The Opinion

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Mitchell
William Mitchell College of Law

William Mitchell

OPINION

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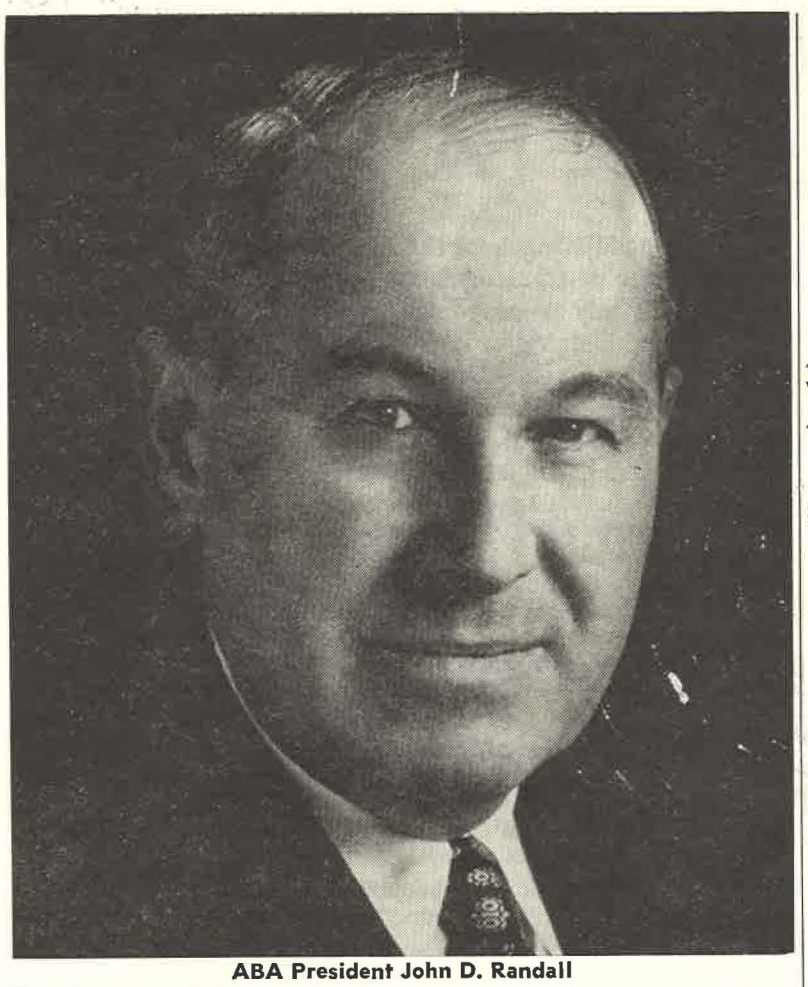

ABA President John D. Randall

ABA President to Speak, Receive Honorary Degree At Commencement

An Honorary Degree of Doctor of Laws will be bestowed on Mr. John D. Randall, President of the American Bar Association, when he arrives at William Mitchell to address 66 graduating seniors at the annual commencement exercises to be held at the College of St. Thomas Armory on Tuesday, June 14.

A resident of Cedar Rapids, Iowa, Mr. Randall was elected the 83rd President of the ABA at its annual meeting held last August in Miami, Florida.

It will be only the second time in the history of the school that an Honorary Degree of Doctor of Laws has been presented. The first such presentation was awarded to Judge John B. Sanborn, of the United States Court of Appeals, Eighth Circuit, at commencement exercises last year.

Marshalled by the eight top students of the Junior Class, the 66 graduating seniors will form a procession at the school and move to the St. Thomas Armory for commencement.

Sixty of the graduates will earn their LL.B. Degrees in June, while the other six finished their requirements in February.

Three students, David A. O'Connor, Gary W. Flakne, and William C. Hoffman, will receive certificates of completion.

LL.B. Degrees are awarded to those who have completed law school and are eligible to take the bar examination. Certificates of Completion are awarded special students who have finished law school but must complete undergraduate requirements before taking the bar.

GRADUATION PARTY

Mr. Clem A. Ryan, a 1920 graduate of the former St. Paul College of Law and now practicing in Brainerd, Minn., will be the principal speaker at the presentation of the Certificates of Appreciation to the graduates' wives or mothers for their outstanding role in helping their husbands or sons thru school. This presentation will take place at William Mitchell on June 10th, 8:00 p.m., at the Graduation Party.

Mr. Ryan, father of graduating senior Robert J. Ryan, passed up a trip to Europe to be present at these exercises.

Senior Robert J. Ryan is the third generation of the Ryan Family to become graduates of this school. Robert's grandfather, Michael E. Ryan, was a 1903 grad.

Members of the June, 1960, graduating class are: Gerald A. Alfveby, St. Paul; Curtis E. Austin, Mpls.; Donald W. Blockhus, St. Paul; Philip J. Bloedel, St. Paul; James B. Bresnahan, Bloomington; and Robert C. Brost, St. Paul.

Theodore J. Collins, St. Paul; Edward J. Drury, St. Paul; Raymond W. Faricy, Jr., St. Paul; Patrick F. Flaherty, St. Paul; John N. Franta, North St. Paul; and Gerald R. Freeman, Mpls.

Charles F. Gegen, Hastings; Wilton E. Gervais, St. Paul; Marvin J. Green, South St. Paul; Joseph W. Hautman, Mpls.; Patrick W. Hawkins, Mahtomedi; John C. Hedberg, St. Paul; and William C. Hudson, Aitkin.

(Continued on page 2)

Library Dedication Set For May 4th

Dedication ceremonies opening the new John B. Sanborn Library at William Mitchell College will be held this coming Wednesday, May 4, at 8:00 P.M., in conjunction with the observance of Law Day, U.S.A. The Honorable Harry A. Blackmun, judge of the United States Court of Appeals for the Eighth Circuit, will present the dedicatory address.

When he was first admitted to the Bar after graduating from Harvard Law School, Judge Blackmun served as law clerk for Judge Sanborn. He is now a member of the Board of Trustees of William Mitchell, and prior to his appointment to the Federal Court he practiced law in Minneapolis and Rochester.

The new name for the library was chosen by the Board of Trustees in recognition of Judge Sanborn's long service to William Mitchell College. Judge Sanborn graduated from Saint Paul College of Law in 1907. Beginning in 1935 he served as a member and as president of the Board of Saint Paul College. He became a member of the Board of William Mitchell College and served in that capacity until his resignation last year.

Dean Stephen R. Curtis, in discussing plans for the dedication ceremony, described Judge Sanborn as "one of the ablest Federal judges in the country." Judge Sanborn's service on the bench has included the Ramsey County District Court and the Federal District Court, in addition to the United States Court of Appeals.

Presentation will be made at the dedication of a number of rare books from the collection of Brigadier General John Sanborn, father of Judge Sanborn. These books have been donated to the law school by Judge Sanborn. Special glass display cases have been built and installed in the library to properly care for and preserve this collection, as well as making them available to the College.

Invitations have been sent to all alumni of the school. All students, their wives and families are invited to attend.

Foreign Law Institute Planned For Next Fall

Plans are currently being made to conduct an Institute on Foreign Law during the fall and winter of this year. Dean Stephen R. Curtis recently disclosed plans for this Institute, stating, "This is in recognition of the fact that so many American business men today have business transactions of one kind or another in foreign countries, that it is necessary for the American lawyer to have at least a foundation of understanding of some of the differences between our Common Law system and the Civil Law and other systems of jurisprudence in various parts of the world.

"A panel of experts is now being organized to plan and conduct the Institute."

Charles E. Nadler Lectures Set For Mitchell Students In Fall

Once again William Mitchell College of Law will be visited by the nationally known authority on bankruptcy and corporation law, Charles E. Nadler of Macon, Georgia.

Professor Nadler will be conducting classes at William Mitchell during the fall semester, 1960, for third-year students in **Business Reorganizations and Arrangements,** with emphasis on Chapters X, XI, and XIII of the Bankruptcy Act. He will also conduct a course in **Corporate Finance** for fourth-year students.

In addition to his classes, a two-day Institute is planned by Professor Nadler on **Close Corporations.** The dates of this Institute will be announced later. Assisting with the Institute will be Professor F. Hodge O'Neal of Duke University School of Law. Professor O'Neal is one of the few law teachers to hold a J.S.D. from the Yale School of Law and an S.J.D. from Harvard Law School. He is also a nationally known author on **Close Corporations.**

Professor Nadler is a native New Yorker and a graduate of Columbia University with B.S. and B.Ed. degrees. He studied law at the Youngstown College of Law and has taught mathematics and Latin in Ohio schools.

He is a veteran of thirty years practice in Youngstown and Cleveland, and is a member of the faculty at Walter F. George School of Law, Mercer University, at Macon, where he donated his salary and royalties from his book, "Georgia Corporation Law," to the student scholarship fund. He is a visiting professor of law at William Mitchell and was with us in the winter semester of 1958-59.

He has also authored numerous books on Bankruptcy, Debtor Relief, Creditor and Debtor Relations, and is associate editor of the Commercial Law Journal.

Professor Nadler is a member of the American, Georgia, and Macon Bar Associations, an honorary member of Phi Alpha Delta law fraternity, and a member of the National Bankruptcy Conference and chairman of its Committee on Chapter XIII (Wage Earners Procedure) of the Bankruptcy Act.

