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St. Mary's University School of Law

ST. MARY'S UNIVERSITY LAW SCHOOL

Barrister News

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13th ANNUAL RED MASS

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LAW REVIEWS

ALUMNI NEWS

Barrister News

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EDITOR'S DESK

The **BARRISTER NEWS** has, for more than a decade, presented to its readers items and articles o general interest. But our journalistic endeavor ha encountered a challenge commensurate with th function of a Law School publication; that of pre senting Law Review articles of merit and providin a forum for the responsible expression of opinio and fact dealing with the field of Law.

In this issue are found two law reviews. Bot are examples of current legal argumentation an litigation and are published in the interest of pre senting diversified fields of law to our readers. On review is by a Law Student, and the other, by a Attorney at Law; both delve into their subject mat ter in a way that invites subsequent reading an research by the readers.

Both students of Law and Attorneys are in vited to submit articles to this legal forum for pub lication, for it is the continuing intention of thi publication to better serve the Students of Law Alumni of the University, and interested reader with law reviews of merit and articles of genera interest.

The Editor

IN THIS ISSUE

Nelson Samuel Magedman, a Senior Law Student, hails from Detroit, Michigan having received his B.S. degree from Wayne State University in Detroit in 1959. He received a Medical Technologist degree in 1961 from St. Joseph's Hospital School, Burbank, California and became certified by the American Society of Clinical Pathologists in 1962. Nelson is currently the Historian of his legal fraternity Phi Delta Phi, and having represented his fraternity chapter at the 37th Biennual National Convention of Phi Delta Phi Fraternity, is considered a valuable member by his brother members. Nelson is the recipient of two Bancroft-Whittney Awards. He married Kathryn Lois Wyatt in 1964, and is a veteran of three years military service in the United States Army. Nelson's law review article reflects growing concern for the members of the Armed Forces with regard to legal counsel and represents his views on the matter.

THE ARMED FORCES AND THE RIGHT TO COUNSEL

By Nelson Samuel Magedman

There are three kinds of courts-martial in each of the armed forces. They are called the general courts-martial, the special courts-martial, and the summary courts-marital.[1] General courts-martial have jurisdiction to try persons subject to the Uniform Code of Military Justice for any offense made punishable by this code and may, under such limitations as the President may prescribe, and judge any punishment not forbidden by the code, including the penalty of death when specifically authorized by the Code.[2] Special courts-martial have jurisdiction to try persons subject to the code for any noncapital offense made punishable by the code, and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by the code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months. A bad-conduct discharge cannot be adjudged unless a complete record of the proceedings and testimony before the court has made.[3] Summary courts-martial have jurisdiction to try persons subject to the code except officers, warrant officers, cadets, aviation cadets, and midshipmen for any non-capital offense made punishable by the code. No person with respect to whom summary courts-martial have jurisdiction can be brought to trial before a summary court-martial if he objects thereto, and in such instance, trial will be ordered by special or general court-martial, as may be appropriate.[4]

The right to assistance of counsel for the accused's defense is recognized as essential to any fair trial of a case prosecuted by the Federal government,[5] and this right to counsel applies equally to courts-martial.[6] Assistance of counsel means not only the right to have counsel but also to have qualified counsel and the right to an opportunity for such counsel to acquaint himself with the facts and the law of the case and to a reasonable time to prepare the defense.[7] The right may be waived by the accused, but it must appear that he affirmatively and intelligently waived it;[8] otherwise, the failure to provide counsel for an accused who is unable to obtain counsel, or forcing the accused to trial in the absence of his counsel, constitutes a denial of a constitutional right.[9] The accused has the right, however, to choose individual counsel which may be military, if reasonably available, or civilian, if provided by the accused; and such individual counsel may serve in co-operation with the appointed defense counsel; or if requested by the accused, he may supersede such defense counsel as the legal representative of the accused.[10] It is not essential that the defendant in a special court-martial be represented by an attorney-at-law.[11]

(Continued on Page 8)

RED MASS

The San Antonio Catholic Lawyer's Guild, in cooperation with the St. Thomas More Club of St. Mary's School of Law, sponsored the annual Red Mass on the fourth day of November, 1965.

Observance of the Red Mass dates back to 1274 and the reign of King Edward I of England. Held prior to Michaelmas or the beginning of the Fall Term of Court, it marks the opening of the parliamentary, judicial and academic years. The Mass became a custom in France and Italy during the thirteenth century, being first celebrated in the United States in 1928 by the right reverend Monsignor William E. Cashin of St. Andrew's Church in New York City.

The Celebrant of the Thirteenth Annual Red Mass was the Very Reverend Louis J. Blume, S.M., president of St. Mary's University. The Mass was attended by graduating seniors, distinguished jurists and guests, leading citizens and civic leaders, and students of the School of Law.

L. to R.: Mrs. Ernest A. Raba, Dr. Katherine A. Ryan, Very Rev. Louis J. Blume, S.M., president of St. Mary's University.

Following the Red Mass, at Assumption Chape a reception and social was held in Chaminade Ha Lounge. The Red Mass this year honored in pa ticular the Supreme Judicial Court and the Cou of Criminal Appeals. The reception and Social Chaminade Lounge afforded all of the guests a opportunity to meet the honorees in person.

Mass is celebrated in Assumption Chapel to ask for the guidance of the Holy Spirit during the coming judicial and academic years.

FRATERNITY NEWS

Delta Theta Phi

The Officers of Bickett Senate, DELTA THETA PHI, for the Fall Semester Are:

Bruce Tondre, Dean
Carl Krause, Tribune
Mark Sideman, Master of the Rolls
Gale O. Castillo, Master of the Ritual
Don Saunders, Exchequer
Cam Smith, Bailiff

Congratulations from every member of DELTA THETA PHI to the St. Mary's School of Law students who have become eligible to join the ranks of this organization. The Rush Party honoring the New Rushees was held on November 21, at the Four Brothers' Steak House, where Judge John Onion, 175th District Court, was our guest speaker.

