

1970

Colonial Lawyer, Vol. 2, No. 3 (Winter 1970-71)

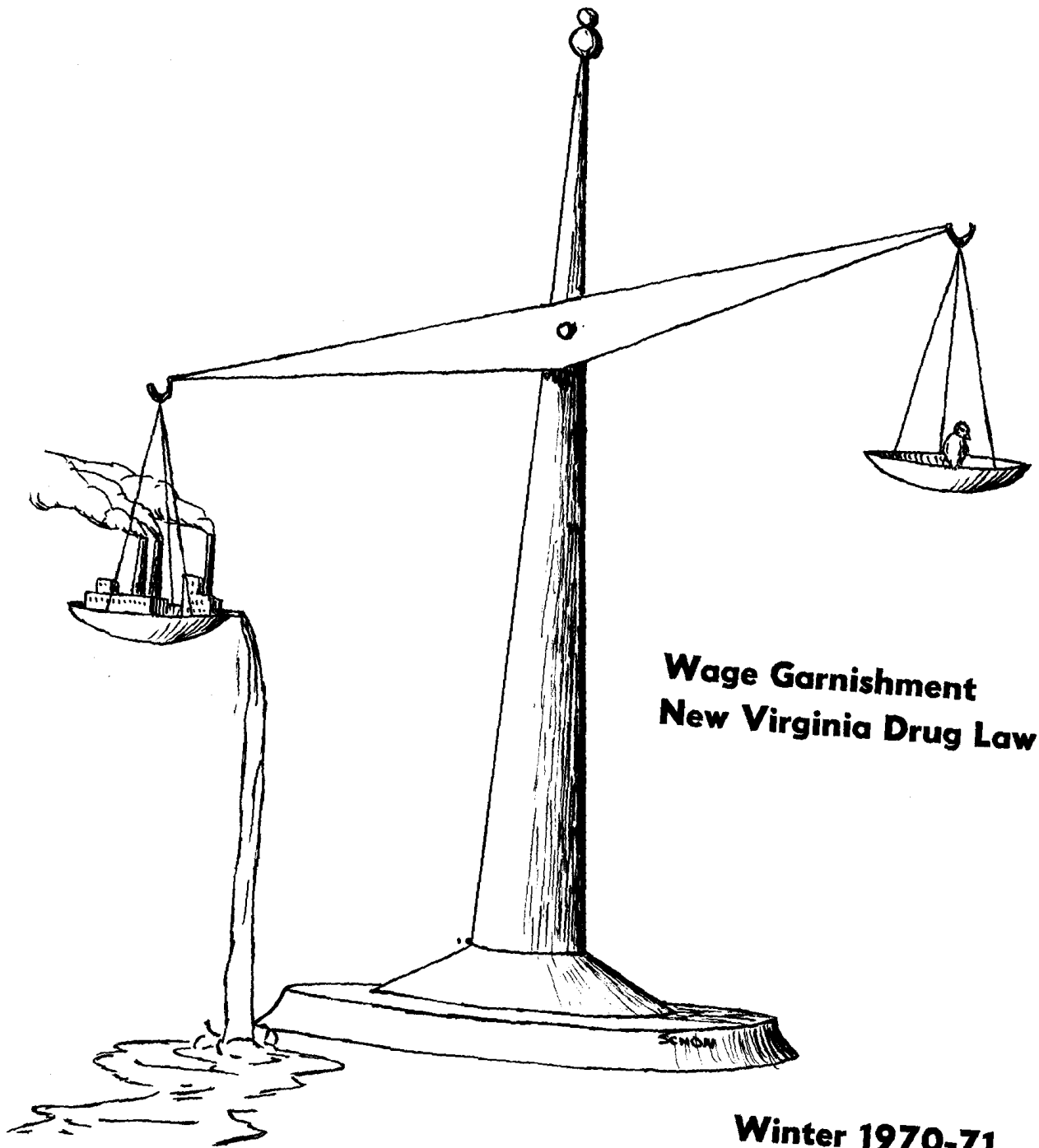
Editors of Colonial Lawyer

Repository Citation

Editors of Colonial Lawyer, "Colonial Lawyer, Vol. 2, No. 3 (Winter 1970-71)" (1970). *Colonial Lawyer*. Paper 8.
<http://scholarship.law.wm.edu/wmcl/8>

Copyright c 1970 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<http://scholarship.law.wm.edu/wmcl>

THE COLONIAL LAWYER





THE COLONIAL LAWYER is a publication of the students of the Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia, dedicated to the exploration of the law as it acts in our society, and with the hope of a contribution to the growth of that understanding which inspires the greatest in our chosen profession.

The opinions expressed are those of the writers, and do not necessarily reflect an official position of the school.

THE COLONIAL LAWYER STAFF

Editor in Chief

Mrs. Elsie Powell

Business

Mr. W. C. Jefferson, Jr.

Mr. Morgan Scott

Feature Staff

Mr. Alan G. Enderle

Marshall-Wythe News

Miss Ellen Lloyd

Also See

Articles Staff

Mr. David S. Favre

Mr. Richard Potter

Mr. Douglas Wood

Mr. T. W. Wright

Photography

Mr. Giacomo J. Guarnaccia

Mr. Everett P. Priestley

Artist

Mr. Alan Schon

Exchange

Miss Mary Frech

THE COLONIAL LAWYER

published quarterly

Marshall-Wythe School
of Law

College of William and Mary

Williamsburg, Va. 23185

The staff welcomes reader
comment and ideas.

THE COLONIAL LAWYER WINTER 1970-71

Contents:

Wage Garnishment 1970—Douglas S. Wood.....	2
Whither the Runaway in Virginia Beach, Va.? —Alfred Bernard, III, Norfolk, Va.....	4
Installment Buying—Hold-up in due course? —T. W. Wright.....	6
Virginia Drug Control Act—David S. Favre.....	9
Air Pollution—Statement of L. A. Iacocca, Ford Motors.....	11
Marshall-Wythe News—Alan Enderle.....	13
Extrajudicial Opinion	16

WAGE GARNISHMENT – 1970

Douglas S. Wood

For years wage garnishment has been one of the principal collection tools of various creditors, particularly those dealing primarily with low-income consumers. The process itself is relatively simple. First the creditor obtains a judgment against a debtor who has defaulted on an obligation. (It should be noted that if this obligation arose out of a sale of goods, the goods themselves will almost certainly have been repossessed.) He then executes by obtaining a garnishment order on the debtor's wages. This order names the debtor's employer as defendant and places on him the burden of all necessary action.

There are serious problems inherent in this process. The first is the reaction of a typical employer. He does not like wage garnishment orders because they present demands on his time and cause extra book-keeping expenses in order to pay the amount allowed by law to the creditor. In the past the employer has often simply eliminated the problem by discharging the employee.

What effect does this discharge have? It is a fact of life that the persons whose wages are most often garnished are one holding low-income, unskilled or semi-skilled positions. As a result they can be replaced with a minimum of expense. Also, because of the readily available labor force in these categories, employers are not enthusiastic about hiring a person who has been discharged as a result of a wage garnishment.

The end result is that a person who depends on his weekly income to obtain the necessities of life is at least temporarily deprived of that income. Not only is he unable to satisfy the obligation for which his wages were garnished, he is not even able to put food on his table. At best he will incur new debts and at worst be forced into personal bankruptcy.

