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Scholarship Fund Nearly Quadrupled

Scholarship applicants can have sharply higher hopes of receiving aid this year, according to a recent release from the dean's office.

"Our available funds have nearly quadrupled over last year's," Dean Stephen R. Curtis stated, "and there is strong evidence that we may have even more untapped sources."

The largest single group of contributors, the dean reported, is law firms within the Twin City area. Corporations have also made substantial contributions.

"Our solicitations have only just begun," he said. "The response has been most encouraging." "Many attorneys indicated that they had not considered contributions to William Mitchell, only because no one had ever suggested it. We were happy to find that they have a strong interest in the progress of our school."

A widely held false conception, according to the dean, is that students at evening law schools have no need of scholarship aid. "While it is true that most of our students hold down full-time jobs, it is also true that a great majority of them are supporting families. For some of these, the cost of a legal education is almost prohibitive." The dean found a high interest in the students' situation among most attorneys, once they were apprised of the facts.

The awards will be announced during November or December, depending upon when all contributors have informed the college of their intended gifts. A faculty committee will name the recipients, basing their decisions on both academic achievement and financial need. Most funds are contributed without restriction as to recipients, giving the committee full discretion in its choices.

Among the awards from new sources this year are two from women's groups interested in the college. The William Mitchell Law Wives have announced a $300 tuition award, and the Ramsey County Lawyers' Wives Guild has resolved to make a contribution.

Orientation Nights Held For Freshmen

The freshman class this year participated in William Mitchell's first orientation program.

The sessions were held Thursday and Friday in the week before classes started.

The students were welcomed by Dean Curtis. He talked to them about the history and operations of the school and the responsibilities of the students.

Mr. Danforth talked to the students about the adversary system, systems of courts and the conduct of William Mitchell's Moot Court.

Mr. Montague discussed the sources and forms of law, how to study law, the use of the case method and briefing cases.

Mr. Green talked to the students about the place of law in society, the importance of language in the work of the law students and lawyers and the content and use of the library.

Mr. Dulebohn explained some of the work the lawyer does, his office work and litigation.

Milton Bix, President of the Student Bar Association, talked to the group about the Student Bar Association. Dr. Raymond B. Vander Borght talked on our Common Law in the world.

Judge John B. Sanborn Portrait Hangs In School's Front Foyer

By John E. McKendriek

Image

Photograph of Dean Curtis and Lee Slater looking at Portrait of John Sanborn

Presenting the portrait of the Honorable John B. Sanborn to Dean Stephen R. Curtis and the William Mitchell College of Law is Mr. Lee H. Slater.

One of the new additions to the physical plant of the William Mitchell College of Law during the past year is the portrait of the Honorable John B. Sanborn, which now hangs on the wall opposite the front foyer of the building.

The portrait first appeared last summer at the commencement exercises in June, where it was presented to William Mitchell by Lee H. Slater, President of the West Publishing Co. Reportedly, the finished painting was partially the product of much diligence on the part of Mr. Slater and Dean Curtis, whose task it was to convince Judge Sanborn that being photographed for the portrait was in the interest of propriety.

Considering Judge Sanborn's long association with William Mitchell College of Law, the presence of his portrait is deemed to be most appropriate. From the time of the merger in 1956, Judge Sanborn was a trustee and vice president until 1959.

Formerly, during the period from 1935 to 1956, he was a trustee and eventually the president of the St. Paul College of Law, which with the Minneapolis-Minnesota College of Law, was the forerunner of the William Mitchell College of Law.

Judge Sanborn is also an alumnus of the St. Paul College of Law, where he received his LL.B. in 1907. Born in St. Paul on Nov. 9, 1883, he has lived in the state all of his life.

After admittance to the Minnesota bar in 1907, Judge Sanborn practiced law until 1922. During this time, he served for a few years in the Minnesota House of Representatives and later became Commissioner of Insurance and a member of the Minnesota Tax Commission.

In 1922, Judge Sanborn was appointed as judge of the District Court for Ramsey County, where he remained until 1925. He then became a United States district judge for Minnesota and, in 1982, he was appointed to the United States Court of Appeals for the Eighth Circuit.

Since his "official" retirement two years ago, Judge Sanborn has remained at his post under the title of senior judge and still retains a full workload.

REVISE MODEL PENAL CODE AND MINNESOTA'S PROPOSED PENAL CODE

Law Institute Approves Model Penal Code

By Russell L. Streefland

The American Law Institute on May 24, 1962, gave final approval to a Model Penal Code that has been under preparation for 10 years.

The new code encompasses an exhaustive study of the philosophical and psychological bases of the criminal law. More important probably than any single provision of the code is its over-all approach. It tries to bring a unified and logical approach to criminal law, which has grown up in the various states by scattered and often inconsistent laws over the years.

To correct the conspicuous variations in' sentencing that sometimes give justice an uneven look, the model code provide three degrees of felony for sentencing purposes. Definitions of particular crimes are carefully drawn. Disorderly conduct, for example, which now can constitute almost anything the state dislikes, is narrowly defined.

More than 100 pages are devoted in the code to such general questions as when the defense of double jeopardy should be available, when it is permissible to use force in defense of person or property, and when a man is mentally responsible for commission of a crime.

The code's definition of criminal incapacity by reason of insanity has already won wide approval. It provides that a person is not responsible for a crime if, as a result of mental disease or defect, he lacks substantial capacity to appreciate the criminality of his conduct or to conform it to the law.

The code takes no position on the question of capital punishment, but it does suggest a new procedure for imposing sentence in the states which retain the death penalty. The jury would first bring in a verdict as to guilt and then in a separate proceeding decide whether there should be a death sentence. Unless the jury unanimously agreed, the judge could not impose the death penalty.

THE MINNESOTA CODE

A re-examination of the criminal law was recently completed in Minnesota,' when the Advisory Committee on Recodification of the Criminal Code of Minnesota released a 579-page report proposing revisions to the Minnesota Criminal Code. This report will be submitted to the 1963 session of the Minnesota legislature.

The core of the present Minnesota Criminal Code was adopted in 1885 and has not since undergone serious revision. The proposed code presents a sweeping modernization of the criminal law, with special emphasis on rehabilitation and restoration of convicted felons to citizenship and de-emphasis on the aspects of punishment.

For example, under the new code presentence investigations would be mandatory after all felony convictions. They are now optional.

Diagnostic studies would be required of convicted criminals by the State Commissioner of Corrections in cases where the crime carries a maximum sentence of 10 years or more, and in cases where the "habitual offender" statute is invoked. These studies would be available to the defense attorney.

Serving on the 22-man Advisory Committee are Prof. Maynard Pirsig, Associate Justice William Murphy and Chief Justice Oscar R. Knutson of the Minnesota Supreme Court. Justice Murphy is an alumnus of William Mitchell, and Chief Justice Knutson is a member of William Mitchell's Committee on Professional Responsibility.

Roland J. Faricy, '22 Dies

Image

Photograph of Roland Faricy

Sad news has been received of the sudden death on November 16, of Roland J. Faricy, '22. He practiced law in St. Paul for forty years, after graduation from the St. Paul College of Law. He was a member of the firm of Faricy, Moore, Costello and Hart and a member of the corporation of the William Mitchell College of Law.

He rendered valuable services to this school through the years and only a few months ago participated through his firm in our scholarship program.

THE STUDENTS SPEAK:

Law Student's Role

Our society is an extremely complex structure. The LAW is the cement that holds this complexity together much in the way that cement holds a brick building together. If the holding cement is improperly mixed or improperly applied the entire building collapses, if indeed it rises at all.

We can reason, therefore, that untrained workers should not undertake either to mix or apply the cement. Only those workers thoroughly trained have the knowledge and skill necessary to ensure that the building holds together.

When this theory is related directly to our society, we see that it is the student of law who is endeavoring to learn the mixing and application processes necessary to society's "holding strength." Without the lawyer, the mixing and application could never occur. Without this, society would collapse.

With this in mind, we as law students should see our goal clearly. We must recognize the true value of the opportunity that is before us and be thankful for it. We must feel the necessity of the law as an intricate and vital aspect of our society. To attempt the study of law without realizing the full meaning of its importance to our life would be a meaningless task.

Above all, we must remember that the student of law is the worker who is seeking to acquire the necessary knowledge and skill with which to mix and apply the "cement" of society. His goal-our goal-is the preservation of a way of life.

-Douglas Wayne Snyder

Support Student Bar

The purpose of the Student Bar Association at William Mitchell is to promote scholastic achievement among the students, develop understanding among the faculty and students, and further the professional and social interests of the students. These goals can be accomplished only through a coordinated effort between the governing board and the students. It is my desire that this year the Student Bar can achieve new goals in providing the students the services that are needed.

Our "smoker" in September was a tremendous success. More than 200 students showed up at the University Club to meet their friends and get acquainted with members of the faculty.