Congratulations, also, to DELTA THETS Brice Tondre and Joe McGill who appeared on the Dean's List for the Summer Term of 1965. And to Brother Mike LaHood, newly elected President of the Student Bar Association, and Brother Gale O. Castillo (outgoing President) elected as the American Law Students Association (A.L.S.A.) Representative.

Phi Delta Phi

Phi Delta Phi members elected Marion Carson as Magister, Charles Hyder Exchequer, Douglas Cowan Clerk and Nelson Magedman Historian for the Fall semester.

The fraternity wishes to congratulate Brother and Mrs. Melvern Stein on their latest addition to their family, a son, Michael Dennis.

At the end of the Spring semester 1965, seven new members were initiated into the fraternity. They were Marion Carson, Douglas Cowan, Paul Flores, Cecil Henne, Patrick Nitsch, Sheldon Oster, and Melvern Stein. Phi Delta Phi also bestowed an honorary membership upon a prominent San Antonio attorney, Mr. Rudy Rice. Presiding at the initiation were six members of the judiciary. We gratefully acknowledge the initiation services rendered by Justice James R. Norvell and Justice Jack Pope of the Supreme Court of Texas; Judge Charles W. Barrow, Court of Civil Appeals; Judge Archie Brown and Judge Peter M. Curry. Brother Nelson Magedman served as Esquire.

Phi Delta Phi congratulates those who attained the distinction of making the Dean's list. Dennis Hendrix, John Killian, Donald Ferguson, Michael O'Quinn, Aubruy J. Flowers, Louis Cappadona, Melvern Stein, Dan Rutherford, John Sanders, Tom Kayser and Leo Michaud all members of Phi Delta Phi made the Dean's list this last Summer session.

On September 6, 7, & 8 the National Fraternity of Phi Delta Phi held its 37th Biennial Convention at the Chateau Frontenac in Quebec City, Canada. Representing Tarlton Inn at the convention was Brother Nelson Magedman. Four colonies were given the status of Inns making a total of eighty-five Inns throughout the United States and Canada.

This semester twenty-six students have attained eligibility for rushing Phi Delta Phi. We extend to these students our congratulations in attaining a high scholastic average.

DEAN'S LIST

DAY DIVISION

	Average	Hours
Notzon, Marcel	85.5	40
Parker, James M.	82.6	78
Hendrix, Dennis E.	81.1	79
Tondre, Brice A.	80.4	61
Killian, John M.	80.1	84
Ferguson, Donald O.	79.8	84
Ransom, Champe C.	79.1	62
O'Quinn, Michael	78.8	90
Flowers, Aubrey J.	78.8	76
McGill, Joe K.	78.3	90
Cappadona, Louis A.	77.8	89
Stein, Melvern	77.7	66
Rutherford, Daniel R.	77.5	81

EVENING DIVISION

Hill, Roger C.	84.6	33
Sanders, John L.	84.4	54
Benson, Philip F.	83.8	31
Kayser, Thomas C.	83.7	90
Rocha, Juan	82.8	21
Taylor, Edwin H.	82.0	56
Priest, Wayne P.	81.4	23
Michaud, Leo C.	80.3	66

School Average 74.9

STUDENT BAR ELECTS NEW SLATE

Left to right, the newly-elected Student Bar officers are: John Oppenheimer, treasurer; Gerald Lopez, parliamentarian, Ray Taylor, sergeant at arms; Charles Muller, historian; Sherry Walls, secreary; Al Garza, vice-president; Machael LaHood president; Gale Castillo ALSA representative, and Dick Glaser ALSA alternate

The Student Bar Association held its regular semi-annual election of officers on the 18th and 20th of October, 1965.

Candidates for the various offices were the following: For President, Michael T. LaHood of San Antonio, Texas and Raymond V. Manning of Taylor, Texas; for Vice-President, Al Garza of Laredo, Texas, Jack Lubben of McAllen, Texas, Norman Manning of Taylor, Texas, and Harriet Owen of Austin, Texas; for Secretary, Marian Ombres of West Palm Beach, Florida and Richard Brock Shamberg of Houston, Texas; for Treasurer, Jeff Morehouse of Corpus Christi, Texas and John Oppenheimer of San Antonio, Texas; for Parliamentarian, Gerald Lopez of Odessa, Texas; for Historian, Charles Muller of San Antonio, Texas; for Sergeant at Arms, Ray Taylor of San Antonio, Texas; for American Law Student Association Representative, Marion T. Carson of San Antonio, Texas and Gail O. Castillo of San Antonio, Texas, for American Law Student Association Alternate, no petitions for candidacy were filed.

Two posts were actively sought via the write-in method. Jesse Gamez of Crystal City, Texas was write-in candidate for Historian, and Sherry Walls of Carlinville, Illinois was write-in candidate for Secretary.

As a result of achieving simple majorities in the election on Monday, the 18th of October, Michael T. LaHood was elected President, John Oppenheimer was elected Treasurer, Gerald Lopez was elected Parliamentarian, Charles Muller was elected Historian, Ray Taylor was elected Sergeant at Arms and Gale O. Castillo was elected American Law Student Association Representative. The Vice-President's race was thrown into a runoff between Al Garza and Harriet Owen which was won by Al Garza. The Secretary's race also developed into a runoff between Marian Ombres and Sherry Walls the latter winning the runoff. Three candidates ran for American Law Student Association Alternate during the runoff election. The candidacy of the three arose from a three-way tie in the number of write-in votes each received during the initial election. Richard Glasser of Dallas, Texas Nelson Magedman of Tacoma, California, and Vic Putman of San Antonio, Texas, were the three candidates. Richard Glasser was victorious in this race.