Chief Justice Roger L. Dell Gives Pointers to Students

Briefs prepared for appeal to the Supreme Court of Minnesota should be brief and should be argued, not read, to the court when presented, emphasized Minnesota Chief Justice Roger L. Dell, in a talk delivered to the student body on April 5th.

Contrary to what some people may believe, all the justices do read the briefs, continued the Chief Justice, and are well aware of their contents, so that an attorney on appeal should stand up and argue his case instead of sitting down and reading it.

The Chief Justice, a 1920 graduate of the St. Paul College of Law, pointed out that many of the briefs are too long and he suggested how the length could be cut down.

Chief Justice Roger L. Dell

Since a record of the trial, which contains all the facts, is before the court, the statements of the facts in the briefs should be short and cover only the main points.

In many instances many of the errors committed by the trial court do not affect the outcome of the case, and therefore are not subject to review.

The Chief Justice stated that all briefs used for appeal to the Supreme Court should contain the following four points in order: (1) Procedural History of the Case, such as, where was the case tried and what was the result, (2) Legal Issues, for what reason is this case up for review; (3) Arguments, these should be as brief as possible; (4) Conclusions, what do you think is wrong with the result of the verdict in the lower court and what do you think should be done.

The Chief Justice also informed the students that the court is investigating the possibility of eliminating the printing of the record of the trial court for appeal purposes. This, he stated, would help reduce the cost of appeals and would help further the ends of justice.

Students Attend Medicolegal Class

Twenty-five Mitchellites joined with 200 attorneys and 25 students from the University of Minnesota in a seminar on medicolegal aspects of injuries to the head, face and neck presented by The Law-Science Academy of America at the Pick-Nicollet Hotel on April 9-10.

The seminar, co-sponsored by the Minnesota State Bar Association, featured top trial attorneys and medical men from throughout the nation.

Scholarships for the seminar were given to the students by the Law-Science Academy.

WILLIAM MITCHELL OPINION

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The Students Speak—

All Is Not Well

Mitchellites, being pretty normal student types, are prone to the same "student diseases" as are scholars at every other institution of higher learning. Most of us are stricken, for example, with that nameless disease which compels us, at about the midpoint of a semester, to "take a few days off;" recovering barely in time to cram our way through the casebooks with liberal doses of Nodoz and midnight oil.

Others could be mentioned — probably everyone has his own peculiar allergies, but I submit that the disease most prevalent at this and other schools is Gripe. Now Gripe is not entirely an unmixed evil; there is no more effective, inexpensive, and generally harmless method of letting off steam, for instance, than by a momentary submission to the virus Gripe.

The symptoms of Gripe are easily distinguishable from the other diseases, in that the sufferer invariably discovers that he is in some manner being wronged — usually by the school authorities. The victims can usually be observed gathered at a local oasis — or during school hours in the student lounge — vigorously protesting the injustices to which they are being subjected.

The other night, in the course of my quest for truth — and an idea for this column — I came upon three Mitchellites who were obviously in the throes of Gripe. I took the following notes from behind a palm tree:

Joe Schmalz, a freshman (but a veteran and thus mature for his years), had the floor. "Geez, I'm hardly a week late with my tuition, and a'ready I got a threatenin' letter from the Dean — don't he know the GI Bill don't come till the 20th of the month?"

Gary Glom, a senior with a Renault, chimed in: "You think that's bad — the other night I'm late to class and there isn't a parking spot in sight — so I see this spot behind the school — I figure nobody'll be using it now anymore, so I pull in and park it there. I come out at 8:15 and there's a big ticket, covering my windshield — signed by the Dean it was, and it said: 'You got exactly 72 hours to pay the $25 fine, or you better see about enrolling in Barber Academy', Boy, was I burned!"

Oliver Wendell McTigue, being a sophomore and therefore learned in the law, interjected: "They can't do that to us. We oughta complain to our class representatives — wonder who they are."

Being taken somewhat aback, I closed my notebook and went home to ponder what I'd heard. Now as I said earlier, Gripe and its symptoms are pretty harmless when confined to the immediate family — i.e., the student body. But they tend to create certain impressions in the minds of outsiders which are not so harmless.

It then occurred to me that there was a quick, painless antidote for this virus, known in the trade as Responsibility.

I knew for instance that Joe Schmalz was single and made a fair living as an adjuster. Why did he have to wait for the GI Bill before paying his tuition? If he'd paid on time as he'd agreed to (in writing), the letter from the Dean would never have been sent. That's Responsibility.

What Mr. Glom neglected to mention in his soliloquy was the fact of the great empty spaces in the St. Thomas parking lot. It's a little farther to walk, but then he was late anyway. That would have been Responsibility too, and the Dean's ticket would never have desecrated the windshield of the Renault.

I decided that Responsibility must be the key to the whole problem. If everyone would get it, and use it, Gripe would disappear. But so would this column, probably.

JOHN M. MOYLAN

FRATERNITIES

DELTA THETA PHI

With the initiation of 15 pledges this coming Saturday, April 30th, and a joint dinner with the University of Minnesota Chapter, featuring a nationally prominent speaker, on May 14th, the spring activities of the Delta Theta Phi promise the members a busy semester.

Highlights of last semester's activities were the initiation of Dean Emeritus John A. Burns as an honorary member and the giving of the officers' award for outstanding service to Ray Faricy, past Tribune. The initiation and the award presentation were conducted at a banquet held last November.

PHI BETA GAMMA

The Annual Spring Dance is to be held at Culbertson's this Saturday night, April 30. All members and alumni are requested to attend. Arrangements for the dance were handled by Duncan Putnam and Dick Todd.

New officers elected last April 8th are Ken Johnson, Chief Justice; Les Voell, Ass't Chief Justice; Franklin Peterson, Clerk; and Jim Otto, bailiff.

Eleven new members were added to the chapter this semester to successfully complete this year's rebuilding program. Art Anderson has been appointed chairman of the membership committee.

Many Students Placed In Jobs

The Placement Committee of the Student Bar Association, under the chairmanship of Joe Thompson, has submitted its report.

With an expenditure of no money, the committee placed 18 undergraduates in positions both in government and private industry. Placements were as follows:

Court clerks	2
Law clerks	5
Adjusters	3
Salesmen	2
Miscellaneous	6

Many other students and a number of graduates have been aided in solving their employment problems.

Under the guidance of a new chairman, Charles L. Langer, who replaced Mr. Thompson, a senior, the committee hopes to enlarge the program whereby all graduates who do not have jobs after graduating will be given a chance for placement through the committee. This will take the full cooperation of all alumni who are now either in practice or in business and know of vacancies that exist or will exist and can be filled by our graduates. All students, graduates, and alumni are urged to contact Mr. Langer or the school if they are aware of such vacancies.

'Better Luck' Sign Greets Students

"May you have better luck with your clients" was the theme of a sign greeting William Mitchell students, who visited the Minnesota State Prison last March 30th.

Sponsored by the SBA, through the cooperation of prison warden, Douglas C. Rigg, the 170 Mitchellites and wives took a three hour tour of the prison, ate supper in the prison messhall, and listened to short talks by Warden Rigg and his departmental superintendents.

Warden Rigg, a first year student at William Mitchell, stated that this was the largest group of people ever to visit the state prison.

(Continued from page 1)

David C. Johnson, Hopkins; Richard F. Johnson, Mpls.; Phyllis G. Jones, St. Paul; Gerald W. Kalina, St. Paul; Robert W. Kelly, St. Paul; Laurence R. Kennedy, St. Paul; Daniel A. Klas, St. Paul; Marion L. Klas, St. Paul; Jerome E. Kline, Mpls.; and Elton A. Kuderer, Mpls.

Stanley L. Laine, Mpls.; Llewellyn H. Linde, Hastings; Robert M. Lindstrom, Mpls.; Loy A. Maiers, Mpls.; John C. Midanek, St. Louis Park; and Lyman C. Moyer, Circle Pines.

James P. Nelson, St. Paul; Leonard A. Nelson, Mpls.; Lawrence V. Nicholson, Mpls.; Ronald R. Notermann, Mpls.; and Floyd J. Ordemann, Mpls.

John W. Petersen, St. Paul; Roger S. Plunkett, Mpls.; Edward H. Rasmussen, South St. Paul; Peter J. Ruffenach, Mpls.; Gerald C. Rummel, St. Paul; and Robert J. Ryan, St. Paul.

Dale R. Sarles, Wayzata; Kenneth M. Schadeck, St. Paul; Harry P. Schoen, Hastings; Thomas J. Simmons, Mpls.; Robert P. Stinchfield, St. Paul; Carl S. Swanson, St. Paul; Joe E. Thompson, Mpls.; Douglas W. Thomson, Mpls.; David O. Tingum, Mpls.; Stanley N. Thorup, Mpls.; and Richard T. Todd, Mpls.

Andrew O. Volstad, St. Paul; Paul Wendlandt, Jr., Mpls.; and Mary J. Wiesen, St. Paul.

The February, 1960, graduates are: Paul V. Fling; Edward C. Nicholson; Edward P. Starr; Elliott Taler; Quentin E. Tenney; and John A. Thabes.