If any student is finding it difficult to obtain employment, he should talk to William Mortensen, Chairman of the Placement Bureau. He may be able to help you.

Martin Conway, chairman of the Welfare and Curricula Committee, 1s looking into the possibility of adding new machines to our lounge, thereby giving the students a better selection of foodstuffs.

The December trip to the Minnesota State Prison at Stillwater provided to the students was very successful as was a similar trip held three years ago.

Our two sophomore class representatives, Robert Burk and Frank O'Meara, are planning a report on the possibility of a lecture series this year. In the past students have failed to support and hear outstanding speakers. It is an insult to this school to provide speakers for the students and have the students fail to show up. I cannot understand why students will not give one hour of their time a semester to hear a judge or lawyer speak on a topic of interest to all.

Don't forget the Law Wives Annual Dance. It will be held this year at the Commodore Hotel on Feb. 2, 1963. This dance has always been the social highlight of the school year.

A word-of thanks to Mr. William Green and Mr. John Dulebohn. These two respected members of our faculty have never missed a student-sponsored function.

Take part in the Student Bar-the dividends you reap will be most valuable. If you want to work on any of the committees, contact their chairmen or any officer of the Student Bar. Our meetings are held the first

Tuesday of the month in Room 201. Let your voice be heard, it is the only way we have in determining what you want.

The most apathetic student is the one who complains the loudest about the way things are run.

-Milton Bix

President Explains SBA Rule

By Milton Bix

I had the opportunity to attend the 14th annual meeting of the American Law Student Association held this year in San Francisco, Calif.

The purpose of the ALSA Annual Meeting is to bring together the presidents and delegates of the 131 accredited law schools in the United States (representing 40,000 law students) to discuss the Student Bar Association and its responsibility to the student, the school, and the legal profession.

Legal seminars and workshops were conducted by members of the American Bar Association. The lectures and demonstrations dealt with many phases of the legal profession, but the main focal point always concerned itself with the law and its role in society.

This article will deal primarily with two subjects: the individual membership program initiated this year by the ALSA and the role of the Student Bar Association in a law school. It is the purpose of the ALSA to better educate the students with the primary purposes of the Student Bar program.

Student Bar Movement

It is a difficult task to prepare students for the legal profession. The process of preparing law students for the organized legal profession is the essence of what is termed the "Student Bar Movement." Although not licensed practitioners, law students are members of the legal profession and must share its exacting responsibilities. The means by which the student participates in the legal profession is his Student Bar Association and the American Law Student Association.

The Student Bar movement must concentrate on the area outside the classroom – self-development of the law students, organization activities to supplement their formal education, and responsibility to their school. Thus, the Student Bar at William Mitchell must encourage development by each student as he prepares to take his place in society as a member of the legal profession.

As members of the Student Bar, you have available the ALSA Life Insurance and the opportunity to subscribe to the ABA Journal at a nominal fee. You also have available the services of an outstanding placement bureau. As members of the Student Bar you have, in addition, the opportunity to read a national award winning publication, the William Mitchell Opinion.

It is unfortunate that students fail to take an active role in the Student Bar Association. Students

say they lack the time to be active in extra-curricular activities at a night school. I cannot believe this. Our smoker in September attracted more then 200 students, and membership is climbing. The time is there - it is the desire that is lacking.

The American Law Student Association and the local Student Bar can only provide the means by which the individual student can prepare himself for the legal profession; it cannot assume the responsibility that each student must assume himself.

Individual Program

At this year's annual meeting, the final touches on the Individual Membership Program were presented. The establishment of ALSA's program is undoubtedly the most significant development in the organization's 13-year history. Now law students can voluntarily become members of a national legal organization while still in law school.

The Individual Membership Program of the ALSA has several major purposes, the prime one being to acquaint law students with the importance and value of organized Bar participation. Another major purpose is to aid in the strengthening of local Student Bar programs, it being necessary for a law student to be a member of his local Student Bar Association before he can be eligible for ALSA membership.

A third purpose also exists - to provide a convenient and effective means for providing needed services to law students in their pre-professional years. It is axiomatic that there be efficiency and economy, as well as strength, in numbers.

Image

Photograph of Milton Bix

Frosh 131 Strong Begin Studies

On September 12, 1962, 131 men and two women began their course of study at William Mitchell College of Law.

Some of the statistics of this group are as follows: average age, 26; married, 65 per cent; age range, 21-47; average number of children, 1 1/2; number from states outside Minnesota, 30 per cent.

Educational backgrounds are varied and extensive. Approximately 96 per cent hold one or more degrees from 36 colleges and universities. Several students have done advanced work in European universities.

Occupations include that of accountant, business administrator, law clerk, engineer, insurance adjuster and consultant, tax specialist, air force officer, teacher, special investigator, physicist, personnel counselor and geologist.

Dicta By the Dean

Changes in faculty seem endless and so do their causes. During 1962 we have lost Marshman Wattson and Jeanette Bluhm from the full-time faculty, Marsh through death and Jeanette through illness and part-time instructors Hon. Douglas Amdahl, from the pressure of other responsibilities and Charles Gordon, from his promotion to become Assistant General Counsel of the Immigration and Naturalization Service in Washington. There have thus far been no additions to the full-time faculty, but the part-time instructors have been reinforced by six excellent appointments. Information concerning these appear elsewhere in this issue. They contain a healthy admixture of experience and youth.

Faculty From Ten Schools

The preceding paragraph aroused my curiosity as to how we are doing in the matter of the selection of our faculty from the alumni of various law schools. Assuming the prerequisite that, in order to be considered for a position as a law teacher, one must have received his law training in a first class law school, the interest at William Mitchell is not whether the prospect comes from one school or another, but whether he has the fundamental qualifications of sound education, scholarship, character, experience, and the ability to communicate, that are necessary to make a really competent teacher. Our faculty has been built on that basis. A count now disclose that of the 30 men on our faculty this year, eight come from William Mitchell, seven from the University of Minnesota, six from Harvard, two each from the University of Chicago and the University of Michigan and one each from the University of Louvain. Northwestern, Marquette. John Marshall of Chicago and Creighton. Our students are therefore being instructed by men who received their training in 10 different law schools. It is interesting to know that three of the men from William Mitchell are top men from recent classes at the school who are regarded by our faculty committee as prime prospects.

One of the sad experiences of the year was the sudden and shocking death of Judge Herbert F. Goodrich. In spite of intense suffering from a painful hip condition, the judge made the long trip from Philadelphia to St. Paul to appear as commencement speaker at our commencement on June 12. He and Mrs. Goodrich made many friends here, and his address was inspiring. Within less than two weeks he passed away, following what appeared to have been a successful operation on the ailing hip. There is no hope of replacing a man like Judge Goodrich. We can only be thankful for his life and his long service to the nation and the legal profession: Our school is proud of its association with this truly great man.

Scholarship Fund Grows

A most heartening experience has been the willingness of law firms and corporations to respond to our very spotty efforts to increase the school scholarship fund. Time bas permitted only a few calls yet the fund has increased four-fold since last year. The need for scholarships is great, and we hope to increase our efforts. It has been extremely gratifying to have the William Mitchell Law Wives and the Ramsey County Lawyers' Wives participate in our scholarship program.

A school improvement that has been long anticipated is occurring this fall. This is the attractive landscaping of the building grounds. It has been made possible through funds given by our generous friends and supporters, the executives of West Publishing Company. They are thus credited with another important step in the improvement of William Mitchell.

Controversial Holdings Seen on Freeway Access

By Floyd B. Olson

About the Author

Floyd B. Olson, a senior law student at William Mitchell, received his B.A. degree, cum laude, from Gustavus Adolphus College. He has been employed by the Minnesota State Legislature, by the District Court of Hennepin County, and the Attorney General's Office, where he has done legal research for the past two years.

[Article followed by Footnotes]

Almost twenty years before Minnesota became a state, the first American case was decided in which it was recognized that an abutting property owner had private rights in the adjacent streets.1 From that time on, courts have been intermittently confronted by litigation requiring more precise definitions of those rights when the state or its political subdivisions have exercised the police power and the power of eminent domain. Since the advent of the controlled access highway, and more especially since the development of the National System of Interstate and Defense Highways,2 the problem has been one of particular interest to property owners and practicing attorneys.

Earlier courts believed that all roads were established to service the adjoining land.3 By 1949 the concept began to change,4 allowing the courts of several states to hold that where no highway previously existed the construction of an interstate highway gave no right of access to the abutting owner.5 More recently, South Dakota has followed the trend in Darnall v. State.6

The Darnalls had commenced inverse condemnation proceedings against the State of South Dakota and its Highway Commission to recover for a claimed taking of access. They had established a cafe, cabin, and service station business on their property, which abutted a single highway known as U.S. Highway 14 and State Highway 79. Motorists and truckers had direct access to the establishment. On the side of the highway farther from the landowners' property, and adjacent to that highway, a new controlled access interstate highway was constructed; and between the new and old highways a concrete curb and gutter were built, thereby preventing ingress and egress to the new interstate road, except at interchanges about one mile to the north and south of the subject property. The old highway and the Darnalls' access to it were not disturbed. The jury believed that the Darnalls had sustained damages amounting to $7,000.