Having his wages garnished can cause the debtor serious problems even if he is fortunate enough not to be discharged, for he is going to lose a certain amount of his income. Since he probably requires virtually all of this income to provide for necessities, being deprived of any portion is going to disrupt his marginal existence. As with discharge, his only solutions are the incurring of new debts or personal bankruptcy.

These inherent problems of wage garnishment are worsened by the fact that many low-income merchants operate on the premise that they can make more from an extension of credit than the sale itself. As a result they willingly extend credit to persons they know are incapable of meeting the payments, secure in their right to repossess the goods upon default, obtain a default judgment, and garnish the debtor's wages to satisfy that judgment. If some of their customers happen to be driven into bankruptcy, that's too bad.

The House of Representatives recognized these problems in its hearings in 1968 on the legislation eventually enacted as the Consumer Credit Protection Act in May, 1968. After considerable debate, the first federal wage garnishment law in our history was incorporated at Title III of that act. Previously, each state had been left free to regulate wage garnishment in any way it saw fit.

Title III attempts to afford protection to the debtor in both of the problem areas discussed previously. With regard to discharge, it provides that no debtor can be discharged for a garnishment resulting from any one indebtedness, regardless of the number of times his wages are garnished for that one obligation. It also sets limits on the amount of an employee's wages which can be garnished. These limits are based on disposable earnings, which is defined as those earnings remaining after deductions required by law for federal and state withholding, and FICA, taxes. A creditor is allowed to garnish the lesser amount between the amount by which the debtor's weekly disposable earnings exceed 30 times the federal minimum wage (\$48 under the current figure of \$1.60 per hour), or 25% of the total disposable earnings. This rule results in the following practical application:

DISPOSABLE EARNINGS	ALLOWABLE GARNISHMENT
less than \$48	\$0
\$48 - \$64	excess over \$48
more than \$64	25% of total

Title III thus attempts to alleviate somewhat the problems caused by employers' response of discharge, and to insure the debtor is left with an income capable of meeting his essential needs. The enforcement responsibility of these provisions was assigned to the Wage and Hour Division of the Labor Department. The states were given a means, however, of avoiding federal regulation of the provision limiting the amount of wages which can be garnished. If a state enacts "substantially similar" legislation, it can obtain an exemption and keep regulation in its own hands. The effectiveness of Title III was delayed until July 1, 1970, to give the states an opportunity to enact qualifying legislation.

Virginia is one of the states which simply enacted the exact language of Title III into its state code (section 34-29). It should therefore be able to qualify for an exemption (application has been made) and retain regulation by state agencies. As a practical matter the federal government prefers this result because the bulk of wage garnishment orders are issued by state courts, which are more readily regulated by the states themselves.

No provision is made for state exemption from the discharge limitation, however. Virginia nevertheless adopted the restriction and will probably handle a majority of violation complaints.

What does all this discussion mean to those most directly affected — judgment creditors, employers, and employee-debtors. To creditors it means that they will be considerably restricted in the amount they can obtain by use of wage garnishment. To employers it means that they will be responsible for insuring no garnishment order for more than the authorized amount is paid, and that they will be prohibited from discharging an employee on sole ground of garnishment for a single indebtedness. To the debtor it means both that he will be afforded some protection against discharge and that he will be guaranteed a minimum portion of his wages.

Rights are meaningless, however, unless the individual knows of their existence and has a realistic means of enforcing them. It should be the goal of consumer protection groups, various poverty programs, responsible employers, etc. to insure that people likely to be subjected to wage garnishment are made aware of the protection afforded them.

There should be little difficulty in enforcing the wage protection provision. If a court

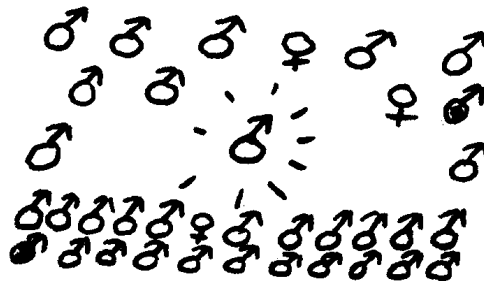
should render an order for an excessive amount, the error can probably be corrected by a phone call on the part of the employer or an attorney. If these efforts are unsuccessful the matter should be referred to the State Department of Labor.

The discharge provision presents a more difficult problem since it must be established that a wage garnishment was the reason for the discharge. Applicable federal regulations indicate that the analysis will be analogous to that under the Fair Labor Standards Act to determine if an employer were discharged for union activities. If private efforts are unsuccessful in resolving a specific problem, it should be referred to an office of the Wage and Hour Division or the State Department of Labor for investigation. If it is determined that the employee was wrongfully discharged, he has a cause of action for all lost wages and to obtain reinstatement.

The protection afforded by Title III and adopted into the Virginia Code will not solve all the problems inherent in wage garnishment, but it will help. On its face the statute eliminates discharges for garnishment on only one debt and sets a reasonable limit on the amount of wages which can be reached. It remains to be determined whether these restrictions will reach the larger problems of personal bankruptcies and unscrupulous extensions of credit to persons clearly incapable of meeting the obligation.

MINORITY REPORT — J & P

♂ - Whose turn is it to Recite?



WHITHER THE RUNAWAY IN VIRGINIA BEACH, VIRGINIA?

Alfred Bernard III

This article is a personal account of a young lawyer's experience while serving his community. The encounter was only remotely related to my profession as that profession is most often viewed and defined by the older members of the Bar and other, outside elements of my community. The project with which I became involved was concerned with aiding runaways and their families. It was directed toward the entire Tidewater area, in an immediate sense, and toward the nation as a whole, in the larger sense of where the runaway left.

In August, 1969, Frederick M. Ritter (Pastor at the St. Matthias Lutheran Church of Norfolk, Virginia), who was then serving as the local co-ordinator of Tidewater Young Adult Project (TYAP), approached me and another member of the local Bar, Frederick M. Quayle, with TYAP's concern about the need to supply help to the runaway in the Tidewater area.

TYAP is one arm of the interdenominational project known as Urban Young Adult Action, Inc., which has as its objective to be an enabler in the community. TYAP researches the community to discover its needs, which leads to an in-depth consideration of the resources of the community available to meet its needs. A decision is then made on priorities of the needs; and, having set such priorities, TYAP then moves to make the community aware of both its priority need and its resources to meet that need, as well as the available resources of TYAP. In the final stages, TYAP aids the community in finding the necessary persons, finances and training to actually meet the need.

Prior to August, 1969 TYAP had surveyed our community and determined that the need for assistance to the runaway was of first importance. A national government agency estimated that the runaway problem in Virginia Beach in 1968 consisted of more than 1500 persons, of whom only slightly more than 100 had been dealt with by the local Juvenile Court.

Pastor Ritter asked Mr. Quayle and me to consider what legal problems were likely to arise in the operation of a Runaway House. To better know the operation of such a facility, we three traveled to Washington, D.C. to see the Runaway House there, which is operated by Tom Murphy, a Presbyterian minister in the District of Columbia.

We returned to Norfolk very enthused with what we could accomplish in our area. We held a conference concerning the probable

legal difficulties that TYAP would encounter in the operation of a Runaway House, including the possible charges that the police could use—and would not hesitate to use—if they chose to close the House down.

