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William Mitchell College of Law

William Mitchell
OPINION

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School Tries New Approach To The Old Problem of Ethics

The William Mitchell College of Law has added a new course, Professional Responsibility, to its curriculum this year. This course supersedes former courses on Legal Ethics and Legal Profession.

The course is conducted by the Committee on Professional Responsibility. The Committee selects the speakers and the topics to be covered. The members of the Committee are 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 character and standing of the members of this Committee leave no doubt as to the value and importance of the course.

This course is aimed at developing the student's appreciation of his future responsibilities as a lawyer. Its purpose is to furnish the student with an opportunity to learn from actual experiences of attorneys in practice the problems and responsibilities which arise when he becomes a member of the legal profession. It is apparent from the lectures given that this is a better method than the study of cases emphasizing disciplinary action by the Bar Association.

This new treatment of the subject gives the student an insight into situations arising in everyday practice which involve problems of professional conduct.

The following topics and speakers have been selected for the course this year: "The Lawyer and His Profession, a First Look," Philip Neville; "Candor and Fairness," Frank J. Hammond; "The Lawyer as a Fiduciary," Judge Oscar R. Knutson; "Conflicting Interests," John G. Dorsey; "The Profession's Duty to Make Legal Services Available to All," Professor Maynard E. Pirsig, University of Minnesota Law School; "Fees," Samuel H. Morgan; "Advertising and Solicitation," Robert F. Henson; "Special Problems in Divorce Practice," Judge Theodore B. Knudson; "Special Problems in Probate Practice," David R. Brink; "Special Problems in Criminal Practice," Judge John W. Graff; "Law Office Management," William H. Oppenheimer; "Relations Between Lawyers and Accountants, Lawyers and Physicians, and Lawyers and Real Estate and Insurance Men," Panel: Charles R. Murnane, Linus J. Hammond and Fred N. Kueppers, Sr.; "Corporate Counsel," Fordyce W. Crouch; "Lawyers in Government Service and Participation in Public Affairs," Judge Edward J. Devitt; "Special Problems in Trial Tactics," Philip Stringer; "Special Problems in Tax Practice," Hayner N. Larson.

All Mitchellites Pass Bar Exam

A total of 167 aspirants assembled to write the Minnesota State Bar Exam in July, 1960, with 100% of the total passing. Sixty-seven William Mitchell students wrote the examination.

Individual writers' results are no longer being given out, as the State Board of Law Examiners decided that this was not necessary.

Too Many Attorneys Doing the Negotiations States Labor Secretary

There is too much law and there are too many attorneys in the labor negotiation field, stated the Secretary of Labor, James P. Mitchell, earlier this fall at a talk given for the students at William Mitchell.

The Secretary, in St. Paul for a series of speeches, had contacted the school administration before leaving Washington and expressed his willingness to speak to the William Mitchell students, if possible.

The ten minute speech was non-partisan, but the one hour question-answer period did, at times, take on a political flavor.

In his short speech the Secretary explained why he thought the labor field would work better with fewer attorneys. The actual negotiation should be carried on by management and labor leaders themselves, since they each understand the business and problems being negotiated. Attorneys, the Secretary continued, would still be necessary to handle the drawing up of the contract and making sure the negotiations comply with the existing laws.

The Secretary added that in place of laws, which are many times passed in a period of haste, it would be far better to have the government act as a guiding hand with all parties sitting down and solving the problem themselves. This has worked very well in the past, when used, and makes for a sound solution. If this procedure is followed, it will cut down on the number of attorneys in the field, as the bulk of the work can be done by those experienced in the management-labor negotiation area not requiring legal training.

In the question-answer period the Secretary answered questions from the 'right to work' laws to the question of whether wage increases cause inflation.

In his answers the Secretary indicated that he is pro-labor and believes that all men have the right to collective bargaining.

To the question of what legislation should come out of the next congress to strengthen the next president in case of a national emergency, the Secretary stated that they should make the injunction time limit more flexible and strengthen the National Mediation Board.

The students at the beginning and end of the speech gave the Secretary a standing ovation.

"Too many attorneys . . ." stated labor Secretary James Mitchell

Effects of Locality on Practice Was Theme of First Lecture

'The effects of locality on the practice of law' was the theme of a five man panel discussion, headed by Judge Donald T. Barbeau, during the October lecture given to Mitchell students.

Sponsored by the Lecture Committee of the Student Bar Association, five practicing attorneys from five different areas of practice gave a very good 2 hour long discussion on the various advantages and disadvantages of practice in their respective fields.

Members of the panel and their area of practice were: Mr. Richard Post, Corporation Counsel; John Connelly, private practice in the metropolitan area; Jerome Blatz, private practice in the suburbs; Richard Leonard, working for a firm of attorneys; and Dan Gallagher, private practice in a small town.

The panel discussed, problems such as "What opportunities for jobs exist in your area?", "Should a young attorney specialize?", "What are overhead expenses in your areas?", and "How important is politics in the life of a new attorney?"

Although there was a fairly small group of students present, they did get very active when Judge Barbeau threw the panel open to questions.

The one point the panelists all agreed upon and said they could not over-emphasize was the fact that the new attorney at the outset should not expect to make very much money. One member of the panel indicated he earned eight dollars his first month in practice.

Foreign Law Institute To Be Held At Mitchell Starting In February

More clients of Minnesota lawyers are engaged in foreign trade than ever before. More people are seeking information about investments and business opportunities in foreign countries. Realizing that today lawyers in general practice need a basic understanding of at least some of the differences between our common law and the civil law system that exists in Europe, South America, and much of the balance of our globe, the William Mitchell College of Law will conduct an Institute on Investments and Business Abroad. The Institute will be held at the school on five Wednesday evenings from February 1, 1961, through March 1.

Plans for the institute have been in process for more than a year. The planning committee consists of fifteen lawyers with divergent interests and connections. The group represents small businesses as well as the very largest, including manufacturing, milling, electronics and banking.

The institute will include lectures on Contracts, Property and Corporations under Foreign Law, by R. B. Vander Morghts, a Belgain lawyer who is in charge of international affairs for Minnesota Mining & Manufacturing Company. There will be panel discussions of Methods of Doing Business Abroad and also of Individual Investments Abroad.

The institute will be co-sponsored by the Minnesota State Bar Association, the Corporate Counsel Association of Minnesota, and the Harvard Law School Association of Minnesota.

All lawyers and law students will be invited to attend.

Wattson Made Chairman

Professor Marshman S. Wattson, a member of the full time faculty at Mitchell, is the 1960-61 chairman of the Tax Section of the Hennepin County Bar Association.

Student Enrollment up For Fall Semester

A total of 417 students enrolled at William Mitchell for the fall semester beginning September 12, 1960. A breakdown by classes finds 81 seniors and 2 auditors, 86 juniors, 93 sophomores and 155 freshmen. This is 7 more than last year's enrollment.

As was the case last year, the average age is 27 for the entering freshmen, with 89% of them having obtained bachelor's degrees from 40 different colleges and universities.

Class Representatives Elected

Recently elected to the Board of Governors of the Student Bar Association are the following eight men:

Dennis J. Holisak and Robert M. Reedquist, first year;
Kevin P. Howe and John M. Sands, second year;
Richard J. Hawkins and John B. McGrath, third year;
John G. Bell and James R. Otto, fourth year.

The above were chosen on October 20 by their respective classmates, whom they will represent on the Board of Governors for the coming school year.

The present officers of the Student Bar Association will remain in office till the general election next spring.

WILLIAM MITCHELL OPINION

Seldon H. Caswell ..... Editor
Robert H. Schumacher ..... News Editor
John G. Bell ..... Technical Editor
John Moylan ..... Editorial Director
O. V. Heath ..... Staff Photographer
Staff: Carol Paar, Thomas Gruesen, Wayne Vander Vort, Berth Jenkins, Robert DeVeau, Barry McGrath and Howard Stenzel.
Faculty Adviser ..... William A. Green

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The Students Speak—

Dare We Refuse

A couple of years ago an unemployed welder was elected to Congress from a midwestern city. Thereupon the gentleman donned string tie, stetson hat and frock coat and went off to Washington. His most noteworthy accomplishment since that date has been his success in renting his front porch to the federal government, with the proceeds going back home to the Congressman's wife.

No great point could be made of this story if it were the only instance of such happenings, but the truth is that totally unqualified people are returned to elective public office with depressing frequency.

Part of the fault, of course, lies in a politically immature citizenry, who vote on the basis of the number of yard signs which have been brought to their attention, or on the basis of a candidate's physical or religious attractiveness. But I think the American voter is becoming progressively more mature rather than less; and it is an oversimplification to place on him the entire blame for the inept leadership with which we are sometimes burdened.

I think a far greater share of the blame must be placed on those people — mature, intelligent, even interested in most cases — who are capable of discharging a public trust but who refuse to do so. I refer specifically to attorneys. There is no better training ground for the public service than law school. The legislator is concerned with creating law; the executive with carrying out the law as promulgated by the legislative body. What training could be better than that of the law student, who spends several years learning what the law is!

