History, Empirical Research, and Law Reform: A Short Comment on a large Subject

By Francis A. Allen
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We in the law schools (to borrow a phrase from Karl Llewellyn) are living through the “second explosion” of interest and activity in the empirical study of legal institutions and processes. It cannot fairly be said that the philanthropic foundations have supplied the spark for the detonation; but they certainly have provided a lot of the power. Explosions, if uncontrolled, can be destructive. But it is not my purpose, in this brief note, to inquire into the myriad problems that have followed in the wake of recently launched programs of institutional research. Rather, for the purposes at hand, I shall assume that these difficulties can and will be resolved, that project research will be domesticated with reasonable success, and that programs of other-than-doctrinal inquiry will become accepted as a normal and important part of the institutional functions of many law schools. I shall, on these assumptions, confine myself to the consideration of one small, but perhaps neglected, aspect of the broad question: How can the utility of such research be most fully realized?

It would certainly be a gross error to assert that, in the movement toward empirical studies of legal institutions, no significant thought has been given to the role of historical research. If one turns to the Summary of Studies in Legal Education, issued by the Columbia law faculty in 1928 (which occupies a place somewhere near the center of the “first explosion”), he will discover frequent references to historical studies, in connection with both curriculum matters and research. Indeed, one of the objectives, stated in the Summary is “to lay the basis for more serious study of legal history than has hitherto been contemplated in this country.” Everyone knows that highly important historical scholarship was inspired by the Columbia studies and by thought of similar orientation elsewhere. And yet, conceding all this, it is probably fair to say that the movement toward empirical research in the law has not been strongly characterized by consistent interest and concern with historical studies. Those attracted to non-doctrinal inquiry have, in general, felt a stronger affinity with the sociologist, the economist, and the psychologist than with the historian and his discipline. The truth is that some of those who, in the last generation, struck the match to the “first explosion” were not only uninterested in, but were inclined to doubt the value of, historical studies, both in and out of the law. And this unconcern, if not hostility, is probably characteristic of a good many who have become active in the contemporary phase of the movement.

It is not hard to advance partial explanations for this situation. One reason undoubtedly lies in the character of much historical research in the closing years of the last century.
New Appointment

The Law School takes great pleasure in announcing the appointment of Roger C. Cramton, JD '55, as Assistant Professor of Law. Mr. Cramton will join the Faculty in the Autumn Quarter of this year.

Mr. Cramton was graduated from Harvard College in 1930, Phi Beta Kappa and magna cum laude. After two years of graduate work at the University of Chicago, he entered The Law School in the autumn of 1952. He was the Class of 1935 Scholar during his second year and a Kosmerl Scholar in his final year. He was the winner, in 1953–54, of both the prize for the best oral argument in moot-court competition and the prize for the best brief submitted in that competition. In his Senior year in the School, Mr. Cramton became editor-in-chief of the University of Chicago Law Review. He was graduated from The Law School in June, 1955, cum laude and Coif.

Following his graduation, Mr. Cramton became law clerk to Judge Sterry Waterman, of the United States Court of Appeals for the Second Circuit. After his year with Judge Waterman, Mr. Cramton became law clerk to Mr. Justice Harold Burton, of the Supreme Court of the United States. His year's service in this position is now nearing completion.

Mr. Cramton is from St. Johnsbury, Vermont. He is married and has two children.

New Assistant Dean

The Law School is pleased to announce the appointment of Mrs. Jean Allard as Assistant Dean. Mrs. Allard received her A.B. from Culver-Stockton College in 1945, her A.M. from Washington University, St. Louis, in 1947, and did further graduate work toward a Ph.D. in Psychology at the University of Chicago. She was graduated from The Law School in June, 1953; during her final year she was an associate editor of the University of Chicago Law Review. Since her graduation she has been associated with The Law School as a Law and Behavioral Science Research Fellow, concerning herself primarily with the School's Arbitration Project.

Faculty Notes

During the academic year 1956-57 the Faculty of The Law School engaged in its usual extensive program of public lectures, service on committees designed to advance the profession, and a wide variety of similar activities. A partial listing includes:

ASSISTANT DEAN JEAN ALLARD: Member of the Chicago Bar Association's Committee on Administrative Law.

PROFESSOR FRANCIS ALLEN: Chairman, Drafting Subcommittee, Joint Bar Association Committee To Draft a Criminal Code for Illinois; special consultant, ALI Model Penal Code Project; lecturer, Federal Probation Service Training Program; lecturer, Distinguished Alumni Visitation Program, Cornell College; member, Executive Board, Illinois Academy of Criminology; chairman, Criminal Law Round Table Council, Association of American Law Schools; member, Legislative Committee, Metropolitan Housing and Planning Council of Chicago; speeches at the Illinois Academy of Criminology, at the Fourth Annual Judicial Council, and at the Law School Luncheon during the annual meeting of the Illinois State Bar Association.

PROFESSOR WALTER BLUM: Member, Federal Taxation Committee, Chicago Bar Association; member, Advisory Group, American Law Institute Tax Project; member, Income Tax Committee, Tax Section, American Bar Association; member, Program Committee, Chicago Federal Tax Forum; member, Planning Committee, University of Chicago Law School Annual Federal Tax Conference; member, Post-admission Education Committee, Chicago Bar Association; conducted a seminar at Yale Law School on "The Uneasy Case for Progressive Taxation."

NORMAN BURSLER: President, Chicago Association of Law Libraries; member, Joint Committee on Cooperation between the Major Law Librarians.

PROFESSOR BRAINERD CURRIE: Member of Board of Editorial Advisers for Legal Subjects, Encyclopaedia Britannica; consultant on legal matters, Illinois Higher Education Commission; member, Executive Committee, Section on Civil Practice and Procedure, Illinois State Bar Association; member, Committee on Racial Discrimination in Law Schools, Association of American Law Schools; chairman, Special Committee on Definition of Sound Educational Program, Association of American Law Schools; participated in panel discussion of new Illinois Civil Practice Act

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Horace Kent Tenney

By Henry F. Tenney, JD '15

[This is the third in a series of lectures on eminent lawyers which is being sponsored by The Law School. The first two lectures, "Stephen Strong Gregory," by Mr. Tappan Gregory, and "Silas Strawm," by Mr. John Slade, appeared in the two preceding issues of the Record.]

A friend once asked my father, Horace Kent Tenney, how he managed to do so many things at the same time, to which he replied, "Half the fun of practicing law is to see how many balls you can keep in the air at the same time."

This ability to carry on simultaneously many wholly unrelated matters was one of his outstanding characteristics—not only to carry them on but to do so with relish and with zest. After a heart attack in 1920, his family and friends tried to persuade him to slow down and give up some of his professional labors. To these entreaties, he answered, "I intend to go down with the harness still on," and that is just what he did.

In 1859 Portage, Wisconsin, was a small frontier village between the Fox and Wisconsin rivers at a point where these rivers are scarcely two miles apart. It is, therefore, a natural portage from Lake Michigan to the Mississippi River. It was the route traveled by Pierre Radisson and by Marquette and Jolliet. For years it was the site of an active trading post and of Fort Winnebago, which protected the white settlers from the Indians. The coureurs de bois, black-robed Jesuits, roving trappers, and traders of all kinds who passed that way left something of their adventurous spirit behind them—traces of which were still apparent in 1859.

In this small town of Portage, Horace Kent Tenney was born on September 11, 1859, ninety-seven years ago last fall. As a demonstration of the then primitive character of Portage, it is recorded that a large black bear walked unconcernedly down the main street on the day of H. K.'s birth. He (that is, H. K.—not the bear) always claimed that in some mysterious way the presence of that old she-bear officiating at his birth instilled in him a lifelong craving for the forests, lakes, and streams of Wisconsin.

He took naturally to the practice of law, as his father, Henry W. Tenney, and his uncle, Daniel K. Tenney, were both active practitioners when Wisconsin was still a territory. His father's office in Portage was over the town's one bank on Main Street. There he attended to the legal wants of such clients as were available in that small community.

His family moved to Madison when, judged by its present size, it was still a small town. Covered wagons lumbering westward, wandering remnants of vanishing Indian tribes, soldiers, en route to the Civil War battlefields, and restless travelers of all kinds were familiar sights on its muddy streets. It was, of course, the state capital and the seat of the state university, which gave it a distinctive flavor, a charm, and an atmosphere all its own.

The families that settled there were drawn together in a closely knit group so that, no matter how far they might wander from the home town, they were always proud of their Wisconsin heritage and looked upon all Madisonians as kinsfolk. H. K. once said, "Wherever we live we may also boast that we are Badgers still, and wherever we live we may also boast that we are Badgers who lived in the boyhood of their state."

As late as 1870 the largest part of Wisconsin was covered with forests, and Chicago, as the largest city in the vicinity, exercised a powerful magnetic pull on the surrounding area. It drew to this spot trade, industry, commerce, and people in ever increasing numbers. Its magnetic field was sufficiently wide to include Madison and to induce H. K.'s family to leave their native heath and come here. From that time until his death in 1932, he lived in Chicago, most of the time within a few blocks of this campus.

He entered the old University of Chicago, then located at Thirty-fifth Street and Cottage Grove Avenue. As I understand it, and in this I could be wrong, it was a sort of a high school, not a university in the sense that it is today. It had a rather checkered financial career, finally closing its doors in 1886. It was, nevertheless, one of the schools from which our battle-torn towers have sprung.

At this school he had as two of his classmates his lifelong friends, Edgar B. Tolman and Cyrus Bentley. Both were to become distinguished members of the Chicago bar, the

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INTERNATIONAL LAW CONFERENCE

The Law School and the American Society of International Law were joint sponsors of a Conference on International Law and the Middle East Crisis; the Conference was held on the Quadrangles in April. The papers which follow were delivered at that Conference.

The Middle East Crisis and Developments in International Law

By Leonard C. Meeker
Assistant Legal Adviser for United Nations Affairs, Department of State

I have been asked to talk this afternoon about developments in international law related to the Middle East crisis of the last few months, particularly as those developments are connected with the actions of the United Nations. This is a rather large order when we consider the number and range of legal questions which have emerged from events in the Middle East and which have in a number of instances come before the United Nations. It is also necessary to include, here, constitutional developments in the United Nations Organization itself, following on these Middle Eastern events. My purpose is primarily to raise questions, knowing that answers are difficult to reach, if attainable at all.

A catalogue of major legal issues might run as follows:

Was Egypt's nationalization of the Suez Canal valid, and what legal effects are to be attributed to it?

How were the military operations against Egypt by Israel, France, and Great Britain to be characterized, and what measures were to be taken in consequence?

Was the obstruction of the Suez Canal and of the flow of oil through international pipelines justified?

Does Egypt have valid claims for war damages against Israel, France, and Great Britain? Do the decrees providing for Egyptianization of foreign business enterprises in Egypt give rise to justifiable international claims?

What are the rights of navigation in such waterways as the Suez Canal, the Strait of Tiran, and the Gulf of Aqaba?

NATIONALIZATION OF THE SUEZ CANAL

In talking about the Middle East crisis, a convenient point of beginning is the nationalization of the Suez Canal by Egypt last July. Was the action lawful and valid? Did the compensation offered by Egypt meet the requirements of international law? Would the nationalization be accorded extraterritorial effect as to assets of the Suez Canal Company outside Egypt? Are shipowners paying tolls to Egypt protected from lawsuits which might be brought by the company for the same tolls? Professor Olmstead has already given us a comprehensive view of the various legal questions raised by the Suez nationalization, so I shall refer here only briefly to certain aspects which have particularly concerned the United States government.

On the question of validity, the argument has been made that the Suez Canal is an international public utility to

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Nationalization of Property: The Suez Canal Company Case

By Cecil Olmstead
Professor of Law and Director of the Middle East Institute
New York University

During the post-World War II decade rising economic and social demands of peoples in some of the less-developed areas of the world have sometimes manifested themselves in governmental taking of foreign-owned enterprises. In some of these quarters the belief persists that governmental operation of enterprise will accelerate economic and social development. These takings, variously termed "nationalizations," "expropriations," or "confiscations," have been legally rationalized as being exercises of sovereignty or acts of state.