New officers begin their terms of office in a strategy session accidentally caught by the candid camera .

Out of 252 eligible voters, 191 voted in the election. To be eligible a student must be enrolled in at least 10 semester hours of study in Day School or 6 hours of study in Night School. In the election last Spring, 79% of all eligible voters cast ballots while this Fall the total casting ballots represented only 75% of the eligible voters.

The new officers were sworn in on Thursday, October 29, 1965 at installation ceremonies conducted during the regular meeting of the Student Bar Association by Professor Crawford Reeder of the Law School.

President's Letter

Another year of professional awareness by the Student Bar Association comes to an end. Throughout this year the Student Bar Officers have sought to improve the entire BARRISTERS program and provide solutions to the varied problems existing for many years past. While no organization can completely eliminate its problems, for new ones come into existance with progress, the BARRISTERS have taken the necessary steps to alleviate them.

By active participation and encouragement, the officers and student members have taken great strides forward to carry forth the goal of the elected administration, to "supplement the theoretical education given in law school by providing for each student a close connection with the realities and problems of actual practice by fostering a closer relationship between the future lawyers and present members of the legal profession."

Participation by Student Bar Officers ranged this year from the registration-information service, to used law books cooperative, to weekly coffee gatherings, to law clerks placement service, to active social activities, to weekly series of assembly speakers responsible for a most successful year at St. Mary's School of Law were: Hon. James R. Norvell, Associate Justice of the Supreme Court of Texas; James E. Barlow, Criminal District Attorney for Bexar County; Alan McNeil, S. A. Jr. Bar Association; Joe Hernandez, Chief City Prosecutor; James Knight, Bexar County Clerk; Maj. David Minton, JAG Corps, U. S. Army; Clem Lyons, County Court Prosecutor; Philip E. Hammer, McGown McClanahan & Hammer; Pheston Dial, First Assistant District Attorney; Josh Groce, Groce Hebdon Fahey & Smith; Ray Wietzel, District Court Prosecutor; further acceptances included Henry B. Gonzalez, U. S. Congressman; Fred Semaan, Defense Counselor; Hon. Hipolito Garcia, Judge County Court at Law Number Two; and, Joe Frazier Brown, President, San Antonio Bar Association.

The aforementioned members of the legal profession gave of their time and insight into the practical aspects of the law. The BARRISTERS shall remember them.

When reviewing the past few months there is temptation to declare them as the best, and that all major problems were solved. It should be remembered that progress does not come with satisfaction in the present nor reliance on the past. So, to the newly elected administration is left this legacy exerted by the outgoing administration,—Set precedence if precedence need be set.

Gale Castillo

A court-martial is a military court convened under the authority of the Federal government and the Uniform Code of Military Justice for trying and punishing offenses committed by members of the armed forces.[12] It is a lawful tribunal with authority to determine any case over which it has jurisdiction, and it is the only and the highest court by which a military offense may be punished. So far as it is a court at all, and within its fields of action, it is as fully a court of law and justice as any civilian tribunal. The jurisdiction of courts-martial is entirely penal or disciplinary. It is a court of record, has no fixed place or time of session, and it has no inherent power to punish for contempt. It has no power to issue judicial write or mandates, nor is its jurisdiction territorially limited by the venue of the offense charged as in the case of a civilian tribunal.[13] Civilian tribunals cannot review the proceedings of courts-martial by a Writ of Habeas Corpus except to ascertain whether the court had jurisdiction.[14] Jurisdiction exists if the court-martial was legally constituted, [15] if it had jurisdiction over the prisoner[16] and the offense,[17] and if it did not exceed its power to sentence.[18] However, the Supreme Court held in a case involving a federal criminal prosecution and conviction that denial of the right to the assistance of counsel was a factor affecting jurisdiction. This enlargement of the scope of review on habeas corpus was continued until in 1949 the Court of Appeals for the Fifth Circuit affirmed the discharge of a prisoner on the grounds that his court-martial was without jurisdiction and that he had been denied due process of law.[19] The jurisdictional defect was found in an arbitrary organization of the court-martial without an officer of the Judge Advocate General's Department as law member, and many errors at the trial were cited as amounting cumulatively to a denial of due process.[20] The Supreme Court, however, reversed the decision of the Court of Appeals finding that the appointment of the law member under the circumstances was within the discretion of the appointing authority, and as to the elements bearing on due process, stated the following:

"We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. It is well settled that by habeas corpus the civilian courts exercise no supervisory or correcting power over the proceedings of a court-martial. The single inquiry, the test, is jurisdiction. In this case the court-martial had jurisdiction over the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."[21] The only review of a military court-marital by a civilian court is in the field of jurisdiction. The Supreme Court held that portion of the Uniform Code of Military Justice providing for military jurisdiction over persons accompanying the armed forces without the continental limits of the United States and its territories to be unconstitutional as applied to the trial of military dependents by courts-martial for capital offenses committed while accompanying the forces overseas in peacetime.[22] A majority of the Court stated that such civilians were entitled to constitutional safeguards under Article III and the Fifth and Sixth Amendments that could not be waived by Congress in attempting to provide for trial before military tribunals.[23] The Court recognized that Congress waived certain constitutional safeguards in providing rules and regulations for the discipline and punishment of those in the armed forces.