We also determined that the City of Virginia Beach had the greatest attraction for runaways over the other cities in our area, both because of the beach and because of the heavy drug traffic there. We further decided that TYAP would not, at this juncture, seek to give assistance to those in the drug scene. We believed that the need of the runaways was more immediate and that the problem of drug abuse was the recipient of greater and more varied publicity than that of the runaway. Also, in our community, drug abuse was being attacked by a myriad of groups, agencies and individuals. Moreover, by running away, a young person is usually signalling those circumstances that lead to drug use; and by offering help when the problem was one of running away, perhaps we could prevent drug use.

Our immediate aim in establishing a Runaway House was to provide an immediate haven from crash pads and other centers of drug use that would be an enticement to the young runaway on the street. In the longer view, we were concerned with providing a bridge between the parent and the child, attempting to aid both in seeing and in listening to each other. These decisions were based on the fact that when a young person runs away from home, he is saying that he does not feel that he is being dealt with or treated as a separate, independent human being.

We knew that we would have to locate counsellors, who would be available on a twenty-four hour basis to the runaway. We also had to locate other persons who had counselling backgrounds and the experience to assist at the sessions between the parent and the runaway. We could not afford to hire persons for either function and had to look to the community.

A group was collected rather than formed from those people in the community most familiar with the runaway and his problems. The group began to meet in order to establish a location and a budget, as well as to establish certain ground-rules for the operation of the House. For various reasons, this group stalled and shrank into a very active nucleus which founded Way Inn, Inc., a non-stock, non-profit corporation.

Way Inn located a house in the heart of the area in Virginia Beach where the runaways seemed to congregate. Resident

counsellors were found after interviewing several persons—Buddy and Patricia Taylor, who are two young people who are concerned and who have a very special talent for understanding and communicating with young people. Counsellors for the parent-runaway sessions were located among area preachers and lawyers. Beds were made, linens were begged, food was donated, and money was received through TYAP and many area churches as well as from private individuals. Way Inn decided that help would not be extended to all runaways but only to those sixteen years old or younger. Certain rules were made, most notably no person allowed who was using drugs and no cohabitation. Males were restricted to the first floor and girls to the second floor where the Taylors had their room.

We opened in the first part of April, 1970 and immediately began receiving requests for help. There also began to be heard noises in the community from the police and other segments of the established leadership. Most of this clamor was directed toward criticism of our extra-legal existence. Prior to actually opening the Runaway House, Way Inn visited the police and advised them of its intentions. We had hoped that such an approach would lead to a common undertaking in meeting the problem. Essentially, Way Inn was rebuffed. We met with representatives of other elements of the established leadership in Virginia Beach with the same hope. This meeting was more successful in terms of communicating our aims but effective cooperation never resulted because no one understood or cared that the Runaway House could not be effective as an arm of the local police department.

Way Inn would not make available to the police a list of runaways that came to the House; Way Inn would not turn runaways over to the police; and Way Inn would not force a runaway to call his parents. Runaways were assured that their presence would never be told to anyone unless he agreed. Runaways were told when they first arrived at the House that he would have to call home or leave, but we did not force the decision or make it an immediate one. It was left up to the counsellors and to the runaway as to when the choice was to be made.

These were all matters that the experience of the Runaway House in Washington, D.C., of the people in our community, and of our own told us were important to the runaway. These were procedures that the established elements in Virginia Beach wanted us to abandon. The established leadership seemed primarily interested in acquiring a site where runaways could be gathered in and arrested. There were very few persons of some influence who were on the side of helping runaways.

Finally, in mid-July, 1970, Buddy Taylor was arrested and charged with contributing to the delinquency of a minor. The charges arose out of the failure of a runaway to call home after being at the House for a day and also because Mr. Taylor explained to a girl runaway exactly what the rule against cohabitation meant in words used in conversation rather than medical terms. The fact that the charges are still pending prevents me from saying more.

The publicity of the arrest and the arrival of non-beach weather has closed the Runaway House. When warm weather returns, and when we have completed our efforts to make the citizen of Virginia Beach aware of what has occurred, Way Inn will once more seek to open a Runaway House.

In review of my participation in this project, I would not alter one aspect of our approach to the problem. We sought to provide an unstructured and open, honest source to the runaway and to the parents of runaways. We did reach a number of people. We were successful simply because we were there. The very existence of the Runaway House in Virginia Beach was a significant step toward people helping people out of concern; before, help was either non-existent or forthcoming only out of hope for reward. The arrests have delayed our efforts and deterred the efforts of others. The families that we helped both in the immediate area and in other states know we were there; and they know we will be back.



PREVENTIVE LAW

INSTALLMENT BUYING

The convenience and appeal of buying on credit is as familiar as this month's payment book. Installment credit has become a common feature of American buying that sometimes accounts for over 90% of a retail merchant's sales.¹ But before signing your next installment contract you might consider an offsetting feature that can severely limit your rights.

The average consumer using a conditional sales contract may assume that he owes the merchant the installment balance stated in the contract and that the merchant owes him the service, guarantee or warranty on the merchandise. However, a substantial number of dealers routinely sell the installment contract as commercial paper to a bank or finance company in order to get their money immediately. While this is a legitimate practice, the transaction now involves a financial institution which holds the note and the consumer is indebted to that institution.

At this point, the rights and liabilities of the consumer are materially altered to his disadvantage. If the dealer renounces all responsibility for his duties of service, warranty or delivery, the consumer may feel proper in refusing further payment until the dealer fulfills his duties. The financial institution however, frequently can claim immunity from responsibility for what happens to the merchandise and, as a "holder-in-due-course," require the consumer to continue payments. The holder-in-due-course doctrine is a legal principle recognized in all states that protects financial institutions holding negotiable promissory notes from claims by the buyer of goods or services purchased through those notes.² By purchasing a conditional sales contract drafted in such a way that it is also a negotiable instrument, the financial institution acquires holder-in-due-course status and the protection the status affords.

A justification for this doctrine is that banks and similar institutions are organized only for financial functions and should not be held liable for the merchants retail functions if there is no misrepresentation or fraud on the bank's part. But it is even less fair for the consumer to bear the burden of his dealer's fraud. This burden appears in a variety of situations.

¹FTC, Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers, March, 1968.

²Uniform Commercial Code, sec. 3-305;

T. W. Wright

Mr. and Mrs. Jones purchases a color television or a washing machine from a local appliance merchant because of his 'low overhead' discount and easy payment plan. The TV or washer proves defective but the merchant stalls, first by saying that the manufacturer is responsible and finally that he's sorry, but his serviceman has just quit.

Mr. and Mrs. Smith buy a contract with a home-improvement firm which promises to install new siding for their house. The sales contract specifies a brand, guaranteed not to chip, crack or tarnish and also provides for extended payments after a small initial payment. As the siding begins to deteriorate, the Smiths discover that the firm has moved and left no forwarding address. (In some cases the siding has never been installed).

It is usually at this point that the Jones and Smith families discover that a bank or other financial institution holds the contracts and is quite firm in demanding that payments be continued. Although some remedy may be possible, the burden of legal action, complaint, and correspondence falls to the consumer who in the chain of distribution has the least emotional and financial resources to handle the problem. Too often the result is bitter resignation to "being taken," but ruined credit ratings or bankruptcy can also result.

Before signing the next installment contract for the convenience of extended payments, ask the dealer if he sells such contracts to a finance company. In spite of the inevitable reassurances that he accepts full responsibility for the merchandise or service, look closely at the fine print for such phrases as:

. . . The Buyer acknowledges his personal liability for his indebtedness and agrees forthwith to pay the same to the **seller or his assignee** . . .