On appeal, the State Supreme Court reversed and held that there was no taking of access from the landowners' property; that the controlled access highway which resulted in a diversion of traffic from the old highway and the circuitous route to get to the property was not a taking for which compensation had to be paid. The court reasoned that since there was no physical taking of the landowners' property, or loss of access from the old road on which the property abutted, the lack of direct access to and from the new interstate was not special to the property owners, but was the result of a proper exercise of the police power to be complied with by the public generally.

The fundamental problem in the Darnall case, as in every case involving interference with the right of access, is to reconcile conflicting public and private right, (s) 7 and to determine by what power of the state this should be done. Often the question of what constitutes a "taking or damage" under the power of eminent domain is inextricably woven into the question of whether a specific act causing diminution of property value is an exercise of the police power. Both the police power and the power of eminent domain are essential attributes of sovereignty without which social order would be questionable. On the other hand, constitutional limitations, well known to judges and lawyers, have been placed upon the exercise of these powers for the protection of private property rights. Some courts have expressly recognized that the distinction is one of degree, depending upon the facts of the case, to be decided by weighing the private rights infringed as against the public rights obtained.' The problem "cannot be disposed of by general propositions," asserted Mr. Justice Holmes. "One fact for consideration," he thought, "in determining such limits is the extent of the diminution."9

Other cases, however, indicate that the courts have searched for general propositions, many of which appear to be applied with axiomatic accuracy in disregard of a weighing of the interests involved. One

writer has suggested that "they are poles on a spectrum, and beyond the guidelines of reasonableness and suitability to the end sought there is no constantly ascertainable dividing line between them." 10

The police power is generally understood to be the power of the state to impose reasonable restrictions on private property rights without incurring liability by regulations tending to promote the health, welfare, safety, morals, and convenience of the public.11 But the monotony of the principle does not reveal the new content that changing precedents give to it. Statutes prohibiting the maintaining of advertising signs within five hundred feet of the right of way line of an existing highway have been upheld under the police power on the ground that they are reasonably related to safety and the preservation of natural beauty.12

On the other hand, the concept of eminent domain has not remained static. The federal and many state constitutions 13 provide that private property cannot be "taken" for public use without paying just compensation. Since the Illinois amendment in 1870, other states,14 including South Dakota 15 and Minnesota,16 have provided substantially that private property cannot be "taken or damaged" for public use without payment of just compensation. The extent to which these differing eminent domain provisions affect the rights of property owners is not entirely clear. At least three views have been expressed as to whether the words "or damaged" have extended the rights of property owners under constitutional eminent domain provisions.

First, a superficial reading of the provisions has led some courts to the conclusion that any public use of land which caused ascertainable diminution of the market value of neighboring land, though no property was taken therefrom, constituted damage in the constitutional sense.17 Most courts, including those of South Dakota18 and Minnesota,19 have considered this definition too broad.

Second, some courts have adopted the view that if the injuries inflicted were actionable at common law they would constitute "damage" for purposes of eminent domain.20 At common law, property is the right of any person to possess, use, enjoy, and dispose of a thing.21 Thus, any interference with that right, regardless of a physical taking, would "damage" the property and be compensable. This interpretation also has been regarded as too sensitive.22

Third, many courts have adopted the reasoning of the Supreme Court of Illinois in Rigney v. Chicago.23 Perhaps Mr. Justice Mitchell stated it most clearly when he said, ". . . that to entitle a party to compensation he must have sustained special damage with respect to his property, different in kind from that sustained by the public generally, and which, by common law, would have given a private right of action." 24 This more restricted view is the one adopted in Darnall. Whether "damage" occurred was not determined by the amount of loss, but by the type or kind of loss."25

The frequent difficulty of determining whether the damage is special engages the controversy as to whether the state has exercised the proper power. The question; whether in a denial of access or limited control of access case, is often reduced to the kind of damage suffered by the landowner. Having decided this, the courts then generally characterize the circumstances as a "taking of access" for which compensation must be paid under eminent domain provisions, or as a "diversion of traffic" 26 or "circuity of travel" 27 which the property owner must share with the general public under the police power.

Despite the English view that an abutter has the right to immediate access from his property to a public highway,28 American courts generally have not allowed recovery where the property owner was left with indirect access to his property after construction had caused a more circuitous route.29 Thus, in cases involving motels, restaurants, service stations, and other businesses dependent upon the motoring public, the courts have recognized that losses of trade might result from more circuitous routes or diversions of traffic. But they have also understood that the costs of highway development might become prohibitive if they were to recognize a right to the traffic passing by such establishments.30 The practical question before the court in the Darnall case, as in other controlled access cases, is whether the landowner's loss is one which the benefiting public should bear, or whether the claim if established as precedent would impose a burden on the public exceeding the benefits. If Darnall had been affirmed, there would be no legal reason why every businessman in town should not recover for loss to his business when an interstate highway by-passes the town. The matter is only one of distance. The adoption of the terms "diversion of traffic" and "circuity of travel" indicates the courts' response to the problem.

Courts have, in addition, concluded that the right of access does not include access at all points between property and an adjacent highway.31 Where an existing highway is converted into a controlled access freeway, with a single entry way remaining for access, the question is

whether the regulation of access unreasonably restricts the abutting owners' rights.32 If it is found to be an unreasonable restriction on the abutter's rights, or that the highway commission attempted to acquire rather than regulate a portion of the owner's access, compensable damage occurs.33 Acquisition results in absolute control of the portion of access taken and future entrances may be prohibited along that portion.34 Regulation permits the courts to determine whether a denial of future entry is unreasonable.35

The determination of what is reasonable or unreasonable under the police power is not confined to the needs of the landowner. It may extend to the control exercised over access rights of others who are similarly situated. For example, a motel and restaurant owner alleged that city officials prevented him from breaking a curb to allow direct access to his business on the ground that the highway was to be a controlled access highway. The allegation also stated that property owners similarly situated had direct access to the same highway. It was held that the complaint on its face, "has alleged arbitrary and discriminatory action on the part of the city."36

Other limitations on recovery for claimed loss of access have been established in cases where there was no prior access, and in cases where the property owners have claimed access to both sides of the travelled portion of the highway. In the first type of case, the controlled access highway severs the owner's land into two parcels. Courts do not permit recovery for loss of access to the new highway on the theory that no access existed before the taking.37 However, it is arguable that severance damages would be greater because the severance by access control would be greater than it would if the highway were not access controlled. In the second type of case, a raised centerline strip is constructed, or a sign prohibiting left turn, is erected, to prevent motorists from crossing into the lane of oncoming traffic. Regulations of this nature are important to trucking firms and drive-ins. Yet they are considered a proper exercise of the police power.38

The legal problems inherent in highways designed for denial or control of access are likely to remain controversial. Contrary to the Holmes dictum, the fact alone that the value on land has diminished

seems to have had little weight in allowing recovery under eminent domain.39 In an era of transportation revolution, a safe and efficient highway system is essential. With the changing concepts of highway use, courts should be frank to admit that the function of roadways is to facilitate traffic, not to raise local land values. Darnall has contributed much to this end.

1 Lexington and Ohio Ry. Co. v. Applegate, 8 Dana 289, 33 Am. Dec. 497 (Ky. 1839).

2 The 41,000 mile network of federal roads scheduled for completion by 1972. It is estimated that in every year after 1972, over 5,000 persons will be saved who otherwise would have died in traffic accidents. Prisk, Charles W., Benefits of the Interstate System, Traffic Engineering, Feb. 1962, Pp. 11-12.

3 3 Stan. L. Rev. 298 (1951).

4 City of Los Angeles v. Geiger, 94 Cal. App. 2d 348, 210 P. 2d 717 (1949).

5 Smick v. Commonwealth, 268 S.W. 2d 424 (Ky. 1954); State v. Burke, 200 Ore. 211, 265 P. 2d 783 (1954); State v. Clevenger, 365 Mo. 970, 291 S.W. 2d 57 (1956); South Meadow Realty Corp. v. State, 144 Conn. 289, 130 A. 2d 290 (1957); State v. Calkins, 50 Wash. 2d 716, 314 P. 2d 449 (1957); State v. Ralston, 359 P. 2d 529 (Ore. 1961).

6 108 N.W. 2d 201 (S.D. 1961).

7 Smith v. State Highway Commission, 185 Kan. 445, 340 P. 2d 259 (1959).

8 See e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Iowa State Highway Commission v. Smith, 248 Ia. 869; 82 N.W. 2d 755 (1957); Smith v. State Highway Commission, 185 Kan. 445, 346 P. 2d 259 (1959).