On Friday, October 1, 1965, a Federal court[24] ruled in an application for a Writ of Habeas Corpus that the accused, in a trial by special court-martial, was entitled by the Sixth Amendment to the Constitution to be represented by a trained lawyer, not by any officer appointed to defend him.[25] The Uniform Code of Military Justice states that in the case of a special court-martial, if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel apointed by the convening authority shall be a person similarly qualified; and, if the trial counsel is a judge advocate or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel appointed by the convening authority shall be one of the foregoing.[26] If the trial counsel is not a qualified counsel as stated above, the defense counsel appointed by the convening authority need not be qualified. The point that is now being advanced is that this is a violation of the individual's constitutional rights.

All persons who enter military service of the United States are amenable to the jurisdiction which Congress has created for their government, and while thus serving, they surrender their rights to be tried by the civilian courts. The Uniform Code of Military Justice was enacted by Congress under its constitutional powers to make rules for the government and regulation of the armed forces.[28] The President, without need for congressional authorization, as Commander-in-Chief, is enpowered to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to insure order and discipline in the armed forces. Whether resting upon statutory authority or not, such regulations are said to have the force and effect of law and are binding upon all parties subject thereto.[29] The question that arises is whether the Uniform Code of Military Justice is judicial or executory. The Supreme Court decided that courts-martial are not part of the judicial branch of the government, but are regarded as instrumentalities of the executive branch provided by Congress to aid the President in his capacity as Commander-inChief in order that he may properly command the military forces and maintain discipline therein.[30] In all criminal prosecutions, the accused enjoys the right to a speedy and public trial and to the Assistance of Counsel for his defense,[31] but criminal prosecution does not include proceedings before court martial,[32] and therefore the Sixth Amendment does not apply. Congress is free to provide the procedure as it sees fit. The Constitution sets forth that Congress has the power to provide for the trial and punishment of military offenses in the manner then and now practiced by civilized nations and the power to do so is given without any connection between it and the Third Article of the Constitution which defines the judicial power, and the courts-martial not belonging to the judicial branch of the government, it follows that the two powers are entirely independent of each other.[33] The Uniform Code of Military Justice is therefore valid in respect to Article 27. This article provides that in the special court-martial, which is a court of limited jurisdiction, for the punishment of offenses, prosecuting and defense counsel may be qualified lawyers. It is not essential however, that the defendant be represented by a lawyer.[34] The field is wide open for inadequate representation. These could include people who in civilian life would be engaged in the unauthorized practice of law. The accused is deprived of qualified counsel for his defense. A Federal court assumed that a Writ of Habeas Corpus, by an accused tried by general court-martial, may be obtained on the ground that the defense counsel was incompetent; the general court-martial provides for qualified counsel. The important point is that the court recognized the need for qualified counsel.[35]

In Summary: The Uniform Code of Military Justice does not provide for the compulsory appointment of qualified counsel in the special courts-martial where the accuseh requests military counsel, although he is not provided with qualified counsel as he would have been if he were a civilian. Our citizen soldiers are deprived of having qualified counsel appointed for their defense in special courts-martial because of the military's unique position. The members of our armed forces take an oath to defend the Constitution, but they are deprived of certain constitutional rights afforded to civilians. The Federal and State Courts cannot deprive the accused to the right to have counsel for his defense. The courts-martial is neither part of the Federal nor the State court system. Yet, this court is a court of law, and in the special courts-martial the accused may not be entitled to qualified counsel. It is the duty of Congress to amend the Uniform Code of Military Justice to make mandatory the appointment of qualified counsel in all cases which are tried by special courts-martial where it is desired by the accused to have such counsel.

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29. U.S. v. Eliason, 16 Pet. 296, (1842).
30. Ibid n. 17.
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32. Ibid n. 13.
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34. Adams v. Hiatt, D.C. Pa. 1948, 79 F. Supp. 433, 173 F. 2d. 896, certiorari denied 337 U.S. 946, 69 Sup. Ct. 1504, 93 L. Ed. 1749.
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Scholarships Announced

Awarded Grants in Aid were

1. Marcel C. Notzon
2. Douglas B. Cowan

1. Patrick D. Burke, Marion T. Carson, Jesus M. Gamez, Fred R. Granberry, Mark L. Nichols, and John L. Sanders were all awarded scholarships from the James W. Brackenridge Estate Scholarship Fund.

2. Robert W. Coffin, & Raymond V. Manning are recipients of the Isaac and Henrietta Lang Scholarship.

3. Frank Herrera, Jr., received the Carlos C. Cadena Scholarship awarded by San Antonio Lulac Council No. 2.

4. Loyd Bingham, Mark L. Nichols and John L. Sanders received the San Antonio Legal Secretary's Scholarship for books.

5. Raymond V. Manning received the National Association of Homebuilders Scholarship.

ALSA Circuit Report

By Marion Carson

The 1965 annual meeting was outstanding and much of its success goes to our host school this year the University of Miami School of Law and to Ronald P. Ponzoli President of its student bar. Our American Law Student Association, a new giant among the bar associations of the United States stands as of June 25, 1965 with a total of 131 membership law schools and over 30,000 law students as active participating members. All have joined together in furtherence of their common professional interests and the increasing betterment of their chosen career, the legal profession. As the elected representative, I actively supported the following two resolutions:

Resolution number one, Lawyers in the Armed Services:

Introduced by the Eight Circuit.

Whereas, There exists a well-established tradition of high professional service rendered to the nation and society by those trained in the law; and,

Whereas, members of the legal profession who enter the Armed Forces have not received benefits commensurate with their professional standing; and,

Whereas, the present policy of the Armed Forces in this resject is an undeserved discrimination in derogation of the professional standing of the legal community.

Now Therefore, Be It Resolved that the American Law student Association recommend to the Armed Forces of the United States that immediate action be taken to improve the military status regarding areas of rank, professional pay, longevity, and length of service of the attorneys serving with the Armed Forces.

Resolution number two, Cooperation with the Student American Medical Association.