. . . The Purchaser agrees promptly and faithfully to pay to **seller or seller's successors or assignees**, the full amount of the balance set forth in the installments herein provided . . .

. . . The Buyer will not assert against **any assignee of this agreement any defense or claim which he may have against the seller** of the collateral except such defenses or claims as may be asserted against a holder in due course of a negotiable instrument . . .

Yet, knowledge of the situation usually does not make it possible for the consumer

HOLD-UP IN DUE COURSE

to change or avoid the effects. The lone consumer can not realistically prevent the effects by demanding an exception based on his single purchase. In any case, such an awareness is rare even among educated and affluent consumers. Mr. Barnett Levy, Chief of the Bureau of Consumer Fraud and Protection in the New York Attorney General's Office explains that consumer complaints in this one area occur daily. The elderly, poor, or functionally illiterate consumer is usually unaware of his vulnerability until he is actually forced to continue payments for unsatisfactory goods or services. After such unfair treatment or even conscious exploitation by the dealer, the consumer justifiably feels that this doctrine has robbed him of a naturally assumed right.

Since the individual is limited in his response, various consumer fraud agencies, better business bureaus, legal aid societies and private attorneys have attempted to educate consumers about this risk in installment contracts. State legislation and state and federal decisions in individual court actions offer the most effective means of limiting the doctrine.

Retail sales acts in Maryland and Vermont forbid treating consumer installment notes as negotiable instruments and forbid inserting contract clauses in which the consumer waives all claims against the holder of the note. Massachusetts legislation created a separate category of paper titled "consumer paper" as distinguished from the traditional commercial paper and forbids applying the holder-in-due-course doctrine to "consumer paper."³ Other states, including California, Delaware, New York, and Pennsylvania, allow the consumer a short period of time in which to complain to the finance company holding the note. This compromise approach gives the buyer ten to fifteen days after signing a sales contract to notify the company that the contract is incorrect or that the goods and services purchased are not satisfactory. After this short period of time the finance company acquires the holder-in-due-course protection.⁴ This solution is criticized because defects in the merchandise or deceptive intentions of the dealer are often not obvious within the statutory period.

³Md. Ann. Code, art 83, sec. 147 (1957); Vt. Stat. Ann., tit. 9, sec. 2455 (Supp. 1967); Mass. Gen. Laws Ann., ch. 255, sec. 12c (Supp. 1966).

⁴Cal. Civ. Code, sec. 1804.2 (15 days); Del. Code Ann., tit. 6, sec. 4312 (Supp. 1964) (15 days); N.Y. Pers. Prop Law, sec. 403(1)-3(a) (10 days); Pa. Stat. Ann., tit. 73, sec. 500-208 (Supp. 1964) (15 days).

Logically, the main responsibility belongs to the dealer who sold the merchandise or service. In fact the doctrine does not relieve the dealer of his liability. Yet that dealer may stall until a court action is brought against him or may leave the area or his business may have been dissolved or declared insolvent.

Mr. Sumpter Priddy of the Virginia Retail Merchant's Association in Richmond, feels that the small fly-by-night dealer may consciously use the sales contract to pass damaged goods or to sell inferior services to unwary customers. Such hit-and-run retailers do not depend on community reputation or repeat sales for their business. The duped consumer must continue to make payments and, at the same time, bear the burden of bringing suit against the dealer, if the dealer can be found.

The legislation mentioned above shifts the burden of dealer fraud from the consumer to the financial institution. While the buyer chose the merchant who defrauded him, the finance company also made a choice in agreeing to buy negotiable notes from that merchant. For this reason and because the finance company has greater facilities than the consumer to investigate the merchant, the company should share a responsibility for the Merchant's conduct. The agency can further protect itself by requiring a repurchase agreement binding the dealer to buy back repossessed merchandise or requiring the dealer to set aside funds to protect against defective goods or services.⁵ The agency is in an equal bargaining position with the dealer whereas the individual buyer is usually stuck with the contract on a take-it-or-leave-it-basis.

A potential solution is the recently drafted Uniform Consumer Credit Code which would prohibit treating consumer credit sales or leases as negotiable promissory notes. It would rule that any financial institution buying such a sale or lease is not protected as a holder-in-due-course and is subject to all the claims and defenses the buyer might have against the merchant up to the balance owed on the sales contract or lease.⁶ The code is a proposed statement of law and has not yet been adopted by a state legislature.

(cont. over)

⁵Translating Sympathy for Deceived Consumers into Effective Programs for Protection, 114 U. Pa. L. Rev. 395, 417 (1966).

⁶The Uniform Consumer Credit Code, Draft, part 4, sec. 2.403 and 2.404.

Installment Buying . . . (cont.)

State and federal court decisions have offered a variety of solutions. Some state courts have refused to apply the doctrine and placed responsibility on financial agencies that were closely associated with dealers because the agencies should have known of the dealers' fraudulent practice.⁷

A number of federal court actions, initiated by the FTC, have attacked the protection of holders-in-due-course. Mr. William Dixon, Assistant Director for the Federal Trade Commission's Industry Guidance Section, Bureau of Consumer Protection, states that under the FTC Act the Commission has the power to investigate appearances and apprehensions of fraudulent acts or practices in commerce.⁸ Mr. Robert A. Smith, attorney with the FTC in Falls Church, Virginia, feels that abuses through the doctrine represent a significant area of consumer fraud. The Commission's effectiveness is through its power to require companies to "cease and desist" from unfair or deceptive conduct. A recent decision required a company to disclose affirmatively to all buyers

prior to the sale and in writing in the contract that the sales contract would be transferred to a third party to whom the buyer would be indebted but against whom the buyer's claims would not be available. Another decision prohibited a company from transferring any conditional sales contract until five days after signing the contract, giving the buyer some time in which to make a claim directly against the seller.⁹ Although these decisions do restrict the dealer and alert that dealer's future customers, they are limited to individual companies on a case to case basis.

The most effective solution is abolishing the holder-in-due-course immunity on consumer paper by state statute or adoption of the Uniform Consumer Credit Code. Until that time, consumer protection groups will continue efforts to inform buyers in an expanding credit market of the risks involved and to lobby for corrective legislation. The individual consumer, once aware of the risks, must be more critical before committing himself to another installment sales contract.

⁷Unico v. Owen, 50 N.J. 101, 232 A.2d 405, 413 (1967); Norman v. Worldwide Distributors Inc., 202 Pa. Sup. 53, 195 A.2d 115, 118 (1963); Westfield Inv. Co. v. Fellers, 74 N. J. Sup. 575, 181, A.2d 809 (1962).

⁸Federal Trade Commission Act, sec. 5(c), 15 USC sec. 45(c).

⁹Allstate Industries of N.C. v. FTC, 423 F.2d 423 F.2d 423 (1970).

COURTROOM DRAMA—THE PEREMPTORY CHALLENGE



"Pssst... Lets STRIKE THAT CLOWN ON THE FRONT ROW"

VIRGINIA DRUG CONTROL ACT 1970

David S. Favre

Should possession of Marijuana be legalized? Does an individual have a right to use "mind expanding" drugs? Does society have a higher right to prohibit its members from engaging in an unproductive lifestyle? These are very serious questions to many but not even worth discussing to others. However, regardless of your stand on drug "use" or "abuse", it is necessary that the written law and its application be understood by everyone.

