Mr. Justice Burton at the Law School

At the dinner preceding his public lecture, Mr. Justice Burton talks with Kenneth Dam (left) of the Law Review and Bigelow Teaching Fellow Thomas Watts (right).

On Monday and Tuesday, February 4 and 5, The Honorable Harold H. Burton, Associate Justice of the Supreme Court of the United States, was a guest of The Law School. On Monday morning Justice Burton taught Professor Kurland's class in Constitutional Law. On Monday noon he lunched at the Quadrangle Club with the Board of Editors and staff of the University of Chicago Law Review.

Tuesday afternoon the Justice had tea with students responsible for the administration of the Hinton Competition, The Law School's student-run moot-court program.

Justice Burton was, on Tuesday night, the guest of honor at a dinner at the Quadrangle Club, which was attended by members of the Bench, the Faculty, and the student body. Following the dinner, the Justice delivered a public lecture in Breasted Hall. His topic was: "The Independence and Continuity of the Supreme Court of the United States."

The Honorable Harold H. Burton, Associate Justice of the Supreme Court of the United States, just before his public lecture during his recent visit to The Law School.
At the colloquium held in Santiago in September, 1956, it was apparent that there exists a general agreement as to the desirability of the greatest possible stability of marriages and family relations in general. This conviction was shared equally by the representatives of the Western countries, of the people's democracies, and of the oriental countries. There also exists a widespread feeling that at the present time the stability of the institution of marriage is being endangered by a number of recent trends and developments. Everybody agreed that all possible measures should be taken to preserve and, in so far as necessary, to strengthen the stability of the institutions of marriage and the family. It also became apparent from the discussion that there exists a need for knowledge and information with respect to both the actually existing state of facts and the possible cause-effect relationships between the various devices advocated and the actual state and trend of marriage stability.

The present dearth of factual knowledge and information was felt to be serious and to be potentially productive of dangerous effects; widely divergent opinions have been held and professed with great strength and conviction. On the one side, for instance, it is said that "divorce breeds divorce," while on the other side it is held with equal conviction that "the lack of divorce breeds immorality." The advocates of neither opinion have so far been able to adduce proof for their respective positions.

The devices which are potentially apt to influence the stability of marriage are many and of great variety. Many potentially useful devices do not belong to the sphere of law but rather to those of religion, education, psychiatry, city planning, and similar non-legal spheres.

The characteristic of the sphere of law is compulsion through the might of the government. No government however can bring about durability of a marriage by direct compulsion. If two married people do not wish to live together, or if one is determined to abandon the other, no government can forcibly keep them together. All legal devices available are therefore of an indirect character only.

Indirect is even the effect of the rules of law which either render the tie of marriage completely indissoluble or permit the dissolution of the marriage tie only under certain limited conditions. A legal system which excludes divorce or under which a divorce is obtainable only with difficulty cannot prevent the occurrence of factual separation and abandonment or the creation of new adulterous unions. All it can do is to prevent the creation of a legally recognized new union. The effectiveness of the law concerning divorce is therefore not so obvious as it may appear at a first glance.

Even more difficult to ascertain is the casual effectiveness on marriage stability of laws concerning such topics as marital property rights, social security, taxation, pensions, family allowances or housing, or of laws providing for the use of public funds for marriage counseling or education for family living.

In view of this striking lack of indispensable knowledge and information, the members of the colloquium unanimously reached the conclusion that the 1957 Colloquium should be charged with the task of preparing the collection of such factual knowledge.

It was also unanimously held that it would be impossible for a colloquium of short duration by itself to find all the information which is presently lacking. The task of collecting the data will require years. The colloque will have achieved a task of great importance, however, if it succeeds in finding and defining the questions to be answered, in indicating methods for their solution, and in establishing a well-structured systematic survey of all the problems.
not only to eliminate all friction, but also to carry on all conversation in the calm spirit of scientific inquiry. It was also possible to reach agreement on a considerable number of propositions, the most important of which can be summarized as follows:

1. Legal devices to prevent family breakup can operate only by indirection. Governmental power cannot be effectively used to compel a married man or woman to live with his or her spouse against his or her own wishes. No such attempts are made anywhere in modern society. All the state can do is, by threatening punishment or by direct action, provide for the enforcement of those duties of support which are incumbent upon a husband or father or, in some countries, upon a married woman or a mother. The law can also prevent the factual breakup of a marriage being followed by the conclusion of new legitimate marriages by the parties.

Divorce laws, that is, laws which exclude or limit the possibility of dissolving the legal tie of an existing marriage, cannot prevent the factual breakup of a marriage by unilateral abandonment or mutual separation or by the creation of new irregular unions.