Introduced by the Eight Circuit.

Whereas, historically the legal and medical professions have shared a concern for the problems of the people, the ethics of their professions, the values of society, and the consequences of laws; and,

Whereas, confrontation of all the mutual problems of the two professions requires the combined knowledge, talents and efforts of both, neither being adequately conversant with the wisdom of the other; and,

Whereas, the Student American Medical Association concurs in expressing mutual concern for these problems and the desire to cooperate in their confrontation;

Now Therefore Be It Resolved, that the *Medico-Legal Committee* of the American Law Student Association shall communicate as necessary with its counterpart in the Student American Medical Association to determine and consider problems of mutual concern and to frame reports and recommendations; and

Be It Further Resolved, that local member associations of the American Law Student Association are hereby encouraged to create committees to meet with their counterparts from chapters of the Student American Medical Association to determine and consider medico-legal problems.

Both Resolutions I am happy to say were so adopted.

Our newly elected Executive Officers for the American Law Student Association for the 1965-66 academic year are:

President—Richard Schisler, University of Cincinnati
Executive Vice President—Arlan Preblud, University of Denver
Second vice President—Woodrow Stewart, Tulane University
Secretary—Charles Bailiff, Stetson University
Treasurer—John Niebler, University of Wisconsin

The Barristers of St. Mary's Law School extend congratulations to each officer and offer our full assistance and cooperation with their newly presented challenge in our organization.

The programs and seminars presented in conjunction with the theme "Education in Advocacy" were excellent and thoroughly enjoyed. The three part "Student Administration Conference" was not only informative but an outstanding success. The American Law Student Association has grown into a giant, and will continue to grow in membership participation and contribution to the legal profession.

Mr. Black's talk was made available to the Barrister's News through the courtesy of the San Antonio Bar Association. It is one of twelve included in the transcript of the May, 1964 Institute, "Legal Aspects of Doing Business in Mexico" sponsored by the San Antonio Bar Assn. Bound copies of the entire transcript are for sale at the Bar office, 5th floor, Bexar County Courthouse at $10 per copy. Individual copies of the talks are not available.

BANCOS

By Thomas Black
Attorney, Austin, Texas

After listening to all of the distinguished speech today and noticing that the subject matter consistently involves deep and vital concerns of contemporary business, investment and finance, I cannot help but wonder if our hosts, when they invited me to speak at this institute, were under the impression that the "bancos"' which are the subject matter of my speech, are banks or some other species of financial institution in Mexico.

If this was the impression, I regret to say that is is mistaken for the subject "bancos" are not financial institutions; they are isolated strips of land along the Rio Grande created as the river straightens out curves in its channel. Bancos are the old bed and the new channel.

Such changes in river channels are common geological phenomena and cause relatively little legal difficulty except when the river happens to represent the boundary line between two sovereign nations. Along the Rio Grande, which we all know to be such a boundary, these strips represent areas that were once on one side of the river, say in Mexico, and suddenly were shifted to the other side, becoming a part of the United States, or vice versa.

At one time, changes in the river channel had no effect upon the boundary, because, in 1884, a Convention between the United States and Mexico provided that changes "brought by the force of the current . . . shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commission in 1852; but the line then fixed shall continue to follow the middle of the river channel bed, even though this should become wholly dry or be obstructed by deposits."[1]

This situation was obviously infeasable and thus in March of 1905, the United States and Mexico modified the 1884 Convention by a Convention providing that all bancos be eliminated from the effect of the 1884 Convention and that "the domination and jurisdiction of . . . (the 58 bancos then existing) which may remain on the left bank shall pass to the United States of America and vice versa. The Convention also provided for the transfer of "dominion and jurisdiction" of bancos later formed. Article IV of the Convention provides that "property of all kinds situated on said bancos shall be inviolably respected . . . "[2]

At the time of the 1905 Convention, the bancos had absolutely no mineral value, and it is perfectly plain from studying the correspondence and statements of the diplomats that ownership of minerals was not even to be considered in the negotiations. Within the last two decades, however there have been discoveries of oil and gas on or near some of these bancos, and, because the question was not expressly considered at the time of the Treaty, rightful ownership of these minerals is the subject of considerable dispute.

There are four claimants who can convincingly assert ownership in and to the minerals underlying the bancos on the United States side. They are the surface owners, the Republic of Mexico, The United States of America and the State of Texas. It is reasonably certain that any controversy between two or more of these claimants will be litigated in a federal or State Court in Texas, for "jurisdiction" over the bancos was unquestionably ceded to the United States.

The claim of the surface owner is contingent upon the status of title under Mexican law at the time the particular banco was transferred to the United States. This is settled by *Shaplleigh v. Meir*[3] in which the United States Supreme Court in a 1937 decision held that in order to adjudicate title to the surface of a banco "we must know where title stood while the land was yet in Mexico." In *Terrazas v. Donohue*[4], the Texas Supreme Court in 1925 ruled that title to cattle imported to the United States from Mexico is determined by the status of title under Mexican law at the time of importation. Presumably, this reasoning would apply to real property.

Thus, in order to discuss the validity of the surface owners' claim, I am placed in the presumptuous and impertinent position of explaining the mineral law of Mexico to a group of distinguished experts on Mexican law. I only hope that I can remain sufficiently general and peripheral to avoid error and if I do not, I will be grateful for enlightment.