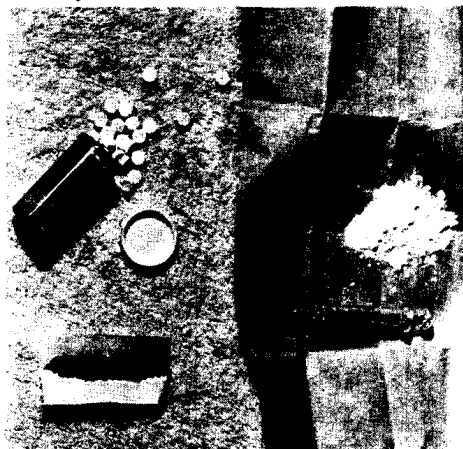
The 1970 Virginia Assembly passed a new drug law. It is an updated combination of three older drug laws of varying ages. It does an exceptional job of organizing and clarifying what can be a very confusing topic by dividing the drugs into categories, authorizing the distribution of all drugs and defining the penalties for violations of the law. Despite the new internal organization, the legislature has hidden the law under the general topic of occupation (title 54) and in the chapter on pharmacy (15.1). Once you find the law, the reading comes much easier.

The first five articles are concerned with the practice and licensing of pharmacists with a major change being a \$15 increase in the license fee. Starting with Article IV we get into drug control. It divides all known drugs into five different schedules (see the included chart). It covers everything from aspirin to acid, although listing only the latter as having high potential for abuse. Schedules I, II, and III name specific drugs as well as giving general descriptions, Schedules IV and V are given only by general description (the examples are my choice). This is the same breakdown which the pharmacists had been using but it is now much easier for the average citizen to determine into which category a drug falls.

Article VIII contains all the substance of the Act with the enumeration of the punishments for violations. It is illegal to manufacture, distribute, or possess with the intent to distribute any drug without a state license. Also, it is illegal to sell a controlled drug to other than agents authorized by the Act, such as doctors, dentist, pharmacists (etc.). "Intent to distribute" is usually determined by the quantity found and other circumstances. Under the old law, possession of more than 25 grams or 8 fluid oz of a controlled drug without license was automatically construed as intent to distribute with a minimum of 20 years in jail, but this was totally dropped in the new law.

The major change in this section is the expanding of both the maximum and minimum punishments. All of the officials that I talked with were in favor of this, as it allows a judge greater flexibility in affixing punishments. For example, under the old law a first conviction for possession of heroin could result in a 3 to 5 year prison term, currently the same conviction could bring 0 to 10 years. This will allow the judge to differentiate between the high school student with a clean record who gets busted while trying a drug for the first time, and the neighborhood "pusher" with a long dark record. One distinction that the legislature has forced upon the courts is between first and second offenses (subsequent violations are considered to be second offenses). As you can observe there is a large difference between the harshness of the penalties. A person would come under the second offense category in Virginia if he has had a previous drug conviction in Virginia or the equivalent in either the Federal Courts or another state. A second distinction is that of distribution to a minor or to an adult. If the distribution is to a minor the sentence is much stiffer, from five to forty years.

The next listing of punishments is for illegal possession of a controlled drug. Possession usually includes finding a drug on a person or his property (car, house). The amount needed to prove possession is the amount that the police need to prove the identity of the drug. Perhaps the most highly publicized change in the law is that the first conviction for possession of marijuana has been made a misdemeanor rather than a felony.



The chart should make all of this clear, but it should be observed closely for to try and describe all the differences in the drugs and punishment would take several pages.

ARREST

Drug arrests seem to fall into two different categories, incidental and calculated. Police may find drugs incidental to other activities such as traffic arrest or criminal investigations. However, most of the time arrest comes only after a concerted effort on the part of the police. One situation is where the offender sells to an undercover agent. Another is where an informer or "plant" gathers enough information against a person or property to allow the police to swear out a search warrant allowing the police to enter private property and search for drugs. Because of the US Constitution and the rulings of the Supreme Court, the police have many involved procedures and rules that have to be followed in order to secure admissible evidence in a trial. One would think that the complicated procedure and intensive planning would necessarily be limited to the larger populated areas, but not so. This fall a William and Mary student was found guilty of possession of LSD as the result of inside work done by a police plant in his apartment.

PERSPECTIVE

Now let us put Virginia in perspective with the rest of the United States. In October new Federal legislation was passed, making

possession of any drug a misdemeanor. It also stiffened the penalties for drug traffickers and includes the infamous "no knock" clause. Looking around at the various states, according to Playboy (Nov. 1970, p. 66), we find a wide variety of penalties for possession of marijuana. Keep in mind that in Virginia conviction can bring up to 12 months and or up to \$1,000.

Alabama—5-20 years, up to \$20,000

Colorado—2-15 years, up to \$10,000

Kansas—Up to 1 year

Minnesota—5-20 years, up to \$10,000

Nebraska—7 days in jail and a drug education course

Utah—not less than 6 months

Vermont—Up to 6 months, up to \$500

Virginia seems to fare rather well when compared with other states, but it should be pointed out that many of the states have not yet changed their old laws to reflect a developing social consciousness.

By now you should have an understanding of what the drug law in Virginia consists of and how some of it operates. At present there are no noticable or immediate changes in the operations of the courts as a result of the new law. The Virginia Legislature has made its first step in modernizing the Virginia drug laws. Unfortunately, it is likely that the Legislature will consider this to be all that is necessary in the modernizing of our drug laws. This new law was a good strong step, let us hope it is not the last.

Punishments

VIRGINIA DRUG LAW

Schedule	General Description	Examples	Illegal Possession		Illegal Distribution	
			1st Offense	2nd Offense	1st Offense	2nd Offense
I	Drugs have no known medical use, and a high potential for abuse.	Heroin LSD Mescaline Hashish Marijuana	0-10 years* and/or 0-\$5,000	0-20 years and/or 0-\$10,000	1-40 years and/or 0-\$25,000	10-Life and/or 0-\$50,000
II	Of limited medical use, abuse may lead to moderate, physical, dependence, or high psychological dependence.	Opium Methadone Methidine	0-10 years and/or 0-\$5,000	0-20 years and/or 0-\$10,000	1-40 years and/or 0-\$25,000	10-Life and/or 0-\$50,000
III	Drugs of a less serious nature than schedule II, still controlled, drugs with limited prescriptions.	Benzdrine (Bennie) Dexdrine (Dexies) Miltown (Depressent) Diet Pills	0-12 months and/or 0-\$1,000	0-20 years and/or 0-\$10,000	1-40 years and/or 0-\$25,000	10-Life and/or 0-\$50,000
IV	Drugs not covered above but needing a prescription to purchase.	Amytal (Blue Heavens) Seconal (Red Devils) Antibiotics Cold Remedies (Prescription) Decongestives	—	—	0-12 months and/or 0-\$1,000	0-5 years and/or 0-\$10,000
V	All nonprescription drugs sold by a licensed pharmacist.	Vitamins Bufferin Asperin	—	—	0-12 months and/or 0-\$1,000	0-5 years and/or 0-\$10,000

*In this one place marijuana will be considered a schedule III drug.

AIR POLLUTION

PROBLEMS FOR THE 70'S

The following is a statement, with some omissions, issued in pamphlet form by the Ford Motor Company. We think it deserves reprinting here for two reasons. First, the information contained in the statement helps to give a picture of some of the events around the country as the American people mobilize to save our environment. Second, the article gives a glimpse of some of the real difficulties in the path of that project. The statement was issued by L. A. Iacocca, Executive Vice President of the Ford Motor Company.