Ideally every attorney should dedicate a portion of his career to serving the public. I venture to assert that there is no lawyer or law student who has not been dependent on someone else for some part of his legal or pre-legal education.

Some of us who sat out our service careers stateside, behind a desk, certainly are indebted to the government which paid our way through college and law school just as it paid the freight for those who made far more significant contributions to the nation's service than we did.

Some part of the education of all of us has unquestionably been financed by others — relatives, parents usually — who in many cases had no one to pay their way through school, and who are therefore not themselves in positions to assert leadership in the community.

These people have a right to expect intelligent political leadership — particularly from those of us in whose education they have invested.

Judge Barbeau told us the other night that an attorney should above all be a leader in his community. And although chambers of commerce, charity drives and other civic enterprises usually have attorneys in positions of leadership, and although these are all laudatory, if somewhat non-controversial activities, it is in the fields of politics and government that the attorney should participate, but in too many instances does not.

JOHN M. MOYLAN

FRATERNITIES

DELTA THETA PHI

The Delta Theta Phi Law Fraternity concluded the spring term, 1960, with its annual Founders Day Banquet held last May 14th, in co-operation with the University of Minnesota Chapter of the fraternity. The main speaker was Professor Walter Jaeger of Georgetown University, Washington, D.C., who was flown here for the occasion.

Formal introduction of officers for 1960-61 also took place at the banquet. They are: Thomas Gruesen, Dean; Thomas Murphy, Vice Dean; Royal Bouschor, Tribune; Edward Soshnik, Clerk of the Exchequer; Anthony Dana, Master of the Ritual; James Reding, Clerk of the Rolls; and Kevin Howe, Bailiff.

During the summer a picnic was held at Sucker Creek Park in St. Paul for all actives and their families. About 85 attended the affair. After the picnic some 30 members and their wives or dates attended an informal dance.

The formal pledging took place on November 19th at the Normandy Hotel, followed by an all school dance.

The fraternity plans several smokers during the course of the coming year. The dates are to be announced later and all students interested in pledging will be invited.

PHI BETA GAMMA

Phi Beta Gamma is continuing its policy of selective activities for its membership during the current school year. Some of the upcoming social events are:

Alumni Banquet courteously sponsored by Walter Dorle, Alumnus and President of Northwestern State Bank of St. Paul.

Dinner parties at Navy Officers' Club and St. Paul Pool and Yacht Club.

Dinner-Dance at Culbertson's.

Worthy of Note: Five out of nine of the National Executive Council members are from the Minneapolis-St. Paul Chapter.

Note to Alumni: Please forward your name and present address to Vince Dahle, 1804 Silver Lake Road, New Brighton, in order that the permanent membership roster can be completed.

Second In Series—Know Your Trustees

Judge Stewart Devotes Life To Profession And School

For the past 50 years the Honorable Arthur A. Stewart, Judge of the Ramsey County District Court, has been actively participating, either as teacher or as trustee, in the functioning of the William Mitchell College of Law. He is presently Vice President of the Board of Trustees.

Judge Stewart, born and raised in St. Paul, joined the faculty of the St. Paul College of Law in 1910, two years after he graduated from the same school, and through the years taught courses in Minnesota practice, bailments and carriers, torts, criminal law, and evidence. Few men have been as loyal and dedicated to the furtherance of their profession and their alma mater as has Judge Stewart.

While the Judge was in law school, he was employed as Secretary to Chief Justice Charles M. Start of the Minnesota Supreme Court. Within a year after graduation Judge Stewart became a member of the law firm of Barrows and Stewart. In 1922 he was appointed Assistant Corporation Counsel for the City of St. Paul, and in 1925 was elevated to the Corporation Counsel's position. Subsequently, in 1928, he was elected to the Board of Ramsey County Commissioners and again became affiliated with his old law firm, Barrows, Stewart and Metcalf. He continued his practice of law with that firm until his appointment to the district court bench in 1946.

When asked what a law student could do over and above his academic course work to prepare himself for the practice of law, Judge Stewart said that improving one's ability to stand up and speak before a group is very helpful in developing the necessary poise and presence to try a case before a jury. Being able to speak both forcefully and logically is a valuable asset. Practicing attorneys who have trouble in articulating make it difficult for the jury to understand what counsel is trying to get across to them. Judge Stewart also stressed the importance of good English composition in preparing briefs, memoranda, and other legal documents.

He recommended that the law student become familiar with the operation of the courts and government agencies. Actually watching the trial courts and the Supreme Court in operation is a form of legal education which cannot be taught in the classroom.

Judge Stewart said that the most obvious shortcoming common to newly graduated lawyers is that they tend to be more nervous than the seasoned practitioner. He observed, however, that after a couple of years experience, the average young lawyer gains the necessary self-confidence and is better able to combat this tendency.

In comparing modern law school graduates with those of 40 or 50 years ago, Judge Stewart said that today's law graduate is better educated and equipped to enter the practice of law. Around 1910 the only education required of in individual who wanted to practice law was graduation from high school and attendance at a night law school for a period of three years or a day law school for two years.

Judge Stewart cited the fields of tax law and administrative law as examples of the great expansion the law has undergone since the day when he began his practice. In commenting on employment opportunities, he said that although it is more difficult for the new lawyer to set himself up in practice than in times past, there are as many, if not more, opportunities for him to find employment with business enterprises or established law firms.

New Librarian '26 Graduate

Mr. Paul H. Philippy commenced his duties as instructor and librarian on August 15, 1960. He is a 1926 graduate of the St. Paul College of Law and has worked 33 years with the West Publishing Company.

As Legal Research instructor at William Mitchell College of Law, Mr. Philippy is placing a heavy emphasis upon modern and efficient uses of legal publications, which he claims are not being followed by many attorneys today.

DICTA By The Dean

William Mitchell students, faculty, trustees, and alumni are prouder than ever these days. The award of second place to our school newspaper, the William Mitchell Opinion, in the nationwide American Law Student Association contest among law school newspapers was a recognition that was not only well deserved but quite phenomenal, when it is realized that this honor was won by our paper after just one and one-half years of existence and with the publication of only three issues. We have all been aware that the student editors have been turning out an excellent product. Such prompt national recognition is most gratifying.

Our faculty and others interested in the continuing effort to improve the training provided for our students get satisfaction in the publication in each issue of the William Mitchell Opinion of one or more legal articles by our students. The prospect of publication in the opinion, which is the school's only periodical, holds out both inducement and recompense for excellence in the school's enlarged program in legal writing and research.

An item of unique interest in this issue of the Opinion is the publication of the tribute paid last June to our neighbor, the West Publishing Company, by Mr. John D. Randall. The President of the American Bar Association was in St. Paul to be our Commencement speaker and to receive an honorary degree from our school. On Commencement Day Mr. Lee H. Slater, President of West Publishing, gave a luncheon in honor of President Randall and graciously included among his guests the members of our Board of Trustees and the members of our full-time faculty. A number of years ago when I was practicing law in Chicago, I expressed the opinion to my friend, Rolf E. Dokmo, who is a 1929 alumnus of our law school and president of West's Illinois affiliate, Burdette Smith Company, that someone should find a way to publicize the many services rendered over the years by the West Publishing Company to the legal profession, and largely unknown to the members of the profession. Mr. Randall has evidently been filled with the same sentiment. The William Mitchell Opinion is happy to be able to publish, to the complete surprise of the West Publishing Company, this overdue encomium.

The fall semester is moving under full steam. Each year's class is in two sections, with all eight classrooms in use every night. Students and faculty were disappointed that visiting Professor Charles E. Nadler was unable to be with us this fall. He wore himself out last spring writing a new book on Florida corporation law. We are glad to report that he has recovered, with the aid of a trip to Europe, and we look forward to having him with us in the near future.

The enlarged Moot Court program has met with approval from the fourth year class. Our impending lawyers welcome the opportunity for each student to try two jury cases, to be followed in the spring by the writing of an appellate brief and the making of an appellate argument. Judge Ronald E. Hachey reports that the students are exploring to the fullest the possibilities of their cases and are doing good research work. During the winter there will be a criminal trial, and also a special term night, which will include such proceedings as a default divorce, a change of name, an adoption, a land registration, and an action to quiet title. The appellate arguments will be presided over by members of the Minnesota Supreme Court.

Surely it is worth recording that the distinguished members of the school's Committee on Professional Responsibility, which selected both the subjects for discussion and the speakers for the new course on Professional Responsibility, have had a 100% record of acceptance from the chosen speakers. This is in spite of the fact — perhaps it is because of the fact — that the speakers are among the busiest and ablest lawyers and judges in the Twin Cities area. This is gratifying to our law school, as are the many expressions from lawyers of approval of the approach of the new course to the problems of professional ethics and responsibility. The approval of the members of the fourth year class is obvious from their attention to the speakers and their participation in the discussions.