It is safe to say that under traditional Spanish and Mexican concepts, title to minerals, including petroleum, rests in the sovereign. This concept was

(Continued on Page 12)

recognized in the Royal Mining Ordinance of New Spain in 1783[5] and I believe that such is the present law of Mexico under Article 27 of the Constitution of 1917 which provides that: "To the nation belongs the direct ownership of all minerals . . . solid, combustible minerals: petroleum, and all solid, liquid or gaseous hydrocarbons."[6]

Difficulty is presented by the fact that in 1905, when the original 58 bancos are transferred, the Mexican law was somewhat different. The Mining Law of 1844 provided that: "Underground petroleum gas wells" and other minerals "are the exclusive ownership of the owner of the land."[7]

This was revised in 1892 to provide that: "The owner of the soil may exploit the following mineral substances freely and without the need of a special concession in any instance", petroleum being one of the substances mentioned.[8]

The Mining Law of 1909 declared that: "Beds or deposits of all kinds of combustable minerals . . . (are) the exclusive property of the owner of the soil . . ."[9]

On the surface of these laws the simple answer to the surface owners' claim is the conclusion that as to bancos eliminated prior to the Constitution of 1917, the surface owner is the owner of the minerals; and as to bancos eliminated thereafter, the sovereign is the owner of the minerals by virtue of the new Constitution. I am ready to say, despite my resolve to avoid all but compelling conclusions, that this latter proposition is correct, that is, that the Mexican Government was the owner of the minerals in all bancos transferred after the enactment of the Constitution of 1917, and thus, that some sovereign is the present owner of these minerals.

It may be equally logical to conclude that the surface owners held and still hold title to the minerals under all bancos eliminated prior to the Constitution of 1917. However, there is one substantial contrary argument based upon later decisions by Mexican courts construing the Mining Laws of 1884, 1892 and 1909. These decisions indicate that the surface owners' right or title to oil under these laws could be perfected only by "positive acts" in the form of development, the situation being very similar to the *profit a prendre* type of ownership of minerals recognized in certain states in the United States.[10]

Thus, under Mexican law any minerals not actively exploited by the surface owner prior to 1917 were lost to the sovereign upon adoption of the Constitution.

Insofar as bancos are concerned, the Mexican courts' interpretation of these Mining Laws is further supported by the fact that when the original 58 bancos were eliminated in 1905, the surface owner did not enjoy the "exclusive ownership" of minerals granted by the 1884 and 1909 laws, but held instead only *a right to exploit without concession* as provided in the Law of 1892.

Certainly, the Mexican courts' construction of these Mining Laws have great influence in determining the status of title to minerals in bancos transferred prior to 1917. If the interpretation is accepted, the surface owner either has no title to these bancos or, when they were transferred, he had a *profit a prendre* type of ownership perfectable only by exploitation. Since the Mexican Constitution of 1917 would have had no effect upon the ownership of a banco already transferred to the United States, it is difficult to imagine what the status of title would be at the present time and whether the right to exploit would be cut off by non-use within a reasonable time whether it still pends. It is highly improbable that the Texas courts will reach a conclusion creating such a complicated situation in these isolated strips of land along the Rio Grande. Instead the surface owners of bancos eliminated prior to 1917 will be held either to own the minerals by virtue of the Mining Laws referred to or they will be held not to own them following later decisions of the Mexican courts.

I am simply not going to decide this problem, but will leave it to the proper court at the proper time. It is my view that reasonable arguments support either side.

As to bancos eliminated after the Constitution of 1917, and possibly as to those eliminated previously thereto, the title at the time of transfer was in the Government of Mexico. This government transferred "dominion and jurisdiction to the United States." The question is: does this transfer effect a transfer of title to minerals?

Based upon these exchanges, the Texas courts have interpreted the 1905 convention as effecting a simple boundary adjustment rather than as a cession of territory. One Court of Civil Appeals opinion describes the treaty as involving "trifling and unimportant cessions.[13]

All of this diplomatic fantasy is fine so long as the bancos remain the relatively valueless property which they were in 1905. However, those which are found to contain oil or gas are not valueless and no amount of diplomatic exchanges can change the fact that if Mexico transferred these minerals she gave up valuable teritory contrary to her intention and contrary to her constitutional limitations.

It should be remembered that the 1905 Convention provides that "property of all kinds situated on the said bancos shall be inviolably respected." Certainly Mexico's sovereign ownership of the minerals is "property" under this classification.

Imagining an oil well on a banco does not change the problem one iota, but it helps to clarify the strength of Mexico's claim. It is doubtful that if

(Continued on Page 14)

Dr. Carl Walker Joins Part-Time Faculty

Dr. Carl J. Walker, M.D.; J. D. will join the part time faculty at St. Mary's School of Law in the spring semester of 1966. Dr. Walker will teach in the field of legal medicine for the future practicing attorney.

Dr. Walker was born in Moline, Kansas at the farm home of his parents Mr. and Mrs. Hugh Walker, October 17, 1915. Dr. Walker attended country school thru the sixth grade. He then transferred to a parochial school in Moline, Kansas to complete junior high and high school. Along with the "Great Depression" came a delay in the educational process of two years for Carl Walker. After the Depression Dr. Walker entered Independence Junior College for the first year, followed by two more years at St. Benedict's College, in Atchison, Kansas. In the summer of 1937 he was admitted to the School of Medicine at the University of Tennessee in Memphis Tennessee. He completed Medical School and received his M.D. degree in 1940. Dr. Walker did his internship at St. Francis Hospital in Wichita, Kansas and at Osawatomie State Hospital for a residency in psychiatry for one year. Following that a full internship was taken at the Robert B. Green Hospital in San Antonio, Texas, in 1941 to 1942. Dr. Plant, Parsons, Kansas. He then returned to San Antonio, Texas where he commenced private practice in May of 1943 in the Medical Arts Building. In 1950, Dr. Walker took a one year residency in the Basic Sciences at the University of Kansas, and then returned to his private practice in San Antonio. In September of 1959, in order to satisfy a yearning for a legal education and also his father's wishes, though his father was deceased, he entered the School of Law, at St. Mary's University, discovering that the study of law was a jealous mistress but more rewarding. Dr. Walker earned a Law degree in 1965 and also passed the 1965 March Bar examination. Dr. Walker says the feat was much more impressive than passing the Medical Board examination.