Last December, Mr. Henry Ford II publicly committed Ford Motor Company "to an intensified effort to minimize pollution from its products and plants in the shortest possible time". He promised that "we will achieve products and manufacturing facilities that do not significantly contaminate our atmosphere, waters, or landscape."

We stand behind those promises. We support the intent of the Subcommittee's bill. (Senate Subcommittee on Air and Water Pollution, amended Clean Air Act). We are opposed to some of its provisions because they are unenforceable or impractical. We oppose these provisions because they would produce minimum improvements in air quality at maximum cost to the public.

The manufacture of motor vehicles and parts is the largest industry in America—first in sales, first in employment, and first in payrolls. Automobile manufacturing and distribution and automotive transportation provide 15 million jobs—28 percent of non-farm employment.

Each car and truck manufactured and sold in the United States generates \$1,200 in taxes—nearly 35 percent of the average retail price. And these taxes provide 5 percent of the total tax revenue of all units of government.

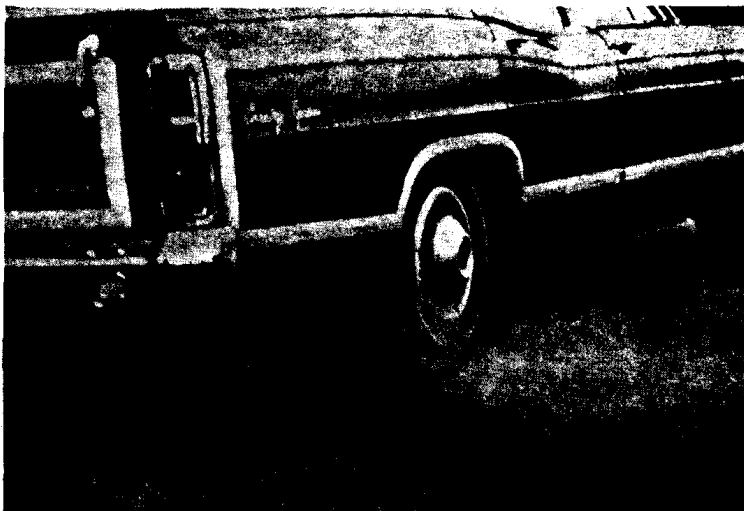
We are most gravely concerned about Section 202 of the Subcommittee's Bill which freezes into law emission standards for 1975 models that are 90% below the 1970 levels and lower than we know how to meet. If these standards become fixed in law, the technology as we know it today would not permit us to build cars after January 1, 1975.

This is not a question of how determined we are to control air pollution from cars, nor is it a question of how much we are willing to spend. No matter how much we spend and how many people we assign to the task, we do not think we can do it by January 1, 1975.

The bill is not asking for a 90% reduction from scratch in automobile emissions. It is asking for a 90% reduction in what is left after we have already removed most of the emissions that used to come out of cars.

Our first controls were installed on 1961 cars in California, and nationwide in 1963. These controls completely eliminated the 20% of hydrocarbon emissions that used to come out of the crankcase. Exhaust emission controls were first required in California in 1966, and nationwide in 1968. The 1970 standards and the technology to meet them will produce an 80% reduction in hydrocar-

Con't over



Air Pollution . . . (cont.)

bons as measured by the Federal government's present test procedures. A 70% reduction in carbon monoxide has already been achieved.

Because of these efforts, the total air pollution from cars has passed its peak and is now on the way down. It will continue to drop as new cars replace older cars without controls, even if no change is made in the standards, and in spite of the expected growth in the number of cars in use. It would drop even faster if emission control systems were installed in the 60 million pre-control cars that are still in use.

Ford has developed such a system for use on precontrol cars and has applied for accreditation from the state of California. If approved, it will be sold at a suggested retail price of less than \$10.00 and will take about an hour's labor to install. If the engine is in decent shape, this system will reduce emissions by 30 to 50 percent.

We know, however that the big reductions already achieved are not big enough. Last year, California tightened standards for 1970 through 1974. Since last year, the Federal government has been matching or outdoing California in stringency. In January, California adopted very stringent requirements for a "smog-free" car by 1975. In February the Department of Health, Education and Welfare proposed even more stringent controls for hydrocarbons, carbon monoxide, and oxides of nitrogen for 1975 models.

Although the Federal government's proposed 1975 standards were based on a thorough assessment of the maximum reduction that would be technologically feasible they have now been topped by the 1975 standards proposed in Section 202 of the Senate Subcommittee's bill. We believe these levels are unrealistic for 1975. They would produce a very small improvement in air quality compared to the government's proposed standards, but the engineering task created by the bill would be virtually undoable in the time allowed.

It's just like playing golf. If you're a 130 golfer, it's easy to take 10 strokes off your average with one lesson and a few rounds of practice. But if you average 75, it may take a couple of years and a small fortune to get down to 74, and none of your friends will ever notice the difference.

The timing of new standards is as crucial as the level of new standards in determining their practicality and their cost to the public. Cars are complex mass-produced machines that are operated under widely varying conditions. Any hasty change in their design leads inevitably to both higher costs and reduced reliability. Our normal schedule for the introduction of new product features allows 43 months of lead time from the initial invention of a new approach to production. Complex changes, such as the introduction of new emission control concepts would normally take more time. Production lead time can be compressed, but only within limits, and even within those limits, usually at a cost that is out of proportion to the time saved.

If the Subcommittee's bill is enacted into law in its present form by the end of this year, only three and a half years will be left until the beginning of 1975 model production. This just happens to be our normal production lead time but the processes involved in production lead time cannot be started until new approaches are invented. Even if the production lead time for 1975 emission control systems is compressed to the absolute minimum of two years, we will have only 18 months left to invent new emission control approaches before we have to start getting them ready for production.

Necessity may be the mother of invention, but not even Congress can guarantee that the gestation period will be 18 months or less. Everything we know about the problem indicates that the gestation period will be longer than 18 months, and that is why we believe that it is virtually impossible to meet the level and timing of the standards specified in the bill.

NEW REVISED VIRGINIA BAR NOTES
AVAILABLE JANUARY 1971

Approximately 1,000 pages, covering all subjects on the Virginia Bar Examination.

Cost: \$35.00

Order now from:

Editor
Virginia Bar Notes Association
Marshall-Wythe School of Law
College of William and Mary
Williamsburg, Va. 23185

(Enclose check payable to **Virginia Bar Notes**)

MARSHALL-WYTHE NEWS

Alan Enderle

NADER IN WILLIAMSBURG

Consumer rights advocate Ralph Nader gave legal educators a taste of what it must feel like to be the president of General Motors during a speech on the William and Mary campus on October 20.

Nader's subject was "Legal Education" and the thrust of his speech was that law schools are simply not producing lawyers who are prepared or oriented toward meeting the pressing problems of modern society, the foremost of them being "institutionalized illegality." At the root of the problem are irrelevant curricula that result in students "contracting torts and torturing contracts." Closely related are somnambulant law professors who have parlayed the Socratic teaching method into an exercise in frustration for even the most dedicated student.

Nader's appearance was sponsored by Jefferson Inn of Phi Delta Phi legal fraternity and was attended by over 800 persons. Nader did not disappoint his audience, the majority of whom were not of the legal profession. After relating the problems he saw in legal education he launched into his controlled tirade against the ills of American society, the ills that, in his eyes, well-trained and motivated lawyers and citizen advocates should dedicate themselves to eliminating.