DICTA By The Dean

In every good law school the curriculum is in a more or less constant state of transformation. Our faculty is engaged in a continuing study of ways to improve and broaden the instruction and training of our students. Last year it was found possible to reduce the time allotted to Personal Property and make room for a stimulating course on Introduction to Law. This year we salvaged two hours by combining Agency and Partnership in a single course on Business Associations and were able to schedule Legal Accounting and Legal Drafting (the drafting of legal instruments) for second year students. Trusts is being shifted from the second year to the third year program and so did not need to be given this year. This made room for a third year course in Real Estate Transactions and we also managed to offer Trade Regulation to third year students. One of our aims has been to expand the program in taxation. A move was made in this direction during the current semester by adding a course on Taxation of Estates.

For the year 1960-61, by better coordination of the courses in the field of civil procedure, practice and moot court, we will include in the third year program a course in Legal Writing, which will give to all of our students the training that was provided this year to a few by seminar, on the form and content of office memoranda, briefs, case notes and comments.

The Moot Court program will be expanded to run through the entire fourth year for a total of eight hours. With two courtrooms in operation it will be possible to have two trials going on at once. This will enable each student to take part in two jury trials. The program also calls for each student to write an appellate brief and make an appellate argument. The increased training thus provided in trial and appellate practice will prove of great value in the early days of the young lawyer's practice.

One of the advantages in these curricular changes is the broader training in legal writing and research. The program begins with the first year course in Legal Research, which introduces the beginner to the use of law books and the fundamentals of research and legal writing. In the second year Legal Drafting will aim at the functions and responsibilities of the draftsman in preparing legal instruments and will provide training and practice in the planning and wording of instruments. Legal Writing in the third year will provide instruction and experience in the preparation of various kinds of legal memoranda and briefs, to be followed by the research and writing of an appellate brief in the fourth year Moot Court.

Another very real enrichment of the 1960-61 program will be two courses to be given by our Visiting Professor of Law, Charles E. Nadler, who will be with us during the first semester. Professor Nadler will give a course to the third year class on Business Reorganizations and Arrangements. This will cover reorganization problems of various forms of business organizations and will emphasize Chapters X, XI and XIII of the Bankruptcy Act. Under his tutelage in the course on Corporate Finance the fourth year class will study the corporate financial structure, and legal, economic and business administration problems of corporate reorganization, capitalization and financing. Our students are looking forward to the stimulation they have learned to expect from Professor Nadler's instruction.

A curriculum, like a law school, never stops growing and moving forward. To stop is to stagnate and die, and William Mitchell has no such plans.

Stephen R. Curtis

President Andrew N. Johnson Active In Law School Since 1915

Andrew N. Johnson, first president and a trustee of the William Mitchell College of Law, is a practicing attorney, Consul General of Denmark, a legal educator, and a man whose life has been dedicated to the legal profession.

Upon merger of the St. Paul College of Law and the Minneapolis-Minnesota College of Law in 1956, Mr. Johnson continued his long-existing interest in providing an opportunity for a high-level legal education for students who have to help themselves financially. After graduating second in his class at Northwestern University in 1915 with honors in scholarship, oratory, and athletics, he taught various subjects at the Minneapolis-Minnesota College of Law until 1952. He was Dean and a trustee of that school from 1940-1956. Thus, upon the merger of the two schools into the William Mitchell College of Law, it was only fitting that a man with such a background should be selected as president of the new combined operation.

Mr. Johnson has been engaged in the active practice of law in Minneapolis since receiving his LL.B. in 1915. During the intervening years, he has been a partner in six law firms. In addition to practicing law, he has been legal counsel for the North American Life and Casualty Co. of America, and at the present time he is associate general counsel, having been general counsel for a number of years.

In 1927, Mr. Johnson became Vice-Consul of Denmark in Minnesota, and Acting Vice-Consul of North Dakota in 1947. In recognition of his services to the Danish government, Mr. Johnson has been decorated with the Order of The Knighthood of The Danish Flag, he is the recipient of the Christian X Medal of Liberation, and recently he received the Order of The Knighthood of The Danish Flag First Class from King Frederik IX. In addition to these honors by the Danish government, he was honored by the Swedish King in December, 1958, by receiving The Knighthood of The Order of Vasa. At the present time, he is Consul General of Denmark for the states of Minnesota, North Dakota, South Dakota, and Montana.

FALL OF JENCKS

by Philip John Bloedel

It is hornbook law that a witness testifying to material facts may be impeached by prior inconsistent statements relating to his testimony.[1] When the witness denies making inconsistent statements, opposing counsel may introduce evidence to impeach the witness.[2] In federal criminal prosecutions, a narrow issue arose from this rule: Where the prior statements were given to a government agent — and those statements remained in the Government's possession — could a defendant in a prosecution by the Government require their production for use in cross-examining the witness? The answers shaped by the federal courts, federal administrative agencies, and Congress are the subject of this article.

THE FIRST ANSWERS

Initially, federal decisions responded in three channels of thought.

(1) The largest group of cases reasoned production and inspection of government witness's statements were two distinct operations. The trial judge first ordered the Government to produce, for his private inspection, requested statements. Although a defendant needed to show no inconsistency between these statements and the witness's testimony, he only received those portions which were inconsistent.[3] The trial judge determined what was, and what was not, inconsistent. Segments of statements not found inconsistent by the trial judge were pruned.

(2) The second line of authority required a showing of inconsistency as a condition precedent to production. Since defendants were normally unaware of the contents of statements in the Government's possession, the requirement generally had the effect of depriving defendants of a witness's prior statements. When inconsistency could be shown—usually because the witness admitted conflict on cross-examination — defendant's motion for production was granted.[4]

(3) The third group of cases based defendant's right of inspection on the governments witness's using memoranda to refresh his memory while testifying.[5] The courts reasoned that inspection prevented improper use of the documents. Use of statements to refresh the memory of a witness prior to trial raised no **right** enabling the defendant to inspect. Inspection rested in the trial judge's discretion.[6]

THE SUPREME COURT SPEAKS

In June, 1957, the Supreme Court overruled these three lines of cases in **Jencks v. United States.**[7] The **Jencks** case established broader discovery rights for criminal defendants.

Undercover agents[8] for the FBI gave crucial testimony that the defendant, a union official, falsely swore on his noncommunist affidavit under the Taft-Hartley Act.[9] On cross-examination the government witnesses admitted making regular oral and written reports to the FBI on the subject matter of their testimony. Defendant moved for production of these statements for an IN CAMERA examination by the trial judge and delivery to defendant of those portions found admissible for use in impeachment. The judge denied the motion. Defendant was convicted. Since defendant failed to lay a preliminary foundation of inconsistency between the testimony of the witnesses and the reports held by the Government, he was not entitled to production of the reports. The Court of Appeals of the Fifth Circuit affirmed.[10]

Mr. Justice Brennan — speaking for five members of the Supreme Court — reversed. The majority held that defendant was entitled to an order directing the Government to produce the reports for his inspection. When statements of government witnesses relate to the events and activities of their direct testimony, sufficient foundation is laid for production. The opinion expressly disapproved the practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused. The Court declared that it had not meant to imply, in **Gordon v. United States**[11] that a preliminary showing of inconsistency was necessary for production. Since a defendant would be unable to show inconsistency unless the witness admitted conflict, the effect is to deny material evidence to the defendant. This would be "clearly incompatible with our standards for the administration of criminal justice in the federal courts . . . ,"[12] especially since the Government's interest in a criminal prosecution " 'is not that it shall win a case, but that justice shall be done.' "[13]

Since only the defendant is fully equipped to evaluate the full impact of statements as an impeachment device, the Court disapproved the practice of first submitting the documents to the trial judge. The case discards the evidentiary tests of pre-**Jencks** decisions. Relationship is now the sole test. "[R]eports . . . shown to relate"[14] to the subject matter of the testimony must be produced directly for defendant's inspection. Since unrelated parts could not be inconsistent with the witness's testimony, they have no hidden impeachment value.

CONGRESSIONAL RESPONSE

Congress responded immediately to the **Jencks** case. A Senate committee recommended clarifying legislation because of so-called gross misinterpretations of the **Jencks** case.[15] The legislation was passed quickly because of an impending recess.[16] The law became effective September 2, 1957, three months after the Jencks case.

The new statute (hereafter called the JENCKS statute) reaffirmed the decision's holding that in a criminal prosecution defendant is entitled to reports in the Government's possession relating to the witness's testimony at the trial.[17] The Government, however, may claim privilege. In that event, the witness's testimony is stricken from the record and the trial either proceeds or a mistrial may be declared. The JENCKS statute requires no preliminary foundation of inconsistency between statements and testimony — again following the decision. If the statement relates to the testimony, it must be produced.[18]

Part of the statute's impact is upon the mechanics by which the defendant is to be furnished statements. Here, the statute overrules the decision. Upon defendant's motion and the Government's refusal to produce the statements, the trial judge requests the statements. The Government forfeits the testimony of the witness if it fails to comply—but not the entire case as in the decision.[19] If the Government does comply with the judge's request, the judge inspects the documents privately. The judge then rules on whether the documents are related to the testimony. Defendant's motion will be denied when the judge believes that the statements do not relate to the witness's direct testimony. If the defendant objects to the denial and is later found guilty, the Government must preserve the statements for review by the appellate courts for determination of the correctness of the trial judge's ruling.[20] The requirement that defendant object to the withholding of the statements to preserve his rights on appeal seems to be a useless ceremony. How can a defendant make an intelligent objection without access to the contents of the statements?