Because of the contemporary interest of both capital-exporting and capital-importing countries in foreign investment of a private nature, examination of the legal and policy problems raised by nationalizations and similar takings of foreign-owned holdings appears desirable. A principal focal point to be developed is the legal effect of governmental takings of properties and other interests operated by foreign enterprise pursuant to a valid agreement between the government and such enterprise.

The history of governmental takings seems to be as long as recordation. Early takings of private property did not typically present international problems, for in the usual case the property was locally owned and the sovereign took it through the exercise of eminent domain. The doctrine of eminent domain developed in an era when international investment was of little or no consequence and, therefore, did not affect foreign interests. Furthermore, the practice of eminent domain, at this early date, was limited in scope and subject matter, and the character of the sovereign was indeed that of a personal sovereign frequently accorded a measure of divine right. Even a sovereign in this historic sense, however, was limited in the exercise of eminent domain to a taking for a public purpose. Such a purpose in this sense was one designed to accomplish a governmental, as distinguished from a proprietary, purpose. Normally, the validity of the taking was predicated upon the payment of fair compensation to the owner.

The first significant nationalizations of the twentieth century were those decreed by the Russian Socialist Federated Soviet Republic following the revolution in 1917. In important respects the Russian Communist takings were unique and marked a departure from prior practice of other

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which the ordinary rules concerning nationalization do not apply. The history and provisions of the Constantinople Convention of 1888 have been cited as a basis for the proposition that the Canal was immunized by treaty from nationalization. So far as the United States government is concerned, it has reserved its position on this question and indicated its disposition to try to work out a practical solution of the Canal problem which would protect the interests of all concerned.

International discussions prior to the outbreak of hostilities last fall were looking toward the conclusion of an agreement which would settle both the question of compensation and the commitments regarding future operation of the Canal. Following Egypt's rejection of proposals worked out at London by a group of user nations, the United Nations Security Council on October 13, 1956, adopted a resolution—with the concurrence of Egypt—which set forth six agreed requirements for a settlement governing the Suez Canal. These requirements were as follows:

1. There should be free and open transit through the Canal without discrimination, overt or covert—this covers both political and technical aspects;
2. The sovereignty of Egypt should be respected;
3. The operation of the Canal should be insulated from the politics of any country;
4. The manner of fixing tolls and charges should be decided by agreement between Egypt and the users;
5. A fair proportion of the dues should be allotted to development;
6. The possession of all property in the Canal area should be vested in the United Nations.

Before the revolution, foreign capital invested in Russia amounted to more than two billion rubles. This was completely lost, and all private ownership of property in the Soviet Union was abolished. The Soviet government offered no compensation to foreigners or to Russians. This action was accomplished by force, and, once the government proved that it was able to survive, there was little that could be done through peaceful means to obtain redress. Attempts were made by Russian nationals in the courts of the United States and Britain to recover their confiscated property which the Soviet government had sold to persons who transported it to other forums. While there was some early division of decision on the question of whether or not the Soviet government obtained title, once that government had received recognition by the states in which litigation arose, the Soviet confiscations were brought under the magic mantle of the "acts of state" doctrine, and all lived happily ever after.

The second major nationalization of this century occurred in Mexico. By the end of the dictatorship of Díaz in

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David Goepper, chairman of the Chicago Bar Association Committee on International Law, opens the afternoon session of the Conference on International Law and the Middle East Crisis. Seated, from left to right: Professor Cecil Olmstead of New York University Law School, Rolf Bengston of the World Bank, and Leonard Meeker of the State Department.

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Professor Nicholas deB. Katzenbach (center), who was in charge of the International Law Conference, talking with speakers Cecil Olmstead, New York University School of Law (left), and Leonard Meeker, U.S. Department of State (right).
Distinguished Visitors

During the Spring Quarter The Law School had the pleasure of acting as host to four distinguished visitors from abroad.

Dr. Konrad Zweigert is professor of law at the University of Hamburg and a former member of the Constitutional Court of the German Federal Republic. Dr. Zweigert delivered a public lecture at The Law School on the subject of "The German Constitutional Court." Preceding the lecture a dinner was held at the Quadrangle Club in Dr. Zweigert's honor.

Dr. Hafeez ul-Rahman, dean of the Law School at Aligarh Moslem University, India, was a guest of the School for about ten days. Dean Rahman is spending several months in the United States, studying American methods of legal education.

Dr. Herman Mannheim, professor of law at the London School of Economics and Political Science, visited The Law School for several days. During the course of his stay Professor Mannheim was the guest of the Faculty at a dinner in the Law Lounge, Burton-Judson Court, following which he presented a public lecture on the subject, "Judicial Sentencing Policy."

Mr. C. J. Hamson, professor of law, Trinity College, Cambridge University, was the fourth eminent guest. Professor Hamson spoke informally following a downtown luncheon held by the School for members of the bench and bar in Chicago. His topic was "The Rule of Law as Understood in the West." Professor Hamson will return to the University in September for the forthcoming meeting of the International Association of Legal Science.

Chief Justice Wilbert F. Crowley, of the Criminal Court of Cook County, with law students before the Mannheim lecture. The judges of Criminal Court were guests of the School at the dinner honoring Professor Mannheim.

Professor Herman Mannheim of the London School of Economics and Professor Francis Allen at the dinner for Professor Mannheim which preceded his public lecture.

Professor Wilber Katz presents the Joseph Henry Beale, Jr., Prize to Kenneth Howell, '59. The prize is awarded annually to the student whose work in the first-year tutorial program is judged by the Faculty to be most worthy of special recognition.
Allen—
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History has been written in response to a variety of motivations and to serve a variety of purposes. Certainly, many of "the Historical School" often employed history as an instrument of legal conservatism. It was not entirely without reason that some who pioneered in the application of empirical technique to the study of legal processes recognized in the legal historian their natural enemy. Perhaps more fundamentally, it is a matter of temperament. An urge to disturb the dusts of the past and a desire to apply empirical technique to contemporary issues are not always found in the same person, and rarely in anything approaching the same degree of intensity.

Nevertheless, it seems to me that historical studies have a role to play in the current movement toward empirical inquiry and that this role has not always been adequately appreciated. In making this observation, I am not simply viewing with alarm the current state of scholarship in American legal history. Of course, the field is and has been neglected; but a reasonable amount of very good work is being done, and there are favorable auguries for healthy development in the future. Nor should I be understood as saying that the study of legal history can be justified only by its contributions to empirical inquiry into contemporary problems. No doubt, history, like Emerson’s Rhodora, provides its own excuse for being. It may be essential to the “humane study of the law,” as Boorstin would have it. And it has contributions to make to doctrinal, as well as other sorts of, scholarly endeavor.

But it is the relations between historical and “fact” research that I wish to assay. Presumably, the general object of systematic examination of legal institutions and legal processes is to derive understanding. But most research in the law contemplates that such understanding shall be put to use, and this use may often be the intelligent modification of existing institutions, processes, and doctrine. It is my contention that, in many instances, the attainment of these objectives is assisted and advanced by competent historical inquiry and that, clearly, the construction of any general theory of institutions is not possible without very considerable research into extensive historical sequences, along with much else.

In considering some of the reasons for this, I should perhaps begin with a truism. Most would agree that, ordinarily, intelligent fundamental modification of institutional arrangements requires the grasp of some useful general notions of institutional behavior and a great deal of understanding of what the particular institution is and does. And understanding of what any particular institution is requires knowledge of how it has become what it is. Perhaps most of what I shall say is really summarized in this formulation. But the statement is too general to be either very meaningful or persuasive.

Second, history expands the range of basic data relevant to the understanding and solution of contemporary problems. This is true both with reference to the ordinary functions and functioning of institutions and with reference to the effects of various measures impinging on the operation of institutions and processes. This proliferation of data provides a stimulus to the imagination when making provision for the problems of the future. It may, for example, permit the legislative draftsman to avoid “forgetting something” vital when he undertakes to order or influence the future.

Third, history frequently throws light on what will and what will not work. It frequently suggests something of the price that must be paid in countervailing values. Can it be doubted that a really competent modern account of that great (if not noble) experiment, Prohibition, would have much of value to teach as to contemporary problems of social policy and the mechanisms of social control within the legal order? And should one doubt the significance of the element of recurrence in historical development, let him compare the problems of the Thames waterfront in the closing years of the eighteenth century, as described by Radzinowicz in the second volume of his evolving history of English criminal law, with the conditions of the New York waterfront in the 1940’s and 1950’s.

Fourth, historical research (to state an apparent paradox) is often required to overthrow the dead hand of tradition. To express the thought differently, history needs writing to correct false notions of history and the social consequences of such notions. No matter is of greater importance to the law reformer, or any other apostle of change, than the currently accepted historical image of the institution, arrangement, or process which he seeks to alter. This is true whether he be concerned with the jury, the privilege against self-incrimination, the elected judiciary, or the use of the seal in real estate transactions. As Morris Cohen well said, inertia is the first law of social change, as it is of physics. In the social arena the sanctification of existing institutions is the mechanism of inertia. No claim need be made that the competent writing of history will often, by its own force, guarantee the achievement of that which is needful. But it can and should be asserted that historical research may clear the ground for, and render more nearly possible, the rational and intelligent discussion of what is required to be done. Nor is it the point that historical research is only an instrument of change. For, as Julius Goebel has properly observed, it has lessons to teach as to what are the essentials of the tradition worth preserving as well as to what may sensibly be abandoned or altered.

Fifth, history serves to keep alive insights and proposals of the past which tend to be lost in oblivion. This is a wastage of intellectual assets we can ill afford. The lack of continuity relating the work of one investigator to that of another, and the loss thereby occasioned, has frequently been noted in the social disciplines, including non-doctrinal work in the law. I suggest this discontinuity also separates the

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Three graduates of The Law School will serve as law clerks to Justices of the Supreme Court of the United States during the forthcoming year.

Mr. Preble Stolz, JD '56, will be law clerk to Mr. Justice Harold A. Burton. Mr. Stolz, a native Chicagoan, received the B.A. degree from Reed College in 1953. He then came to The Law School as the recipient of the Reed College–University of Chicago Law School Scholarship. In 1954 Mr. Stolz was awarded the Joseph Henry Beale, Jr., Prize for the best paper submitted pursuant to the work of the first-year tutorial course. He became editor-in-chief of the University of Chicago Law Review, was elected to the Order of the Coif, and was graduated in June, 1956. During the past year Mr. Stolz has been serving as law clerk to the Honorable Walter Pope, JD '12, judge of the United States Court of Appeals for the Ninth Circuit.

Mr. Kenneth W. Dam has been appointed law clerk to Mr. Justice Charles Whittaker. Mr. Dam, who is from Maryville, Kansas, was graduated from the University of Kansas in 1954. He received the degree of Bachelor of Science and stood first in his graduating class. Mr. Dam has served as associate editor of the University of Chicago Law Review and has been elected to membership in the Order of the Coif.
Mr. Dallin H. Oaks will serve as law clerk to Mr. Chief Justice Earl Warren. Mr. Oaks, a native of Spanish Fork, Utah, received the Bachelor of Arts degree from Brigham Young University in 1954; he was first in his graduating class. In 1955 he was awarded the Joseph Henry Beale, Jr., Prize for the best paper written in fulfillment of the requirements of the School's first-year tutorial program. Mr. Oaks was editor-in-chief of the University of Chicago Law Review and has been elected to the Order of the Coif.

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and Supreme Court Rules at the Annual Meeting of the Illinois State Bar Association; chairman, Nominating Committee, Association of American Law Schools; member, Round Table on Remedies, Association of American Law Schools. Professor Currie will spend the Autumn, Winter, and Spring quarters as a Fellow at the Center for Advanced Study in the Behavioral Sciences at Palo Alto, California. Mr. Currie will devote his time at Palo Alto to research on problems in the conflict of laws. He will return to The Law School in the Autumn Quarter, 1958.

Professor Allison Dunham: Chairman, Committee on Planning and Developing Metropolitan Communities, Section of Real Property, Probate and Trust Law, American Bar Association; member, Real Property Committee, Chicago Bar Association; member, Board of Governors, Metropolitan Planning and Housing Council of Chicago.