The Institute on Investments and Business Abroad, announced in this issue and scheduled to begin on February 1, is the result of planning over a period of more than a year by a group of lawyers now numbering fifteen. The purpose is not to presume to develop experts in foreign law, but to offer basic training to lawyers that will enable them to understand more fully, and therefore more helpfully, the problems of that ever-increasing number of clients who are engaging in trade and investments in foreign lands. It will be worth watching to see how many lawyers are sufficiently interested to attend.

Stephen R. Curtis

The Aftermath of Entick V. Carrington

by Edward J. Drury

Each year thousands of American householders are required to allow entry to their homes to various public officials for purposes of inspecting health conditions, surveying and measuring distances in gas and electrical installations and other activities. Many people understandably do not like their personal privacy upset when they are required to allow strangers entrance to their homes. At certain times, even during daylight hours, people do not want others tramping through the house at the will of a minor administrative official, even though the householder knows nothing is wrong. The object of these inspections is to protect the public from dangers of disease, fire and other calamities common to large metropolitan areas.

The age-old conflict presented is the balancing of the rights of the individual against measures taken by the government for the common good or benefit of all. In the matter of inspections, the individual's rights under the constitution of the United States are also present. Both aspects of the problem, the balance of interests between individual and government and the rights given individuals by the constitution, were analyzed and balanced against each other in an important 1959 Supreme Court decision.

During the afternoon of February 27, 1958, a health inspector of the Baltimore Health Department, acting on a complaint from a resident of the city that rats were in her basement, checked the premises owned by one Frank and discovered in Frank's back yard a pile of trash and debris containing rodent feces weighing approximately half a ton. During the inspection, Frank approached Inspector Gentry, who asked Frank's permission to inspect the basement. Frank refused and the next afternoon Gentry returned with two police officers. No response was elicited by the inspector's knock on the door and he then swore out a warrant for Frank's arrest alleging a violation of section 120 of Article 12 of the Baltimore Code.[1] The Inspector did not have a warrant on either occasion authorizing him to enter Frank's residence.

Frank was arrested on March 5 and found guilty of the offense charged in the warrant. He appealed to the Criminal Court of Baltimore, which also found him guilty in a de novo proceeding. Certiorari was denied by the Maryland Court of Appeals, but the case went to the U. S. Supreme Court on a challenge to the validity of section 120 and for a determination of whether Frank's conviction was obtained in violation of the Fourteenth Amendment's Due Process Clause. In a five to four decision,[2] the Court upheld the conviction.

The Court held in effect that Frank was not deprived of due process of law in being punished for refusing entrance to a health official without a warrant. The Fourteenth Amendment[3] does not specifically prohibit unreasonable searches without a warrant, but the Fourth Amendment[4] does contain this prohibition. The Court has consistently held that the Fourteenth Amendment does not incorporate and make applicable to the states the guarantees of the Bill of Rights,[5] though two of the present justices have made strong dissents from this determination.[6] Some individual rights, however, have been held to be so basic as to be "implicit in the concept of ordered liberty and thus, through the Fourteenth Amendment, . . . valid as against the states."[7] Mr. Justice Frankfurter in **Wolf v. Colorado** said that "the security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states thru the Due Process Clause."[8] Thus the court majority stoutly subscribes to the theory that the first eight amendments do not apply to the states through the Due Process Clause of the Fourteenth Amendment, but makes exceptions to the rule where basic rights "at the core" of these amendments are jeopardized.[9]

In the Frank case, both Mr. Justice Frankfurter for the Court and Mr. Justice Douglas for the dissent looked to history in their attempts to determine whether the health inspection without a warrant was one of those "unreasonable searches" mentioned in the Fourth Amendment. The English case of **Entick v. Carrington**[10] decided in 1765 arose as a result of King George III's battles with the Whig Ministers in Parliament, who had held the prime power in England for the first half of the eighteenth century. The Crown's influence had diminished with the advent of the German Kings in the early years of that century. When George III came to power in 1760, he resolved to make the House of Commons subservient to the Crown. There were many conflicts and on April 23, 1763, a newspaper called "The North Briton, No. 45" was published, which attacked the Ministers of the Crown and the unpopular Peace of Paris signed the same year. King George was angry and a short time later his Secretary of State issued general warrants for the arrest of persons unnamed who had published or authorized "The North Briton, No. 45". Nearly fifty people were arrested, after houses had been searched and personal papers seized. There was an outcry when John Wilkes, a member of Parliament, was arrested and confined in the Tower of London.

In the years following 1763, Wilkes and others sued public officials, who had executed the warrants, and recovered money damages for false imprisonment. The general warrants were declared illegal and Lord Camden's decision has been cited by Winston Churchill as "a classic statement on the rule of law."[11]

Both Mr. Justice Frankfurter and Mr. Justice Douglas agree that the principles laid down in **Entick v. Carrington** were fresh in the minds of the framers of the Fourth Amendment[12] but they disagree as to what the principles were. Mr. Justice Frankfurter for the Court reasoned that two constitutional rights were fortified by events in years preceding the Bill of Rights. The first right was "personal privacy" and the second was "self protection".[13] The Court said that it was the second right, that of self protection— ". . . the right to be secure from searches for evidence to be used in criminal prosecutions"[14] that was involved in **Entick v. Carrington** and which formed the basis of the Fourth[15] and Fifth[16] Amendments.

Mr. Justice Douglas decided that the teaching of **Entick v. Carrington** was broader and that it definitely involved more than the restrictions on invading a person's home to gather evidence to convict the person. He felt that the case involved also the protection of individual privacy and that the Fourth Amendment did not rest solely on the issue of searches for evidence to be used in criminal prosecutions. In this respect, an English Law professor, discussing the different interpretations put on **Entick v. Carrington** in the Frank case, disagreed with Mr. Justice Douglas' belief that Lord Camden's decision was so broad.[17] **"Entick v. Carrington** merely decided that, as the common law withheld from all the right to search for and seize evidence to support a civil action, so it withheld from Crown and commoner a similar right in relation to a criminal prosecution. . . ."[18]

The basic issue in the Frank case was whether a person is to have the same constitutional protection from unauthorized invasions of the home from health inspectors as from criminal law enforcement officials. Mr. Justice Frankfurter reasoned that a person is not entitled to the same protection because the "unreasonable search" mentioned in the Fourth Amendment pertained only to searches for evidence to be used in criminal proceedings and even though the right to privacy given to people by the Fourteenth's Due Process Clause is not restricted within the bounds of the Fourth Amendment, the inspection in the Frank case did not violate Frank's constitutional right of privacy.[19] The Court felt that the Baltimore City Code contained a sufficient safeguard[20] and this, coupled with increasing concern for the public welfare,[21] rendered a warrant unnecessary. It is clear that the Court has distinguished an "inspection" by a health officer from a "search" by an officer seeking material for criminal prosecution.[22] But doesn't the "inspection" by the health officer amount to a "search" in certain instances where the health inspector gains entrance to a dwelling, orders it cleaned or repaired, returns later to find his order not obeyed and then uses his report of the substandard condition to convict the owner?[23]

The dissent recognizes the difference between a health inspection and a search for evidence to be used in a criminal proceeding but holds that ". . . the inspector's knock on the door is one of those 'official acts and proceedings' . . . squarely within the Fourth Amendment."[24] Mr. Justice Douglas points out certain situations where a search warrant is not required for entry[25] but concludes that absent these ". . . extraordinary situations, the right of privacy must yield only when a judicial officer issues a warrant for a search on a showing of probable cause."[26]

It might be well to ask what is meant by "probable cause". In Baltimore an average of over 30,000 inspections annually have been made under section 120 of the City Code for the years 1954-58.[27] If a warrant is to be signed for each of these inspections, will the magistrate really check to determine the validity of the proposed inspection or will he be merely a rubber stamp executing a "synthetic search warrant"?[28] The dissent admits that something less than the probable cause necessary in a criminal investigation should be required in health inspections. Indeed, "the passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant."[29] If this is sufficient to constitute probable cause, why have the requirement at all?[30] The dissent's reason is simply that since the "inspector's knock on the door" is an official act or proceeding within the Fourth Amendment and the Fourth doesn't relieve "the health inspector . . . from making an appropriate showing to a magistrate if he would enter a private dwelling without the owner's consent,"[31] the inspector must show probable cause and get his warrant.

Few would argue that in most instances there would be a considerable difference in the type of visit made by a health inspector as contrasted with the police in a criminal search. With the exception of the special circumstances under which a police officer may enter a dwelling without a warrant,[32] the police are looking for a particular object and the "search" can be particularly burdensome to the householder.[33] Health inspectors on the other hand probably are less time consuming[34] and would most likely fail to arouse the curiosity of the neighborhood, as would a police investigation. Nevertheless, the de-

(Continued on page 5)

1. "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

2. *Frank v. Maryland*, 359 U.S. 360 (1959). Mr. Justice Whittaker wrote a brief concurring opinion, and Mr. Justice Douglas, with whom the Chief Justice, Mr. Justice Black and Mr. Justice Brennan concurred, dissented.

3. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. *Wolf v .Colorado*, 338 U.S. 25, 26 (1949). "The notion that 'the due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the constitution and therefore incorporates them has been rejected by this court again and again, after impressive consideration. . . . The issue is closed."

6. *Adamson v. California*, 332 U.S. 46, 71 (1947). In his dissenting opinion and joined by Mr. Justice Douglas, Mr. Justice Black said, "My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states."

7. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

8. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). In the Wolf case, the Court held that evidence gained through an unreasonable search could be used in a state criminal proceeding, although similar evidence could not be used in a federal criminal proceeding because of the rule adopted in *Weeks v. Colorado*, 232 U.S. 383 (1914). Although the basic right to be secure from unreasonable searches applies to the states, the federal exclusionary rule does not because this ruling was not gained explicitly from the Fourth Amendment, but came by way of judicial implication. Even Mr. Justice Black subscribed to this theory in his concurring opinion.

9. But see *Twining v. New Jersey*, 211 U.S. 78, 99 (1908). ". . . it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."

10. Howell's State Trials, Col 1029 (1765).

11. Churchill, A History of the English Speaking Peoples, Vol. 3, The Age of Revolution at 167.

12. See generally *Boyd v. United States*, 116 U.S. 616, 626 (1886). "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures."

13. *Frank v. Maryland* at 365.

14. *Ibid.*

15. See note 4 *supra*.

16. ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

17. Waters, Rights of Entry in Administrative Officers, 27 U. of Chi. L. Rev. 79, 81 (Autumn 1959).

18. *Ibid.*

19. *Frank v. Maryland* at 366.

20. *Ibid.* "Valid grounds for suspicion of the existence of a nuisance must exist." In the Frank case, "valid grounds" were certainly present. Rats were reported in the vicinity and Frank's yard contained the pile of rodent feces and trash. The Baltimore City Code provision (see note 1 *supra*) requires that the health officer have "cause to suspect that a nuisance exists" before making an inspection. The majority opinion and especially Mr. Justice Whittaker's concurring opinion in the Frank case made reference to this requirement. What will the Court do with a no-cause requirement statute? The question has probably already been answered. Less than four weeks after *Frank v. Maryland* was decided, the four dissenting justices in the Frank case voted to note probable jurisdiction in *State ex. rel Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958), probable jurisdiction noted, 360 U.S. 246 (1959). Section 806-30 (1954) of the Dayton, Ohio, Code authorizes the Housing Inspector to make inspections "at any reasonable hour" and no "cause to suspect" is required. Four of the five justices who formed the *Frank v. Maryland* majority voted against noting probable jurisdiction in the Ohio case and stated that "we deem the decision in the Maryland case to be completely controlling upon the Ohio decision." In view of the delimiting statements by the majority and concurring opinions in the Maryland case as to the "cause to suspect" safeguard, there appears to be a major difference in the two cases. Mr. Justice Stewart who was with the majority in *Frank v. Maryland* took no part in the decision to note probable jurisdiction in the Ohio case because his father was then serving on the Ohio Supreme Court.

21. *Id.* at 371. "The need to maintain basic, minimal standards of housing, to prevent the spread of disease . . . has mounted to a major concern of American Government."

22. *Id.* at 366. "No evidence for criminal prosecution is sought to be seized." For a strongly worded opinion contra to the theory that "inspection" and "search" can be distinguished in this area, see *District of Columbia v. Little*, 178 F2d 13, 18 (App. D.C., 1949). "Distinction between 'inspection' and 'search' of a home has no basis in semantics, in constitutional history, or in reason. 'Inspect' means to look at, and 'search' means to look for. To say that the people, in requiring adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny. . . . One of the two complaints made by the unidentified informant was that some of the occupants of the house 'failed to avail themselves of the toilet facilities.' Reducing appellant's doctrine to practicalities, the result would be that if the owner of a house be reliably charged with concealing a cache of arms and munitions for purposes of revolution, police officers could not search without either permission or warrant, but if the information be that an occupant fails to avail himself of the toilet facilities, government officials could enter and examine the house over protest and without a warrant. . . . (E)ven if the front door of the house is no longer protected by the Constitution, surely it had been thought until now that the bathroom door is."

23. 108 U. Pa. L. Rev. 265, 273 (Dec. 1959).

24. *Frank V. Maryland* at 383 (Dissent). In this respect, the dissent quoted extensively from Judge Prettyman's majority opinion in *District of Columbia v. Little*, 178 F2d 13 (1949), aff'd on other grounds, 339 U.S. 1. "The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

25. *Frank v. Maryland* at 380. ". . . a house . . . on fire or if the police see a fugitive enter a building. . . ."

26. *Ibid.*

27. *Id.* at 372, note 16.

28. *Id.* at 383.

29. *Ibid.*

30. 108 U. Pa. L. Rev. 265, 277 (Dec. 1959). "A preferable solution, and one that should be dispositive of the instant case, (*Frank v. Maryland*), is that in the field of public health inspection no search warrants should be required, because that kind of prior judicial scrutiny which they are intended to secure is neither effective nor appropriate."

31. *Frank v. Maryland* at 383. (Dissent).

32. See note 25 *supra*.

33. See *Harris v. United States*, 331 U.S. 145, 149 (1947). "One agent was assigned to each room of the apartment and, over petitioner's protest, a careful and thorough search proceeded for approximately five hours. As the search neared its end, one of the agents discovered in a bedroom bureau drawer a sealed envelope marked 'George Harris, personal papers'." See also the classic example of police indiscretion in *Irvine v. California*, 347 U.S. 128 (1954) where a microphone was concealed in a married couple's bedroom for twenty days.

34. In the Frank case, the presence of the half ton of debris and rodent feces in the backyard would indicate something less than ransacking the house sufficient to determine unsanitary conditions. The rats in the basement would probably hasten the inspector's departure.

Income Taxation of Multi-State Business

By Barton C. Burns

This discussion deals with the power of a state to levy income taxes on corporations which sell their products in the state, but which have no production facilities there. It will be presumed that the statutes of the state impose a tax on the income from the activities of the corporation within the state and that the tax does not violate the requirements of the state constitution. Therefore, the only question to be answered is this: Does the tax so levied violate the requirements of the Commerce clause of the Constitution of the United States and the Due Process clause of its Fourteenth Amendment?

There are important variations in the language of the imposing clauses of the income tax laws of the several states. Some states impose the tax for the privilege of doing business within the state.[1] Others impose the tax as a direct levy on income earned or received from within the state;[2] some include specifically income of corporations engaged exclusively in interstate commerce;[3] others contain no specific reference to interstate commerce but have been interpreted by the courts to encompass it.[4] These variations in wording of the statutes will be important in determining whether the tax can reach a foreign corporation engaged solely in interstate commerce in the state.

SUPREME COURT ACTION

Prior to the early part of 1959, it was generally assumed by both the business community and the state tax administrations that the states could not impose a tax on net income earned exclusively in interstate commerce.[5] On February 24, 1959, however, the United States Supreme Court decided **Northwestern States Portland Cement Company v. State of Minnesota** and its companion case, **Williams v. Stockham Valve and Fittings, Inc.**[6]

Mr. Justice Clark summarized his majority opinion as follows, "We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same."

The only question that the court left for future consideration was precisely what activities constitute the "sufficient nexus" to which Mr. Justice Clark referred. "Nexus" is a Latin term meaning a connection, tie or link. The term is not defined in **Black's Law Dictionary** in the manner used by Mr. Justice Clark. It will almost certainly, however, be included in Black's next edition, and it is equally certain that the term will rise to haunt businessmen and tax men for many years to come.

It was previously stated that prior to the **Northwestern States** case it was generally understood that a state could not impose a tax on purely interstate commerce. The members of the majority of the U.S. Supreme Court, however, were of the opinion that the decision was not a departure from the Court's previous position. They distinguish carefully their 1951 opinion in **Spector Motor Service v. O'Connor.**[7] In that case they struck down an income tax imposed upon the privilege of engaging in interstate commerce within the state. They reaffirm their opinion in that case and state that such a tax will still be invalid. A different result, however, follows from a tax imposed on the income from interstate commerce after it has been earned.

Justice Nelson, in his dissent to the opinion of the Minnesota Supreme Court in the **Northwestern States** case,[8] argues that this distinction is artificial. He points out that a tax is no more a burden if levied on the income from interstate commerce after it is earned, than if levied for the privilege of engaging in such commerce. He contends that the economic burden should determine the validity of the tax rather than the language of the statute.