The trial judge may also turn over to defendant relevant parts of statements — excising those portions deemed not to relate to the testimony of the witness.

The statute also established two important limitations, at least the first of which was implicit in the JENCKS case. Statements of a witness must be given to defendant only after the witness has testified. This indicates that the use of the statements is solely for impeachment. The other limitation imposed by the statute is a definition of "statement."[21] Only written statements adopted by the witness or oral statements which are "a substantially verbatim" record made "contemporaneously with the making of such oral statement" may be ordered produced.[22]

Although the **Jencks** case did not rest on constitutional grounds, the commands of the Constitution were close to the surface.[23] Congress recognized these constitutional overtones.[24] The Federal Rules of Criminal Procedure were specifically excluded from the statute. Since the **Jencks** case made no reference to the rules, the legislation—intended only to affect the decision — likewise avoided them.[25]

Congress intended the **Jencks** statute to strike a balance between a defendant's demands for all that might aid in his defense and the Government's interest in protecting its sources of information. But the statute is not free from defect. The definition given to the word "statement" in subsection (e) of the act only applies to subsections (b), (c), and (d), and apparently not to subsection (a).[26] But after the witness has testified, subsection (b) provides that the court shall order production of "any statement (**as hereinafter** defined). . . ." (Emphasis supplied.) Apparently Congress intended limiting the production of documents which satisfied the strict requirements of subsection (e) and then only after the witness has testified. But the **Jencks** case defined statements as "all reports . . . written and, when orally made, as recorded by the FBI . . . ."[27] Subsection (e) limits oral statements to a "substantially verbatim recital." The Government, thus, may avoid the thrust of both the **Jencks** decision and statute by merely summarizing oral statements of prospective witnesses.[28] The statute also leaves unclear whether statements of a third person—approved or otherwise adopted by the witness — escape production because not within subsection (e). The subsection (e) definition also does not adequately cover production of an agent's summary which records part, but not the entire interview between the witness and government agent.

ADMINISTRATIVE HEARINGS

One extension of the **Jencks** principle has been in the area of federal administrative law.

The administrative process may be divided into two broad categories: (1) Rule and Regulation Making, and (2) Adjudication. Since the former closely resembles the **legislative function**, cases normally hold that due process is inviolate if the proceedings are subject to judicial review.[29] But in the case of administrative hearings—adjudication—the agency exercises a **judicial function**, and analysis begins with the assumption that notice and an opportunity to be heard are essential to the requirements of due process.[30] It is in this segment of administrative law that the Government, although not involved in criminal proceedings, has a duty to see that justice is done.[31] Even though the **Jencks** statute is limited, by its own terms, to criminal proceedings, federal appellate courts have applied the **Jencks** rule to administrative hearings based on due process talk.[32]

Congress gave administrative agencies wide latitude in receiving evidence. Administrative proceedings are also freed from the Federal Rules of Civil and Criminal Procedure. The Administrative Procedures Act[33] (hereinafter referred to as APA) provides in Section 7(c): "[A]NY oral or documentary EVIDENCE MAY BE RECEIVED . . . . [A]ny agency may adopt procedures for the submission of all or part of the evidence in written form." (Emphasis added.) However, evidentiary rules adopted by the agency must satisfy the requirements of due process.[34]

Prior to **Jencks**, in administrative hearings, it had been held that due process did not require disclosure of a government witness's earlier statements relating to his testimony at the hearing unless a foundation of inconsistency had first been laid.[35] But after development of the **Jencks** principle, applications began to appear in administrative hearings. One of the most interesting applications of this philosophy appeared in **Communist Party v. Subversive Activities Control Board.**[36] The case has significance here for two reasons: (1) the Court of Appeals for the District of Columbia applied the **Jencks** principle to an administrative hearing, and (2) three distinct treatments of production problems were involved.

The case centered on damaging testimony of several witnesses against the Communist Party of the United States, and alleged statements, supposedly given by the witnesses to the FBI, relating to their testimony. The Court, while accepting that the case was not a criminal proceeding, nevertheless laid the groundwork for application of the **Jencks** philosophy. The hearing before the Board, said the court, is an adjudication—as that

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1. McCORMICK, EVIDENCE (Hornbook) § 34 (1954).
2. 70 C.J. *Witnesses* § 1219 (1935).
3. See *e.g.*, United States v. Cohen, 145 F.2d 82 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945).
4. See, *e.g.*, Herzog v. United States, 226 F.2d 561 (9th Cir. 1955), *cert. denied*, 352 U.S. 844 (1956).
5. See, *e.g.*, Little v. United States, 93 F.2d 401 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938).
See, *e.g.*, Goldman v. United States, 316 U.S. 129 (1942).
7. 353 U.S. 657 (1957).
8. The infamous Harvey P. Matusow was one of these.
9. "No investigation shall be made by the [National Labor Relations] Board of any question affecting commerce concerning the representation of employees raised by a labor organization . . ., unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization . . . that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits." 61 Stat. 146 (1947), 29 U.S.C. § 159(h) (1952).
10. 226 F.2d 540 (5th Cir. 1955).
11. 344 U.S. 414 (1953).
12. 353 U.S. 657 at 668.
13. *Ibid.* quoting from Berger v. United States, 295 U.S. 78, 88 (1935).
14. 353 U.S. 657 at 669.
15. S.REP. No. 569, 85th Cong. 1st Sess. 2-3 (1957). See also statement of Attorney General Brownell, *id.* at 4-8.
16. The bill was passed by the Senate on August 29, 1957, 103 CONG. REC. 16489-90, and by the House on August 30, 1957, (the day Congress adjourned) *id.* at 16742.
17. 71 Stat. 595 (1957), 18 U.S.C. § 3500 (Supp. V, 1958), see generally S. REP. No. 981, 85th Cong., 1st Sess. 3 (1957), and H. R. REP. No. 700, 85th Cong., 1st Sess. 3-4 (1957).
18. 18 U.S.C. § 3500 (b), (c), and (d) provides:
"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statements which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purposes of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.
"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."
19. Jencks v. United States, 353 U.S. 657, 672 (1957). See also cases cited 103 CONG. REC. 14552 (August 26, 1957).
20. 18 U.S.C. § 3500 (c) (Supp. V, 1958).
21. 18 U.S.C. § 3500 (e) (Supp. V, 1958) provides:
"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section relation to any witness called by the United States, means —
(1) a written statement made by said witness and signed or otherwise adopted or appoved by him; or
(2) a stenographic, mechanical, electrical, or other recordings, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."
22. Congress intended the limitation to restrict lower courts in ordering entire government files and grand jury testimony turned over to a defendant. See cases cited 103 CONG. REC. 14552 (August 26, 1957).
23. Jencks v. United States, 353 U.S. 657 at 669 where it was said, "Justice requires no less. . . ." This reference pertained to turning statements over to the defendant. Nothing was said about due process nor were any cases cited indicating a constitutional basis. See also Palermo v. United States, 360 U.S. 343 (1959).
24. 103 CONG. REC. 15249 (August 30, 1957) and 103 CONG. REC. 14538 (August 26, 1957). See also S. REP. No. 981, 85th Cong., 1st Sess. 2 (1957).
25. 103 CONG. REC. 14534 and 14537 (August 26, 1957) and 14727 to 14730 (August 27, 1957). See also 103 CONG. REC. 15249 (August 30, 1957).
26. Subsection (e), *supra* note 21. Subsection (a) of the statute provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."
27. 353 U.S. 657 at 668. Subsection (e) has been held constitutional even though it may exclude statements discoverable under the *Jencks* decision. United States v. Grunewald, 162 F. Supp. 621 (S.D.N.Y. 1958).
28. Palermo v. United States, 360 U.S. 343 (1959).
29. See, *e.g.*, Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).
30. See, *e.g.*, Philadelphia Co. v. Securities & Exchange Commission, 175 F.2d 808 (D.C. Cir. 1948) wherein at 817 it was said: "adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution."
31. See, *e.g.*, Federal Communications Comm'r v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).
32. See, *e.g.*, Communist Party v. Subversive Activities Control Board, 254 F.2d 314, 327-28 (D.C. Cir. 1958).
33. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).
34. See *e.g.*, N.L.R.B. v. T. W. Phillips Gas and Oil Co., 141 F.2d 304 (3d Cir. 1944).
35. *E.g.*, *Ex parte* Bridges, 49 F. Supp. 292 (N.D.Cal. 1943).