Professor Harry Kalven: Chairman, Conference of Law Teachers and Social Scientists at the Center for Advanced Study in the Behavioral Sciences; participant, Round Table on the Jurisprudential Bases for Absolute Liability, Annual Meeting, Association of American Law Schools; served as only lay participant on the Panel on Forensic Psychiatry at the annual meeting of the American Psychiatric Association; member, Illinois Supreme Court's Committee on Jury Instructions; under auspices of Social Science Research Council, conducted two-day meeting on Jury Project at the University of Minnesota, meeting with law student body, members of Minnesota judiciary, and members of social science faculty, social psychology faculty, law faculty, and psychology faculty of that university; spoke on the University of Chicago Law School's Jury Research Project before the Ohio Bar Association, the Harvard Law School Alumni of Chicago, a section of the American Bar Association, the American Political Science Association, the Social Science Research Council, the Society of Trial Lawyers, the National Association of Independent Insurers, a special meeting of Minnesota judges, the Chicago Society of Criminal Lawyers, the Hennepin County (Minneapolis) Bar Association, the legal staff of the Chesapeake and Ohio Railroad, the University of Chicago Alumni Association of Washington, D.C., and the Utah Bar Association.

Professor Wilber Katz: Lecture to Chicago Bar Association on "The Sale of Corporate Control" (printed in the previous issue of the Law School Record); "Theology and Law," address at the University of Chicago Law School Luncheon held during the annual meeting of the Association of American Law Schools; lecture at Purdue University on "Moral Theology and Criminal Law"; participated in Conference on Christianity and the Legal Profession, held under the auspices of the United Student Christian Council; chairman, Committee on Academic Freedom and Tenure, Association of American Law Schools.

Professor Philip Kurland: Reporter, Illinois Supreme Court Committee on Jury Instructions.


Professor Karl Llewellyn: Participated in Social Science Research Council's Conference on Law and the Social Disciplines; addressed the American College of Trial Lawyers; delivered dedication address at dedication of the new building of the Villanova Law School.

Professor Bernard Melzer: Arbitrator in various cases involving grievance adjustments; arbitrator in practice arbitration before Industrial Management Council of South Chicago; member of the Advisory Committee on

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Selected Articles on Evidence, Association of American Law Schools; member of the Labor Law Committees of the Chicago Bar Association and the Illinois State Bar Association.

Professor Soia Mentschikoff: Spoke to a general meeting of University of Chicago alumni in Chicago, and a similar meeting in New York, on The Law School's Arbitration Project; speech on Founder's Day at Hunter College on "Law and the Liberal Arts."

Norman Miller: Speeches before the Chicago Bar Association on "Arbitration in the New York Stock Exchange" and "Legal Education in England and the United States."

Assistant Dean James Ratcliffe: Member, Planning Committee, University of Chicago Federal Tax Conference; member, Committee on Matrimonial Law, Illinois State Bar Association.

Max Rheinstein, Max Pam Professor of Comparative Law at the University of Chicago Law School, was recently awarded the honorary degree of Doctor of Laws by the University of Stockholm.

Professor Rheinstein, who came to the Law Faculty in 1933, is Director of the School's Comparative Law Research Center. He is a member of the Executive Board of the American Foreign Law Association, of the Board of Directors of the International Society for Copyright Law, and of the Board of Directors of the American Society for the Comparative Study of Law. He is also a member of the Senate of the Centre International d'Études Universitaires, a member of the Editorial Board of Archiv für Rechts- und Sozialphilosophie and of the Jahrbuch für Politik, and Secretary of the Board of Editors of the American Journal for Comparative Law. Professor Rheinstein served as General Reporter for the Conference on Law and Marital Stability, held last year in Spain under the auspices of the International Association of Legal Science, UNESCO.

Professor Sheldon Tefft: Addressed University of Chicago Law School Alumni meetings at the annual meetings of the State Bar of California and of the Iowa State Bar Association. Professor Tefft will teach at the University of California School of Law at Berkeley, California, during the Autumn Quarter, 1957. He will return to The Law School at the beginning of the Winter Quarter, 1958.

Christopher Wright: Fellow of the Institute on Ethics of the Institute for Religious and Social Studies.

Professor Hans Ziebel: Talks on the Law School Jury Project before the Oregon Bar Association, the Kentucky Bar Association, the Bar Association of Kansas City, and the Railroad Lawyers' Association of Missouri; speech on "The Rationale of Punishment" at the First Unitarian Church of Brooklyn; member, Committee on Expert Testimony, American Bar Association.

To His Coy Professor

Dedicated to Professor Kalven, one-fourth of whose text was completed at the end of the first one-half of the course.

Had we but world enough and time, This volume, Harry, were no crime. We would sit down and think which way To learn, and pass the law's long day. Thou by Professor Gregory's side Shouldst cases find: I by the dreary Hour would complain. I would Study Morris until the flood And you should, if you please, declaim, Till the last clear chance to make your fame. My knowledge of torts would grow Vaster than empires, and more slow. An hundred years should go to ponder Negligence, and at its dogmas wonder. Two hundred then upon consent, But thirty thousand on intent. An age at least, each part to scan, And then at last, The Reasonable Man. Nor would I learn at a lower rate. But at my back I always hear The winged final hurrying near, And yonder all before us, wait Deserts of Common Law, precedents great. The course shall then have been no aid, And from thy ivory tower so staid Come echoing "Fs." Next year I plea This course will move more rapidly, And Assumption of Risk will take but a week, While Negligence (wanton) will be done in a streak: The law of Torts is fine and splendid, But will this course be ever ended? Now, therefore, while my prayerful words Sit on thy desk like solemn birds; Now while thy pedagogue's soul desires To fill us with Knowledge's holy fires, Not let us learn it while we can, And now, like a furious lawyer-man Rather at once in our cases devour Than languish in this slow-chapt power. But if we fail, and our plea fall, Let us then roll our cases and all Our statutes up into one great ball And throw the bundle with tortious force At the creator of this course. Thus, though we cannot make our Prof Speed up, yet we will make him drop.

Michael Padnos
Class of 1959
The Casebook's Reply

[Published as a Robert and Public Service]

This is the law of the casebook,
That only the strong shall thrive,
That surely the weak shall perish
And only the fit survive.
Dissolute, damned, and disdainful,
Crippled and palsied and slain,
This is the will of the casebook—
Lo, how it makes it plain.

HARRY KALVEN, JR.

Sports Corner

Manager Bernie Meltzer took his place in baseball annals beside such miracle managers of the past as George Stallings and Leo Durocher, and of the present such as Al Lopez, when he led the Faculty to a 19 to 18 win over an all-star Mead House law-student team in a nine-inning softball battle at Burton-Judson Field, June 1, 1957. The game, a quinquennial affair, was a remarkable reversal of the apparent trend established in 1952, when the student team won 64 to 12. Each team scored three runs in the first inning, and the game then steadied down into a pitcher's duel. Manager Meltzer when interviewed later attributed the team's success to several factors: the increased maturity and judgment of the Faculty, the psychological desire to win, and the temporary appointment to the Faculty of some seven able-bodied students.

One rather remarkable feature of the game was that the Faculty team played errorless ball throughout and frequently got their hands, or other parts of their body, on hard chances and succeeded in deflecting them. Another rather novel feature of some interest from the legal point of view was that the Contract Termination Act of 1944 was held to apply, and as a result the score was at several points renegotiated. A knotty issue was presented late in the game when one of the students came to the plate with a cricket bat. The jurisdictional conflict was referred to Brainerd Currie, who was playing second base at the time, and he ruled that the baseball rules still controlled.

Observers who were present on behalf of the University Administration are reported to have come away much impressed and favoring lowering the compulsory retirement age at the University.

Among the Faculty players who will be back next season were Currie, Dunham, Lucas, Kalven, Zeisel, and Meltzer (mgr.)

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Aronberg was appointed to the Faculty to run for Currie in the sixth; Claus was appointed to the Faculty to bat for Dunham in the eighth. Doubles: Meltzer, Currie, Alex. Triples: Lawrence, Kline, Rudley. Home run: Alex. Fingers batted in: Kalven (1), Zeisel (1).

A lawsuit filed against the University immediately after the game shows that the students are as eager for litigation as the faculty for exercise. The plaintiffs in the action were those students who had been appointed as Lecturers in Law from 2:00 p.m., June 1, 1957, to 11:59 p.m., June 1, 1957. They have filed a class action for compensation on a quantum meruit basis. The law Faculty, blazing with confidence, has advised the University to forego several obvious defenses to liability; to offer to determine the amount thereof, if any, in the following manner: The Faculty will play another game against the students without ad hoc lecturers, but with Sheldon Toff as umpire. If the students get more runs than the Faculty, they shall as a group be entitled to a sum represented by the excess of runs multiplied by $1.32. (Cf. any section of the Revenue Act of 1954.) The plaintiffs, for reasons which are plain, have not accepted this offer. It is not easy to predict how the litigation and negotiations will come out. But readers of this corner will be promptly advised of all developments.
Annual Alumni Luncheon

On June 7 The Law School again acted as hosts to its graduates at the annual Alumni Luncheon. For the second year in succession, the weather made it necessary to move the luncheon, originally scheduled for the lawn outside the Law Building, into the Reading Room of the Law Library. In spite of the weather, however, more than 225 alumni, students, and members of the Faculty attended.

Dean Levi reported briefly on the academic year then drawing to a close. Morris E. Feiwel, JD '15, President of The Law School Alumni Association, spoke on the accomplishments of the School, the great contribution made by the alumni to the School’s growth in stature, and the need for continuing support.

Edward D. McDougal, Jr., JD '23, Chairman of the Alumni Committee of the Building Fund Campaign, reported on the results of that effort, which had been in progress for more than a year. As of June 7, 1,292 alumni of the School had contributed $338,369. Mr. McDougal pointed out that more than 200 alumni had worked actively in the Campaign; both he and Dean Levi expressed their deep gratitude for that support.

Glen A. Lloyd, JD '23, Chairman of the Board of Trustees of the University, and a past president of The Law School Alumni Association, discussed the great encouragement which could be drawn from the $2,500,000 currently on hand toward the new building and commented on the problems still to be faced in achieving the announced objective of $3,500,000.

Laird Bell, JD '07, spoke briefly and introduced his classmates, who had returned for their Fiftieth Anniversary Reunion. Leonard P. Aries, JD '32, introduced members of his Class who were present and reported that the Twenty-fifth Reunion of the Class would be held at a dinner in the Law Lounge of Judson Court that evening.

Following the luncheon Professors Brainerd Currie, Allison Dunham, and Philip Kurland discussed recent leading decisions of the United States Supreme Court.
Morris E. Feiwel, JD '15, President of the Law School Alumni Association, addressing the annual Alumni Luncheon.

Edward D. McDougall, Jr., JD '23, Chairman of the Alumni Committee of the Law Building Campaign, reports to the Alumni Luncheon on the results of the alumni effort.

A portion of the site of the new Law Building. Prefabricated structures located on the site are now being demolished and the land cleared. Burton-Judson Court, which will house law students, is on the right.
Arnold H. Maremont, JD ’26, lunches with law students in the Law Lounge. Following lunch, Mr. Maremont spoke informally on views on American Far Eastern policy, based in part on his recent visit to the Orient. This meeting was one of a series held in The Law School Residence and designed to supplement the formal program of instruction.

**Alumni Notes**

At the annual University Alumni Day ceremonies in June, Judge George Rossman, JD ’10, of Salem, Oregon, received the Alumni Medal, the University’s highest alumni award. Judge Rossman is this year celebrating his fortieth year on the bench and his thirtieth year as a member of the Supreme Court of Oregon. The Alumni Medal is awarded to those graduates who bring credit to themselves and to the University through achieving a distinguished professional career coupled with a major contribution to community and public service.

Miss Dorothea Blender, JD ’32, has been elected a vice-president of Commerce Clearing House, Inc.; she will be in charge of CCH’s Business Development Organization. Miss Blender joined Commerce Clearing House upon her admission to the Illinois Bar in 1932. She has served as president of the Women’s Bar Association of Illinois, two terms as president of the National Association of Women Law-

**Alumni Meetings**

In addition to the annual Alumni Luncheon, described elsewhere in this issue, six other alumni meetings have been held in recent weeks.

On June 7 Professor Sheldon Tefft spoke at a luncheon for Law School alumni held in connection with the annual meeting of the Iowa State Bar Association in Des Moines. Joseph Brody, JD ’15, took the lead in arranging for the meeting.