Mr. Justice Clark, however, contends that in 1948 the United States Supreme Court approved a tax levied on purely interstate commerce in the case of **West Publishing Company v. McColgan.**[9] In that case the Court unanimouslly affirmed **per curiam** the opinion of the California Supreme Court sustaining the tax levied on West Publishing Company. West had salesmen in California working out of the offices of attorneys who gave the salesmen office space in exchange for the use of the books West kept there. The offices were advertised as West's local offices. The salesmen were authorized to receive payments on orders taken by them, to collect delinquent accounts, and to make adjustments in case of complaints by customers. California had argued that West was doing intrastate business in California. From all that appears in the opinion of the California Supreme Court, there was no finding that West's activities constituted solely interstate commerce. The authors of four of the six opinions in the Minnesota and U.S. Supreme Court decisions in **Northwestern States** took the position that the **West** case involved intrastate commerce. Only Mr. Justice Harlan agreed with the majority opinion of Mr. Justice Clark. His concurring opinion, however, went so far as to say that the **West** decision squarely governed the situation.[10]

A review of the changing trend of thinking of the Court with its changes in personnel is revealing, however—Justices Clark, Black and Douglas dissented from the Spector[11] **opinion rejecting the tax in 1951; Justices Warren, Clark, Black and Douglas dissented from the 1954 opinion rejecting the sales tax in the important case of** Miller Bros. v. Maryland.[12] **Finally these four together with the later appointees, Justices Harlan (1955) and Brennan (1957) constituted the majority of six in the** Northwestern States **case. In view of this, it seems almost inconceivable that the Court as constituted in 1948 would have unanimously affirmed the** West **case if they thought that purely interstate commerce was involved.**

The facts of the **Northwestern States Portland Cement** case are summarized briefly as follows: Northwestern States Portland Cement Company is an Iowa corporation manufacturing cement in Mason City, Iowa. It rented a sales office in Minneapolis, Minnesota, from which it regularly and systematically solicited sales from Minnesota lumber and building material supply houses, contractors and readymix companies who were on a list of eligible dealers. All orders were sent to Mason City for acceptance, filling and delivery. Orders were also solicited from parties not on the list of eligible dealers. These orders would be given to one of the dealers who would in turn place an order with the company. The Minnesota sales constituted forty-eight per cent of the company's volume.

It is hard to quarrel with the result of **Northwestern States** on the basis of equity. The company maintained a regular place of business in the state from which it derived almost half of its sales. However, the result can be justified without finding purely interstate commerce. Mr. Justice Whittaker in his dissenting opinion[13] points out that the Supreme Court has previously held that taking orders from builders, contractors, and architects for local dealers constituted intrastate business which would support a franchise tax based on income. **Cheney Brothers v. Massachusetts.**[14] In order to provide a basis for a strong precedent from the **Northwestern States** case, however, the State of Minnesota stipulated that Northwestern States had engaged exclusively in interstate commerce in Minnesota.

In the months that remained of the term of Court after the **Northwestern States** case was decided, the Court indicated that it was not interested in drawing the fine line of the "nexus" requirement very close to the facts of **Northwestern States. In E.T. & W.N.C. Transportation Co.**[15] the Court held that North Carolina could properly tax a trucking company which operated out of freight terminals in the state, even though it made no intrastate hauls. Finally the Court refused to reverse two Louisiana cases, **Brown-Forman Distillers Corporation v. Collector of Revenue**[16] and **International Shoe Company v. Fontenot**[17] in which the Louisiana Supreme Court upheld a net income tax imposed on a foreign corporation based solely on solicitation in the state. In these cases the only activities of the companies in Louisiana were through salesmen and "missionary men" sent into Louisiana and working out of offices outside the state.

Although the Supreme Court dismissed the appeals apparently without reaching the merits, nevertheless, the result seems to be that the Court would sanction a tax by every state into which a corporation's salesmen traveled.

The business community was also waiting with apprehension for[18] Supreme Court action on the taxpayer's appeal from the Florida decision in **Scripto, Inc. v. Carson.**[19] The Florida decision was rendered October 17, 1958. The Supreme Court had noted probable jurisdiction on October 12, 1959,[20] and rendered its affirming opinion on March 21, 1960.[21] It seems that the fears with regard to this decision were more than justified. The case involved a Georgia corporation which sold to Florida customers through independent commission representatives who solicited orders and forwarded them to Atlanta for approval, filling and shipping. For all that was material to the decision, Scripto never had any property or employees in the State of Florida. The tax sustained was a use tax levied on Scripto's Florida customers, which Scripto became liable for when it failed to collect the tax from the customer and remit the tax to the state.

The Court carefully distinguished the 1954 case of **Miller Bros. Co. v. Maryland**[22] wherein the United States Supreme Court held that the State of Maryland did not have the power to collect from a Delaware retailer the use tax on purchases by Maryland residents when the goods were delivered to them. Maryland had seized the seller's delivery truck. Once again, Justice Clark felt that "nexus" was the key to the problem in **Scripto,** as it was in **Northwestern States.** Justice Jackson had failed to find "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax" in the **Miller Bros.** case.[23] Mr. Justice Clark felt that Scripto's independent commission representatives supplied that link (he also felt the link was present when he dissented in **Miller Bros.**). He reasoned that sales of the independent commission representative could not be treated different from the sales of an employee salesman. To find otherwise would prompt business to make superficial changes in their contractual relationships with their salesmen in order to save taxes. The taxability of the Florida sales of employee salesmen had been settled by the Court in 1944 in **General Trading Co. v. State Tax Commission.**[24] The fact that Scripto's representatives were independent and also represented other sellers was without constitutional significance to Mr. Justice Clark. There was no indication that the Court believed "nexus" to be different in a use tax case than in an income tax case.

CONGRESSIONAL ACTION

Thus, with fears that the Supreme Court might sustain an income tax with no more "nexus" than independent commission jobbers, or newspaper, radio or television advertising, the business community went to Congress for help.[25] The various states were increasing their collection efforts, and some were broadening their tax laws to take advantage of this newly-found taxing power.[26] In an amazingly short time, (less than seven months from the **Northwestern States** decision) Congress responded to the pleas with Public Law 86-272.[27] This has been described as hastily drafted legislation. State tax administrators have criticized Congress for its passage before adequate consideration of their views.[28] The bill, however, does call for a full study by the House Judiciary Committee and Senate Finance Committee with a recommendation prior to July 1, 1962, of permanent legislation providing uniform standards.[29]

P.L. 86-272 limits the conditions under which any state may levy a tax imposed on, or measured by, net income. It provides that such a tax may not be levied if the only activity in the state is the solicitation of orders for tangible personal property, which orders are sent outside the state for approval or rejection, and shipment is made from a point outside the state. The tax may be levied if the company maintains a sales office in the state. Thus, the result of the **Northwestern States** case is not changed. If, however, the only activity is the solicitation by salesmen or "missionary men" (one who promotes orders for the benefit of a current or prospective customer) based outside the state, the limitation applies. The act also denies the taxing power when the "nexus" consists of an independent commission representative (even if he maintains a place of business in the state) who sends the orders outside the state for approval and shipment. The representative, however, must solicit orders for more than one principal to meet the test of "independence".

Thus, the act, if sustained by the Courts, squarely reverses the effect of the Louisiana cases. The Louisiana Collector of Revenue, Robert L. Rohland, has announced that his state will challenge the constitutionality of the act as soon as an appropriate case presents itself.[30] He will undoubtedly select a case which will test the retroactive aspect of the new legislation. An income tax within the scope of the act may not be assessed after September 14, 1959, even though it relates to a prior year.[31] Louisiana may very well have had some cases under investigation prior to the act, which are now barred because the formal notice of assessment was too late.

If the constitutionality of the new law is tested before the Supreme Court, the Court will undoubtedly be reminded of its 1953 opinion in the case of Dameron v. Brodhead, Manager of Revenue and Ex-Officio Treasurer of the City and County of Denver.[32] **Under the terms of the Soldiers' and Sailors' Relief Act,**[33] **the Court denied Denver the right to tax the personal property of a non-resident serviceman stationed in Denver, but living off the military reservation. Justices Douglas and Black, however, dissented. They said that Congress clearly has the power**

(Continued on page 6)