9 Pennsylvania Coal Co. v. Mahon, Supra, note 8. at 413.

10 Covey, Frank M. Jr., Roadside Protection Through Access Control, Thesis for Degree of Doctor of Juridical Science, U. of Wisc., 1960, p. 12.

11 Mugler v. State, 123 U.S. 023 (1887); Graham v. Kingwell, 218 Cal. 658, 24 P. 2d 448 (1933).

12 New York State Thruway Authority v. Ashley Motor Court, Inc., IO N.Y. 2d 151, 218 N.Y.S. 2d 640 (1961). At page 644 the court said: ''Even supposing, however, that the defendants possessed valid and subsisting property rights which the legislation here in issue abrogated, this would not provide sufficient basis for declaring the statute unconstitutional. In this connection, it is to be borne in mind that it was the very construction of the thruway which created the element of value in the land abutting the road. Billboards and other advertising signs are obviously of no use unless there is a highway to bring the traveler within view of them. What was taken by the regulation, therefore was a value in the land which the thruway itself had added to the land and of this the defendant cannot be heard to complain. The police power is 'the least limitable of the powers of government and ... extends to all the great public needs' .... " But see Commonwealth v. Boston Advertising Co., 188 Mass. 348, 7 4 N.E. 601 (1905) which held that a municipal regulation forbidding signs within a specific distance from a public park was invalid as an attempt to take property for a public purpose without compensation.

12 See e.g., Ia. Const., art. I, § 18; Mass. Const., part I, art. IO; Mich. Const., art. XII, § I; N.Y. Const., art. I, § 7; Wisc. Const., art. I, § 13.

14 See e.g., Cal. Const., art. I, § 14; Colo. Const., art. II, § 15; Mo. Const., art. II, §§ 20 and 21; Tex. Const., art. I, § 17; Wash. Const., art. I, § 16.

15 S.D. Const., art. VI, § 13.

16 Minn. Const., art. I, § 13.

17 See e.g., Omaha Horse Railway Co. v. Cable Tramway Co., 32 Fed. 727 (1887); McCandless v. Los Angeles, 214 Cal. 67, 4 P. 2d 139 (1931); Jaynes v. Omaha Street Ry. Co., 53 Neb. 631, 74 N.W. 67 (1898); Hanks v. Port Arthur, 121 Tex. 202, ,18 S.W. 2d 944 <1932)

18 Darnall v. State, 108 N.W. 2d 201 (S.D. 1961).

19 See e.g., Rochette v. Chicago, Milwaukee and St. Paul Ry. Co., 32 Minn. 201, 20 N.W. 140 (1884); Guilford v. Minneapolis and St. Louis Ry. Co., 94 Minn. 109, 102 N.W. 365 (1905); Matthias v. Minneapolis, St. Paul and Sault Ste. Marie Ry. Co., 125 Minn. 224, 146 N.W. 353 (1914); Locascio v. Northern Pacific Ry Co., 185 Minn. 281, 24 N.W. 2d (1932).

20 Lambert v. Norfolk, 108 Va. 259, 61 S.E. 776 (1908) ·

21 1 B1. Comm. 138; 2 Austin's Jurisprudence; 3rd Ed., 817, 818.

22 See Rochette case, footnote 19, wherein Mr. Justice Mitchell said: "No law ever proposed to give indemnity for all losses occasioned by the construction of railroads and other public improvements. If it did, it would extend indefinitely."

23 102 Ill. 64 (1881).

24 Rochette v. Chicago, Milwaukee and St. Paul Ry. Co., 32 Minn. 201, 20 N.W. 140 (1884).

25 See also Pennysavers Oil Co. v. State, 334 S.W. 2d 546 (Tex. 1960) where a service station business was lost completely.

26 “Diversion of traffic" is the term used to designate a reduction in the volume of the traffic on the highway fronting the abutter's property which is caused by changes in the highway system.

27 "Circuity of travel" is the term used to designate the additional distance which an abutting owner must travel in his use of the highways as a result of the highway design.

28 Lyon v. The Fishmongers Company, 1 A.C. 062, 684, 685 (1876).

29 Nick v. State Highway Commission, 13 Wisc. 2d 560, 109 N.W. 2d 71 (1961); Carazella v. State, 269 Wisc. 593, 71 N.W. 2d 276 (1955); Darnall v. State, 108 N.W. 2d 201 (S.D. 1961); Pennysavers Oil Co. v. State, 334 S.W. 2d 546 (Tex. 1960). Contra: People v. Ricciardi, 23 Cal. 2d 390, 144 P. 2d 779 09-l3); Hamilton v. Mississippi State Highway Commission, 240 Miss. 895, 128 So. 2d 742 (1961).

30 Darnall v. State, 108 N.W. 2d 201 (S.D. 1961); Pennysavers Oil Co. v. State, 334 S.W. 2d 546 (Tex. 1960).

31 Mccann v. Clarke County, 149 Iowa 13, 127 N.W. IOU (1910); Wenger v. Kelly, 182 Iowa 259, 157 N.W. 206, 165 N.W. 449 (1917).

32 Smith v. State Highway Commission, 185 Kan. 445, 346 P. 2d 259 (1959).

33 Id.

34 Id.

35 Id.

36 Howard Johnson of Kingsport, Inc. v. City of Kingsport, 192 F. Supp. 2ll (E. D. Tenn.1961).

37 See cases cited, note 5, Supra.

38 Jones Beach Boulevard Estate v. Moses, 268 N.Y. 362, 197 N.E. 313 (1935); State v. Ensley, 164 N.E. 2d 342 (1960).

39 Pennysavers Oil Co. v. State, 334 S.W. 2d 5.16 (Tex. 1960); Nick v. State Highway Commission, 13 Wisc. 2d 560, 109 N.W. 2d 71 (1961).

Party Speakers for Law Wives

By Mrs. Paul Rosenthal

The William Mitchell Law Wives organization began its fourth year of operation with a party at the school on Sept. 26 to welcome all freshman wives and wives of transfer students.

The first regular meeting of the group was held Oct. 3. A panel discussion on "The Role of a Lawyer's Wife" was given by Mrs. Douglas K. Amdahl, whose husband is District Court judge in Minneapolis, and Mrs. George Scott, wife of the Hennepin County Attorney.

At the meeting on November 7 Charles R. Coulter, a Minneapolis attorney, spoke on "Your Liability for Your Child's Mischief."

Real Property Forfeiture Rule Weaker

By James Malecki

About the Author

James Malecki is a senior at William Mitchell. After receiving his B.A. in Business Administration from the University of Minnesota in 1957. he served four years in the U. S. Navy. He is presently a Lieutenant in the U. S. Naval Reserve and is employed by the Pillsbury Company in Minneapolis as Marketing Brand Manager.

"Equity abhors forfeitures." This fundamental concept of justice is one of the most venerable maxims of equity ever to be echoed in this country or England.1 In countless cases, the courts have not only refused to enforce forfeitures, but have also strictly construed forfeiture clauses in contracts against the

person in whose favor they operate. Despite this most formidable wall of law against anything that might even resemble a forfeiture, since earliest times there has existed a notorious exception to the prohibition of forfeitures rule. This is the exception that allows the vendor in an installment contract for the sale of land to retain all installments paid, upon a default by the vendee operating to cancel the contract. In a recent Wisconsin case, Uihlein Realty Company v. Downtown Development Corporation,2 this exception was once again affirmed, although the court in dicta indicated that its days may be numbered by holding that if vendees could prove unjust enrichment of vendor, they might be entitled to restitution of payments made prior to default and cancellation.

In the Uihlein case, plaintiff vendor brought an action in the nature of a strict foreclosure asking the court to set a reasonable time for payment of the amount due from defendant vendee under an installment land contract, and in default of payment, defendants to be barred and foreclosed from all rights and interests in the land. Defendants answered that to grant strict foreclosure would result in a forfeiture and unjust enrichment of the plaintiff, and further counter-claimed for restitution of amounts already paid under the contract.

The land involved was a parcel of high-value land in downtown Milwaukee, the purchase price of which was $1,000,000. A down payment of $100,000 was made when the contract was executed, and at the time of the default, installments totaling $338,000 had been paid, making a total of $448,000 paid on the purchase price of $1,000,000. The trial court determined that plaintiff's loss of bargain damages (the difference between the contract price and the market value of the land at the time of the defendant's breach) were approximately $375,000.3 Although the trial court's own finding of fact was that plaintiff’s damages were only $375,000, it granted a judgment of strict foreclosure and placed the reasonable time for redemption at ten months. This judgment had the indirect effect of forfeiting all of the defendant's previous payments under the contract (a sum of $448,000), in excess of the determined damages.