In the spring Professors Hans Zeisel and Fred Strodtbeck visited Portland, Oregon, where they described the Jury Project at a meeting of the Oregon Bar Association, and addressed a luncheon for alumni of the School and for members of the Oregon judiciary. Judge Gus J. Solomon, of the U.S. District Court, arranged for the latter meeting.

Dean Edward Levi was the featured speaker at a meeting of the University of Chicago Law School Alumni Club of Washington, D.C. He discussed in some detail the develop-

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yrs, and has been a member of the House of Delegates of
the American Bar Association.

The School notes with regret the recent death of Wil-
liam H. Leary, JD ’08, and Morton C. Seeley, JD ’10. Mr.
Leary, one of the most distinguished scholars and teachers
among the School’s alumni, was, for most of his profes-
sional career, associated with the University of Utah, first
as professor of law and later as dean of its College of Law.
Dean Leary’s daughter, Virginia, is a member of the Law
School Class of 1950; his son John is librarian of the Crom-
well Library of the American Bar Center. Mr. Seeley, of
Toledo, Ohio, entered practice in that city immediately fol-
lowing his graduation from The Law School in 1910 and
became one of the leading members of the Toledo bar. He
specialized in corporate organization and reorganization
and in municipal finance. He was widely active in public
affairs and took a special interest in problems of public
housing, both local and national.

It is with great pleasure that the School notes the election
of Jerome Weiss, ’30, who was recently chosen to serve as
first vice-president of the Chicago Bar Association. Mr.
Weiss, a partner in Sonnenschein, Lautmann, Levinson,
Rieser, Carlin and Nath, has been a member of the Board
of Governors of the Association for some years and is a
Director of the University of Chicago Law School Alumni
Association.

Meetings—
Continued from page 14

ments of the past academic year and the challenges which
the School faces in the future. William P. MacCracken, Jr.,
JD ’11, and H. Charles Ephraim, JD ’51, were in charge of
the meeting.

During the annual meeting of the Illinois State Bar As-
Sociation in Chicago, the School sponsored a luncheon for
its alumni which was addressed by Professor Francis Allen,
who spoke on some of the problems involved in teaching
criminal law.

At about the time this issue of the Record appears, there
will be a Law School Alumni Luncheon in connection with
the annual meeting of the American Bar Association in
New York. Professor Allison Dunham is scheduled to be
the speaker.

It is perhaps a little premature to speak of the next event
as an alumni gathering, but it only missed being such by one
day. On June 6 The Law School held its annual luncheon
for members of the Senior class, who were to be graduated
the following day. Professor Katz offered the toast to the graduates; Theodore Huszagh, president of the Student
Association, responded with a toast to the Faculty. Kenneth
W. Dam delivered the traditional farewell address on be-
half of the graduating class. Professor Emeritus E. W.
Puttkammer then announced the election to membership
in the Order of the Coif of Martin L. Bogot, Kenneth W.
Dam, Joseph DuCoeur, C. Curtis Everett, Bert Z. Good-
win, W. James Liebeler, Dallin H. Oaks, and Terry Sanda-
low. The proceedings were concluded with a recitation by
the graduates of an attorney’s pledge, which was written by
Professor Karl Llewellyn.

George Rossman, ’16, Justice of the Supreme Court of Oregon, who
received the University’s Alumni Medal in June, talking with Joseph
Lohman, sheriff of Cook County and a former member of the Law
Faculty, at the Alumni Luncheon.
The Class of 1932

The Class of 1932 held its Twenty-fifth Anniversary Reunion on June 7, in the Law Lounge of Judson Court. Leonard P. Aries, of Washington, D.C., class president, and Charles E. Herzog, of Chicago, reunion chairman, were responsible for the arrangements.

In attendance were more than forty members of the Class and their wives, from as far distant as Washington, D.C., and Denver, Colorado. Speakers for the evening were Dean Levi and three Faculty members who had been members of the Faculty when the Class of 1932 was at the School: Professors Emeritus Bogert and Puttkammer and Professor Katz. Class President Aries presided and announced the presentation to the School of a Class Gift in commemoration of the anniversary. The members present decided to continue with reunion meetings, probably at five-year intervals.
Federal Tax Conference

The Law School's Tenth Annual Conference on Federal Taxation will be held this year on October 23, 24, and 25 in the Auditorium of the Prudential Building.

Each year the program of the Conference is selected and arranged by a planning committee composed of members of the Chicago Bar, Chicago accountants, and representatives of the Law Faculty. This year the chairman of the committee is William Emery, of McDermott, Will and Emery; the members are John Potts Barnes, of MacLeish, Spray, Price and Underwood; Frederick Dicus, of Chapman and Cutler; William N. Haddad, of Bell, Boyd, Marshall and Lloyd; James Head, of Winston, Strawn, Smith and Patterson; Paul F. Johnson, of Ernst and Ernst; Robert R. Jorgensen; of Sears, Roebuck and Company; William McSwain, of Eckhart, Klein, McSwain and Campbell; Frederick R. Shearer, of Mayer, Friedlich, Spiess, Tierney, Brown and Platt; Michael J. Sporrer, of Arthur Andersen and Company; and Harry B. Sutter, of Hopkins, Sutter, Owen, Mulroy and Wentz. The Law School is represented by Professor Walter J. Blum and Assistant Dean James M. Ratcliffe.

Total registration for the Conference is ordinarily around 375, including lawyers, accountants, and corporate executives concerned with tax matters, coming from all sections of the country.
latter being the father of my present partner, Richard Bentley.

After two years at the University of Chicago, he entered his father's alma mater, the University of Vermont. Later he returned to the University of Wisconsin Law School, where he was graduated in 1881 with the degree of Bachelor of Laws. In later life he was awarded honorary degrees from the University of Vermont and Knox College and was elected an honorary member of Phi Beta Kappa. Such was his academic background.

He started practicing in Chicago as clerk in Stephen S. Gregory's office, and later he joined his father and his uncle in the firm of Tenney, Bashford & Tenney.

I do not know what changes have occurred in law-school teaching since 1881. I rather imagine many of the modern techniques were unheard of and, if they had been attempted, would have met with considerable protest. However that may be, one of our teaching devices was then used—that of the moot court. I have in my possession the calendar of cases in the Wisconsin moot court for the year 1881.

Case No. 1 is that of Kelly v. Doolittle. Tenney was for the plaintiff, and Harding for the defendant. These student counselors later became partners. Mr. Harding's son and grandson graduated from this Law School and became my partners. Other counsel who appeared in this moot-court calendar were Robert M. La Follette (later the governor and senator from Wisconsin) and two others who served as attorney-general of the state.

D. K. Tenney, H. K.'s uncle, came to Chicago at about the same time as H. K.'s family. I mentioned his uncle because I am sure H. K. learned something about litigation from him. He was a legendary figure at the bar, both here and in Madison. A two-fisted, rough-and-tumble lawyer, always a man of action, it was said of him that he started his lawsuits by issuing an execution. He acquired this reputation from the following incident. When he was practicing in Madison, he saw a farmer known as "Old Joe," against whom he had a claim, hitch his wagon loaded with cordwood to the rail which ran around the Capitol square. D. K. rushed over to the courthouse and into the clerk's office shouting, "Give me an execution quicker 'n Hell can scorch a feather!"

"But, Mr. Tenney," asked the startled clerk, "have you got a judgment?"

"No!" said D. K. "I haven't time to get a judgment. Old Joe'll be gone if I waste time getting a judgment."

I have a printed form dated 1879 which D. K. used in forwarding claims to lawyers in other cities. Among the instructions on the form were the following:

The race is to the swift. Act promptly. Take all chances, but do not get caught by holding too long a dangerous position. Make things happen lively. Compromise when necessary.

In my book this is pretty good advice in more situations than that of collecting bills.

From his active uncle, H. K. acquired the habit of constantly moving forward in litigation—never letting the case drag or get cold. This is not always easy to do, but it is essential to the successful conduct of litigation.

He was frequently retained by other counsel in their tough cases—cases which often had been lost in the lower court. He became what might be called a "lawyer's lawyer." If he had practiced in England, he would have been a barrister.

Since the 1880's a great change has taken place in the character of litigation. Back in those days every lawyer was supposed to try cases, and, for better or for worse, most of them did. There were no such things as "office lawyers" or "library lawyers" or what the English called "solicitors."

Legal reputation was built largely on courtroom skill. In those times, when people thought of the great lawyers, it was of those who had been successful in court.

Today, business disputes which formerly wound up in the courts are settled by arbitration or otherwise. Businessmen have found that the delays and uncertainties of court procedure are so serious as to make judicial machinery a poor vehicle for deciding most business disputes.

The result is that the vast majority of cases now pending involve personal injury. These are handled by a small number of plaintiffs' lawyers and lawyers who specialize in that field. With the advent of discovery depositions and pretrial conferences, about 80 per cent of these are settled, with the result that a young man today who wishes to become a trial lawyer has difficulty in finding enough cases to try.

H. K., however, never lacked cases to try. He was, from
the start, engaged in the controversial, litigious branch of the practice. This is remarkable when one considers what a gentle person he was, one who scarcely ever raised his voice, even in the most heated legal arguments. He was the antithesis of what many people visualize a successful trial lawyer to be. From 1881 to the time of his death in November, 1932, he was constantly engaged in trying cases of the most difficult character in all the state and federal courts. Catherine Drinker Bowen's description of Lord Coke might be well applied to H. K. "Coke," she said, "was above all a fighter, a born advocate who loved to feel the courtroom floor beneath his feet.

In my office are more than one hundred bound volumes of his written briefs. These are just the cases which reached the upper courts. There are, in addition, hundreds from which no appeal was taken. The cases cover an unbelievable variety of subjects, no two of which are the same. Each one required special preparation on both law and facts. He did not specialize in any one field.

Just as people are judged by the company they keep, so perhaps a lawyer is best judged by the character of his cases. So I think I will tell you about some of these.

**STRIKE CASES**

Back in the pre-Taft-Hartley days, at a time when there was no legislation on the subject of labor relationships, common-law principles governed the rights of the parties. A lawyer representing parties involved in a labor dispute was forced to rely on a meager supply of court decisions and to reason pretty much by analogy. There were no so-called cow cases. Each case was largely one of first impression.

H. K. was heavily involved in two of the earliest strike cases to reach our Supreme Court. These were *O'Brien v. People* (216 Ill. 354) and *Franklin Union v. People* (220 Ill. 355).

The facts in the O'Brien case were briefly these. In May, 1903, Franklin Union No. 4 presented a closed-shop contract to Kellogg Switchboard & Supply Company, stating that, if the company did not sign, the plant would be struck. The company refused to sign, and a bitter, violent strike ensued. The company secured an injunction restraining the union from obstructing the company's business and preventing workers from entering and leaving the plant. The injunction was violated on numerous occasions, resulting in convictions for contempt. The union appealed to the appellate court and later to the Illinois Supreme Court, where the injunction and conviction were sustained.

The Illinois Supreme Court held, among other things, that it was unlawful for a union to coerce the company into signing an agreement by threats of strike and to prevent other workers from exercising their right to work. The court recognized the significance of the case when it said, "The importance and far-reaching consequences of the case are fully appreciated."

While the Kellogg strike was in progress, the plants of R. R. Donnelley & Sons, W. F. Hall, A. R. Barnes, and other printers, all of whom were members of the Chicago Typothetae, were struck by Franklin Union No. 4. Violence and disorder again ensued. Chicago Typothetae obtained an injunction somewhat similar to that in the O'Brien case, which was also sustained by the appellate and supreme courts.

These cases made new law in Illinois. They have been cited countless times and frequently commented upon in law-review articles. James A. Wilkerson, who later became a federal judge, was H. K.'s partner at that time and was associated with him in these cases. Clarence Darrow and Edgar Lee Masters represented the union.

**ECONOMY POWER COMPANY**

Another case involving public interest was that of *People v. Economy Power Company* (211 Ill. 290; 234 U.S. 498). H. K. represented the state of Illinois in the Supreme Court of the United States. I will not attempt to state all the legal and factual questions involved in this prolonged litigation. Suffice it to say that it was an action brought by the attorney-general of Illinois to enjoin the Economy Power Company from building a dam across the Des Plaines River. One of the most interesting of the claims was that the Des Plaines River was once navigable and hence could not be obstructed.