2. While it is likely that a society's state of marriage stability is to some extent influenced by the comparative ease or difficulty with which the formal dissolution of a marriage and, consequently, the conclusion of a new legitimate marriage can be obtained, few efforts have so far been made to obtain more precise information about this causal relationship, and hardly any reliable information is presently available.

3. Among the present laws dealing with the dissolution of an existing marriage, the following groups can be distinguished:

a) Marriage is completely indissoluble in any way other than by the death of one of the spouses—Canon Law of the Roman Catholic church; Spain, Italy, Peru, Brazil, Colombia.

b) A marriage can be dissolved upon the petition of one party if the other has been guilty of a grave violation of his marital duties—system of divorce sanction; Verschuldensprinzip; England, Scotland, most states of the United States of America, France, and many others.

Kinds of misconduct enumerated in the divorce statutes as "grounds for divorce" are such acts as adultery (only ground for divorce in New York), physical cruelty (England, most American states), mental cruelty of various kinds (France, some American states), or malicious desertion for a certain minimum period, such as two years (Germany) or one year (Illinois).

c) A marriage can be dissolved where it is so thoroughly broken in fact that its factual revival cannot be reasonably expected—system of divorce faillite, Zerritiitungsprinzip.

The agency by which a party's application for the dissolution of his marriage is to be acted upon may be ordered by the appropriate statute to grant the application if the
this with impunity when the buyer is an interested customer, actual or potential, for the corporation's product. But when the sale necessarily results in a sacrifice of this element of corporate good will and consequent unusual profit to the fiduciary who has caused the sacrifice, he should account for his gains. So in a time of market shortage, where a call on a corporation's product commands an unusually large premium, in one form or another, we think it sound law that a fiduciary may not appropriate to himself the value of this premium.

This passage suggests that the case was treated as analogous to the looting cases. The court could say that sale of control to a potential customer under conditions of shortage resulted necessarily in a sacrifice of corporate good will only if it assumed that the new management would not allocate production in accordance with the best interests of the corporation and would thus violate its fiduciary duty of loyalty. No reference was made to the looting decisions, however, and this may possibly reflect a desire to make the opinion serviceable as an entering wedge for a broader rule of liability.

The foregoing is a summary of the principal cases imposing restrictions upon sales of controlling shares. In none of these cases does the opinion argue for a broad rule that the same offer must be made to all shareholders, and many of the opinions expressly reject this rule. Furthermore, there are a number of decisions (in addition to the Dunnett cases) in which the court refused to make the seller account for a premium. *Levy v. American Beverage Corp.*, 38 N.Y.S. 2d 517 (1st Dept., 1942). *Tryon v. Smith*, 191 Ore. 172 (1951).

The view that controlling shares may have a legitimate premium value is also illustrated by the decision of the House of Lords in *Short v. Treasury Commiss.*, [1948] A.C. 534. Here the government had taken all the shares of a corporation under Defense Regulations requiring the payment of "not less than the value...as between a willing buyer and a willing seller." Holders of relatively small blocks of shares objected to the price offered (20s. 3d.), which was based upon stock-market quotations. They contended that the price should have been determined by valuing the entire enterprise and dividing by the number of shares. The arbitrator found that on such a basis each share would have been worth 41s. 9d. This contention, however, was rejected. Lord Uthwatt said:

If some one shareholder held a number of shares sufficient to carry control of the company, it might well be that the value proper to be attributed to his holding under the regulation was greater than the sum of the values that would be attributed to the shares comprised in that holding if they were split between various persons. The reason is that he has something to sell—control—which the others considered separately have not. The contention of the appellant, if accepted, would, as the Court of Appeal point out, deny him the real value of his holding.

In this paper, however, my concern is not with the present state of the law but with the desirability of a rule which would destroy the premium value of controlling shares. Such a rule was urged by Berle and Means in *Modern Corporation and Private Property*. They suggested that "the power going with 'control' is an asset which belongs only to the corporation; and that payment for that power, if it goes anywhere, must go into the corporate treasury." Why should this be true? Presumably the notion of control as a corporate asset is a way of saying that the law should make it impossible for holders of controlling shares to realize the full market value of their shares—or what would be the market value in the absence of the rule suggested. Why should the law intervene in this way?