On appeal, the majority in a brusque affirmance reiterated an earlier statement of the court in the case of Oconto Company v. Bacon.4 Concerning the right of a vendor to strict foreclosure upon default of the vendee:

... Parties, should have some regard and respect for the terms of their own contracts and ought to make the terms thereof conform to their real understanding, and not rely wholly or even largely upon a court of equity for protection from their own acts.5

Continuing, the majority characterized the strict foreclosure as a mere affirmance of the party's contract and not a forfeiture.

The concurring opinion adopted a more liberal approach, approving the theory that a defaulting vendee has an equitable right to a remedy preventing unjust enrichment, and suggesting that this theory has been gaining recognition in many jurisdictions, including Wisconsin." However, before any relief can be granted to the defaulting vendee, he must prove that payments already made under the contract exceed the vendor's damages as a result of the breach. In the absence of what the court calls these "special circumstances," the right to redeem within a reasonable time gives a defaulting vendee all the protection he is entitled to. In the Uihlein case, the concurring opinion held that "special circumstances" did not exist warranting to the defendant vendee further relief beyond the right of redemption. This holding was based on the contention that defendant's inability to redeem implied that the property was

not worth as much as the trial court had determined, or at least that the value could not be readily converted to money.

The problems touched upon in the principal case were aptly described by Professor Ballentine in his now famous article on the same subject in the Minnesota Law Review, Volume 5 at Page 329.

The law, while looking with righteous abhorrence on forfeitures, and washing its hands of their enforcement, after the manner of Pontius Pilate, yet has been reluctant to intervene with affirmative relief or to formulate any principle condemning the validity of cut-throat provisions when their essence involves forfeiture. Although the law will not assist in the vivisection of the victim, it will permit the creditor to keep his pound of flesh if he can carve it himself.

What Professor Ballantine wrote in 1921 still remains a fairly accurate description of the state of modern law on land contracts. By the great weight of American authority, no relief can be afforded against express conditions of a contract for the sale of land which inflict forfeitures upon defaulting vendee, even though the default may be slight, and the payments already made under the contract, or improvements made to the land are substantial.7 An example of the lengths to which the terms of land contracts are enforced by some courts, despite extremely inequitable results, may be found in Nelson Realty Company v. Seaman.8 There the court denied all relief against forfeiture even though the vendee had been killed in France during the war, and his administrator introduced well grounded evidence that payments already made under the contract greatly exceeded the vendor's damages.

Most of the American law on contracts for the sale of land evolved primarily from three English decisions.9 In examining the reasoning of these decisions supporting what appears to be a forfeiture, we find the courts generally treating part payments under land contracts as security for the performance of the contract, to be forfeited in the event of a default by the vendee. Extending this theory further, some English courts have even held that the loss of vendee's payments (in excess of vendor's provable damages) is a punishment of the vendee for his breach.10

Of course, the law here is equally as full of inconsistencies as it is elsewhere. In the face of what appears to be the well established English rule described above, a much more liberal rule respecting the forfeitures of payments was handed down by the English Court in Steedman v. Drinkle.11 There the court stated that the purchase money paid in installments should only be regarded as security for the true amount of the damages suffered by the vendor due to the vendee's breach, and therefore all payments in excess of these "true" damages should be returned to the vendee in the event of a non-willful breach on his part. The court further observed that if the rule established in Howe v. Smith " (one of the keystone cases) were carried to its logical conclusion, the penalty for breach would become more and more severe as the vendee moved closer to completion of his obligations under the contract - a most illogical and inequitable result.

Two distinct lines of cases dealing with the rights of defaulting vendees under an installment land contract of the usual form13 have developed in this country. The first line of cases following the English "strict" rule holds that where there has been a default, the vendor may declare a forfeiture, not only retaining all that the vendee has paid, but also regaining possession. The second and more liberal line has granted varying relief to the defaulting vendee, depending on the equities of the particular case. Holdings included in the second line have been based on any one of three or four legal theories. In

addition to the case law, several states have enacted statutes in an attempt to regulate the rights of parties to land contracts.

Undoubtedly, the majority American rule, as it now stands, embraces the strict rule. However, the sentiments expressed by courts in the liberal minority are gaining a slow but sure foothold on the American scene, as is amply demonstrated in the concurring opinion of the Uihlen case." It is not inconceivable that the majority rule might some day be displaced by a combination of statute and case law based on the equitable principles contained in the present day minority viewpoint. The need for such a change is well illustrated by the following hypothetical.

Suppose one has contracted for the purchase of a house or farm. Not being able to pay the entire sale price in cash, the purchaser is required to enter into some type of credit transaction with his vendor. A purchase money mortgage may be given, but often the mode of financing chosen is the installment land contract (contract for deed).15 This agreement will normally provide that no conveyance is to be made until all the installments are paid. The ordinary installment land contract16 also usually provides that all payments must be made on the day that they fall due, and on failure to pay any installment when due, all obligations of the vendor shall be at an end, and all previous payments forfeited as liquidated damages. Let us now suppose that the purchaser entered into possession of the land under the agreement, has been in possession for many years, and has made considerable improvements. In the years which have passed, the purchaser has paid, in installments, almost 90% of the balance due on the original purchase price. On the appointed day for payment of the last installment, our purchaser through forgetfulness or by mere accident fails to make the payment due. He is ready and willing to pay a week or even a day later, but he has admittedly missed payment on the day agreed upon. Under the majority American rule, this purchaser may, as Professor Ballantine puts it, " . . . be doomed to see the whole of his estate, the reward of years of toil and effort, entirely swept away from him in a moment by the unbending rule of law as to forfeiture."17

On what theory or theories have the courts following the majority view based their oft-times seemingly harsh decisions? The following have been advanced to justify decisions imposing forfeitures of installments, payments or valuable improvements in excess of the vendor's actual damages.18

1. Where a vendee makes default, he cannot take advantage of his own wrong.19

2. To allow restitution raises the implication that the vendee has a reserved right to rescind, a right that may or may not be exercised by vendee depending on what is happening to the market value of the land.20

3. Not to enforce a stipulation for forfeiture in the land contract would amount to interference with the right of the parties to freely contract.21

4. Retention of payments already made is in the nature of liquidated damagee.22

In addition, even those courts which have adopted the liberal view in the adjudication of defaulting vendee's claims, admit that there are certain grounds upon which restitution will be denied to the vendee. Generally the following situations, if found to exist, will operate to deny the vendee's claim:

1. Where vendor bas not cancelled or rescinded the contract and stands ready to perform.

2. Where the vendor's damages are equal to or greater than the payments retained by him after cancellation.

3. Where the express provision for liquidated damages is genuine and does not amount to a penalty or forfeiture.

Looking beyond the specific reasons upon which the courts have based their so-called "forfeiture" rulings, one finds inherent in the general pattern of these decisions a reflection of the social and economic attitudes of the country during the periods when the strict rule found its widest application. Each decision re-affirming the sacredness of an individual's contract made at arm's length seems to echo the tradition of rugged Yankee individualism in a society and economy for the most part free from governmental and court imposed restrictions. Thus, as the country moved away from the traditional doctrine of laissez faire it is only natural that the courts should reflect in their decisions this basic change in the nation's philosophy and attitude towards the government's role in a free and democratic society. As a small part of this fundamental change in outlook, we find an increasing reluctance on the part of the courts to enforce by judicial decree provisions of installment land contracts, which if enforced, will work forfeitures. Strengthening the case law, several states have enacted legislation of one sort or another attempting to provide relief to the hapless vendee caught in the grips of an iron clad contract.23 The success of these statutes has, as will be seen later, not been too spectacular.

In examining the development of the liberal rule, one basic fact cannot be overlooked. A defaulting vendee in seeking restitution of payments, is rarely in as strong a position to ask for affirmative relief, as is the vendor, who is usually ready, willing, and able to perform his part of the bargain. Courts have thus often found it difficult to afford any sort of affirmative relief to the vendee, especially if there is the slightest trace of willfulness or negligence in his breach. However, when the vendee's breach is the result of ignorance, surprise, fraud, accident or mistake, he has been given relief, even in those courts which adhere to the strict rule. Carrying this liberality one step further, some courts hold that the reason for default is immaterial, if it is not willful, and therefore the victim of an economic depression, who despite all human efforts and best intentions is unable to pay, should not be put at the mercy of a vendor armed with a contract giving him the power to work a forfeiture.