The Illinois Supreme Court, in a seventy-five page opinion held against the state on all points. The case was taken to the United States Supreme Court, which affirmed the holding of the state court. The interesting question of the case concerned the navigability of the Des Plaines River. A thousand printed pages of testimony were taken on this point alone. Excerpts from the journals of Marquette, Jolliet, Schoolecraft, and others were cited extensively in the briefs to show that the early explorers had navigated the river. Anyone interested in the history of this region will find the record in this case a gold mine of information.

**TEXAS RANCH**

Another situation which generated years of litigation was the following. In 1882 the state of Texas made a contract with John V. and C. B. Farwell of Chicago and others for the construction of the state capitol at Austin, to be paid for by the transfer of three million acres of land in the Panhandle of Texas.

No part of the country is now as remote as was the northwest part of the Panhandle in the seventies and early eighties. The only means of transportation was by saddle horse and team over rough ways whose course was fixed by the possibility of water. It had to some extent supported, and was then still supporting, buffalo and wild horses. But would it support cattle through the varying seasons and varying hazards of successive years so as to make cattle-raising a commercial success? Could the land be made more productive for agricultural purposes and, if so, to what extent and by what means?

These were some of the questions confronting those who
ventured their capital in this vast undertaking. Any rewards would be for some future generation, not for those who conceived the enterprise.

In order to raise the necessary capital, the Capitol Freehold Land and Investment Company was organized in England. The Farwells and their associates (called the "syndicate") transferred the land to the corporation in exchange for its stock. Cash was provided by the sale of debentures. The syndicate managed this gigantic ranch under a contract with the company.

In addition to the Texas ranch, the syndicate owned a large ranch on the Yellowstone River in Montana. This was before the days of fences and large herds, and cattle were slowly driven from Texas a thousand miles across country to be fattened on the Montana ranch before going to market.

Out of this enterprise there came five separate pieces of litigation, each one of which was a major operation in itself.

1. In 1908 one of the original stockholders brought a suit in the Circuit Court of Cook County, alleging that all the contracts and original leases between the parties were fraudulent and void. An accounting was demanded between the syndicate and the company. H. K. represented the Farwell interests in this case. A demurrer to the bill was sustained in the lower court and on appeal by the appellate and supreme courts. The stockholders' claim was finally defeated. The case dragged on for something like ten years. The briefs in the Illinois Supreme Court alone ran to nearly twelve hundred pages. The legal questions involved were enormously complicated and required extensive preparation both in this country and in England.

2. In 1916, on application by a stockholder, a Texas court appointed a receiver for the ranch without notice. H. K. hurried to Texas and took an immediate appeal from the order. This case required quick action if irreparable damage was to be avoided. The upper court promptly set aside the order appointing the receiver. In its opinion the court copied verbatim large parts of H. K.'s brief, saying, "This has been so orderly and well done, and in such clear, exact and concise language, that the writer finds it almost impossible to express the views of the court without infringing upon and copying therefrom. He thinks that no lawyer ought to complain of an Appellate judge for copying his brief as law in the court's opinion if the decision is in his favor."

3. When the lease between the Capitol Company and the syndicate expired in 1916, suit was started in the federal court to determine the rights of the parties. Numerous complicated questions of law and fact were involved. The original herd consisted of 120,000 head of Texas longhorn cold-blooded cattle. Over the years this was replaced by pure blooded stock of much greater value. Was the syndicate entitled to this increased value? That was one of the many questions involved. This accounting resulted in a judgment of nearly two million dollars in favor of the syndicate.

4. In 1917 the state of Texas started suit against the owners to reclaim part of the ranch on the ground of mistakes in the original survey. This resulted in a long trial involving the study of old surveys made some forty years previously. The court found mistakes had occurred and ordered the company to deed a considerable tract back to the state.

5. In the late 1920's the trustees who then held title to the ranch found themselves on the defending end of a libel suit where damages of something like a million dollars was claimed. The basis of the suit was this:

The trustees, wanting to preserve the history of this remarkable enterprise, hired a professor at the University of Texas to write the story of the ranch. Just to make the book interesting, he included an account of several fights between cattle rustlers and the local vigilantes.

All this occurred back in 1900 in New Mexico at a time when it was still an unorganized range—where large herds roamed the plains almost at will. It turned out that some of the persons who were named as rustlers were still living in a small Texas town. They promptly brought suit for libel.

There was only one defense—the truth of the statements made.

To prove this defense required a year's search for witnesses all over the Southwest and even into Old Mexico. The trial lasted about six weeks. More than a hundred witnesses testified, and the evidence read like a wild-west thriller, which in fact it was. Naturally, it attracted wide attention throughout the Southwest. What did the jury do? Of course, it found the defendants not guilty. Otherwise, I would not be telling you about the case.

TRACTION SITUATION

The attempt of the city of Chicago to solve its mass-transportation problem generated more protracted, complicated litigation than anything else in the city's history. Essentially, the story is one of many consolidations of competing companies into a constantly decreasing number of corporate ownerships until there finally emerged the CTA, a public body owning and operating all local transportation. Without doubt, that result has been in the public interest, but forty years of bitterly fought litigation, in both the lower and the upper courts, was necessary to bring it about. Starting with the 1906 reorganization and until his death in 1932, H. K. was almost without interruption engaged in one phase or another of this litigation.

The rights of various groups of bondholders were complicated and highly controversial. They could be settled only by court decisions—generally decisions of the upper court. The last receivership lasted from 1927 to 1945, in which proceeding H. K. represented the Harris Trust and Savings Bank, foreclosing trustee of the first-mortgage bonds of the Chicago Railways Company. No step was taken in this whole case without vigorous opposition from some quarter. The ramifications, legal, factual, and political, of this litigation were without parallel in our legal history.
Various phases of the litigation reached the court of appeals something like twenty times, and several unsuccessful petitions for certiorari to the Illinois Supreme Court were filed. I will briefly tell you about one phase of this litigation which has some special interest.

In 1905 Judge Grosscup entered a decree which attempted to remake a lease between some of the traction companies in disregard of the right of various security holders and of the city. It was based on the supposed business advantage of the new arrangement, not on its legality. All parties were enjoined from commencing any action which would interfere with the execution of the court's decree. H. K. and Henry Russell Platt, in spite of this, promptly filed a quo warranto proceeding in the state court, attacking the right of corporate officers to execute the new lease. This created a tense situation. It required courage on the part of the lawyers and confidence in their judgment that the court's decree was entirely void. Their clients' interests, however, would have been permanently and adversely affected if they had not made the move.

The point involved is made clear by the following colloquy between the court and counsel:

"If I understand your Honor's position correctly, you propose to substitute the desirability of the ends for the legality of the means by which you are going to attain these ends," said Attorney Platt.

"We must handle this matter practically," said Judge Grosscup. "The law ought to follow the business judgment, and you cannot expect the business to adapt itself to the law."

In H. K.'s brief in the upper court this statement appears:

"The politicians may debate whether urgency of occasion may not justify the disregard of a right, but in the Court of Justice the question is not even to be mentioned."

The court of appeals reversed Judge Grosscup on all counts.

This case illustrates the difficulty lawyers are faced with where they are certain the court's ruling is wrong and where some immediate action is necessary without waiting for an appeal.

ZONING CASES

In 1923 two cases reached the Illinois Supreme Court involving the validity of zoning in Illinois. These were City of Aurora v. Burns (319 Ill. 84) and Deynzer v. City of Evanston (319 Ill. 226). By act of the legislature, cities and villages were given power to adopt a comprehensive zoning ordinance. At that time the idea of zoning was new, and its legal validity had been under attack in numerous cases. The whole future of city planning was at stake.

The Burns case involved an ordinance of the city of Aurora which zoned certain territory for residential purposes and excluded business. The city brought suit to prevent the erection of a grocery store in a residential district. H. K. was not counsel of record when the case was first argued in the Illinois Supreme Court, which in its original decision held the law unconstitutional.

He was retained to file a petition for a rehearing, which petition was granted. The court reversed its original decision and sustained the validity of the city's ordinance in both cases. The decision in the Deynzer case followed the holding in the Aurora case. The fact that the court had first decided against the validity indicates that the questions were not free from doubt.

If these cases had been lost, the consequences would have been extremely serious for the whole state. They were hailed as a great victory for the future of city planning.

FORD v. THE "TRIBUNE"

On June 23, 1916, the Chicago Tribune published an editorial criticizing Henry Ford's attitude toward his employees who were called into the service of the National Guard.

Mr. Tenney's lecture was delivered in Breasted Hall of the Oriental Institute. Just before the lecture Mr. Tenney (center) received a quick tour of the Institute from Glen A. Lloyd, JD '23 (right), Chairman of the Board of Trustees of the University, and Professor Francis Allen, who introduced Mr. Tenney.

Shortly after the publication of the editorial, Ford sued the Tribune for libel, claiming a million dollars' damages. Naturally, the case attracted widespread attention, because of both the personalities involved and the size of the damages claimed. H. K. was associated in the defense of the Tribune with Weymouth Kirkland and my classmate, Howard Ellis.

At that time there was a heated controversy going on in the public press over the question of preparedness, on which the Tribune had taken a very strong stand. The country was on the brink of World War I, and disturbances along the Mexican border had become so serious that President Wilson mobilized the National Guard for service on the border to repel threatened invasion. It was against this background that the editorial was published.
The theory of plaintiff's case was that the editorial was libelous per se and that evidence of the condition along the border and of the international situation was inadmissible. The defense contended that the publisher was only bound to justify the words in the sense in which the jury should determine that they were used and would naturally be understood.

One of the most interesting branches of the evidence was that which was given by the witnesses from the Mexican border who told of the troubles in that part of the country. It showed such a disregard and open violation of this country's rights that a condition of practical anarchy existed all along the border.

Witness after witness told of raids from one to fifty miles within our border; of attacks upon towns, even when theoretically guarded by regular army; of farms along the whole countryside devastated; of people collected for mutual protection in villages; of women whose husbands and sons were killed in their presence; of citizens carried as captives into Mexico and there condemned to death; and of settlers actually fighting singly or in small bands to protect small squads of soldiers of the regular army from attacks by Mexicans. There was the open acknowledgment by the army officers, and finally by the President himself, that the government had not sufficient force to preserve order, enforce the law, or protect the lives and property of its citizens. This was the character and scope of the defendant's evidence. It required fourteen weeks to try this case, at the end of which the jury awarded the plaintiff six cents' damages.

H. K. wrote an article on the case, entitled "Why It Took Fourteen Weeks To Try a Six-Cent Law Suit." He concluded the article by saying that those who look upon the trial of a lawsuit as partisans do not have their views changed by the technical result.

Perhaps their feelings are accurately described by the concluding stanza of an old Scottish poem on the Battle of Sheriff Muir. The shepherd who tells the tale of the fight recounts the varying fortunes of the two sides and winds up with this general description:

And we ran and they ran,  
And they ran and we ran,  
And we ran and they ran awa' man.  
And some say that we won,  
And some say that they won,  
And some say that none won at a', man.  
But of one thing I'm sure, man,  
That at Sheriff Muir a battle there was  
Which I saw, man.

**INSULL CASES**

Another case of some public interest was *Guaranty Trust Co. of New York v. Fenness* (61 Fed. 2d 329). When the so-called Insull empire collapsed in 1930, receivers were appointed for the Insull Utility Investments, Inc., and Corporation Securities Company. These were holding companies owning stock in other Insull companies, which stock was pledged to secure loans from the Guaranty Trust Company, the General Hanover Bank & Trust Company, and the Chase National Bank of New York. H. K. represented the banks in this litigation. A temporary restraining order was entered in the receivership proceedings enjoining the sale of this collateral by the banks. In the course of the oral argument before the court of appeals, H. K. made a statement which was widely quoted in the press. He responded to the argument that the collateral should not be sold until the return of normal times by saying: "I am not so much concerned with the return to 'Normal Times' as I am with the thought that these may be 'Normal Times.'" The court of appeals dissolved the injunction, holding the pledgors had neither possession of the stock nor the right to possession and that the rights of the receivers were no greater than the pledgors. This was to be his last court appearance. Ten days after the case was decided, he died. Died as he had often told me he wanted to—still in active practice.