The first reason urged for a broad restriction on sales of control springs from concern over the motives of the purchaser and the type of transactions likely to follow the transfer of control. Professor Jennings suggests that in the usual case the purchaser's willingness to pay a premium springs from an expectation of returns which will not be shared with all shareholders, returns flowing from private exploitation of "corporate patronage or other non-balance sheet assets or from diversion of profits in reorganization or liquidation." The concern is that the purchaser and those he places on the board will not exercise their management powers in the interests of all the shareholders and that the usual rules of fiduciary loyalty are insufficient protection against such mismanagement.

This suggestion recalls the Newport Steel Corporation case, in which the sale was to a group interested primarily in...
The Sale of Corporate Control

Summary of a Lecture before the Chicago Bar Association

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May the owner of a controlling block of corporate shares sell his holding when an opportunity to sell at the same price is not given to the other shareholders? If he does so, must he account to the corporation or to the other shareholders for the part of the proceeds which represent the "control premium"? These questions are ably discussed in recent law-review articles by Professor Richard W. Jennings (44 Calif. L. Rev. 1) and Professor Noyes Leech (104 U. of Pa. L. Rev. 725). These articles marshal evidence of a trend restricting the freedom of controlling shareholders to sell their shares. Professor Jennings supports the flat rule that when control is sold all shareholders should have an opportunity to sell on the same terms. In this paper I wish to examine the grounds for such a rule and to indicate why I believe them unsatisfactory.

To clear the way for a consideration of the central question, it is necessary first to refer to three theories upon which relief may be given against the seller in certain special situations.

Sale of office.—Corporate officers or directors may not retain sums paid to induce them to resign or to aid others in becoming their successors. This rule was developed in cases where no sale of shares was involved, but it has been invoked also where an agreement for sale of controlling shares required the seller to facilitate the buyer's gaining control of the board by causing successive resignations of directors and substitution of nominees of the buyer. It is argued that this constitutes a sale of directorships as well as shares, and the argument has added force if an identifiable part of the consideration seems to have been paid for thus procuring the election of new directors.

Such a case was Porter v. Hedy, 244 Pa. 427 (1914), in which a uniform price per share was offered to majority and minority holders alike, but with a separate "control fund" paid to the defendants (and not distributed among them according to stock ownership). The court required the defendant to account for the "control fund," and the opinion shows the danger of a separate allocation of consideration for control. It is reasonable to infer, however, that the consideration was separated in this manner because the buyer was planning to represent to minority shareholders that the majority had accepted the same price for their shares. Such misleading statements were actually made, and the recovery might well have been given on the ground that the minority were improperly induced to part with their shares. This ground is discussed below.

However, in cases where no special abuse was involved, the convenient arrangement for transfer of control by resignation and filling of vacancies has not been held to require the seller to account for a portion of the price on the theory that corporate offices have been sold.

Inducing sale by minority.—In some of the cases requiring accounting for the premium, the sellers were directly implicated in representations or suggestions made to the minority that the price offered to them was the same as that which the majority were receiving. This was the situation in Dunnett v. Arn, 71 F. 2d 912 (C.A. 10th, 1934). Here recovery was given to shareholders who relied upon a communication which invited the interpretation that all shareholders were treated equally. The court also spoke of the sale of the controlling shares as a "corporate transaction" analogous to a sale of assets, in which shareholders would participate equally. The actual ground of the decision is clearly shown, however, in the fact that the court denied recovery to shareholders who made no showing of reliance upon the misleading communication. In a related case it was later pressed upon the court that its "corporate transaction" theory would justify recovery on behalf of all shareholders. The court rejected this argument, however, and again refused relief to shareholders who were not misled. Roby v. Dunnett, 88 F. 2d 68 (C.A. 10th, 1937).

Negligent sale to irresponsible buyer.—In another group of cases liability has been imposed where controlling shares were sold to persons who later looted the corporation and where the sale was made under circumstances putting the seller on notice of the probability of such injury. The leading cases involved investment companies which are subject to peculiar danger because of the liquidity of their assets. Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa., 1940), 42 F. Supp. 126 (1941). Gerdes v. Reynolds, 28 N.Y.S. 2d 622, 30 N.Y.S. 2d 755 (Sup. Ct., 1941). In these cases the high prices offered and the buyer's apparent haste to secure control of the assets were circumstances held to put the sellers on notice. In this situation liability is justified on general tort principles. The freedom

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Mr. Justice Burton greeting other members of the Bench. Left to right: Judge F. Ryan Duffy and Judge H. Nathan Swain, JD '16, of the U.S. Court of Appeals (Seventh Circuit); Judge Elmer J. Schnackenberg, JD '12, of the same court; Judge Julius Hoffman, of the U.S. District Court; and Judge Hugo Friend, JD '08, of the Illinois Appellate Court.