Dr. Walker is married to Emerald Pena and has five lovely daughters. The oldest being 16 and the youngest being born January 30, 1964. Their names are Audrey Jean, Carolyn Eva, Frances Yvette, Nora Lee and Carla Hugh. The last two children share the same birthday of January 30, being three years apart.

Dr. Carl J. Walker, M.D., J.D.

The faculty and Student body of St. Mary's Law School are looking forward to having Dr. Carl Walker around his his new position.

one of the Mexican Government's valuable oil or gas wells along the river were suddenly shifted to the United States side, the Mexican Government would cheerfully admit that the elimination of this banco was a mere boundary adjustment, that no valuable property was ceded and that the oil well now belongs to the United States or Texas. Nor, from the other side of the river would the United States or Texas take such a position regarding oil or gas wells or valuable oil or gas deposits which those sovereigns might own in bancos.

Mexico ceded "dominion" but at the same time protected "property rights *of all kinds*" under the treaty. If this creates ambiguity, then the intention of the parties, reflected by the diplomatic exchanges, clearly weighs against a cession of valuable mineral rights.

On the other hand, it might seem improper to construe the treaty in the light of subsequent mineral discoveries, clearly not contemplated at the time.

Again, I have no intention of expressing an opinion upon this problem at this time.

Assuming without concluding that neither the surface owner nor the Mexican Government owns the minerals in the bancos on the United States' side it follows that either Texas or the United States receives the prize.

Mexico granted the United States "dominion and jurisdiction" over these bancos and, subsequently, in 1922, Congress transferred and the Texas Legislature accepted, only "jurisdiction"[14] Mineral ownership being an attribute of dominion was thus retained by the United States on the face of this chain of transfers.

However, there is more to the problem than an analysis of these transfers. The previously discussed issue of whether the treaty amounts to a cession of territory or to a mere boundary adjustment is again important in determining any controversy between the United States and Texas.

If the treaty ceded definite and separate mineral properties, then the United States acquired dominion or ownership of the minerals for the federal government and ceded only jurisdiction to Texas. It is the same as though some private individual had conveyed to the federal government title to minerals under land in Texas, then certainly the State of Texas would have no valid claim to assert in such a situation.

But, if the treaty effected a mere boundary adjustment and no definite territory can be considered as ceded, then the minerals become like any other lands along the Rio Grande and all attributes of sovereignty, including public ownership of minerals, would logically belong to the State of Texas. The acts of Congress and the State Legislature merely recognize a *fait accompli* and from the beginning the State of Texas has held not only jurisdiction, but complete sovereignty over these bancos, not by virtue of Congressional grant, but instead by virtue of the treaty.

It is this later proposition which has been accepted by the cases, and specifically by *Fragoso v. Cisneros*, decided by the El Paso Court of Civil Appeals in 1911.[15] In the *Fragoso* case, the issue was whether the Texas Statute of Limitations applied to adverse possessions of a banco prior to the Congressional grant of jurisdiction to Texas in 1922. The Court held that the statute was applicable from the time the banco was transferred, reasoning that "from the moment of the effective date of the treaty (the bancos became) a part of Texas."

In *Willis v. First Real Estate and Investment Company*, the United States Court of Appeals for the 5th Circuit, in 1934, described one of the 58 original bancos as "Texas territory" from the date of the treaty. [16]

Anyone representing the United States in this matter would encounter something of a dilemma, in that the best position to take against Mexico would be to view the transaction as a mere boundary adjustment, thus resolving the diplomatic and Constitutional problems raised at the time of the treaty. But such a view would be highly prejudicial to the United States' claim against Texas, for as shown above, if the treaty effected a mere boundary adjustment, then from the beginning the land was part of Texas solely by virtue of the treaty and there is no reason for public title in this land and minerals to be treated any differently than that in any other public land or minerals in Texas.

On the other hand, and on behalf of the federal government, when valuable minerals are involved it is certainly more realistic to view the transaction as a transfer or property. Thus, if Mexico ceded property by ceding dominion to the United States and did not protect her rights under the protection clause of the treaty, then it is difficult to see how title to this property got out of the federal government of the United States and into the Texas government.

As for bancos transferred to the Mexican side, the majority of them would presumably be owned by or through the surface owner. Surface ownership of minerals is the common rule in Texas and the property rights of these surface owners would be inviolably protected under the treaty. With respect to minerals which might have been owned by

the United States or the State of Texas, the problem of establishing this title after the banco was transferred to Mexico would be similar to those facing the Mexican government with respect to bancos on the United States 'side. Although the treaty seems to convey all attributes of sovereignty, it is difficult to imagine a relinquishment of valuable minerals by the United States or by the State of Texas on the unrealistic theory that boundaries are being adjusted.

1. Convention with United States of Mexico, Nov. 12, 1884, art. II, 24 Stat. 1012 (1886).
2. 35 Stat. 1863, et seq.
3. 299 U.S. 468 (1937).
4. 115 Tex. 46, 275 S.W. 396 (1925)
5. 1 Rockwell, A Compilation of Spanish and Mexican Law 49 (1851).
6. Wheless, Compendium of the Laws of Mexico 12-13 (2d ed., 1938).
7. Codiga des Minas de los Estados Unidos Mexico, Nov. 22, 1889.
8. Kerr, Handbook of Mexican Law (1909).
9. 2 Wheless, Compendium of the Laws of Mexico 570 (1st ed. 1910).
10. International Petrolium Co. v. El Presidente de la Republica y la Secretaria de Industria Comercio y Trabajo, Juzgado Primero Numeradio de Districo, del Distrito Federal, May 8, 1922, (1922) 10 Semanario Judicial, Quinta Epoca 886 (Mexico); The Texas Co. of Mexico, S.A., v. El Presidente de la Republica y la Secretaria de Industria Comercio y Trabajo, Juzgado Primero Propietario de distrito, del Distrito Federal, Aug. 30, 1921, (1921) 9 Semanario Judicial, Quinta Epoca 432 (Mexico).