1. Vermont, Massachusetts, Connecticut, New York, Montana, New Jersey.
2. Rhode Island, Deleware, Maryland, Virginia, South Carolina, Alabama, Mississippi, Missouri, Iowa, Oklahoma, North Dakota, New Mexico, Idaho, Pennsylvania.
3. Georgia, Arkansas, Louisiana, Minnesota, Colorado, Utah, Arizona, California, Oregon.
4. North Carolina.
5. Tax Management, Inc., *State Taxation—Income Taxes, Portfolio for Executives*, page 9.
6. *Northwestern States Portland Cement Company v. State of Minnesota; Williams v. Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed.2d 461, 67 A.L.R.2d 1292 (1959).
7. *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1961).
8. *Minnesota v. Northwestern States Portland Cement Company*, 250 Minn. 32, 57, 84 N.W.2d 373 (1957).
9. *West Publishing Company v. McColgan*, 27 Cal.2d 705, 166 P.2d 861, affirmed per curiam, 328 U.S. 602 (1948).
10. *Northwestern States Portland Cement Company v. State of Minnesota; Williams v. Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 468.
11. *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).
12. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954).
13. *Northwestern States Portland Cement Company v. State of Minnesota; Williams v. Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 482.
14. *Cheney Brothers Co. v. Massachusetts*, 246 U.S. 147, 155 (1918).
15. *E.T. & W.N.C. Transportation Company v. Currie*, 248 N.C. 560, 104 S.E.2d 403 (1958), affirmed *per curiam*, 359 U.S. 28 (1959).
16. *Brown-Forman Distillers Corporation v. Collector of Revenue*, 234 La. 651, 101 S.2d 70 (1958), appeal dismissed, 359 U.S. 28 (1959).
17. *International Shoe Company v. Fontenot*, 236 La. 279, 107 S.2d 640 (1958), cert. denied, 359 U.S. 984 (1959).
18. *State Tax Review*, Vol. 20, No. 42, Page 1, October 19, 1959. Commerce Clearing House.
19. *Scripto, Inc. v. Carson*, 105 S.2d 775 (1958).
20. *Scripto, Inc. v. Carson*, 361 U.S. 806 (1959).
21. *Scripto, Inc. v. Carson*, 80 S. Ct. 619 (March 21, 1960).
22. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).
23. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 345 (1954).
24. *General Trading Co. v. State Tax Commission*, 322 U.S. 335 (1944).
25. *State Tax Review*, Vol. 20, No. 30, page 1, July 27, 1959, Commerce Clearing House, quoting testimony before hearings of the Senate Finance Committee.
26. Idaho replaced its privilege tax with a direct tax on March 20, 1959. On March 21, 1959, Tennessee made a similar change. Utah enacted a direct income tax on March 16, 1959.
27. P.L. 86-272, 86th Congress, 1st Sess. (September 14, 1959).
28. *State Tax Review*, Vol. 20, No. 40, page 1, October 5, 1959, Commerce Clearing House.
29. P.L. 86-272, *supra*, Title II, Sec. 201.
30. *State Tax Review*, Vol. 20, No. 40, page 1, October 5, 1959, Commerce Clearing House.
31. P.L. 86-272, *supra*, Sec. 102(a).
32. *Dameron v. Brodhead, Manager of Revenue and Ex-Officio Treasurer of the City and County of Denver*, 345 U.S. 322.
33. 54 Stat. 1186, as amended, 56 Stat. 345, 58 Stat. 722, 50 U.S.C. App. Paragraph 501, 574.

Duties, Activities Of SBA Increase

The Student Bar Association of William Mitchell College of Law has played an increasingly active and important role in student life since the beginning of the Fall term. The first social function of the year was an all school golf tournament held at Highland Golf Course on Sept. 17th, under the direction of John Moylan. Plans are to make the tournament an annual affair.

Another first for the SBA was the Freshman Welcome Smoker held at the University Club of St. Paul in late September. The Smoker was attended by 175 faculty members and students. Dean Stephen R. Curtis gave a short address during the course of the evening. SBA President Arthur Anderson has indicated that the Smoker will be part of the annual SBA program. The Smoker afforded an opportunity for both new and old students to become acquainted with each other as well as with faculty members.

The problem has always existed in a night school of divising a method that would enable working students to develop friendships with fellow students and closer ties with faculty members. Realizing how valuable time is, the SBA is concerned with this problem. SBA programs have been planned not only with this is mind but with the idea that it is its job to help make your legal education more complete by sponsoring social and scholastic activities that bring students in closer contact with each other, faculty members and members of the Bar.

It was in furtherance of scholastic activties that the Lecture Committee, headed by Duane Rivard, arranged for a discussion group composed of five practicing attorneys and moderated by Judge Donald Barbeau. This group discussed problems of the profession as encountered by the practicing attorney. The group was representative in that the members were from different types of communities and discussed the problem peculiar to each. The discussion was well attended and proved to be informative as well as entertaining.

Future plans include a discussion of trial technique by William DeParcq and Warren (Pat) King, both well known Minneapolis attorneys. This will take place in late November or early December. The entire lecture series has been well received since its inception last year. The SBA plans to have such affairs each month throughout the school year.

Probably the one function of SBA which will be of greatest concern to the student body is the Placement Bureau. The Bureau, headed by Charles Langer, is concerned with obtaining jobs for students of the school and also for graduates of the school. The SBA Placement Bureau wants alumni and other interested parties to remember that the Bureau has a list of graduates and their qualifications, and will provide selected names upon request.

Appellate Court

So that we can better understand appellate court practice, we will list a few definitions, as collected by the editor of the official publication of the Passaic County Bar Association of New Jersey:

Appellate Courts: ". . . we are aware that the measurement of damages is left to the sound discretion of the jury. . . ."

Translation: The award was too high; let's slice it.

Appellate Court: ". . . The learned judge in the court below. . . ."

Translation: The dumb jerk should have known better.

Appellate Court: ". . . the defendant suffered no prejudicial error by the court's failure to charge. . . ."

Translation: The trial judge goofed but the defendant is guilty anyway, so what the hell.

'Opinion' Wins Nat'l Award

The William Mitchell Opinion was awarded second place in the national competition of law school newspapers at Washington, D.C., last August.

Winning the second place award in its first year of publication, the Opinion finished behind the Virginia Law Weekly, the publication of the Law School of the University of Virginia.

The people responsible for bringing this paper into publication included Phyllis Gene Jones, '60 graduate, first editor of the paper; Robert Schumacher, original and present News Editor; and William Green, the Faculty Adviser.

MINNESOTA DECISIONS

James H. Johnson

CRIMINAL LAW . . .

DEFENSE OF INSANITY . . M'NAGHTEN TEST CODIFIED IN MINNESOTA,

State v. Finn, 100 N.W. 2d 508 (Jan. 8, 1960).

Defendant was convicted of murder in the first degree, the victim being his wife, from whom he was separated. His sole defense was that he was of unsound mind. A psychiatrist for the defense testified that defendant was probably a paranoid at the time of the shooting; two psychiatrists for the prosecution testified that while defendant might have been mentally ill on the day of the shooting, he was not sufficiently ill so that he did not know the difference between right and wrong or the nature of his act.

On appeal, defendant contended that the trial court erred in instructing the jury as to the defense of insanity. HELD, Chief Justice Dell writing for the court, that the M'Naghten or "right-and-wrong" test is codified by statute in Minnesota, M.S.A. Sec. 610.10, and is not subject to judicial construction or modification, and that the trial court did not err in refusing to give defendant's instructions based upon the so-called "irresistible impulse" test and the test adopted in **Durham v. United States**, 94 U.S. App. D.C. 228, 214 F.2d 862, 45 A.L.R. 2d 1430.

CORPORATIONS . . .

STOCKHOLDER GRANTED EXPENSES AND ATTORNEYS' FEES EVEN THOUGH NO CASH FUND PRODUCED BY SUCCESSFUL DERIVATIVE ACTION.

Bosch v. Meeker Cooperative Light and Power Ass'n, 101 N.W. 2nd 423 (Feb. 26, 1960).

Plaintiff had successfully brought a stockholder's derivative action against certain directors and counsel of the defendant corporation. In this action he seeks reimbursement from defendant for his expenses incurred in the prior suit, including attorneys' fees. The lower court held that as the corporation did not receive any pecuniary benefit, plaintiff could not recover.