An entirely different tack has been adopted by one group of courts following the liberal minority rule. These courts in refusing to enforce forfeiture clauses in installment land contracts do so by drawing an analogy between the vendor and vendee under an installment land contract and the relationship of a mortgagor and mortgagee, especially when the vendee is in possession.24 The similarities between the relationships are quite striking, leading the courts on more than one occasion to state that the legal relationship of vendor and purchaser under an installment land contract is substantially that of a mortgagee and mortgagor.25 The only substantial difference between the two situations appears to be one of remedies. Upon default in a lien theory state, the vendor has a "quicker" remedy than his counterpart, the mortgagee.26 Because of this dissimilarity in remedies, it is only logical that the vendee, if given a choice, would prefer the mortgage method of financing his purchase. Unfortunately, financial limitations usually prevent the vendee from exercising this choice. He is forced to trade the protection inherent in a mortgage for the low down payment inducements of the installment land contract. Viewed in this light the position of some courts in creating a fictional mortgagee/mortgagor relationship to prevent forfeiture under a breached installment land contract does not seem altogether unreasonable. Once having determined that a mortgage situation does exist, the courts then apply the

old equitable maxim, "Once a mortgage, always a mortgage," and promptly declare any forfeiture provisions in the contract void as clogs on the mortgagor's (vendee's) right of redemption.

Not in all jurisdictions has the mortgage analogy been used to benefit the defaulting vendee. In a few states27 it has been used as double-edged sword against the vendee, purporting to aid him, but in actuality leaving him worse off than he would have been if left to his substantive rights under ordinary contract law. This rather surprising result is obtained by first implying the existence of a mortgagee/mortgagor relationship, and then granting vendor a remedy of strict foreclosure against the defaulting vendee. The vendee is said to be protected because in so doing he is granted a period of redemption (usually thirty days or less) which he would not be entitled to if left to his contractual rights. The practical effect, however, is to bar all relief for the vendee upon the expiration of the period of redemption, including any equitable remedy which he might have had if the transaction had been handled as an ordinary contract cancellation. Despite well reasoned criticism from reputable authority,28 this rule still persists, as it did in the Uihlein case,29 with the courts that follow it holding that the cases have nothing to do with forfeiture or relief from forfeiture because the vendee, by the terms of his contract, has failed to bring himself within the field of equitable relief.30

Practically, a court need not create a legal fiction such as the mortgagor/mortgagee relationship to grant a defaulting vendee relief from forfeiture. Many courts do not. All that is really needed is a recognition of one of the equity court's roost basic functions, the power to relieve from forfeiture and penalty.31

The law carefully limits the remedies that a party to a contract may provide for by way of liquidated damages. If these provisions are in any way unreasonable, they will quickly be struck down. Often an express condition precedent in a land contract, such as the stipulation which makes time of the essence, is as penal in nature as an unreasonable liquidated damages stipulation. There is a growing tendency for courts of law and equity to disregard both the form and effect of these express conditions when they are harsh, penal, and provide for a penalty or forfeiture.32

The Canadian provinces provide many good examples of this changing attitude on the part of the courts towards defaulting vendee's rights under an installment land contract. In practically all Canadian cases, strict foreclosure will not be allowed to destroy a vendee's interest in the land if a forfeiture will result. A typical example of the courts' attitude towards a vendor's claim against his defaulting vendee when the claim if enforced by strict foreclosure would result in an uncontroverted, unjust enrichment of the vendor, is contained in the following excerpt from the opinion in Canadian Pacific v. Meadows.33

"I think the court ought in every case to consider the interest of all parties who may be affected by its judgment, and if it can do so without injustice to the Plaintiff vendor, it has the power and ought to exercise it to refuse a form of relief to which the Plaintiff vendor is prima facie entitled and give him another form of relief to which he is also entitled, if by so doing the interests of the other parties will thereby be better conserved."

Goaded by the economic and social evils of past depressions legislatures in many states have passed statutes conferring upon courts the power to adopt a more liberal approach by relieving a vendee from the harsh provisions of a land contract when the enforcement of those provisions would work a forfeiture.34 Unfortunately the statutes to a large extent have been disregarded or rendered impotent by judicial interpretation. In some cases, they have even been construed against the vendee, the very person whom the legislature intended to protect. Generally, these statutes may be grouped into two

broad classifications: Those statutes which expressly prohibit the enforcement of any contract stipulation which will work a forfeiture, the California statute being a typical example;35 and those which attempt to modify the harsh effect of "time is of the essence" clauses and other conditions precedent in installment land contracts by prescribing a statutory period of time within which the defaulting vendee may make good his obligations under the contract without having it cancelled. The Minnesota statute is typical of this group.36

A California case illustrates the relative ineffectiveness of these statutes in the protection of vendee's rights against forfeiture under installment land contracts. The case was decided soon after passage of the California statute, and completely disregarded it. The court held that when there has been a default, the vendor may declare a forfeiture, retaining all that vendee has paid, and also regaining possession of the Iand.37 This view has been maintained consistently in California,38 and only recently in but a relatively few cases has the position of the defaulting vendee been strengthened.39

Statutes in the second classification have also, in most cases, been effectively gutted by judicial construction of any substantial protection which the legislatures might have intended for the defaulting vendee thereunder. These statutes have typically been held to create a remedy of strict foreclosure for the vendor,40 making tender and prayer for specific performance by vendee after expiration of the statutory period of redemption ineffective.41 Courts applying this type of statute disregard, in most cases, the extent of the vendor's damages as a result of the breach. As Professor Ballantine states, "statutes which were designed to afford relief against forfeitures have instead become smoothly working devices most favorable and convenient to the vendor, while depriving the vendee of the possible gracious exercise of discretion on the part of the court when equity should demand it.”42

A conclusion of sorts can be drawn, based on the Uihlein case and other recent cases similar to it. Despite the almost insurmountable barrier of stare decisis, a slow trend appears to be developing that gives the defaulting vendee under an installment land contract limited relief from the sometimes disastrous effects of his own acts. Hopefully, in those states not hindered by restrictive legislation, this trend will eventually culminate in the prohibition of all forfeitures under land contracts, resulting in unjust enrichment to the vendor. In states such as Minnesota, where statutes have been interpreted to allow forfeiture, positive action on the part of the legislature will be needed to correct the situation.43

1 1 Pom. Eq. Jur. 446.

2 9 Wis. 2d 620, 101 N.W. 2d 775 (1960).

3 Market value of the property was given three appraisals. Vendor's appraiser - $680,000, Vendee's appraiser - $975,000, Vendee's appraiser - $1,000,000. Court settled on a value between $875,000 and $900,000.

4 181 Wis. 538, 195 N. W. 412 (1923).

5 Oconto v. Bacon, 181 Wis. 588, 195 N.W. 412 (1923).

6 Schwartz v. Syver, 264 Wis. 526, 59 N. W. 2d 480 (1958), and Long Investment Co. v. O'Donnell. 8 Wis. 2d 291, 88 N. W. 2d 674 (1954). In the first case, although denying restitution for failure by the vendee to prove unjust enrichment, the court did say at page 531 of the report, "We think It well to say that we

are in accord with the trend of modern cases which recognize that when the result of retention of monies paid upon a contract by a vendee who later repudiates his obligation is a clear unjust enrichment of the vendor, the vendor may be required to return such part of the payments as exceeds the loss which the vendee's default has caused him."

7 Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329 (1905).

8 147 Minn. 354, 180 N. W. 227 (1920).

9 Saville v. Saville, 1 Peere Wms. 774, 24 Eng. Rep. 596 (1818). Palmer v. Temple, 9 Ad. & F.. 508 (1839). Howe v. Smith, 27 Ch. D. 89, C. A. (1884).

10 This appears to be rather strong language in the face of the widely held proposition that damages awarded in action for breach of contract are to be compensatory and not punitive.

11 1 A. C. 275 (1916).

12 27 Ch. D. 89, C. A. (1884).

13 That is, a contract containing a forfeiture clause and making time of the essence.

14 Henry Uihlein Realty Co. v. Downtown Development Corp., 9 Wis. 2d 620, 101 N. W. 2d 775 (1960),

15 For a discussion of some of the reasons which make financing by installment contract desirable and often times necessary, see Minnesota Land Contract Law in Action, 39 Minn. L. Rev. 92, 104 (1940).

16 For an example of a fairly typical land contract form provided by statute in Minnesota see, Minn. Stat. Sec. 559.21.

17 Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329 at 346 (1905).

18 See Lytle v. Scottish American Mortgage Co., 122 Ga. 458, 50 S. E. 402, (1905). for a comprehensive outline of the theories upon which various courts have refused restitution of payments already made under an installment land contract, when vendee is in default.

19 Ibid. 18.

20 Ibid. 18.

21 Ibid. 18.

22 Ibid. 18.

23 38 L.R.A. (N. S.) 899, discusses statutes aimed primarily at preventing forfeiture when most of the purchase price has already been paid.

24 This analogy is amplified and criticized at 2 Wis. L. Rev. 307 (1902).

25 See e.g. Kreuscher v. Roth, 152 Minn. 320, 324, 188 N. W. 996, 997 (1922) and Nolan v. Greely, 150 Minn. 441, 442, 185 N.W. 647, 648 (1921).