Now, let us turn to another phase of his activities. H. K. never subscribed to the adage that "the law is a jealous mistress." Just who invented that euphemism is shrouded in the mists of antiquity, but certain it is that most of the great lawyers of history never followed it. They cultivated many other fields than those which nurtured legal flowers. In fact, I suspect it was the labor in those fields which enabled them to carry their heavy legal burdens. At least in H. K.'s case, I am certain that he could not have absorbed such an exhausting schedule except for the relief he found in his extra­legal activities—activities which were extensive, varied, absorbing, and in the monetary sense entirely unproductive. I have known him, after a grueling day in court, to go to a
sporting goods store and buy a sleeping bag, a flyrod, an ax, a tent, or some other out-of-doors equipment, thus refreshing his tired mind.

He made many trips into the woods and mountains, hunting and fishing. Edgar A. Bancroft was his frequent companion. Mr. Bancroft was one of the leaders of the bar, and was general counsel for the International Harvester Company, the United States Gypsum Company, and many others. He also was one for whom the law was not a "jealous mistress." He and H. K. for years had a standing date for the opening of the Michigan deer season on November 10. Between the two of them, they induced most of the judges to recognize the event as grounds for the continuance of any court engagement. In addition to deer hunting, they also made two trips to British Columbia for big game. When Mr. Bancroft was appointed United States ambassador to Japan by President Coolidge, he made arrangements through the Japanese government for a big-game hunt in Indochina. H. K. was just on the point of leaving for Tokyo when Mr. Bancroft died.

Let me read you H. K.'s description of how he and Mr. Bancroft, or the "Counselor," as he called him, killed a grizzly bear:

In a moment we saw him [the guide] hurrying back, frantically tugging at one of the horses to get him out of sight from the hilltop above, and beckoning to us. We ran over the short snow patch which lay between us, and with great excitement he told us that the bear was coming down the hill just above us. We crawled up to the rocky edge above the path and stretched out where we could look through the leafy screen of the spruces. By the drawing of lots it had been determined that I was to have the first shot. I looked carefully and very eagerly over the hillside before us, and at first could see nothing but landscape. Then, all of a sudden, I saw him. The sun had come out—for the first time in a week—and in a flood of sunshine he was marching with solemn dignity down a lane between two spruce hedges straight toward us. The sunlight was rippling on his tawny back and shoulders, and his great head swinging from side to side as he lurched toward a little streamlet that trickled through the heather at the foot of the hill. It was certainly a thrilling sight, and he was doing his full part in the performance. When he reached the end and was out of the cover of the spruces, I cut loose, and, as we soon learned, shot him through the heart. He whirled around and bit at the wound and received another from the "Counselor." Then we each fired again, his head went down and it was all over. And that was our first and last Grizzly.

His skin lies on the floor before me as I write, and I can see again the hillside flooded with sunshine, the lane through the spruces, and the bear marching down to keep his appointment with Fate.

Basically, his education was classical. It included such Latin and Greek as was the fashion in those days. He was widely read in all classical literature and had great stimulation from reading. He had the bad habit of waking up around 4:00 A.M., at which time he would turn on the light and read. In these days when we are rapidly degenerating into a race of television morons, reading habits such as his have become extinct.

This thirst for literature started when he was still a boy in Madison. His father was a great reader and saw to it that H. K. was supplied with books. He once described the library in his early home in Madison as "a room filled with shelves to receive the books and was thus transformed into the snuggest, cosiest reading room that the heart of boyhood could desire. And it was there that James Fenimore Cooper opened up to me a long trail of woodland wandering, which happily has not yet ended."

In addition to reading, he had a gift for writing, and, for a busy lawyer, one far too busy to do so, produced a considerable volume of writings. This avocation carried him into many non-legal fields, especially those relating to hunting and fishing. A few of these titles will give you an idea of the scope of his interest: "In the Greenwood with Fenimore Cooper," "A Leaf from a Fly Book," "Red Letter Day with the Deer," "On Seeing Things in the Woods," "Forest Leaves of Old England," "Caribou, Gouts and Grizzlies," "An Unsalted Luncheon," "The Boyhood of Wisconsin," and "English as a Dead Language."

There are many more, some of which were printed in a volume entitled _Vert and Venison_, and the _Quick-as-Scat_ book, which was a collection of children's stories concerning the adventures of two red squirrels called "Tail-in-Air" and "Quick-as-Scat."

In 1924 he became a member of the editorial board of the _American Bar Journal_, where some of his articles appeared. These were "The Trial of Mary, Queen of Scots," "Circumstantial Evidence in the Forest," and "A Case of Lex

At the reception preceding the Tenney Lecture (left to right) Morris E. Feiwel, '15, President of The Law School Alumni Association, Howard Ellis, '15, and Carl S. Lloyd, '20.
Talosion," which dealt with the trial of Chief Oshkosh for murder in the territorial days of Wisconsin.

Always he was out of patience with lawyers' language, with their excessive verbiage and their genius for concealing simple ideas under the impenetrable overburden of useless words. His article on "English as a Dead Language," and "Why This Reduplication of Redundant Reiteration," attracted widespread attention. Let me quote briefly from the former:

I propose that, just as the allied hosts of Christendom in former years organized crusades to rescue from the defiling hands of the infidel the birthplace and tomb of the Son of Man, so now, in our time, the Bar Association organize a crusade to rescue our mother tongue from the hands of the lawyers. For among the lawyers, and only among the lawyers, English is a dead language.

When The Law School was organized in 1902, H. K. joined the faculty and for several years taught a course in practice. Thus he became acquainted with the great men who made up that original faculty. Beale, Hall, Mechem, Freund, Whittier, and all the others were his close friends. His Law School association was one of the pleasantest episodes in his life, because it gave him a chance to rub shoulders with these truly eminent legal scholars.

Long before the advent of the precision power tools of these modern times, H. K. possessed a well-equipped woodworking shop. Except for a miter box, he had no mechanical aids. He worked with edged tools held in the ungloved hand. The product of his shop was beautiful pieces of furniture, some of which are still in existence. He worked in metal as well as wood and gathered around his bench in our Kenwood Avenue home a group of friendly craftsmen from the University community calling themselves the "Merry Metal Workers."

He had a gift for seeing the comical aspects of many ordinary situations and of commenting on them in a humorous manner. As one of his friends said, "His delightful facility of finding so much humor in life made him always a delightful companion." He was sought after as a speaker on many occasions, not necessarily legal in nature and not because he was a great orator (which he certainly was not), but rather because he had the knack of putting into words what people were thinking. He was, in short, always quick with a pungent comment.

Once he was trying a hotly contested case in the circuit court. His opponent was one of the really learned lawyers of the Chicago bar. He had, however, a habit of making sarcastic remarks about his opponent. In the morning session of court he referred to H. K. as "That Old Maid!" and in the afternoon as "That Old Grandmother!"—at which point H. K. arose and said, "If your Honor please, I wish counsel would explain to the court just how I could be an old maid in the morning and a grandmother in the afternoon."

Howard Ellis recently told me that, once in the Ford case, the assembled lawyers were somewhat desperately trying to explain to the court what a prima facie case was. After everyone had a try at it, H. K. addressed the court, saying, "I have always understood that a prima facie case was one which was good from the front and bad behind." In speaking at a Bar Association dinner for judges, he said, "I am happy to see judges here from so many different courts—from courts of original error to those of ultimate conjecture."

During his long career H. K. made hundreds of oral arguments in countless courtrooms. He never wrote out or read an argument. Long experience convinced him that effectiveness was lost when an oral argument was confined in the strait jacket of the written word. Most of his effort was directed at stating the facts clearly, accurately, and so organized as to lead the judge to the desired conclusion.

His advice to his younger partners was this: "Get the facts before the court, and let the judge look up the law. The judge always knows something about the law, but he never knows anything about the facts until they are put before him."

He always took the greatest care with the statement of facts in a brief, generally writing it out in longhand. This practice resulted in eliminating all unnecessary words, in making every word count. So careful was he that, once the statement of facts was written, he rarely made any substantial changes. In commenting on the practice of a brother lawyer who paced up and down his office while dictating his briefs with gestures, he said: "The trouble with him is that he tries his cases to the stenographer, not to the court."

To the younger lawyers in the office he said, "Never make the judge read an unnecessary word; never use a long word where a short simple word will do; use short sentences! The first twenty pages of your brief are the most important ones. Try to get the judge going your way by the time he reaches that point."

"Talk about your own case—not your opponent's."

"It pays to rake the dust heaps for evidence."

"Never go into court with your flag at half-mast."

His manner toward the court was always deferential, no matter what his personal opinion might be of the judge's ability. He might heatedly dispute with opposing counsel but never with the court. He could withstand adverse questioning from the bench without losing his poise or making damaging concessions. Adverse judicial questioning is one of the most nerve-racking ordeals a trial lawyer must withstand.

No invisible curtain hung across his door. Everyone was free to consult him at any time and did so without restraint. Once the fifteen-year-old office boy chanced to see a bill which was about to be mailed. He took it into H. K., saying: "Mr. Tenney, you can't charge as little as this. Look what you did in this case!"

"What do you think it should be?" H. K. asked.

"Why, twice as much," he said.

"All right," said H. K.; "change it and send it out."
That the boy’s judgment was better than H. K.’s own was borne out by the fact that a check arrived by return mail with a note of appreciation for the modest charge.

If there is one word which describes H. K.’s life, I should say it was “versatility.” His interest ranged over a vast area, covering a great many unrelated subjects. In each of these, fields he had a genuine and excited interest—literature of all kinds and all ages; law and its historical development; writing, on legal and non-legal topics; nature study, which took him out of doors; fishing and hunting, in which his main concern was not a full game bag, but enjoying the smells, the sights, the sounds, and the feel of the woods, mountains, and plains. He was an expert craftsman, and, above all, one who enjoyed the company of simple unsophisticated people, one who could with unerring instinct detect the false ring in any spurious human specimen.

One thing to be learned from a life such as his is that the excitement and the interest and usefulness of your life are in direct proportion to the variety of the highways and byways down which your inclination leads you.

Howard Vincent O’Brien in his Daily News column, “All Things Considered,” had this to say of him:

A gentle man, he always suggested a blade of Damascus, fragile to the eye, but tempered and tough. It was oddly fitting that one of his many interests was the history of armor. Others may recall him in court, the successful pleader of great causes. With us, the picture that will linger is set against the green of his beloved northern Wisconsin—the great lawyer, with the sweet-smelling pine curling off under his plane, listening to the talk of small children. His was a soul that never aged.

A collection of materials by and about Horace Kent Tenney. These materials, which include trial records, appellate briefs, books by Mr. Tenney, and early Law School correspondence regarding his appointment to the Law Faculty, were exhibited in The Law School in connection with the lecture by Henry F. Tenney, which is printed elsewhere in this issue.
Meeker—
Continued from page 5

(6) in case of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government should be settled by arbitration with suitable terms of reference and suitable provisions for the payment of sums found to be due; . . .

Secretary-General Hammarskjöld undertook to pursue the negotiations which he had begun earlier with Britain, France, and Egypt in order to reach a formal agreement. On October 24 he sent a letter to the Egyptian foreign minister elaborating a plan based on the six requirements. On November 2 Egypt addressed a reply which accepted the principal features of Mr. Hammarskjöld’s plan. Then there was a several months’ hiatus in the negotiations. In recent weeks the exchanges with Egypt have been renewed, with the United States participating actively. It remains to be seen what kind of permanent regime for the Canal will emerge and what kinds of machinery and remedies will be available for the settlement of any differences regarding its operation.

THE HOSTILITIES

The process of negotiating a Suez Canal settlement was interrupted at the end of October, 1956, by the outbreak of hostilities, which were certainly not unrelated to the Canal problem. These hostilities were a radical deviation from the path of peaceful settlement.

Israel sought to justify its attack on the ground that Egypt had repeatedly violated the armistice agreement and that there was no other way to safeguard Israel’s security. Raids across the armistice lines from Egyptian-controlled territory inflicted serious and continuing harassment. On the day following the Israeli invasion, Britain and France delivered ultimatums to both Israel and Egypt and announced that they would land forces in Egypt to protect the Suez Canal. President Eisenhower, on October 31, stated that these actions by the three countries against Egypt could scarcely be reconciled with the purposes and principles of the United Nations.

The Security Council was prevented by British and French vetoes from acting to deal with the situation. Now, for the first time, an emergency special session of the General Assembly was summoned under the “Uniting for Peace” resolution. It met on the evening of November 1, a little more than twenty-four hours after it had been called.