(Continued)

term is used in the APA—and as such, the proceedings must "satisfy the pertinent demands of due process." [37] A key government witness testified to past events material to the case. At the time of these events, the witness had admittedly made reports to the Government concerning these occurrences. The defense attacked the witness's testimony on this precise point and demanded production of the reports. In holding that the reports should have been turned over to the defense, the Court stressed "simple justice" and "fair play" declaring:

> **"The opinion of the Supreme Court in the Jencks Case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary principle applies here and leads to the same result." [38]**

The second production problem in the case involved another witness, a one-time prominent member of the Communist Party. Long before his testimony at the hearing, he had talked with FBI agents about undercover activities of the Party. Although there was no evidence that the witness had given the FBI written reports concerning these activities, the Party premised its demands for production of alleged reports on the theory that since the witness had talked to the FBI, an FBI agent must have made some written report of the conversation. The Court denied the defense's request. It reasoned that even if there had been a report, such a document would be the words of an unknown government agent, not the words of the witness; and hence, hearsay.[39] The Court emphasized that even under the **Jencks** statute the alleged reports would not be producible since they fall outside the "statement" definition—writings signed or approved by the witness or a substantially verbatim recital. The Court, in concluding that the Board's refusal to produce the alleged reports was proper, said: "surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution." [40]

> **The third production problem in the case involved the defense's attempt to show that one of the Government's witnesses had perjured herself. Earlier, the witness denied receiving compensation for her undercover work for the FBI. Later she explained that she had been reimbursed for certain expenses necessary in this work. In ordering production of records of the witness's compensation from the FBI the court pointed out that it did not rely on the JENCKS case or the JENCKS statute.**

"[T]hese records are not 'statements' of the witness but are rather records of an executive department maintained in the course of carrying out its functions. Our conclusion is based on the general proposition exemplified by Rule 34 of the Federal Rules of Civil Procedure,[41] that where one party to an action is shown to have documentary evidence contradictory to the testimony of one of its witnesses, production of such document is required upon request of an opposing party." [42] (Footnote added.)

Just three months after the **Jencks** decision, an administrative agency, the National Labor Relations Board, refused to apply the **Jencks** rule in **Great Atlantic & Pacific Tea Co.**[43] Respondent was charged with discriminatorily discharging one of its employees in violation of the National Labor Relations Act. The employer contended that the Board's Rules and Regulations had been abrogated by the **Jencks** decision to the extent that they barred production of documents, secured during investigation of charges against the employer. The Board—in upholding the trial examiner's refusal to produce the requested documents—held that **Jencks** was confined to criminal cases and inapplicable to proceedings conducted in accordance with the APA.[44] The dissenting member emphasized that, even if **Jencks** was not controlling in the proceedings, sound policy dictated that in prosecutions under the National Labor Relations Act the spirit of **Jencks** should prevail so that the "Government's role in the administration of justice may be above suspicion and reproach." [45] But the dissent reasoned that an unfair labor practice action was a "public procedure looking only to public ends," and like a criminal proceeding, and held that the **Jencks** rule did apply.[46]

> **In another case involving proceedings before the National Labor Relations Board, the Court of Appeals of the Second Circuit held that the JENCKS rule was applicable.[47]**

Federal courts have placed a limitation on application of the **Jencks** rule in administrative hearings, however. Where a witness's statement contains privileged material, the Government has not been required to produce.[48] A distinction between "confidential" and "privileged" is used:

> "Almost any communication, even an ordinary letter, may be confidential. . . . But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure." [49]

But an excision procedure, comparable to that employed in the **Jencks** statute for unrelated material, can effectively remove this problem in most cases. The administrative tribunal could privately inspect all documents claimed to contain privileged material. Privileged portions would be deleted. If a document were not susceptible of pruning, without losing its effectiveness, the claim of privilege would stand.

A number of agencies have adopted regulations similar to that involved in the **Great Atlantic** case—immunity from production of their files. And the Supreme Court has upheld department heads in preventing subordinates from producing government documents, pursuant to such regulations.[50] But to allow an agency to insulate itself against disclosure seems grossly unfair unless overwhelming considerations of public policy—such as national security or military secrets—are applicable. The better **general rule** is that a department or agency of the Federal Government cannot insulate itself, by its own rules and regulations, from producing its files where justice and fairness require that disclosure is necessary.[51]

THE AXE FALLS

The stringent requirements of the "statement" definition in the **Jencks** statute could have been neutralized by liberal judicial construction under the rationale of the **Jencks** case. In a trio of 5-4 decisions (the alignment of the Court was identical in all three cases), the Supreme Court closed the door on liberal construction. The most devastating impact was felt in the first of the cases, **Palermo v. United States.**[52] Here the Court announced its initial construction of the **Jencks** statute—it is the exclusive, limiting means of compelling production of a witness's pre-trial statements.

> **Defendant was convicted of knowingly and wilfully evading the payment of income taxes. His accountant gave crucial testimony against him. An agent of the Government had summarized in approximately 60 words a conference with the accountant lasting almost 3½ hours. Defense moved for production of this document. The motion was denied. The Court of Appeals for the Second Circuit affirmed.[53] Only statements that a witness "signed or otherwise adopted or approved" or ones which represent a "substantially verbatim recital" are producible under the statute. The Court held that "summaries of an oral statement which evidences substantial selection of material . . ." [54] and statements containing a government agent's "interpretations or impressions" [55] do not fall within the scope of the statute and are therefore not producible. The majority opinion closed the gap in reasoning by declaring that that which cannot be produced under the statute cannot be produced at all—the JENCKS act is the exclusive mechanism for requiring production.**

Although all members of the Court concurred in the result, Mr. Justice Brennan, speaking in behalf of the minority, could "see no justification for the Court's ranging far afield of the necessities of the case" in attempting "a general interpretation of the act." [56] The minority thought the **Jencks** statute was not exclusive. For documents falling outside the stringent requirements of the "statement" definition, the trial judge should exercise his discretion as to whether the documents should be ordered produced. Mr. Justice Brennan reasoned that members of the Court "removed from the tournament of trials, must be careful to guard against promulgating general pronouncements which prevent the trial judges from exercising their traditional responsibility. . . ." [57] The minority emphasized that nothing in the statute or legislative history compelled the conclusion that the statute was the sole vehicle for ordering production of a government witness's pretrial statements to a government agent. Not only is there no express language in the statute indicating that it was to be the sole mechanism for production, but such language, originally contained in the bill, was deleted in the Conference Report. Although congressional concern centered about swelling interpretations of the **Jencks** decision, Congress recognized the constitutional overtones implicit in a statute which would strip the trial judge of all discretion in ordering production of a government agent's summary of a witness's pre-trial statements.[58] Mr. Justice Frankfurter, for the majority, reasoned that it would be irrational and mock congressional intention to prescribe detailed procedures restricting production of those more reliable documents falling within the scope of the statute and yet allow less reliable statements—non-verbatim, non-contemporaneous records—freedom from the statutory safeguards established by the **Jencks** statute. The argument is persuasive but overlooks the inherent danger now possible. The Government may now take "statements in a fashion calculated to insulate them from production." [59] Thus the Government may avoid the thrust of both the **Jencks** decision and statute by selectively summarizing all that a witness says and supplementing this with a few of the agent's impressions. The only possible relief offered from this danger lies in the words of the statute which allows production of "substantially verbatim" reports of what the witness has said. However, since the "substantially verbatim recital" and the "recorded contemporaneously with the making of such an oral statement" requirements are joined by the word "and," a conjunction, it appears that both elements must coexist in order to satisfy the statute.[60] In facts similar to **Palermo**, where the agent's summary is written up **after** the interview, even if the document is a "substantially verbatim" disclosure of the witness's words, the Court has room in which to deny production.

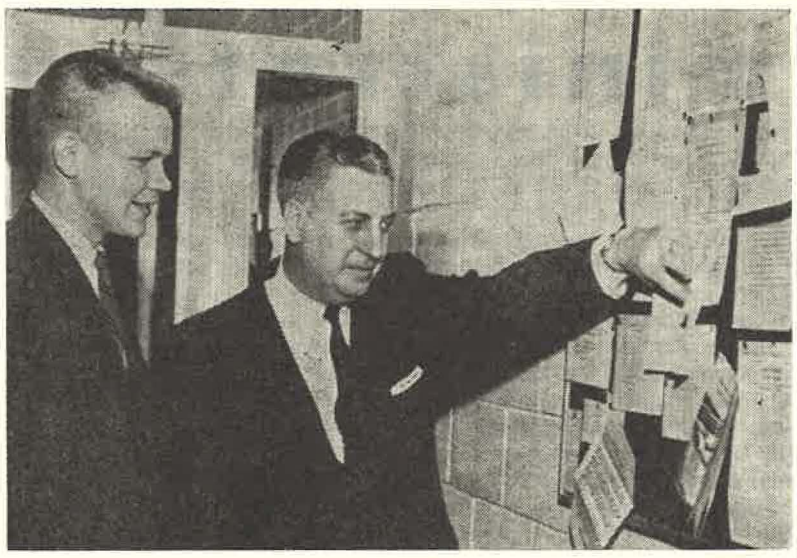
The Supreme Court surrendered the last vestiges of its **Jencks** position in **Rosenberg v. United States.**[61] Defendant was convicted of transporting in interstate commerce a check obtained through fraud.[62] Conviction was reversed, the Court of Appeals for the Third Circuit holding that **Jencks**—decided after conviction but prior to appeal — required production of certain statements.[63] The second trial also resulted in conviction.[64] This time the court of appeals sustained the conviction.[65] The victim of the fraud had written a letter to the Assistant U.S. Attorney revealing that her memory had dimmed in the three years since the fraud and would require her original statement, given to the FBI, to refresh her memory. The trial judge refused defendant's request to examine the letter. The Supreme Court affirmed the conviction by a 5-4 margin declaring that although the letter was clearly within the scope of producible documents under the **Jencks** statute, its non-production was only harmless error. Defendant obtained the same information contained in the letter through cross-examination and questions by the trial judge. Defendant argued that the **Jencks** decision required production and failure to do so was grounds for reversal. Mr. Justice Frankfurter, speaking for the majority, cited **Palermo** for the proposition that the **Jencks** statute, not the **Jencks** decision, governs production of a government witness's pretrial statements. The dissent reemphasized the **Jencks** principle that ". . . only the defense is adequately equipped to determine [the] . . . effective use [of statements of a witness] . . . for purposes of discrediting the Government's witnesses and thereby furthering the accused's defense. . . ." [66] Mr. Justive Brennan, for the dissent, argued that the **Jencks** statute was designed to foster this basic premise.