"People need to wake up and exercise their rights of citizenship", he said, in contending that the country is being run by a small clique which represents their own bureaucracies and interests. "People haven't tried to take control of society and have let the country slide out of their grasp, while watching with the glazed eyes of TV viewers."

Nader exhorted his audience to organize themselves into corps of citizen advocates to bring pressure to bear on polluters, price-fixers and other perpetrators of illegality. Lawyers, he said, should shift their attention from defending corporate polluters to opening wider the channels of justice. "We have a growing population, a growing economy, and a growing demand for public rights. Yet, we have courts that still operate like they did when we wrote with quill pens. If we tell the people to work within the legal system, we'd better give them one which is capable of handling their visions and problems. Rights don't mean much unless effective legal representation is available to combat tyranny."

Taking aim at the Washington bureaucracy, Nader noted that when he first dispatched his "Raiders" into federal commis-

sion offices they eagerly reported their discoveries of the failures of the system to function properly. "After getting deeper into the operations of the commissions," he said, "the only thing that astounded my investigators was when they found something being done efficiently and in accordance with regulations."

Nader also took exception with the tactics of the Nixon Administration in encouraging the "silent majority" to find virtue in the status quo. "Anyone who is a proud member of the silent majority has resigned from democracy," he said.

McGOWAN DELIVERS SHERWELL LECTURE

The police, who have lately come under the gun both literally and figuratively, are in dire need of creative legal thinking to help them meet the constitutional limitations on their investigative methods, according to Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia.

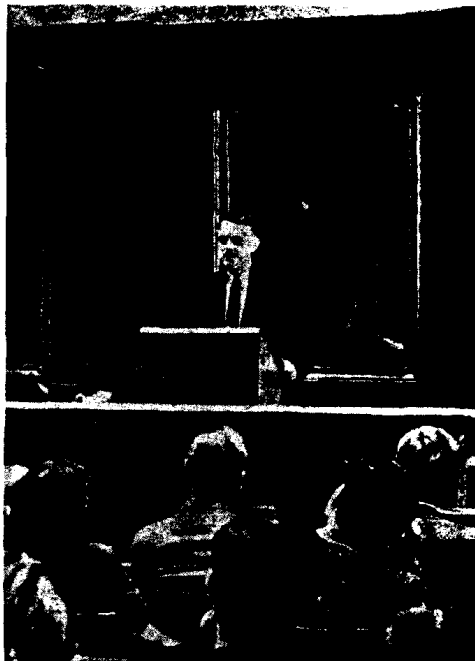
Judge McGowan delivered the Fourth Sherwell Lecture on October 15 at the Marshall-Wythe School of Law.

"There is a visible under-commitment of resources to the police of this country," said Judge McGowan. "But of no resource is this more true than the one of imaginative legal assistance and planning, directly available to the police themselves from lawyers who are familiar with police operations, and who can design new ways of achieving legitimate police objectives which also take account of constitutional necessities."

Judge McGowan addressed himself specifically to the dilemma of police when seeking visual identification evidence. They cannot conduct a formal lineup without an arrest warrant and the requisite probable cause to so obtain a warrant. Any other form of visual identification outside of the courtroom will probably be violative of constitutional rights. And, said Judge McGowan, experience has shown that juries look upon in-court identification with a jaundiced eye.

The Omnibus Crime Control and Safe Streets Act of 1968 provides that the testimony of an eyewitness shall be admissible in any federal court. This, said Judge McGowan, is directly counter to what the Supreme Court has said in recent decisions. "The Congressional action has proved to be

(continued over)



Sherwell Lecture—Judge McGowan

meaningless. The inferior federal courts have appeared to ignore the statute," said Judge McGowan.

Judge McGowan cited two recent probes in the direction of the kind of legal thinking he urges. One is a bill pending in Congress to authorize the courts, upon a proper showing, but one falling short of probable cause to arrest, to require federal criminal suspects to submit to a variety of non-testimonial investigative procedures, including formal lineups for identification. A second procedure now being used in the District of Columbia is to have a magistrate sign an order requiring an arrested suspect to appear at a lineup to be viewed by witnesses of the crime for which he was arrested and of other crimes involving the same *modus operandi*.

"Imagination and innovation, soundly conceived in relation to specific problems, need not be the exclusive stock-in-trade of defense counsel or of reform-minded legislatures and courts. The police are entitled to the same kind of creative, probing, wide-ranging legal thinking."

The Sherwell Lecture Series was established through the generosity of Mrs. Maria Estaire Baumert in honor of her brother Guillermo Butler Sherwell. The Sherwell Family formerly resided in the house of George Wythe in Williamsburg. George Wythe was America's first professor of law and the first occupant of the chair of "law and police" at The College of William and Mary.

The complete text of Judge McGowan's lecture will appear in *The William and Mary Law Review*, Volume 12, Number 2.

JUDICIARY CONFERENCE

Dr. William F. Swindler, Professor of Law at the Marshall-Wythe School of Law, has been named coordinator of the first National Conference on the Judiciary to be convened in Williamsburg on March 11-14.

Over 400 persons are expected to attend the conference which will be chaired by Tom C. Clark, retired Supreme Court justice and leader in judicial reform efforts. Among the participants will be the chief justice, the attorney general and the main law enforcement planning officer from each state and territory. Other judges from federal and state courts, along with delegations of lawyers, also will take part. A federal grant of \$62,000 from the Justice Department will help pay for the conference.

In announcing plans for the conference, Governor Linwood Holton of Virginia said that it will "set the standards for systematic and effective judicial innovation for many years to come."

The parley grew out of an extensive study of the Virginia court system by the research and development advisory committee of the Virginia State Council of Higher Education—a study made at the request of the Virginia Court System Study Commission.

Among national organizations endorsing the conference are the American Bar Association, American Judicature Society, Council of State Governments, Conference of Court Administrative Officers, Institute of Judicial Administration, National College of State Trial Judges, National Institute for Court Management and the Federal Judicial Center.

GRADING CHANGE

With the initial impetus coming from within the faculty, and student opinion being voiced through a referendum, the faculty of the Marshall-Wythe School of Law has recently approved four changes in the curriculum.

Two changes were the center of controversy. We first involved a revised grading system. Whereas previously, quality points were awarded only in whole number (A-3, B-2, C-1, D-0), credit will not be given for plus and minus grades; that is, a C-minus will be worth .67 quality points, a C-plus will be worth 1.33 quality points. There will be an A-minus, but not an A-plus. An overall 1.0 quality point average will still be necessary to continue in school.

The student proposal, as voiced in the referendum, would have eliminated all minus grades but would have given credit for plus grades.

The second change was met with overall student approval but faced a determined, and eventually successful, request for at least partial revision. The issue was required courses beyond the first year. The faculty noted to eliminate them, effective September 1971. The incumbent second-year class sought implementation for the Spring semester 1971, as was the choice of the students in the referendum. The faculty finally agreed to permitting two electives and three required courses.

ANTI-TRUST SYMPOSIUM

Marshall-Wythe School of Law was the site on October 16 and 17 of a symposium entitled "Antitrust and Related Issues and Their Solutions in International Trade and Productive Investment." The symposium was co-sponsored by Marshall-Wythe and The American Society of International Law. The organizer and director was E. Blythe Stason, Jr., Professor of Law at Marshall-Wythe.

More than 90 persons took part in the symposium. They were representatives of most of the large law firms in the nation, in addition to legal educators from prominent law schools, law students and members of the legal staffs of many national and international corporations.