    Juzgado Segundo de Distrito, en Materia Administrativa, en el Distrito Federal, Dec. 2, 1939 (1939) 62 Semanario Judicial 3021 (Mexico).
11. Baker v. Westcott, 73 Tex. 129, 132, 11 S.W. 157, 158-59 (1889).

    See also Coles v. Perry, 7 Tex. 109, 136 (851); Whelan v. Henderson, 137 S.W. 2d 150, 153 (Tex.Civ.App. error dism'd, judgm't correct).
12. San Lorenzo Title & Improvement Co. v. Caples, 48 S.W. 2d 329, 331 (Tex.Civ.App. 1932), aff'd, 124 Tex. 33, 73 S.W. 2d. 516 (1934); San Lorenzo Title & Improvement Co. v. Clardy, 48 S.W. 2d 315 (Tex.Civ.App. 1932), aff'd 124 Tex. 31, 73 S.W.2d 516 (1934); San Lorenzo Title & Improvement Co. v. City Mortgage Co., 48 S.W.2d 310 (Tex.Civ.App., 1932), aff'd, 124 Tex. 25, 73 S.W.2d 513 (1934).
13. Fragoso v. Cisneros, 154 S.W.2d 991, at 995, (Tex.Civ.App., 1941, error ref'd n.r.e.),
14. 42 Stat. 359 (1922.
    Tex. Civ. Stat. (Vernon 1948) art. 5415b.
15. See Note 13, supra.
16. 68 F.2d 671, (5th Cir., 1934).

NEW CRIMINAL CODE INSTITUTE HELD

The San Antonio Bar Association sponsored an Institute on the new Texas Code of Criminal Procedure. The purpose of this institute was to prepare all practicing attorneys with the change in the practice in Criminal law and procedure in Texas. The importance of this institute will become very noticible as more and more attorneys without criminal experience are appointed to represent clients on criminal matters. In the future, State and Federal Courts will appoint attorneys on such matters regardless of their past experience in the practice of criminal law.

Some 130 San Antonio attorneys turned out to hear Judge A. A. Semaan, Judge John F. Onion, Judge Archie S. Brown and Mr. Leon Douglas, States' Attorney to the Court of Criminal Appeals in Austin, discuss the new code and their interpretation of its effect upon the practice of criminal law in the future.

KAPPA BETA PI

Beta Lambda Chapter of Kappa Beta Pi entertained the women students of St. Mary's University School of Law on the evening of October 11 with a buffet supper in the Barristers' Lounge.

In addition to the students the chapter was honored with the presence of Mrs. Ernest A. Raba.

The supper was served from a table decorated with a centerpiece of combined fruits and flowers in the theme of the autumn season.

In the regular meeting of Beta Lambda Chapter of Kappa Beta Pi on October 11 officers were elected as follows:

Corresponding Registrar	Lanette Glasscock
Dean	Eva Long
Associate Dean	Elizabeth Ellington
Registrar	Evelyn Kubala
Chancellor	Hazel Farnz
Quarterly Corespondent	Ruth Jackson

Mary Ann Crosby, honor graduate in June, who successfully passed the bar examination later, was initiated into Beta Lambda Chapter of Kappa Beta Pi on September 13, at the meeting in the home of Hazel Franz.

Alumni News

New members to the San Antonio Bar Association from St. Mary's Law School are:

James K. Gardner	Gray & Gardner
A. Fred Spitta	County Attorney, Boerne, Texas
John C. Blanton	San Antonio Police Department
Stewart J. Alexander	Assistant City Attorney

Mario G. Obledo has moved to Austin and is in the office of the Attorney General in the Taxation Division.

Terry Topham, a recent graduate of the St. Mary's University School of Law, is now associated with Sawtelle, Goode, Troild & Leighton.

Cox, Smith and Smith announce that Jack Guenther has been admitted as a partner in the firm and that Joe P. Smyer, formerly the law clerk for Judge Adrian A. Spears, and Richard T. Brady, has become associated with the firm.

William D. Engle, Jr. announces the removal of his law offices to 1804 Tower Life Building.

James G. Murry announces the removal of his law offices from the Majestic Building to the Milam Building and the association of John Carl Stromberger and F. Peter Herff II under the firm name of Law Office of James G. Murry.

Paul M. Reyna, 42, died in San Antonio on May 31, 1965. He graduated from St. Mary's University School of Law in 1952. He practiced in San Antonio until his death as a member of the firm of Villarreal, Reyna & Medina. He was a former assistant attorney and served as prosecutor in the Corporation Court. He was a member of the State Bar of Texas.

John D. Wennermark has announced the removal of his office to 712 San Antonio Savings Building.

A military career begins for Thomas S. O'Connell, Jr., Dallas whose second lieutenant's bars were pinned on him by his mother at commissioning ceremonies preceding 1965 commencement, when O'Connell received both a BA and one of the University's first JD degrees in law.

Mrs. Dora Grossenbacher, St. Mary's first Dean of Women, received a National Defense Education Act grant to attend an institute on student personnel in higher education this summer at the University of Texas. Mrs. Grossenbacher is an alumnus, LLB. '57 of St. Mary's. She is the wife of San Antonio Attorney, Julius Grossenbacher.