> **"The statute, while delimiting the statements which are to be turned over to the defense, obviously comprehends that statements which are producible under it must be given to the defense regardless of a judge's opinion as to how useful they might be on cross-examination, for only the defense can fully appreciate their possible utility for impeachment." [67]**

The third and last Supreme Court decision deliberalizing the **Jencks** statute was **Pittsburg Plate Glass Company v. United States.**[68] Petitioners were convicted of conspiracy under section 1 of the Sherman Act.[69] The question raised by the case was whether the trial judge erred in refusing petitioner's request to inspect certain grand jury minutes relating to testimony of a key government witness rendered against them. Petitioners argued: (1) **Jencks**, in establishing a standard of fairness, requires production of the witness's grand jury testimony which related to his testimony at the trial, or (2) if the **Jencks** case itself does not dispose of the case, then it is certainly determinative of whether the trial judge abused his discretion under Rule 6 (e) of the Federal Rules of Criminal Procedure.[70] The Court, splitting 5 to 4 again, announced that neither the **Jencks** decision nor the **Jencks** statute is dispositive of the issue. The majority declared that the **Jencks** statute does not apply to grand jury minutes.[71] The majority reaffirmed the policy of secrecy surrounding grand jury proceedings.[72] Only where there is a showing of "particularized need [will the] . . . secrecy of the proceedings [be] . . . lifted discreetly and limitedly." [73] The burden of overcoming the general policy of secrecy is on the party asserting a "particularized need," but the Court declared that the petition-

(Continued on page 5)

36. 254 F.2d 314 (D.C. Cir. 1958).
37. *Id.* at 327 quoting from Federal Communications Comm's v. Pottsville Broadcasting Co., 309 U.S. 134, 143-44 (1940).
38. *Id.* at 328.
39. *Cf.* Palermo v. United States, 360 U.S. 343 (1959).
40. 254 F.2d 314 at 325.
41. "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30.02, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things not privileged . . . which are in his possession, custody, or control. . . ." Fed. R. Civ. P. 34.
42. 254 F.2d 314 at 330 (D.C. Cir. 1958).
43. 118 N.L.R.B. 1280 (1957).
44. The Board specifically ruled that *Jencks* was not meant to overturn agency rules and regulations (such as the one in question which prohibited the Board's employees even from answering a *subpeona duces tecum* affecting documents, like those in the case, without the Board's written consent) which are reasonably calculated to preserve the agency's records. *Id.* at 1282.
45. 118 N.L.R.B. at 1284.
46. 118 N.L.R.B. at 1286.
47. N.L.R.B. v. Adhesive Products Corp., 258 F. 2d 403, 407 (2d Cir. 1958). The Board itself overruled its Great Atlantic decision in Ra-Rich Mfg. Corp., 121 N.L.R.B. 700 (1958), saying: "The Board now holds, in conformity with the decision of the Court of Appeals for the Second Circuit in Adhesive Products that the holding of the *Jencks* case applies to Board proceedings. . . . To the extent inconsistent with this holding, the Great A&P case . . . is hereby overruled." The Ra-Rich rule was approved in Tidelands Marine Service, Inc., 126 N.L.R.B. No. 36, 28 U.S.L. Week 2375 (January 20, 1960).
48. See, *e.g.*, Communist Party v. Subversive Activities Control Board, 254 F.2d 314, 321 (D.C. Cir. 1958) (dictum).
49. *Ibid.*
50. See, *e.g.*, United States v. Reynolds, 345 U.S. 1(1953) ; United States *ex rel.* Touhy v. Ragen, 350 U.S. 462 (1951).
51. See, *e.g.*, United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (D.C. La. 1949), *aff'd per curiam*, 339 U.S. 940 (1950).
52. 360 U.S. 343 (1959).
53. 258 F.2d 397 (2d Cir. 1958).
54. 360 U.S. 343 at 366.
55. *Id.* at 353.
56. *Id.* at 360.
57. *Id.* at 360.
58. See H. R. REP. No. 700, 85th Cong. 1st Sess., 4 (1957); S. REP. No. 981, 85th Cong. 1st Sess., 3 (1957); 103 CONG. REC. 15928, 15933 (August 26, 1957), 16489 (August 29, 1957).
59. 360 U.S. 343 at 366.
60. See 18 U.S.C. § 3500(e)(2).
61. 360 U.S. 367 (1959).
62. 146 F. Supp. 555 (E.D.Pa. 1956).
63. 245 F.2d 870 (3rd Cir. 1957) (*per curiam*). The *Rosenberg* case, according to a Senate Committee report, was said to be a "misinterpretation" of the *Jencks* decision. S. REP. No. 981, 85th Cong., 1st Sess., 3 (1957).
64. 157 F. Supp. 654 (E.D. Pa. 1958).
65. 257 F. 2d 760 (3d Cir. 1958).
66. 360 U.S. 367 at 375 quoting from 353 U.S. 657 at 668-69.
67. *Id.* at 375.
68. 360 U.S. 395 (1959).
69. 26 Stat. 209 (1890), 15 U.S.C. 1 (1938) provides: "Sec. 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."
70. "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the Government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. . . ." Fed. R. Crim. P. 6 (e).
71. See 103 CONG. REC. 15933 (August 26, 1957) (remarks of Senator Clark): "Let us make it clear that [in reference to the proposed statute] we are talking only about records of statements made to a Government agent. Grand jury proceedings could not possibly be based upon the provisions of the bill, because a grand jury is not a Government agent. . . ."
72. See, *e.g.*, United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958).
73. 360 U.S. 395 at 399 quoting from United States v. Proctor & Gamble, 356 U.S. 677 at 683.



Charles L. Langer, new chairman of the Placement Committee, posts another notice of a job-opening on the school bulletin board, while committee secretary, James Mason, looks on. The Placement Committee, less than one year old, has made giant strides in the placing of students and graduates in the positions of their choice. Both Mr. Langer and Mr. Mason are sophomores. (Photo by Burkowski)

Alumni Dinner Set For June 6

James E. Kelley, President of the Alumni Association, announced plans for the Alumni dinner at a meeting of the Board of Directors of the William Mitchell College of Law Alumni Association, held in March.

The annual dinner will be held at the Prom Ballroom in St. Paul on June 6, 1960, at 6:00 P.M. The Honorable Ronald E. Hachey, Judge of the Ramsey County District Court, is chairman of the banquet, and he will also serve as Master of Ceremonies. Other members of the committee are James E. Finley, John W. Cragg, Thomas V. Reagan, Anton Yngve, and William Posley.

ALUMNI NEWS

The officers elected for the Alumni Association for 1960 are James E. Kelley, President, William H. DeParcq, Vice-President, Clarence J. Wagner, Secretary, and Harry L. Holtz, Treasurer. These officers were elected at the last annual meeting in June.

Members of the Board of Directors for the Alumni Association, besides the officers are: Gerald E. Carlson, Joseph M. Donahue, Honorable Ronald E. Hachey, Horace R. Hansen, Honorable Milton D. Mason, Simon Meshbesher, Honorable Edward D. Mullaly, Rolland L. Thorson and Martin J. Ward.

Clarence O. Holten and Richard J. Leonard were appointed as members of the dues committee.

At the director's meeting immediately following the last annual meeting of the Alumni Association held in June, 1959, the directors launched a fund-raising project on behalf of the Association. The purpose of the project is to raise funds for the cost of the new building, to equip and maintain the law library, and to provide the school and class rooms with modern equipment.

ALUMNI NOTES:

George L. Weasler, '38, National Labor Relations Board from '42 to '50, Chief Legal Officer at Puerto Rico from '50 to '57, now in private practice at 607 Condominio Condado, Santurce, Puerto Rico.

Paul H. Nycklemoe, 1958, was appointed Special Assistant Attorney General after being admitted to the bar.

Gordon E. Hackman, 1958, is employed by Investors Diversified as Supervisor in the Accounting Unit.

ALUMNI ATTENTION:
Please send information about yourself, or other Alumni, to:
WILLIAM MITCHELL OPINION
2100 Summit Avenue
St. Paul 5, Minnesota
We want to print news about YOU

Ethics Course Is Revised

Dean Stephen R. Curtis has announced the appointment of the Committee on Professional Responsibility, having the function of selecting the topics and speakers for the new course in Professional Responsibility, which will be taught to the fourth-year students during the 1960-61 school year.

Dean Curtis has succeeded in obtaining the services of several of the outstanding members of the legal profession in this area. Committee members include: Judge John B. Sanborn of the United States Court of Appeals, Eighth Circuit, Justice Oscar R. Knutson of the Minnesota Supreme Court, John G. Dorsey and Philip Neville of Minneapolis, and Frank J. Hammond of St. Paul.

The one semester course in Professional Responsibility supersedes those in Legal Ethics and Legal Profession.