The General Assembly, at its meetings during the emergency special session and later during its eleventh regular session, took three kinds of action. First, it called for a cessation of hostilities and withdrawal of armed forces from positions occupied after the fighting broke out; this the Assembly did on a number of occasions before the withdrawals were finally completed. Second, the General Assembly established a United Nations Emergency Force to secure and supervise the cessation of hostilities. Finally, the Assembly provided for the taking of various measures designed to prevent a recurrence of old conflicts and armistice violations once the withdrawal of forces had been completed.

We should note that the General Assembly’s resolutions calling for cease-fire and withdrawal were recommendations and not binding decisions, such as the Security Council could make under Chapter 7 of the Charter. Yet these calls of the Assembly were heeded—and heeded with relative promptness by Britain and France.

Early in November, before any withdrawals occurred, the Soviet Union proposed the use of Soviet, as well as United States, armed forces to aid in the defense of Egypt. At once the United States declared its opposition to the introduction of Soviet or any other military forces into the Middle East except under United Nations mandate. It further stated that any such move would be directly contrary to the General Assembly’s resolution of November 2 and would violate the Charter—meaning Article 2, paragraph 4, which bans the use of armed force in any manner inconsistent with the purposes of the United Nations. The United Nations was then dealing actively with the situation through a General Assembly cease-fire resolution, through efforts by the Secretary-General to secure compliance with it, and through the setting-up of machinery to police the cease-fire.

To secure and supervise the cessation of hostilities, the General Assembly established the United Nations Emergency Force. This was an innovation in international life. Like the United Nations forces in Korea, this new force was composed of units contributed by member states. But the similarity largely stopped there. The Assembly placed the force under the command of an individual officer chosen by it—Canadian General Edson L. M. Burns. Costs of the force were to be financed from the United Nations budget and contributions of non-participating countries (like the United States) as well as by the countries supplying troops.

The mission of this force was laid down in a series of reports prepared by the Secretary-General at the Assembly’s request and then approved by the Assembly. The Secretary-General, in consultation with an advisory committee of United Nations members, was to play an important part in governing the employment of the United Nations Emergency Force. This force, unlike the United Nations military units in Korea, was not to be a combatant force. But, as an international agency to supervise the cease-fire, it should be free from the frustrations of the Neutral Nations Supervisory Commission in Korea, whose operation has been largely stalled by the veto power of its Communist members.

Let us turn now to the arrangements made by the General Assembly to bring about final withdrawal by Israel and prevent a return of the very unsatisfactory state of affairs that existed before hostilities began. On January 24 the Secretary-General submitted a report proposing a number of measures. Among them were the stationing of the United
Nations Emergency Force in the Gaza strip and on both sides of the armistice line and the stationing of this force at the Strait of Tiran. This strait leads from the head of the Red Sea into the Gulf of Aqaba. The gulf lies just to the east of the Sinai Peninsula, and at its north end are two ports: Aqaba in Jordan and Elat in Israel.

The report of the Secretary-General also recalled a Security Council resolution of 1951 declaring that there was no basis for Egypt's claim and exercise of belligerent rights against Israel in view of the armistice agreement. For several years Egypt had denied passage to Israeli commerce through the Suez Canal and had blocked Israeli access to the Gulf of Aqaba at the Strait of Tiran.

On February 2 the General Assembly voted that the measures proposed by the Secretary-General should be taken. On the same day the Assembly called for the last time upon Israel to complete the withdrawal of its forces behind the armistice line. Israel, however, remained unwilling to withdraw from Gaza and from the coast bordering the Strait of Tiran.

Subsequently, the United States stated its view, in a memorandum to the Israeli government, that the Gulf of Aqaba comprehended international waters and that there was a right of free and innocent passage in the gulf and through the strait giving access to it. On February 22 Mr. Hammarskjöld reported Egyptian agreement that the United Nations' take-over in Gaza should be "exclusive" during an initial period, despite Egypt's right of occupancy under the armistice agreement, and that the United Nations should continue to have a substantial role after this period. On February 25 he indicated in a memorandum given to the Assembly that the United Nations Emergency Force would not be withdrawn from the Strait of Tiran without prior notice to the Advisory Committee, which in turn could decide whether the General Assembly ought to be consulted.

On March 1, following discussions with France and the United States, Israel announced in the General Assembly that it would complete the withdrawal of its armed forces in accordance with the Assembly's resolutions and on the basis of stated assumptions and expectations regarding control of Gaza and access to the Gulf of Aqaba. In a letter to the prime minister of Israel on March 2 President Eisenhower expressed the view that it was reasonable to entertain hopes and expectations such as those voiced by the Israeli and other delegations in the Assembly.

Thus the last withdrawals were completed on the basis of a quite complicated set of de facto arrangements arrived at through the efforts of several governments, the United Nations Secretary-General, and the processes of the General Assembly.

Perhaps mention should be made here of the point that the United Nations Emergency Force entered Egyptian territory with the consent of Egypt. I believe it would be wrong to say, as some have asserted, that a United Nations force organized and directed by the General Assembly can enter territory only with the sovereign's consent. Here, however, consent was given, and this was done in an agreement stating that the force should remain "until its task is completed." This would seem to mean that Egypt is not at liberty, unilaterally, to decide that the force shall leave when Egypt so desires. It is for the United Nations also to decide when the mission of the United Nations Emergency Force is accomplished, or that for other reasons the force should be withdrawn. We may expect that the Secretary-General would consult the Advisory Committee before withdrawing the force and that the Assembly—now in recess—might well be reconvened to consider any such question.

OBSTRUCTION OF THE SUEZ CANAL

We have now looked at some of the principal legal problems arising during the Middle East crisis. I should perhaps mention a few others. There is, for example, the obstruction of the Suez Canal. After hostilities began last fall, a large number of vessels were sunk in the Canal, and a bridge over it was demolished. These actions, according to available information, were taken by Egypt. Assuming the correctness of that information, were they permissible under the Constantinople Convention of 1888?

Article I of the treaty provides:

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

Article IV states:
The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers.

Article IX gave the Turkish and Egyptian authorities the right to take measures "for securing by their own forces the defense of Egypt and the maintenance of public order." But Article XI specified that these measures "shall not interfere with the free use of the Canal."

Was Egypt, therefore, entitled to block the Canal? Is Egypt liable to maritime nations for the losses they have suffered in consequence? Is Egypt liable for losses resulting from its action in slowing down the process of clearing the Canal after that was undertaken by the United Nations at Egypt's request? These are questions which do not seem likely to receive direct answers in any international judicial proceedings.

In connection with the clearing of the Canal, it is worth noting that the United Nations undertook the job upon a request from Egypt. The United Nations then solicited and obtained advances of funds to defray the cost of clearing. The United States advanced $5,000,000 out of a total of approximately $12,000,000. The question remains unsolved as to how these advances will be repaid.

Then there is the question of "war damages" which Egypt has talked of claiming. Egyptian spokesmen have charged Israel, France, and Britain with liability for loss of life and property occurring in Egypt during the hostilities. Egyptian representatives at the United Nations circulated a proposal in December, 1956, to have the Secretary-General make a survey of damage.

It should be evident, in connection with any proposal to settle claims for war damages, that there are many other claims—such as those relating to nationalization of the Suez Canal, to loss and damage caused by raids across the armistice lines, to destroyed pipelines, to the "Egyptianization" decrees, and perhaps to economic losses from closure of the Canal. It would be only just that all these should be adjudicated together if ever there is to be litigation.

There seems to be a possibility of adjudication concerning transit through the Canal and passage through the Strait of Tiran and Gulf of Aqaba. Israel has indicated its intention to attempt such transit and passage for Israeli commerce, while indications of continuing opposition have come from Egypt and Saudi Arabia. Submission to the International Court of Justice has been suggested.

CONCLUSION

As we look back over the events of the Middle East crisis, we may observe that governments have focused attention upon substantive questions of international law and upon legal—as distinct from forcible—means of dealing with them. There has been emphasis on solution of problems within a framework of law, with reliance on the Charter of the United Nations and the operation of its organs.

What significance is discernible here? First, I suppose it may be said that governments have employed the discourse of international law because they thought it relevant to the problems and useful in public presentation of their positions. In other words, international law was considered enough of a reality that they must reckon with it.

A second point to be noted is that international debate and consideration of legal questions can produce developments in the body of international law. A consensus may emerge where there were not generally agreed views before or where the field had not previously been plowed. This process has perhaps taken place to some extent during the Middle East crisis.

How has the law operated during the Middle East crisis? We might look, for example, at the withdrawal of British and French, and ultimately Israeli, forces. In the General Assembly debate a preponderance of opinion was marshaled in support of the law of the Charter and given expression in the Assembly's resolutions calling for cease-fire and withdrawal. Behind these resolutions lay the threat of United Nations sanctions, which are open to the Assembly under Articles 10 and 11 of the Charter and are contemplated by the "Uniting for Peace" resolution. Israel, France, and Britain were subjected by other countries to strong pressures to comply with the Assembly's call—various and divergent as might have been the aims of those other countries.

In a situation of great peril, because of the possibility of a spreading of the conflict, the nations in effect agreed to apply the law of the Charter. This did not result from the direct application of definitive rules by an international agency endowed with governmental power as we know it in domestic law. Much negotiation was involved, both inside and outside the United Nations, as to the means of applying the basic proposition that military forces should be withdrawn behind the armistice lines. This was done in order to take account of legitimate concerns and interests on both sides regarding security and legal rights. In the end, common ground was reached, and the law had pragmatic effect.

The forum of the United Nations and the good offices of the Secretary-General proved a valuable catalyst in the process. We should note here, from the constitutional point of view, that the office and functions of the Secretary-General have developed considerably in scope and influence during the last few months. It is possible that the principal judicial organ of the United Nations, the International Court of Justice, will have an increased role to play in the future.

United Nations rules and processes for dealing with international conflicts tend toward the elimination of the use
of armed force. This is surely a development to be welcomed. Once again the comparison with Korea suggests itself. In the Middle East, as in Korea, there has been no effective military victory for either side. An armistice is once again in effect. The question remains how this uneasy situation can be stabilized and progress be made toward a durable settlement.

There is a pressing need for the community of nations to find, develop, and employ effective means to make just and viable settlements of the problems to which force was once applied as the solvent. Unless this is done, we cannot be confident that the ground seemingly won will be held—that the world’s hold on peace is secure. Groping efforts toward peace with justice are discernible in the arrangements made by the United Nations to try to establish peaceful conditions between Israel and Egypt. We shall have to wait longer to judge the outcome—whether it holds real hope because the nations of the world are determined that their common efforts shall succeed or whether some new beginnings must be made.

The web of history is slowly woven.

Olmstead—
Continued from page 5

1911 (1877-1911) all the land in Mexico was owned by some one thousand powerful families. Article 27 of the 1917 constitution laid the foundation for agrarian reform and the expropriation of foreign-held land and oil interests. It gave only Mexicans, or foreigners who were by special agreement to be treated as Mexicans without recourse to their own governments, the right to acquire ownership in or exploit Mexican natural resources. The constitution further provided for expropriation of private property for reasons of public utility. Confiscations were forbidden. In 1923 the United States accepted compensation in the form of federal bonds for certain lands, and a commission was set up to adjudicate claims, though it never settled any. By 1938 the Mexican government had “nationalized” moderate-sized holdings estimated by their United States owners to be worth ten million dollars. Three million dollars was finally paid by Mexico to satisfy these claims.

Parallel to the land questions, though handled separately and raising different legal problems, was the expropriation of oil rights that had been granted to various foreign companies prior to 1919. At that time the owner of the surface had right to the subsurface minerals. Article 27 vested the nation with all the subsurface rights, but it was held not to be retroactive in effect. Mexico tried to restrict the length of time that the foreign concessions could run to fifty years by requiring that the concessions be confirmed by concessions which would be granted by the Mexican government. Long diplomatic correspondence followed, and the law was finally declared unconstitutional in certain parts in 1927. A new law was passed whereby the concessions were to be confirmed by “issuing,” not “granting,” confirmatory concessions without limitation of time. The question then seemed settled for some years, until 1936, when President Cardenas had carried the agrarian reform near completion and turned his attention to other matters. On March 18, 1938, the Labor Board declared all oil-company labor contracts canceled, and President Cardenas signed the expropriation decree expropriating the foreign oil companies’ interests in Mexico.