26 Under the usual statute a defaulting vendee's rights in the property can be terminated in thirty days or less in a swift and Inexpensive action. Where no statute is involved, the vendor's remedy may be even

more efficient, depending on the terms of his contract. Compare this to the usual mortgage foreclosure proceedings wherein the mortgagor has a statutory period of up to a year after the foreclosure sale in which to redeem.

27 Most notably in the middle western United States, Iowa, Nebraska, Minnesota, and Wisconsin. In Wisconsin the rule has developed through Judicial decision, while in Minnesota It has evolved through construction of a statute (Minn. Stat. Sec. 559.21).

28 83 Harv. L. Rev. 883 (1920).

29 Henry Uihlein Realty Co. v. Downtown Development Corp. 9 Wis. 2d 775, 101 N. W. 2d 775, (1960).

30 Oconto Co. v. Bacon 181 Wis. 538, 195 N. W. 412, 40 A. L. R. 175 (1923).

31 1 Pom. Eq. Jur. 446.

32 4 Colum. L. Rev. 423 (1908).

33 1 Alta. 344, (1908).

34 Statutes in Minnesota, North Dakota, South Dakota, Nebraska, California and Maryland are representative.

35 California Civil Code, Sec. 3275, "Whenever by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in a case of a grossly negligent, willful, or fraudulent breach of duty."

36 Minn. Stat. Sec. 559.21, "When a default is made In the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate same, he may do so by serving upon the purchaser, his personal representative or assigns, either within or without the state, a notice specifying the conditions in which the default has been made, and stating that such contract will terminate thirty days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service ... If within the time mentioned the person served complies with such conditions, and pays the cost of service and attorneys' fees as provided herein, the contract shall be thereby reinstated; but otherwise shall terminate:"

37 123 Cal. 1, 55 Pac. 718, 43 L. R. A. 199, 69 Am. St. Rep. 17, (1898).

38 For recent cases following the Glock view, see: Gattian v. Coleman 86 Cal. App. (2d) 266, 194 P. 2d 728, (194,8), and Wilson v. Security First Nat. Bank, 84 Cal. App. (2d) 427, 190 P. 2d 975 (1948).

39 Barkis v. Scott, 34 A. C. 153, 208 P. (2d) 367, 37 Cal. L. Rev. 704 (1949).

40 International Realty Co. v. Vanderpoel. 127 Minn. 89, 148 N. W. 895 (1914), and Olson v. N. P. Ry. Co. 126 Minn. 299, 148 N. W. 647 (1914).

41 Clark v. Dye, 158 Minn. 217,197, N. W. 202 (1924).

42 Minn. L. Rev. 351 (1921).

43 For an interesting discussion of the possible economic effects (primarily an increase in the size of down payment requirements in land contracts) which might result from statutory reduction of vendor's rights in the event of a default by vendee see Minnesota Land Contract Law in Action, 39 Minn. L. Rev. 92 (1940).

KNOW YOUR TRUSTEES

John B. Burke Leads Busy Life

Mr. John B. Burke, a member of our Board of Trustees, was born in McGregor, Iowa, April 21, 1901, the son of James J. and Mildred (Goedert) Burke.

He married Margaret Barrett, of Hastings, Minn., on May 17, 1925. They have five children: Mary (Mrs. John Stryker), Geraldine (Mrs. Howard Boyer), Patricia (Mrs. Warren Kump), John B. Jr. and Margaret (Sister Jeanne Charlotte of the Order of the Visitation nuns). The Burkes have 15 grandchildren.

Mr. Burke was educated in the parochial schools of Iowa and Minnesota. In 1922 he graduated cum laude from St. Paul College of Law, where he was a member of Phi Beta Gamma.

A former faculty member of St. Paul College of Law, Mr. Burke taught a course entitled Mortgages now known as Security Transactions.

From 1922 to 1924, Mr. Burke was a title attorney for the Federal Land Bank of St. Paul. In 1924 he became chief counsel for Minnesota Federal Savings and Loan Association, a position he still holds.

In 1924 he became a partner in the law firm of Scott and Burke, in 1936 a partner of Scott, Burke and Scott, and in 1962 he was joined by his son, John B. Burke, Jr,. in the firm Burke, Scott and Burke.

Mr. Burke is a member of the American Bar Association, a past president of the Minnesota State Bar Association, a past president of the Ramsey County Bar Association, and a past treasurer of the Minnesota Tuberculosis and Health Association. He is an active member on the Board of Governors of the Minnesota State Bar Association.

Image

Photograph of John Burke

Mitchell's Grandson Forms Firm

Bradshaw Mintener and William Mitchell, grandson of the namesake of William Mitchell College of Law, have announced the formation of a partnership for the general practice of Law in Washington, D.C., on Sept. 15, 1962.

Mr. Mitchell is the son of William D. Mitchell, former Attorney General of the United States under President Hoover. He was a partner in Doherty, Rumble, Butler, Sullivan and Mitchell, St. Pan], from 1937 to 1953; General Counsel of the United States Atomic Energy Commission from 1953 to 1957, and more recently special counsel to Jones, Day, Cockley and Reavis, Washington, D.C.

Mr. Mintener was formerly General Counsel of the Pillsbury Co. from 1946 to 1954, Assistant Secretary of the Department of Health, Education and Welfare of the United States from 1954 to 1956, and more recently counsel to Powell, Dorsey and Blum, Washington, D.C.

Practice, Two Teaching Jobs Keep Forsberg Busy

The course in Criminal Law is undertaken by law students at William Mitchell during their first year of studies. It is taught by David C. Forsberg, who is not only engaged in private practice, but also has a second teaching position on the faculty of the University of Minnesota Law School.

"I've always had a desire to do some teaching," says Mr. Forsberg.

He has been fulfilling this desire at William Mitchell and is also teaching a course at the University law school in appellate advocacy, which consists of writing briefs and making oral arguments. Besides his teaching duties, Mr. Forsberg is engaged in law practice, associated with the firm of Briggs and Morgan in St. Paul.

The decision to study law was not made by Mr. Forsberg until he had completed his undergraduate work and was serving in the Army. He had attended the University of Minnesota, graduating with a B.A. in international relations in 1953. While in the service, from 1953 to 1955, he became interested in the study of law through some contact with court martial proceedings. Therefore, in 1955, Mr. Forsberg enrolled in law school at the University of Minnesota, graduating with honors in 1958. He was in the top 10 per cent of his graduating class, and in the Order of the Coif. He also wrote for the Minnesota Law Review as recent case editor.

At the law firm, he works in the litigation department, preparing cases for trial. Although only a small part of his practice consists of criminal work, he indicates a keen interest in this field, perhaps partially stimulated by his teaching at the school.

Mr. Forsberg was born and raised in this area, and makes his present home with his wife and four children outside of St. Paul in Washington County, Woodbury Township. He is a member of the Ramsey County, Minnesota and American Bar Associations.

Image

Photograph of David Forsberg

Alumni Officers Named at Dinner

The Sixth Annual Dinner of the William Mitchell College of Law Alumni Association was held Wednesday, June 13, in the Star of the North Room of the Radisson Hotel.

Officers were elected for the association at the dinner. The Honorable Ronald E. Hachey was elected president, William H. De Parcq, vice-president, the Honorable Donald T. Barbeau, secretary, and Harry L. Holtz, treasurer.

The classes of 1912 and 1937 were honored at the dinner.

The Alumni Association voted to participate in fund-raising for the school at the dinner.

Members of the Alumni Banquet Committee were the Honorable Douglas K. Amdahl, chairman; David E. Mikkelson, Gabriel D. Giancola, John B. Keefe and George Scott.

Advice... On Advice

Starting law school is like getting married; everyone has some advice on how to make a go of it. No matter how good the advice is though, there is nothing that will replace trying thing out for yourself. Before the first week has ended in hopeless confusion a first-year law student will have heard fifty different study technique. even if he talks to no one, walks in the shadows, and wears a disguise.

The adviser who has the last word on how to stay in law school will start by saying "the most important thing to remember" or "the only thing to do is" and then go on to say, ''brief every case.'' “never touch a canned brief or outline,” “annotate," “Make summaries of each section of class notes,” “attend all lectures,” “seminar but with moderation, (no bull sessions)” “practice writing old exams," "be organized," "keep physically fit, morally straight," and on and on ad nauseam.

Throughout this maze of advice, one does not have to be overly bright to catch one little thread of consistency: it's a four-letter word that wears you out, "work.” Surprisingly enough, even though one must do his own work it's quite enjoyable to most. and I venture a guess to all that come back for the second round. The advice on advice offered here spells work; listen up, for that’s the last word on how to stay in law school. Additional advice may be obtained from other first-year students.

Anonymous

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Faculty Writes Summaries for “Bench and Bar”

Under the editorship of Mr. William B. Danforth, the William Mitchell faculty members are currently preparing summaries of recent Minnesota Supreme Court decisions. Beginning in September, 1962, these summaries appear in the "Bench and Bar," the official monthly publication of the Minnesota State Bar Association.