The Committee will request practicing attorneys who are especially well versed in certain fields of the law to present lectures which will be stimulating and informative and will show the young attorney how to analyze a situation which may carry the seed of a legal ethics problem so that he can avoid such problems before they arise.

Many Goals Were Completed By Year Old Student Bar Assoc.

Although still faced with a lot of problems, the Student Bar Association has accomplished many goals since its inception one year ago.

Led by its recently elected president, Mr. Arthur Anderson, the SBA is seeking to expand the accomplishment of the Placement and Lecture Committees and to actuate the Student Welfare and Curriculum Committee.

In elections held earlier this spring, Mr. Anderson was elected to the presidency to replace Mr. Raymond Faricy, who is graduating this spring. Other newly elected officers are Howard Stenzel, Vice President; Tom Murphy, Secretary; and Bud Schlehuber, Treasurer.

Mr. Charles L. Langer was appointed chairman of the Placement Committee for 1960 to replace Joe Thompson, a senior. Mr. Langer, who is business administrator of the Metropolitan Mosquito Control District, hopes to continue the good work done by the committee during 1959 and to expand the program of placing graduating seniors in the positions of their choice.

Appointment of a new chairman for the Lecturue Committee to replace Gerald Kalina, who is graduating, has not yet been announced. In the past there have been two lectures a year. However, the newly elected officers are in favor of increasing the number of lectures, as they feel the students' response has been very encouraging.

Vice President Howard Stenzel will head the Student Welfare and Curriculum Committee. Other members of this committee are the class representatives. This committee was established to handle problems of the students in regard to the school and to present these problems to the school administration, if necessary.

Dean Hamilton To Direct Bar Exams

Dean Robert R. Hamilton, retiring dean of the University of Wyoming Law School, began duties as Director of the Minnesota Bar Examinations for the Spring Bar Examinations in March of this year.

Dean Hamilton was appointed Director of Bar Examinations by the Minnesota Supreme Court.

Above are the new officers of the SBA for the year 1960-61. In elections held earlier this spring, these students were chosen to lead the student government by showing outstanding leadership, both in and outside the classroom. They are, from left to right, Howard Stenzel, Vice President; Tom Murphy, Secretary; Bud Schlehuber, Treasurer; and Arthur Anderson, President. (Photo by Burkowski)

FALL OF JENCKS

(Continued from opposite page)

ers had failed to show any need for the testimony at all. Instead of invoking the discretion of the trial judge under Rule 6(e) of the Federal Rules of Criminal Procedure, the petitioners asserted a claimed right—a right which the Court says petitioners did not have.

Although the Court in **Jencks** established no specific rules concerning grand jury minutes, the decision did announce principles of fairness which are as applicable to grand jury minutes as they are to statements given to government agents. Although the Supreme Court and some lower courts have relied on the opinions of congressmen that the **Jencks** decision did not apply to grand jury minutes, in the absence of an ambiguity in a pertinent statute, such opinions should be given **no** weight.[74] Even the dissenters do not quarrel with the interpretation that the statute has no application in this case. In the face of pertinent **Jencks** talk about standards of fairness in a criminal proceeding, the reasoning of the case is not persuasive. The majority has relied heavily on the overriding policy of secrecy surrounding the grand jury—the rationale in part being that witnesses coming before the grand jury must feel safe that retaliation will not be forthcoming upon disclosure of their testimony. But the force of this argument is dissipated with the realization that key testimony of such witnesses will often mark the cornerstone of the Government's case at an ensuing trial. That same witness who supplied crucial testimony in obtaining an indictment will reveal himself at the trial. The Court has turned back the clock in this case. Trial judges are now free to rule on the production of grand jury minutes as though **Jencks** had never been decided.

CONCLUSION

In **Rosenberg**, the Supreme Court emphasized that the **Jencks** statute overruled the **Jencks** decision. The statute is now the sole, and limited, vehicle for ordering production of a witness's pretrial statements. The statute itself is subject to three broad limitations:

(1) The statute probably covers no matters not contemplated by Congress—such as grand jury minutes.

(2) The statute, by its own terms, applies only to criminal actions.[75]

(3) The statute only commands production of documents meeting the strict requirements of the "statement" definition.[76] Documents not fulfilling these requirements are not producible at all.[77]

Under the shadow of these limitations, few documents remain producible. In circumstances conducive to taking pretrial statements, the Government can avoid the whole problem by merely summarizing a witness's words immediately after the interview with the witness.[78] And even if a document clearly falls within the definition of producible statements, the statement may not necessarily be ordered. If both the trial judge and the reviewing court agree that defendant was not prejudiced, the document may be inaccessible.[79]

The practical status of the law is a return to pre-**Jencks** practices. **Jencks** philosophy probably will no longer be applied in administrative hearings. The **Jencks** statute overruled the decision. Since the Supreme Court reads into the statute only what Congress thought was covered—administrative hearings were not contemplated—the lower federal courts, and certainly the administrative agencies, will pick up the new philosophy. Analogical applications of **Jencks** will cease.

Jencks ushered in broad discovery rights for criminal defendants. In the wake of explosive expansions of this basic philosophy, Congress, under the urging of the powerful Justice Department, enacted law intended to curtail this expansion. No sufficiently strong voice is likely to urge reestablishment of the broad discovery rights. The only likely reversal of the trend comes from the commands of the Constitution. **Bona fide** due process or Sixth Amendment arguments may supply the backdrop for another **Jencks** aftermath.

74. *Cf.* Matter of National Tube Co., 76 N.L.R.B. 1199 at 1203 (1948) where, in the construction of a section in the National Labor Relations Act, it was said: "Consideration of legislative history to determine legislative intent is normally confined to those instances where the statutory language is not, on its face, susceptible of reasonable interpretations, or where it contains some patent ambiguity that cannot be resolved by a consideration of the statute as a whole."

75. 18 U.S.C. § 3500 (a) (Supp. V. 1958).

76. 18 U.S.C. § 3500 (e) (Supp. V. 1958).

77. Palermo v. United States, 360 U.S. 343 (1959).

78. See *id.*

79. See Rosenberg v. United States, 360 U.S. 367 (1959).

Mitchell Law Wives

Since its inception in October, 1959, the William Mitchell Law Wives organization has become an active and purposeful group, which has met regularly every month at the law school building and has participated in four general types of activities, including the monthly programs, special interest groups, service to the school, and social functions.

The programs, designed for entertainment plus education in various phases of law, included a talk by Phyllis Jones, a senior student, on the challenges of law students with helpful suggestions to the wives; slides on a trip to Russia by Mr. John Sandors, St. Paul attorney; a discussion of "The Legal Profession" by Mr. Andrew N. Johnson, Minneapolis attorney and President of the Board of Trustees of the William Mitchell College of Law; a movie entitled "Where Law and Practice Meet" shown by the West Publishing Co.; a speech by Judge Theodore B. Knudson about the "Family Court" of Hennepin County; and a talk by Mrs. Douglas Rigg about the life of a warden's wife and advice on interior decorating. Professor William B. Danforth will be the speaker for the final meeting of the year in May. He will discuss "Civil Procedure and the Law Wife."

English Judicial Administration

By The Hon. Albin S. Pearson, Judge of the Ramsey County District Court

Judge Pearson, as a representative of the Minnesota District Judges Association, attended the meetings of the section on Judicial Administration of the American Bar Association in Miami, Florida, last August. The following is a reprint of his report to the President of the Minnesota District Judges Association, dated November 17, 1959.

Participating in the meetings of the section on Judicial Administration were a number of English lawyers, judges and other court officers. The following information is based upon what they said; but to avoid error in recollection, it has been verified by a careful review of the literature in our State Law Library. While subject to objection for brevity and generalization, it is substantially correct. Nothing herein relates to Scotland or Ireland; the words "England" and "English" include "Wales" and "Welch". The population of the country is seventeen times greater and its area is three-eighths less than Minnesota's. There are only thirty-nine judges whose work as trial judges (they also serve as appellate judges) is similar to that of sixty-two State and Federal District Judges here. To a Minnesotan this seems incredible unless some study has been made. Practically all competent observers agree that the English Bench enjoys a dignity and prestige far beyond that of any other Bench in the world. Even a casual objective investigation convinces one that the practice of law there is more professional and less commercial than here. Space is limited so the following is not a full explanation; it is only enough to suggest that while the English might well adopt some of our ideas, we should at least consider the advisability of adopting some of theirs.

THE PROFESSION GENERALLY. Our profession is very broadly (and only so) similar to the solicitors' branch of the English profession; and there is nothing here comparable with the English Bar, except by an immense stretch of the imagination, perhaps some "associations" of exclusively trial lawyers. In England the word "Bar" is used only in relation to barristers, whereas it is used here in connection with professional activities generally. Solicitors have no right of audience in any court superior to the County Court, which means in the High Court, the Court of Appeal, the House of Lords, and the Judicial Committees of the Privy Council; and barristers, in general, have no right of direct access to a lay client or a non-expert witness.

In a population of 52,000,000 there are less than 18,000 solicitors singly or in partnership and 1,000 barristers (partnership forbidden); but those figures include many who do not depend entirely upon professional income. American lawyers have a more favorable status in elective office, in labor negotiations, and in the management and direction of industry and commerce than the English who are less favored than their accountants in management, industry, and commerce and especially in tax law.