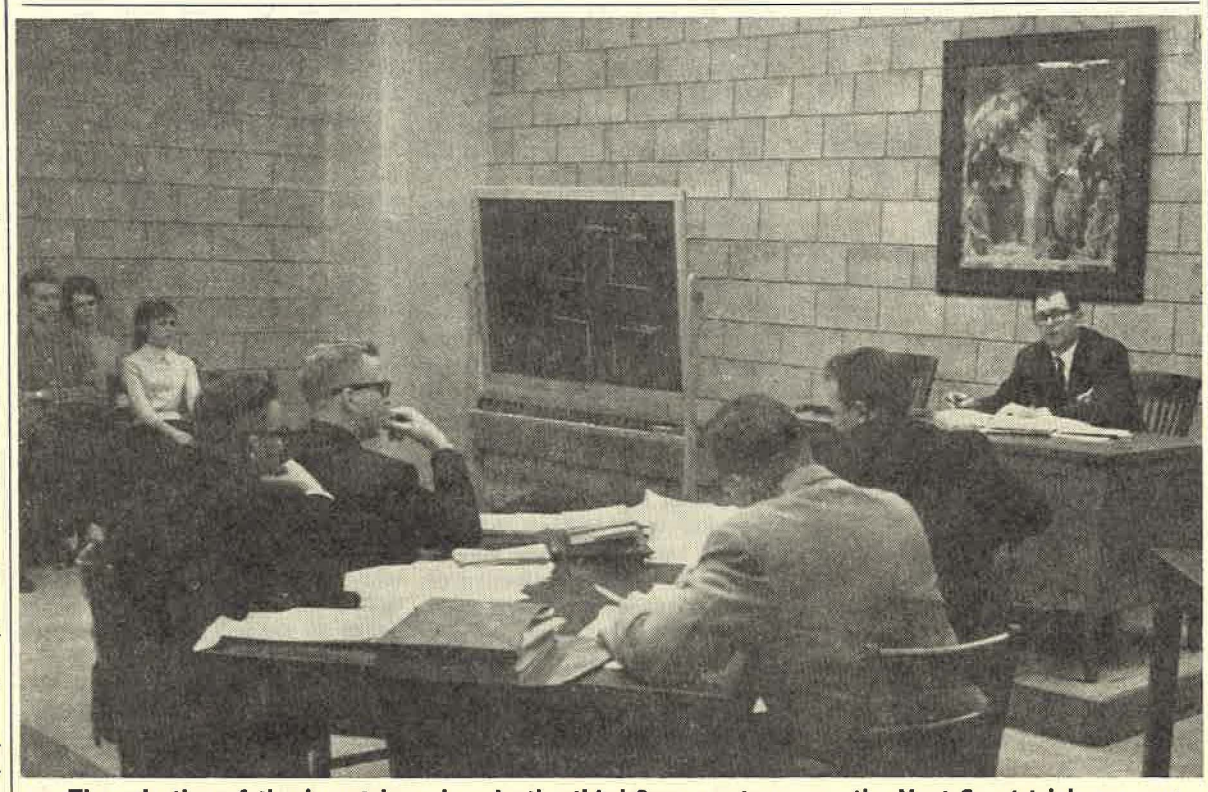
On appeal, reversed and remanded. Murphy, Justice, speaking for the court, said that Minnesota has recognized the common-law rule that a stockholder can recover if his action results in a pecuniary benefit to the corporation and that this rule should be extended to provide that the stockholder should be reimbursed where there has been a substantial benefit to the corporation, even though no cash fund is produced as a result of the derivative action.

ABA Reaffirms 'Connally' Position

The American Bar Association reaffirmed its position in favor of repealing the Connally amendment, limiting U.S. adherence to the world court in a close 114 to 107 vote in the House of Delegates last August at Washington, D.C.

Proponents of repeal rested their case on the point that the reservation should be dropped as proof to the world that the legal profession in the U.S. believes in extending the rule of law.

Opponents contended that repeal would be a surrender of U.S. sovereignty and a dangerous step in the uncertain state of world affairs.



The selection of the jury takes place in the third floor court room as the Moot Court trials are now in full swing. This year every senior will have two trials, one as plaintiff and one as defendant, and one appeal case to the Supreme Court. Judges sitting in these moot court cases are either judges or attorneys, who volunteer their valuable time to the school. Instructors for the course are Judge Ronald E. Hachey and Mr. William W. Essling.

Law Wives Club Plans Active Year

The William Mitchell Law Wives are off to a rousing start this Fall of 1960. Beginning the long list of activities for the year was the Freshman Party, held in the school on September 28 for the wives of all new and transfer students. The evening included introduction of officers, explanation of the purposes of the group for the new members, and a "get acquainted" session. Monthly meetings of the club are held on the first Wednesday of each month, at 8:00 P.M., in the school.

New officers for 1960-61 are: Mrs. Everett (Martha) Hamilton, president; Mrs. Paul (Donna) Dove, vice-president; Mrs. Edward (Mary Lou) Reichert, recording secretary; Mrs. Charles (Mirth) Langer, corresponding secretary; Mrs. James (Yvonne) Reding, treasurer; Mrs. Douglas (Jean) Heidenreich, public relations director; Mrs. Robert (Jo) White, social chairman; Mrs. David (Sandy) Olson, hospitality chairman.

Permanent committees for the year include: The Library Group, **with Mrs. Loren (Connie) Retzlaff as chairman. This group is planning an extensive study of all phases of the Minnesota Judicial System, the state's political set-up, its legislative organization, and study in the field of Civil Rights. Meetings are held in members' homes, in addition to the monthly meetings of the entire membership.**

The Interior Decorating Committee, under the direction of Mrs. John (Beth) McGrath, holds its meetings in the school. In addition to speakers, they have working projects for the members, revolving around some household item.

The Bridge Group, Mrs. James (Marsha) Mason, chairman, provides lessons and play for its members. The meetings are also held at the school.

The first meeting featured a speech by Mrs. Phyllis Jones, 1960 graduate and newly appointed Assistant Ramsey County Attorney. Mrs. Jones spoke on the responsibility and duties of the law wife. C. Paul Jones was main speaker at the October meeting, discussing "The Role of the Prosecutor."

Speaker for the November 2 meeting was Dean Robert R. Hamilton, Director of Bar Admissions. His topic was "School Children and The Law." Plans were laid for aid to certain charities at Christmas and for the dance in April.

In the following months, Judge Betty Washburn of the Minneapolis Municipal Court will address the group, Mr. Brown of St. Paul Fire and Marine Insurance Company will speak on Malpractice, and Mrs. Thomas (Carol) Duffy will plan and present a style show. Guests are invited. A date will be set soon. A dance is planned for April, and the end of the year finds the Junior Wives acting as hostesses to the seniors and Senior Wives at the School's traditional Graduation Party.

The Law Wives have begun to set up a scholarship program, with money already set aside for that purpose. A committee of Mrs. Douglas Heidenreich, Mrs. James Reding, Mrs. John McGrath, Mrs. Paul Dove, and Mrs. Everett Hamilton have been appointed to report on the matter. This scholarship fund will be available to married students of William Mitchell College. Further arrangements for the program will be announced as they are available.

Entick v. Carrington

(Continued from page 3)

termination that no search warrants are required in the field of public health inspection [35] seems to be a broad encroachment on individual rights. Probably the best answer to that suggestion is the fact that few people object to health inspections.[36] In those few cases where people do object, would it be much trouble to have the inspecting officer show cause to a magistrate for a warrant? [37] It seems important to have at least one person between the health inspector, who might like to carry his weight around, and the person who owns the dwelling. "One rebel a year . . . is not too great a price to pay for maintaining our guarantee of civil rights in full vigor." [38]

35. See note 30 *supra*.
36. *Frank v. Maryland* at 372 (note 16). An average of one conviction out of 30,000 annual inspections in Baltimore.
37. *Id.* at 381 (Dissent). The Inspector couldn't get a warrant and come back later in the Frank case because he had to be in his office every day at 3:30 to get out his reports. See also Waters, Rights of Entry in Administrative Officers, 27 U. Chi. L. Rev. 79, 93 (Autumn 1959). "The object should be the creation of warrant provisions in a statutory code of powers of entry, guaranteeing to the individual thereby the impartial, if rarely invoked, judgment by magistrates of the fairness and legality of an attempted entry."
38. *Frank v. Maryland* at 384 (Dissent).

Former ABA Head Praises One of the 'Allies of Justice'

(John R. Randall, Cedar Rapids attorney and then President of the American Bar Association, delivered the following address at a luncheon given in his honor by West Publishing Company on June 14, 1960. Mr. Randall, Commencement speaker before the 1960 William Mitchell graduating class, took the opportunity to recognize the many and varied contributions rendered by the West Publishing Company to the legal profession, not only to attorneys of Minnesota and the midwest region but to the legal profession throughout the United States. West Publishing and its executives have been friends and contributors of long standing to William Mitchell College of Law, and we, the staff of the William Mitchell Opinion, wish to present to you Mr. Randall's speech, "Allies of Justice," in its entirety, not only to thank them, but to keep you, the readers, better informed about the workings of the Legal Profession.—Ed. note.)

"There could be no learned profession without books. And there could be no science of jurisprudence without those books and their contents being indexed, organized, and presented in a manner readily accessible to the practitioner. For this, we in the legal profession are indebted to the West Publishing Company. Through your excellent research staff, your writers, and lawyers, you have made it possible for today's lawyer to keep abreast of the ever changing law of our dynamic and complex America. Without this information readily available, today's lawyer would be unable to practice effectively. You have done your job well.

"But, I have come to thank West not only to praise it, if I may alter a rather familiar quotation. For the past several months, as President of the American Bar Association, I have spoken before audiences in New York and Hawaii, in Alaska and Florida, and many points between. I have stressed in almost every one of these forty addresses the professional responsibility of the American lawyer. I have endeavored to point out that by his very place in the community he assumes a responsibility that reaches out far and beyond the clients who come into his office. I have stated repeatedly that he has a responsibility which stems from the mere fact that he is a lawyer and makes every legal problem within his community his vital concern. I could not have used a better analogy to stress my point than the professional responsibility which has been recognized and honored many times by West Publishing Company.

"You have gone far beyond your more limited and technical duties of providing good research material for the practicing lawyer. You have cooperated with the Bar and aided in the publication of materials which might have rather limited market appeal, but which you have felt would be of value to the legal profession nonetheless. Your magnificent contribution and presentation to the Cromwell Library of a very rare and valued edition of **Corpus Juris Civilis** was deeply appreciated by all members of the Bar. Repeatedly you have prepared and made available for distribution documents such as the Report of the Joint Conference on Professional Responsibility and Report of the Committee on Economics of the Bar, to name only a few. These publications have had an important bearing on the practice of law and the future of the profession.