This project is the result of a suggestion, by Mr. Ronald P. Smith, Project Chairman of the State Bar's Legal Publications Committee, that the faculties of the two law schools in Minnesota contribute articles to the "Bench and Bar." In discussions with William Mitchell representatives it was decided that the case summaries would be the special project of the William Mitchell faculty.

Mr. Danforth, Professor of Law and Assistant Dean at William Mitchell, is presently doing the preparation work as well as the editing, until a definite format of presentation can be established.

Mitchell Welcomes Instructors

TWO GET NEW ASSIGNMENTS

By Gary Phleger

Two members of the present William Mitchell faculty will have new teaching assignments this coming semester. Mr. William J. Erickson will be teaching the course in Conflict of Laws and Mr. Roger W. Schnobrich will instruct the course in Trusts.

William Mitchell will welcome several new faculty members this fall and coming semester.

Mr. Solomon lsenstein will be teaching the course in Administrative Law the second semester. A graduate of Harvard University with both an A.B. and LL.B. Mr. lsenstein will divide his duties between teaching and work for the Immigration and Naturalization Service. He has been an attorney in that service for twenty years and was recently transferred to St. Paul as regional counsel.

The course in Taxation of Estates is being taught by Mr. Norton L. Armour, who has served for the past five years in the office of the regional counsel of the Internal Revenue Service in Boston. Mr. Armour is currently associated with the firm of Bundlie, Kelley and Torrison in St. Paul, and received a B.B.A., M.B.A. and LL.B. from the University of Michigan and an LL.M. in taxation from Boston University.

Mr. Alonzo B. Seran will teach the course in Personal Property for the second semester. Mr. Seran received a B.B.A. from the University of Minnesota and an LL.B. from William Mitchell, where he graduated in 1959 ranking number one in his class. Mr. Seran is associated with the Minneapolis firm of Farnand, Lee, Mastor and Hart, as well as serving as chairman of the Junior Bar Section of the Hennepin County Bar Association.

Joining the staff in the second semester will be Charlton Dietz, who received a B.A. from Macalester College and an LL.B. from William Mitchell. For the past five years Mr. Dietz has worked in the legal department of Minnesota Mining and Manufacturing. He will assist Dr. Van der Borght in the course on Antitrust Law.

Mr. Charles L. Langer is the most recent graduate to join the faculty, since he received his LL.B. from William Mitchell last June. Mr. Langer received a B.B.A. from the University of Minnesota, and is assisting in the instruction in the course in Legal Research.

Another recent graduate of William Mitchell appointed to the faculty is Mr. Marvin J. Green, who received his B.A. from the University of Minnesota and his LL.B. from William Mitchell, ranking number one in his class. Mr. Green is associated with the firm of Meier, Kennedy and Quinn in St. Paul and will teach the course in Business Associations this coming semester.

Images

Six photographs of new professors

Solomon lsenstein Norton L. Armour Alonzo B. Seran Charlton Dietz Charles L. Langer Marvin J. Green

Teaching Isn't New for Prof. Dulebohn

John F. Dulebohn, who is currently teaching the course in Torts at William Mitchell, had experience in teaching while attending the law school at the University of Minnesota as a student. He explains that as a student at the university, where he received his LL.B., he taught school at Augsburg College Prep School to earn his way through law school.

A graduate of Gettysburg College with a B.A. degree, Mr. Dulebohn was persuaded to come to Minnesota by a former college friend who lived in this area.

Upon graduating from law school, he was in private practice for about a year when, as Mr. Dulebohn explains, "I wanted to see France." He enlisted in the army and served in France, during which time he also attended the University of Nancy, France, and obtained a Diploma in Civil Law.

After returning to private practice in Minneapolis in 1920, Mr. Dulebohn met Dorothy Brown and was married. Shortly thereafter, he took a position in the legal department of the Minneapolis Street Railway Co. In this work, Mr. Dulebohn handled cases in the Municipal and District courts and argued appeals before the Supreme Court of Minnesota. Although he did not keep accurate records of statistics, Mr. Dulebohn estimated he had tried over 1,800 cases for this company and argued about 18 cases before the Minnesota Supreme Court. In 1947, he was appointed general counsel for the transportation company and served in this capacity until 1952.

Thoughts again turned to teaching for Mr. Dulebohn in 1954, when he accepted a position teaching at the Minneapolis-Minnesota College of Law and later at the William Mitchell College of Law. He has taught a variety of courses at the law school, including Agency, Equity, Evidence, Legal Research and Torts. Says Mr. Dulebohn, "If a student applies himself to the program we have here (at William Mitchell) he will be a well-rounded individual in the practice of law."

Image

Photograph of John Dulebohn

Alumni Briefs

By R. W. Rahn

DEAR ALUMNI: We've had excellent response from the recent grads. But how about some of you earlier grads? We at the school and your fellow alumni across the nation would be interested in knowing what YOU are doing these days. So why not drop a card or a short note, care of the ALUMNI EDITOR, and fill us in?

At the time this goes to press, we have an interesting situation involving two of our alumni-Judge Douglas K. Amdahl, Class of 1951, and Judge Donald T. Barbeau, Class of 1943. Both men, judges on the municipal bench in Minneapolis, would like to succeed the late Judge Harold N. Rogers, who passed away on Oct. 31 of this year. Judge Rogers was on the District Bench for the 4th Judicial District, which you will recall is the Hennepin County District Court. Judge Amdahl was appointed by Minnesota's Gov. Andersen to fill this vacancy, under a constitutional provision for the filling of such vacancies for the unexpired term. Judge Barbeau, however, was elected on the Nov. 6 ballot to this same position, under a statutory provision providing for the filling of such vacancies at the next election. As the matter now stands, our two alumni will probably have recourse to the Minnesota Supreme Court in a "friendly suit" to determine who should get the judgeship.

1922

Geoffrey P. Mahoney, senior member of the law firm of Mahoney and Mahoney, Minneapolis, passed away on June 24 after suffering a stroke. A native of Ireland, he had practiced law in Minneapolis since

1922. He was active in the International Association of Insurance Counsel, Knights of Columbus, American Legion and local athletic clubs, as well as the county, state and national bar associations.

1926

Hon. James T. Harrison. chief justice of the Supreme Court of Montana, gave the commencement address, entitled "The Responsibilities of Citizenship," at the June commencement of the Montana School of Mines at Butte, Mont. Chief Justice Harrison was awarded the degree of doctor of laws, honoris causa, by the school during the commencement exercises.

1930

George R. Bohrer has been president of Farwell, Ozmun, Kirk & Co. since 1958. He came to St. Paul in 1925 and started with F.O.K. & Co. as an order clerk. He attended law school out of a desire to have more than a high school education, and since those days, although he has never practiced law, he has risen in his company through the positions of clerk in the buying department, buyer, assistant to the sales manager, sales manager and finally to member of the board of directors. He was also made president of a subsidiary company in 1956.

1942

John C. Chommie, B.S.L., LL.B., LL.M., J.S.D., professor of law at the University of Miami, has written a review of a book titled "Taxation of Foreign Income" by Bittker and Ebb. This review appears in 14 Stanford Law Review 626.

1958

David Mikkelson, formerly engaged in private practice in Minneapolis, is now an attorney in the civil division of the Hennepin County Attorney's Office. Mikkelson, during his years of study at the law school, was assistant registrar and in that position had much to do with the organization of our school in its present quarters on Summit Ave.

1959

Kenneth D. Siegfried is now a partner in the firm of Schroeder & Siegfried, Minneapolis, and is continuing in the practice of patent and trademark law.

1960

John A. Thabes, who was admitted to the Minnesota Bar in May 1960, was also admitted to practice in Florida in June 1961. He is now living in Fort Lauderdale, Fla., and is associated with the firm of Saunders, Curtis, Ginestra & Gore, Atlantic Federal Building, Fort Lauderdale, engaging m the general practice of law.

1961

Kenneth J. Maas Jr., is associated with the firm of Firestone, Fink, Krawetz, Miley & O'Neill, St. Paul.

Douglas Heidenreich, who ranked first in his graduating class, is with the firm of Erickson, Popham, Haik & Schnobrich, Minneapolis.

1962

Complete information is not available from the 1962 Alumni. The results from the recent survey will be published in the spring edition of the Opinion.

Hon. Goodrich, '62 Speaker, Dies in June

Many of those who attended the commencement exercises last June 12 were saddened to learn that the Hon. Herbert F. Goodrich, who delivered the commencement address and received an honorary degree of doctor of laws from the William Mitchell Board of Trustees, passed away two weeks later.

After participating in the graduation ceremonies, Judge Goodrich, on the following day, flew back to his home in Philadelphia, Pa., where he underwent a serious operation. Unfortunately, complications developed and on June 25, he died.