A barrister is engaged by the solicitor and not by the client; and his fee depends upon bargaining whereas solicitors' fees for routine work are fixed by schedule. Fees seem high, yet practice has become less attractive for the number of recruits continually diminishes. Barristers' fees are not in pounds but in guineas, not coined after 1813 but still meaning five per cent more than pounds! A solicitor's overhead is over sixty per cent while that of an American lawyer is forty per cent. While the standard of advocacy is higher there, than here, among lawyers not exclusively in trial work, the expense of litigation to the litigant, but not to the taxpayers, is much higher; for in addition to paying for his solicitor's work, the client must pay for his barrister even though the latter's services would not be necessary except for the legal requirement; and if he loses, he must also pay a substantial part of his adversary's expenses plus very high fees to the court itself. The expense is further aggravated by the division of the barristers into "Juniors" and "Leaders" or "Silks". A junior may appear without a leader but a leader must be attended by a junior who charges the client's solicitor one-third less than the leader does.

In a simple English default divorce case comparable with one here with no property whatever except household goods and wages of fifty dollars per week, the usual expense is four hundred dollars of which the Court takes eighty dollars, the solicitor one hundred and sixty dollars and the junior barrister (with no leader) takes one hundred and sixty dollars. The minimum expense for a client earning more than twelve dollars per week is one hundred and fifty dollars; and to one who earns less, the recent Legal Aid Act gives very little assistance.

The annual professional income is rather meager except for a very few. After being called to the Bar, not by the Court but by one of the Inns, he must be a pupil of a practicing barrister for one year for which he pays four hundred and fifty dollars and gets little or no business to pay living expenses. More exacting are the requirements for a solicitor who must serve a five (three, if he has a B.A.) year apprenticeship and attend an approved law school for one year during the clerkship. Until very recently the apprenticeship tuition was nine hundred to one thousand dollars.

THE JUDICIARY. Having replaced lay judges with law trained ones, Minnesotans may not understand that the English system of unpaid lay justices is more firmly established than in the past. Respect for law and confidence in the judicial system depend very much on the conduct of cases in inferior courts because for most people, "the law" means the police, Justices of the Peace, Magistrates, and County Courts. There are no judges elected. Most are laymen, very carefully chosen from only the most reputable citizens, acting on a part time unpaid basis and many barristers are part time paid judges. There are many administrative and regulatory boards and special tribunals dealing with transportation, industrial accidents, labor disputes, taxation, rents, housing, land use, etc., with little or no judicial review.

There are over four hundred County Courts with sixty-five full time "judges" who are not judges as that word applies to High Court Judges. They are former barristers each on £3750 salary and having a full or part time registrar who is a solicitor, heads the clerical staff and acts as "judge" when less than £10 is involved, which cases amount to one-third of those contested. It has (1) no criminal jurisdiction (2) contract and tort (except defamation, seduction, and breach of promise to marry) involving less than £100 (3) trusts, mortgages, etc., not exceeding £500 (4) title to land having less than £100 annual rent (5) small bankruptcies and (6) transfers from the High Court.

The High Court has thirty-nine judges (salary £8000 since 1956 when raised from £5000 unchanged for one hundred and twenty-five years despite tax increase) plus Lord Chief Justice, Lord Chancellor and the President of Probate Divorce and Admiralty Division. Normally they sit singly; each being attached to a division so there are at least five for equity, seventeen for law cases and appeals from Magistrates, and three for Probate Divorce and Admiralty. It also has original criminal jurisdiction which is seldom exercised and supervisory jurisdiction over inferior courts.

From County Courts and the civil side of the High Court, appeal is to the Court of Appeal consisting of four divisions each having three members who are either trial judges of the High Court or ex-officio members. It has no criminal jurisdiction. There are no shorthand notes in County Court cases; the only note is that of the judge and the appeal is limited to points taken in the County Court.

Appeals from the Court of Appeal go only by leave to a committee of the House of Lords consisting of at least three members. By leave of the Crown, an appeal lies to the Judicial Committee of the Privy Council composed of judges of the courts of England, the Dominions and some colonies, from judgments not made final by the Dominions. Even if one or more judges of the Privy Council disagree, the only view published is that of the majority; and the judgment is in the form of unanimous advice and always acted upon because it is unconstitutional for the Crown to receive contradictory advice.

An appeal in a criminal case may be made either by the defendant or prosecution from a Magistrate direct to the High Court on points of law only, or through the Appellate Division of the Court of Quarter Sessions (Justices of Peace or Recorder) only by the defendant to the High Court which may increase or decrease the sentence. From the original jurisdiction of the Court of Quarter Sessions an appeal only of conviction goes to the Court of Criminal Appeal consisting of an uneven number, not less than three, of High Court judges who may affirm, vacate, decrease or increase sentence or substitute conviction for another offense but cannot order a new trial. From the Court of Criminal Appeal an appeal lies to the House of Lords only if the Attorney General certifies that a point of law of exceptional public importance is involved.

JURIES. The frequent use of juries in civil trials here astounds Englishmen for they are accustomed to a system whereby a civil jury is a very rare occurrence and they regard its disappearance as one of the great legal reforms of this century. A jury is never used in a County Court, nor in any civil action in the High Court, except in defamation, malicious prosecution, false imprisonment, seduction, fraud, and breach of promise to marry; and not always in these six kinds. If it be observed that there was no inclusion of cases involving battery, breach of contract, other than to marry, and negligence, which constitute practically all of our civil jury business, the preceding sentence is very significant. The English judges at the Miami convention stated positively that in their population of 52,000,000, civil jury trials per annum would certainly not exceed twenty four and perhaps only twelve. The English claim that its retention here accounts for some distinction between the customs in the professions such as (1) the existence here of old-fashioned harangues which long ago passed into disuse there, (2) that an English advocate gets his effects by understatement, the American by overstatement, (3) stricter observance here of technical rules of evidence, the formulation of improper questions and the making of objections, (4) the limitation of a judge's power to comment on evidence convinces the English, as stated in 20 Modern Law Review, London 1957, page 340, that "Americans having saddled themselves with the incubus of the jury, have gone out of their way to ensure that the system operates with the maximum disadvantage."

ETHICS. The English Press is restricted to publication of what is actually put in evidence without comment on its effect; and publication of any other material before the trial ends is a serious contempt of court. Another example of the difference in ethical practices is that the Americans condemn the rule that a barrister must not interview witnesses other than experts and the client himself because it destroys one of the main advantages of having specialists as trial lawyers; while the English condemn the contingent fee, common here but utterly unprofessional there.

EXPENSE. Originally the main function of judges on circuit was tending the sovereign's finances instead of trying ordinary lawsuits; and the English position still is that courts should not operate at a loss. For obvious reasons the defendant in a criminal case pays nothing beyond his own lawyers' fees, his fine and punishment; but the English views on civil actions are that the expense, if any, for judges should be borne by the public and that all other expenses should fall on the litigants. The latter consist of (1) court fees for maintenance of courthouses, clerical salaries, etc., (2) expenses in collecting evidence and producing witnesses and (3) payment of solicitors and barristers.

High Court court fees are fixed by the judges with concurrence of the Treasury. By 1910 the "profit" exceeded £1,000,000 and was applied against the capital cost of buildings. During the wars, there were "losses"; but recently the annual "profit" approximates £100,000. County Court court fees while high are more favorable to litigants, so there has been a deficit since 1915. The court fees in an ordinary action in the High Court average £30.

The Minnesota definition of "costs and disbursements" meaning five dollars or ten dollars plus small amounts for clerk, witnesses, etc., has no application to English "costs". The solicitor, and not the barrister whom he hires and pays, determines what expenditures should be incurred. Those items, known as "solicitor and client costs," if reasonable may be recovered by the solicitor from the client. The costs payable by the loser to the winner, known as "party and party costs," are allowed by a taxing master upon the basis that the loser must pay what the total expense would be if the work had been done as cheaply as possible even though it was prudent to be prepared more fully.

The actual taxation of costs requires a fee. If less than one-sixth of the costs be disallowed, the expense of taxation falls on the objector; and if reduced by more than one-sixth, the claimant pays for the taxation. In many instances the expenses of both or even of one litigant are highly disproportionate to the amount in controversy. The effect of expense was well stated in 1953 in Jackson, The Machinery of Justice in England, page 264:

"There is no section of the community that is satisfied with the present cost of litigation. A few lawyers find that it is to their advantage, but lawyers as a whole do not gain by it. There has been a decline in the amount of litigation and a tendency to create administrative machinery rather than extend the work of the law courts. Lawyers as far as litigation is concerned flourish best upon a large volume of relatively cheap work. High costs frighten away clients. As the volume of litigation has contracted the cost has risen. Most solicitors now regard fighting an action as a misfortune from which they may save their client; a good settlement is better than a victory in the courts, and a solicitor who ignored this would not be doing his duty to his client. But the real effect is that many just and proper claims are compromised because a verdict of the courts is too expensive."

School Grad Tops

Clifford F. O'Rourke, a June, 1958, William Mitchell graduate, received the highest grade in the 1960 Maine Bar Examination, from a total of eleven men taking the exam.

Number two man was a graduate of Harvard Law School. Only four men passed the test.

Mr. O'Rourke passed the July, 1958, Minnesota Bar Examination but is presently practicing law in Camden, Maine.

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