The expropriation had its immediate origin in a labor controversy but was really an expression of the second objective of the Mexican revolution, the “Mexicanization of industry.” The expropriation of oil, unlike the expropriation of land, did not affect Mexican and foreigner equally, as only the foreign oil interests were nationalized. The United States recognized the right of Mexico to expropriate the oil resources but, as in the land question, demanded that prompt and just payment be made. Mexico had argued in the land question that all the foreigner could ask was equality of treatment with the national but admitted liability to compensate. The issue was finally resolved in a similar fashion to the land question.

It is significant to note that, so far as the oil expropriations were concerned, Mexico breached valid concession agreements with oil companies in this and other countries. But, recognizing a “sovereign” power in Mexico to terminate the agreements, the United States government pressed only for compensation and did not question the basic abrogation of contractual obligations by the government.
The next act of the play was the action by the Iranian government in 1951 in nationalizing the oil industry in Iran. This was of a pattern similar to that of the Egyptian taking of the Suez Canal Company. The Anglo-Iranian Oil Company operated the oil industry in Iran pursuant to a valid and unexpired agreement with the government when the Iranian parliament enacted legislation nationalizing the company. Offers of the company to arbitrate the dispute under terms of the agreement were refused on the ground that, as a nation, had a sovereign right to nationalize properties within its territories. Britain strongly contended that by this action Iran was breaking a binding contractual obligation and appealed to the International Court of Justice, which, after issuing a temporary restraining order, decided in 1952 that it lacked jurisdiction.

The jurisdiction of the court depended on the declarations made by the parties under Article 36(2) of its statute. The court was of the opinion, as Iran argued, that the compulsory jurisdiction attached only to disputes arising out of conventions or treaties accepted by Iran after the signing of the declaration. The British argued that disputes arising out of "situations or facts" prior to the declaration were within the compulsory jurisdiction, since they based jurisdiction on certain treaties accepted by Iran before 1932.

The Anglo-Iranian case involved many of the facts and circumstances that characterize the principal problem of contemporary concern. Iran, a country with a valuable and perhaps essential natural resource, had contracted with a Western company for the operation of the oil industry within its territory. The company made substantial investments of capital and technique in the development of Iran and its oil fields. Motivated by a nationalistic xenophobia and demands for accelerated proceeds from the principal enterprise in the country, the Iranian government took the foreign-owned enterprise as an act within its "sovereignty." The near-bankruptcy of Iran, only prevented by extraordinary aid measures of the United States during the period between nationalization and settlement of the dispute, indicates the dependence of such countries upon the technical skill and capital resources of the more-developed countries of the West.

The announced nationalization of the Universal Suez Maritime Canal Company in July, 1956, posed legal, economic, and policy problems that raise all the issues connected with investments pursuant to agreements between business organizations in countries of more-developed economic systems and governments of less-developed countries. President Nasser declared that stockholders of the company would be compensated at the prevailing price of the stock on the Paris Bourse on the day preceding nationalization.

Nationalization of the company closely followed United States and British withdrawal of earlier offers to help Egypt build the high dam at Aswan on the Nile. In his speech announcing the nationalization, Nasser declared the revenues from canal transit would be used by Egypt for construction of the Aswan dam. This announced purpose was obviously to accelerate the economic development of Egypt. However, there were also apparent political overtones. To maintain his position of prestige in the Arab world and twister of the lion's tail, it was essential that Colonel Nasser undertake spectacular action following withdrawal of the Aswan Dam offer.

The original concession for the construction of the Suez Canal was granted by the viceroy of Egypt to Ferdinand de Lesseps, a Frenchman, in 1854. He was directed to organize a company to build the Canal. Use of the Canal commenced in 1869, and the term of the concession was for ninety-nine years from that date, at the end of which it was to revert to Egypt upon indemnification of the company. The distribution of net profits was divided 15 per cent to the Egyptian government, 75 per cent to the company, and 10 per cent to the founders.

The Convention of 1866, between the viceroy and the company, under which the Canal was operated, provided that the company was Egyptian and was to be governed by the laws and customs of Egypt. On the other hand, as regards its constitution as a corporation and the relations of its partners with one another, it is governed by the laws of France that govern joint-stock companies. Disputes between Egypt and the company were placed under the jurisdiction of the Egyptian courts.

In 1888 the principal maritime states using the Canal entered into the Constantinople Convention concerning free navigation in the Suez Canal. The states party agreed that the Canal shall always be free and open in time of war as in time of peace to both commercial and naval vessels without distinction as to flag. This convention takes note of the earlier concession to the Canal Company, but the duration of the former was not limited by the ninety-nine-year term of the latter. When this convention came into force, Egypt was under Ottoman suzerainty and not a party, but, later, after obtaining its independence, Egypt affirmed adherence to it. At the time of nationalization the concession had some twelve years of its term to run, and there is no indication that the Canal Company had not faithfully performed its obligations under the concession.

Abrogation of the contractual agreement with the Suez Canal Company presents the legal question of the right of a state under international law to breach its contracts with foreign persons or with local entities owned by foreign individuals. The latter case presents no problem, as corporate veils are frequently lifted to determine the real parties in interest.

The position advanced by spokesmen for Egypt is that the Suez Canal is within its territory and that the taking of property by the territorial sovereign, even though foreign owned, is a valid exercise of jurisdiction by the sovereign, particularly as compensation is offered.

Several arguments have been advanced in opposition to
the validity of the nationalization. It is contended that the
concession to the Suez Canal Company is a part of the
Constantinople Convention and that, therefore, the abroga-
tion of the concession is a violation of a treaty—a recognized
breach of international law. Egypt has sought to separate
the convention from the concession, contending that none
of the obligations affects its sovereignty but that it will abide
by the terms of the convention. It is difficult to find an in-
corporation of the concession by the convention even
though it refers to it and in the preamble speaks of the com-
pletion of "the system under which the navigation of this
canal has been placed." To buttress this position, claims are
made that the spirit of the convention negates ownership
and control by any one nation. An attempted incorporation
by reference would undoubtedly fail because of the in-
definiteness of the reference and because the ultimate rever-
sion of the Canal to Egypt rebuts any inference against
ownership and operation by any one country.

In the case of the Suez Canal a strong argument can be
along the line that it is a unique international public utility
of vital concern to the world community and, therefore,
beyond the capacity of any single state's jurisdiction to na-
tionalize. Perhaps, in the case of Suez this is a valid char-
acterization. Certainly the doctrine of eminent domain—
that is, a taking for a public purpose by a sovereign—would
not apply where the public interest is that of the world
community and, hence, not properly to be determined by any
one state—even the territorial sovereign.

Valid objection can be taken to the proposed measure of
compensation—the market value of the stock on the day
prior to nationalization. The traditional doctrine runs that a
state may nationalize the property of foreigners provided it
makes "adequate, effective and prompt compensation," and
unfortunately this has usually been acceptable to the United
States Department of State as a validating principle. Assum-
ing the validity of this formula, the price of the stock does
not appear necessarily to constitute adequate compensation.
Measure of damages rules under both common and civil
law systems are designed to compensate the injured party
for its losses under the broken contract—and this does not
mean upon a quantum meruit basis. Therefore, payment for
all properties taken plus future lost profits would represent
adequate compensation. Of course, prompt payment of
such a measure is far beyond the financial capabilities of
Egypt. Furthermore, if full damages were paid by the na-
tionalizing state to the victim of the expropriation, there
would be no financial gain to the state and no incentive to
nationalize.

While of importance, I submit that these arguments do
not reach the policy and legal heart of the problems raised
by the nationalization of foreign-held enterprise operated
pursuant to a contractual agreement with the government
of the host state.

An announced major policy objective of the government
of the United States, of the United Nations, and of the less-
developed countries of the world has been to stimulate and
encourage the flow of private capital for purposes of indus-
trial development from developed to underdeveloped coun-
tries. A necessary condition for fulfillment of this objective is
the creation of confidence on the part of potential investors.
Arbitrary abrogation of contracts by governments seeking
to benefit from foreign investment does not establish an
appropriate climate for investment.

The basic premise upon which rests the theory that states
may disregard their agreements with individuals is the
antiquated notion that only states are subjects of interna-
tional law and that individuals are mere objects. This is no
longer factually correct, as Philip Jessup has so well demon-
strated in his recent Transnational Law. Furthermore, to as-
sert that these nationalizations of foreign enterprise are only
exercises of eminent domain by the sovereign and subject to
its finding of public interest is a serious confusion of the rule
and the facts to which it is applied. The doctrine of eminent
domain has always been limited to a taking for a public
purpose, defined as a governmental as distinguished from a
proprietary purpose. A sovereign, at the time of the formu-
lation of the concept of eminent domain, was an absolute
one sometimes identified with a divine being. While a lim-
ited right of eminent domain is recognized, it should not be
extended to include takings of all types of property by gov-
ernments that have by agreement undertaken to respect
a certain foreign interests.

Beyond this is the duty of any party to perform its obli-
gations under a valid contractual agreement. Notwithstanding
the Holmesian homily that a party to a contract has the
option of performance or nonperformance, it appears that
breach of a contract is not legally sanctioned conduct but is
legally condemned, and the law seeks to place the injured
party in the position he would have been in had the other
party performed—this contains an obvious element of sanc-
tion. This reasoning has long been applied, under the
maxim pacta sunt servanda, to agreements between states,
and states have enforced it between their nationals. It seems
incongruous for the states of the world community not to
apply this same standard to their own agreements with indi-
viduals.

The binding effect of a state's agreements upon it should
not be viewed as a restriction or limitation upon its sov-
eignty, but, on the other hand, the entry into, and per-
formance of, contractual obligations is in reality an exercise
of a sovereign personality.

In today's world community that is characterized by in-
terdependence rather than independence nineteenth-cen-
tury concepts of sovereignty and nationalism must give way
to concepts of state responsibility and co-operation for the
well-being of all. It is essential that countries of the West,
particularly the United States, and underdeveloped areas
establish modus operandi for trade and investment. A corner-
stone of this pattern must be the sanctity of contracts be-
tween states and individuals.
Allen —
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work of the generations. That the problem is real may be illustrated by a trivial example. Who has not experienced the shock of discovering (sometimes by accident) that his “new” idea was being discussed in the law reviews twenty-five or thirty years ago? Again, an interesting contrast is provided by the continuing influence of the Benthamite reformers in England and the comparative absence of influence, in this country, of such innovators as Livingston. I suspect that a complete explanation would take into account the differences in the character and extent of historical endeavor in the two countries.

Sixth, history works economy in another sense. Any major proposal for law reform is likely to involve some preliminary historical investigation, however unsystematic, simply because it is obviously indispensable. Such efforts are usually inadequate because of the labor involved in collecting relevant, but widely scattered, materials. Competent histories which collect and systematize the source materials ease these labors and go far to insure consideration of the proposal on a broader base of information and insight.

The foregoing observations, of course, do not in any sense exhaust the subject. There is an obverse side to this discussion. For the insights and techniques derived from empirical studies of current problems may often be of the greatest utility in historical research. Indeed, in many areas they have contributed wholly new conceptions of what is relevant and meaningful for historical study. Thus, the Kinsey studies, for all their methodological vagaries, and despite the sheer perversity and wrongheadedness that undoubtedly characterize the work, produced insights which are genuine and of continuing value. No subsequent studies of the history and development of American family relations or the regulation of sexual conduct will be able wholly to avoid taking them into account. Two generations of investigation into the relations of economic interest to political theory and thirty years of speculation as to the psychological underpinnings of judicial behavior have eliminated at least the excuse for production of a biography like Beveridge’s magnificent and magnificently naïve Life of Marshall. Moreover, “fact” research in its descriptive aspects often provides a base line from which subsequent change and modification may one day be measured by the future historian with a degree of accuracy never attainable heretofore. Indeed, the state crime surveys of the twenties and thirties and the Wickersham Report of the same period, for all their disappointing limitations, are already, in some measure, serving this function in the area of criminal law administration. One may hope and expect that the function will be served more adequately by the current Survey of the American Bar Foundation. But allow me to return to my original thesis. The systematic study of things legal from other than a predominantly doctrinal orientation is in its infancy. Maturity is yet to be won. In making this effort, we shall be wise not to overlook the contributions which historical study can supply.