the talented touch of the master.

The note of joyous jubilee struck at eventide, carried through candlelight and illumined the revelers' homeward way, deep in rich recollection.

Any expression of gratitude to those who anticipated in the jubilee, in the nature of things, must be totally inadequate . . . The Regent honestly recalls that he was quite moved in attempting to give an expression of his feelings on that night. With that in mind, let me ask your indulgence in allowing him, despite repetition, to give a direct quote from that occasion. "All the thought and labor that went into this splendid program, leaves me deep in your debt, but being in debt to such generous and understanding associates as are you, is a pleasant penalty and I love it."

AMERICAN SOCIETY OF INTERNATIONAL LAW— SOUTHERN CALIFORNIA REGIONAL MEETING, 1966

By L. F. E. Goldie*

No Regional Meeting of the American Society of International Law has been held in Southern California for almost ten years. This sorry position is to be remedied when, on Saturday, April 23, of this year, such a meeting will be held in the John F. Kennedy Memorial Moot Court Room. Loyola University School of Law and the Los Angeles Bar Association are the joint sponsors of the venture. Associate Professor L. F. E. Goldie of this Law School (and writer of this note) is chairman of the organizing committee and is carrying out most of the work of making general arrangements, drawing up the program, inviting speakers, contacting possible participants and circulating the intended audience.

Eminent judges, legal practitioners, law teachers and scholars have together formed a committee which gives the writer the advice and encouragement which are so essential to the carrying forward of such a project as this to be a successful fruition. Mr. Ralph Abee, of the General Counsel's Office, Bank of America, has agreed to undertake the tasks of Treasurer.

The general topic of the Meeting will be "The Continental Shelf and Fisheries Rights off the Pacific Coasts of North and South America." The morning session's Chairman will be Professor Hans W. Baade of Duke University School of Law and Editor of *Law and Contemporary Problems*. Professor Baade is currently visiting the U.C. L.A. School of Law. Mr. Goldie will give the first paper—to be entitled "The Continental Shelf: Twenty Years in Review." This presentation is intended to provide an historical and analytical introduction to the main issues confronting the Meeting,

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and to suggest some of the questions which brought about the choice of the Meeting's topic.

Following Mr. Goldie's introduction there will be a paper on the economic and conservation problems of the resources of the seas which the present state of international law creates. After a short coffee break the rest of the morning will be devoted to a critical discussion of *United States v. California*, 381 U.S. 139 (1965) by a number of leading lawyers active in the case.

The morning session will be followed by a buffet luncheon in the Library, and Dr. William B. Stern will give an address on the international, comparative, and foreign law holdings of the County Law Library. (It is one of the best collections of its kind in the world, indeed better with regard to its fields of collection than that of the Peace Palace Library at The Hague—a fact which has not been sufficiently well publicized.)

The morning session's topics have been chosen for their generality of interest and their utility to law school and college students taking international law courses. While still formulated as being of interest to students, the afternoon session will also be oriented towards practitioners' concerns. The topics to be discussed in the later session will be more specific and will take up current political and legal problems involving the resources of the seas. This session, chaired by Professor Carl Q. Christol, Professor of International Law, University of Southern California, will begin with a discussion by Dr. John Mero of Ocean Research Inc., San Diego, who will talk on the mineral resources of the ocean and of that new science, ocean mining. Dr. Mero's presentation will be followed by talks on current United States policy with regard to the arrests of American tuna boats by Ecuador, Peru, and Chile while fishing up to a two hundred sea miles limit from the mainland coast and island territories of those countries. Considerable interest should be generated at this point—a lawyer representing the San Diego and Long Beach fishing interests will give the main presentation of this phase of the Meeting.

ing. In response to at least some of the challenges to these countries' laws which may be expected, a very eminent South American lawyer, who champions Ecuador's, Peru's, and Chile's two hundred miles seaward claims, has been invited to give one of the major papers of the Meeting. So far no indication of his availability (or otherwise) has been received. Speakers have also been invited to discuss fishery problems of the North Pacific—particularly from the standpoint of problems faced in Washington, British Columbia, and Alaska.

A Round Table discussion will follow the afternoon session. This will create an opportunity for further examination of the problems arising out of the day's activities. Questions from the audience will be welcomed at this time, as at the other sessions of the Meeting.

After the day's work is done there will be a cocktail party (cash bar), and a banquet. No final catering arrangements for these two important functions have been decided at the time of this writing (March 5, 1966). But one important item has been settled: Lord Caradon, who is both Ambassador of Great Britain to the United

Nations and a very highly regarded public speaker here in the United States, has accepted an invitation to be the Guest Speaker at the banquet.

The charges which have been provisionally determined are:

- (1) Registration, \$7.00 (students free);
- (2) Luncheon, included in registration;
- (3) Cocktail Party, cash bar;
- (4) Banquet, \$8.00.

It may become necessary to charge those students \$2.50 or so who attend the luncheon—depending on the other expenses, the amount of advance registrations, and the caterer's assessment and advice closer to the time.

This writer hopes that the 1966 Regional Meeting of the American Society of International Law in Southern California will prove to be the first of many, of what will become an annual event to be hosted, in turn, by the Law Schools and Colleges of Southern California.

In closing this writer would like to offer his very sincere thanks to Miss Megan Geffeney, Miss Lola McAlpin, and Mrs. Alice Merenbach for so kindly agreeing to do duty at the registration desk and to help with "In formation."

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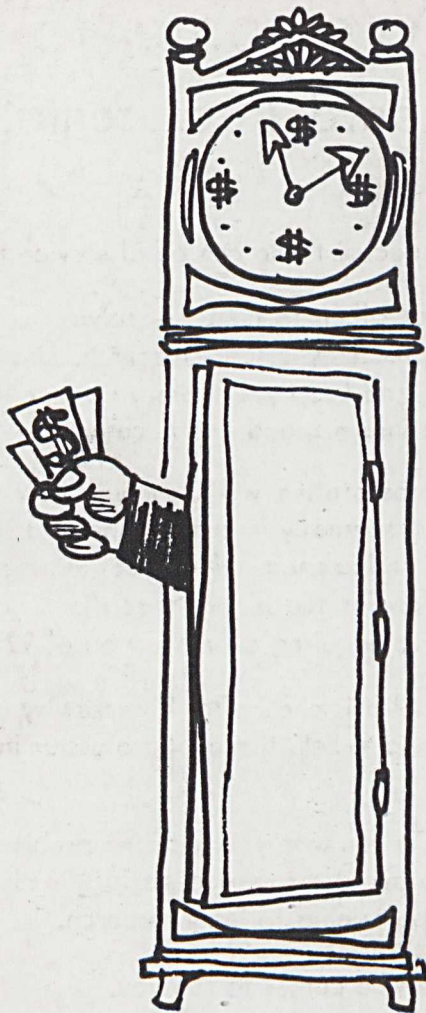
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