"You have not limited your assistance to the preparation and publication of these materials. You have made substantial financial contributions to the American Bar Foundation's project to annotate the Model Corporation Act, to the Essay Contest of the Section of Administrative Law, and the publication of the proceeding of the Section on International and Comparative Law. Again this list is incomplete but serves to illustrate the extent of your contributions.

"One of the pleasures I have found in serving the American Bar Association has been that of working with the West Publishing Company.

"You are truly one of the allies of justice."

Income Taxation of Multi-State Business

(Continued from page 1)

to withhold a tax immunity where one naturally exists (Government instrumentalities, etc.); but the power to create a tax immunity is narrowly confined.

If the Court strikes down P.L. 86-272, an almost intolerable situation will exist in light of the **Scripto** decision.[34] Many small corporations that have never moved the boundaries of their business outside their home state will be faced with tax liabilities in numerous states. Each time a jobber secures them an order from a new state they may open a new door for taxation. Furthermore, the widely varying and complicated state income tax apportionment formulas (and varying definitions of income) will cause heavy expenses in order to comply with the laws. Also, multiple taxation is a real danger. Should the Court find P.L. 86-272 unconstitutional, Congress will virtually have no choice other than forcing the states to adopt a uniform apportionment formula and a uniform definition of net income. This could be neatly accomplished by providing a credit against the federal income tax for state tax payments, but only if the state law met the standards of uniformity. Such a plan may well be adopted without regard to the action of the Courts. Uniformity would be more important to many businessmen than tax immunity. If state tax laws could be complied with by making 50 copies of the federal income tax return and 50 copies of one schedule dividing the income among the states, the costs of state tax compliance would be materially reduced. The costs of tax collection by the states could also be reduced because the taxpayers will have a better understanding of the state laws.

CONCLUSIONS

It is almost certain that litigation and legislation will produce changes in the law in this area in the next few years. Businessmen, however, will have to make decisions in the meantime on the basis of the current state of the law. Should income tax returns be filed in various states? Should activities in the states be changed to strengthen their position if returns are not filed?

The following is an assessment of the current tax results which may flow from various activities in a state having a broad net income tax:

1. If the corporation is incorporated in the state or licensed to do business therein, a return is probably required without regard to the corporation's activities.

2. If the corporation maintains a regular business establishment in the state (whether a sales office, warehouse, factory, service depot, or other) a return is probably required.

3. If the only activity in the state is the solicitation by employee-salesmen residing and working out of offices outside the state, a return is not required. It is imperative, however, that the salesmen do not have authority to accept the order.

4. If the employee-salesman works out of his own home in the taxing state, a more doubtful situation exists. The home may be a sales office. There is certainly a greater "nexus" than if he worked out of an office in another state. A wise precaution may be to avoid any other administrative activities by the salesman which are connected with his home. In this situation, the slightest activity going beyond solicitation may subject the company to the tax.

5. A company may now operate through jobbers or brokers without being subjected to tax in their states. The broker can maintain an office and devote most of his time to the company's sales efforts. He must, however, represent another seller. Again, he cannot be given authority to accept an order.

6. Any activities going beyond solicitation by either a salesman or broker could subject the company to tax. A company may be advised to conduct collection efforts and product service activities outside the state, or turn them over to an independent agency.

7. Delivery by the company's own trucks and employees to points within the state may subject the company to a tax.

8. Owning property within the state could precipitate a tax. Furnishing the salesman a company car might be enough, particularly if he works out of his own home in the taxing state, thus giving the property a situs within the state.

9. Directing advertising into the state which produces mail or telephone orders probably does not go beyond solicitation. Without other activities, this should not support the tax.

10. Consignment sale arrangements with dealers in the taxing state may result in a tax. Title to the goods rests in the company until sold to the customer. Title passes in the taxing state, and shipment to the customer is not made from a point outside the state. In this situation, the company may consider the advantages of a sale to the dealer, giving him an option to return the goods.

11. If the company's business does not involve the sale of tangible personal property, the new law is of no effect. Thus, the sellers of services, such as transportation, or intangibles, such as securities, insurance, electricity(?), or natural gas(?) will draw little comfort from P.L. 86-272.

When called upon to help a client in state income tax matters, there are many factors to consider. Certainly, the limitations of the federal Constitution and statutes are important. More basic, however, are the facts underlying the company's operations in any particular state. Top management, which may be seeking the advice, may not even be aware of all of the significant facts. They may also fail to recognize that some facts are significant. The counsellor must guard against giving an opinion on the basis of less than all the facts.

Another important factor to be considered is the law of the particular state. The statutes, administrative regulations, or case law may not impose a tax in every instance where the state has the power. State constitutions have also invalidated taxes which did not violate the U.S. Constitution. Over-generalizing is not advisable.

In this field, a crystal ball would be of more than usual utility. The client will be held accountable on the basis of law which has not yet been defined. Few would claim to be able to predict what course either the stautory or case law will take. Furthermore, the client's activities in the state many years hence (in particular his future contacts with the state tax administration) may have a very practical effect on the tax he pays for today's activities. In many instances, the cost of litigating the client's rights will exceed the tax demanded by the state. Therefore, these practical considerations cannot be ignored.

34. *Scripto, Inc. v. Carson*, 80 S. Ct. 619 (March 21, 1960).

Alumni News

E. R. (Mac) MacDougall, 1937, has been appointed supervisor of all bond claims of the United Pacific Insurance Company of Tacoma, Washington. The appointment was effective last December. A graduate of Minneapolis College of Law, he received a scholarship key for the highest four-year law school average, with a grade of 91+. He was admitted to the Minnesota Bar in 1939, and is a member of the American Bar Association. Prior to joining Union Pacific, Mr. MacDougall had been with Merchants and Farmers Mutual Casualty Company and with Hardware Indemnity of Minnesota at St. Paul for six years as an adjuster and claims examiner. He has been with Union Pacific for the past fourteen years, first at Seattle branch office as claims examiner and since 1946 at the home office in Tacoma as supervisor of claims. Mac is married and has four children.

Hon. Lawrence E. Plummer, 1933, a graduate of St. Paul College of Law, was nominated by both parties for District Judge, District Court of Iowa, 12th Judicial District, and was elected on November 8th to fill this position. Judge Plummer resides in Northwood, Iowa.

John A. Burns, former Dean of William Mitchell and now Dean Emeritus, has moved to 1116 Montclair N.E., Albuquerque, New Mexico.

Richard Meyers, 1956, I. Mirviss, 1956, and James J. Schumacher, 1957, are partners in the law firm of Minenko, Feinberg, Mirviss, Meyers and Schumacher, with offices in the Title Insurance Bldg., in Minneapolis. Mr. Meyers has a suburban office in New Brighton, where he is Village Attorney for New Brighton and Mounds View, and is also Bond Consultant for the Village of New Brighton. Mr. Schumacher has a suburban office in Bloomington and is counsel for G.E.M. Inc., in Bloomington.

Gerald Rummel, 1960, is Assistant Village Attorney in Bloomington. Raymond Faricy, 1960, is associated with the law firm of Schultz and Springer in St. Paul. John Franta, 1960, is practicing law in Marshall, Minnesota. Paul Fling, 1960, is practicing law in Slayton, Minnesota. Robert Kelly, 1960, is associated with the Thoreen law firm in Stillwater, Minnesota. Jack Zeug, 1960, is associated with the Foley firm in Wabasha, Minnesota. Elton Kuderer is associated with the firm of Erickson and Zierke in Fairmount, Minnesota.

Mr. Louis Plutzer, 1959, was recently appointed Director of the Inheritance and Gift Tax Division, Minnesota State Department of Taxation. Before this appointment, Mr. Plutzer was with the Income Tax Division.

Richard C. Marshall, '58, is a CPA with Anderson-Seiberlich CPA firm in St. Paul. Gerald L. Priebe, '58, is an assistant trust officer of the American National Bank of St. Paul. Gerald H. Swanson, '59, is a research analyst with the Minnesota Legislative Research Committee. LeRoy F. Werges, '58, is the assistant to the attorney in the Installment Loan Division of the Northwestern National Bank of Minneapolis. Chester J. Ungemach, '59, is a patent lawyer for Minneapolis Honeywell Regulator Co. Aero Division.

O. Harold Odland, '58, is an assistant Hennepin County Attorney. Alvin C. Schendel, '59, is a City Engineer of Robbinsdale. Thomas J. Rooney, '58, is in general practice with Harold Shear in St. Paul.

ALUMNI ARE REQUESTED TO SEND THEIR CORRECT ADDRESS TO SCHOOL OFFICE.

Display Improper

The ABA Standing Committee on Legal Ethics reports that automobile emblem manufacturers are continuing to try to sell to lawyers "blind goddess" emblems for their cars. The committee has repeatedly held that the display of such emblems by lawyers is improper.

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