The aims of the symposium were to examine the principal national and supranational antitrust and other trade-regulating laws that will or may bear upon the businessman when doing business in a multinational situation; to outline and discuss the legal problems presented by those laws and their inevitable overlapping and conflict, which may restrain international trade and productive investment more than the laws in question will promote it, to explore measures that have been or may be adopted to harmonize those laws, thus solving at least some of the issues posed by their present and future overlap and conflict.

At a luncheon on October 16, the members of the symposium were addressed by Richard W. McLaren, Assistant Attorney General in the Anti-trust Division of the Department of Justice. Other speakers during the course of the symposium were William D. Rogers, formerly Deputy Coordinator, Alliance for Progress and Deputy Assistant Administrator, AID; Jared G. Carter Assistant Legal Advisor for Economic Affairs, Department of State; James A. Rahl, Professor of Law and Director of Research, Northwestern University; Lawrence F. Ebb Area Counsel, General Electric Corporation; Sigmund Timberg, Attorney-at-Law, formerly Special Assistant to the Attorney General, Department of Justice; Breck P. McAllister, co-author of the book "The Common Market and American Antitrust: Overlap and Conflict"; Seymour J. Rubin, Surrey, Karasik, Greene and Hill; Mark R. Joelsom, Arent, Fox, Kintner, Plotkin and Kahn; Stanley D. Metzger, Professor of Law, Georgetown University; Milo G. Coerper, Coudert Brothers.



Ralph Nader

NEW SWINDLER PUBLICATIONS

The second of a two-volume analysis of the Supreme Court and the U.S. Constitution written by Dr. William F. Swindler of the Marshall-Wythe School of Law has recently been released by the publisher, Bobbs-Merrill Co., of New York.

The new volume, "Court and Constitution in the 20th Century," covers the years 1932 to 1968, from the New Deal through Earl Warren's tenure as chief justice.

Dr. Swindler's first volume, subtitled "The Old Legality" gave an analysis of the years 1889 to 1932.

Dr. Swindler divides the mid-20th century's constitutional changes into three distinct periods. The first covers the New Deal, when the Supreme Court confronted the administration of Franklin D. Roosevelt and shifted to a wide-ranging approach to the lawmaking authority of federal and state governments.

Secondly, Dr. Swindler examines the period when legal precedents based upon the earlier narrow concept of lawmaking were replaced by broader interpretations.

The volume's third period reached its climax in the Warren years when the Supreme Court polarized into "activists," led by Justice William O. Douglas and Hugo L. Black, and advocates of "restraint" led by the late Justice Felix Frakfurter and Justice John M. Harlan.

A constitutional law specialist for more than 30 years, Dr. Swindler was general counsel to the Virginia Commission on Constitutional Revision in 1968. In 1971 he will be coordinator of a national conference on the judiciary to be held in Williamsburg, Virginia.

EXTRAJUDICIAL OPINION



THE LAW STUDENT AND THE TUBE

Richard Potter

Law students across the nation have new hope in the growing rumor emerging from Hollywood and the television industry—PERRY MASON LIVES!!! Of course, times have changed a great deal since the days of Perry and Judd. Our new Champion of Freedom and Justice is now twenty years younger, ninety pounds lighter and ten times poorer. And unlike Perry, the young lawyer loves to get emotional, especially in the courtroom. Ah!—But the clever TV producers have covered all the bases. Our Hero has a black militant female associate who replaces the cunning Della Street and a wealthy, conservative advisor who breathes over his protege's shoulder as the "spirit of Perry" and whispers legal gems like, "Don't get personally involved", or "Get your hair cut—I know that judge!"

As the avid viewer can see immediately, the new shows try to "bridge the gaps" and really "tell it like it is". The average day in the life of the law student is spent lecturing to a senile judge, arguing policy over a martini, and running hand-in-hand up and down the courthouse steps. Occasionally, even realism creeps into a scene. In one episode, for instance, the law students, alias "almost lawyers", discussed a legal point in front of a coffee machine with a sign that read "Out of Order". In still another, our Hero had to park his car in a reserved parking lot because he couldn't find another space within five miles of the school. Now there's something any law student can identify with!

The subject matter for each production is the same found in Legal Air Brochures but rarely discovered beneath all the title-searchers of a lawyer's office. To keep the ratings up and the viewers awake, these new shows no longer rely on the "who-dun-it" endings, but now give new twists to over-worked topics. There's the story about the hardhat who claims job discrimination because of his race and the liberal judge who as a young attorney was incompetent in defending a Black youth. And one of the first programs even tried to appeal to the young doctors in the audience by depicting our hero representing an intern. Like all good

interns, he wanted "to get involved" by aiding a victim of an auto accident and like all good law students, the Star refused to accept any money for his courtly performance. And finally, there was the beautiful young run-away who left home to bring her parents closer together and ended up in our Hero's bedroom in search of sympathy—or was it justice?

Amid this fiction and overacting, there are some real contributions made by television's newest invasion of the law student's privacy. The shows serve as notice to the American public that such legal aid organizations do exist for the benefit of at least part of the thousands—even millions—of citizens who just cannot afford "justice for all." And they also reveal the effects that some lawyers, law students, and other effete snobs are having on the legal profession, that bastion of liberalism and change. But these new programs also create some dangerous fallacies for the law student who ventures into our own form of Legal Aid. First, even if he does have long hair, he may not be competent enough to win a single case. Second, he should be prepared to take on the characteristics of a clerk's secretary rather than an attorney. And third, the only time he will see the inside of a courtroom is when he shows up to pay his traffic ticket. With all these factors in mind then, the law student who finds time to view himself on the Tube may well be reminded of dictum in another case involving indigent clients entitled *The Beggar's Opera* (cite Act I, Scene 1)

"The charge is prepared, the lawyers are met,
The Judges all ranged—a terrible show!"

MINORITY REPORT - J.P.


THEY SAY HE TEACHES
SALES...

SOMETIMES THE GOOD GUYS LOSE

E. M. Powell

The Prosecutor, James Mills, Hardback — Farrar, Straus & Girous, paperback, Pocket Book edition, 1970.

The author's note at the beginning of the book gives the overall picture. James Mills has undertaken a study of some of the problems of a big-city prosecuting attorney, taking as his example Mr. James C. Mosley, chief of the homicide bureau of the New York City Queens County District Attorney's office. The book reports on three cases undertaken by Mr. Mosley, the bulk of the action centering around a Mafia execution of one of its own killers. Life magazine sponsored the project, and the book originally appeared on its pages.

The key to the writing of the book seems to lie in the sheer frustration of Mosley in the face of a virtual army of Mafia lawyers, some really amazing rules of evidence, and a court which the author at least implies has some friends or sympathies with the brotherhood. The total impact of the tale is that everybody has a friend in court except those who would like to prevent and punish homicides.

One interesting observation (at least to the legal world) is that in this criminal proceeding the judge, knowing that the prosecution has no appeal from an acquittal, and being chary of appeals that might reverse his judgments, simply decides every motion and objection in favor of the defense, thereby relieving himself of any possible higher court criticism. It is a charming line of thought, and one we can only hope is confined to the court of Mr. Mills' observation.

Perhaps the greatest value of the book is the reflection of the personality of the prosecutor and his motivations. In an age in which the phrase "law and order" has become a politician's euphemism, it is educational to be reminded of the desires from which that phrase was born.

The book is not long, and should appeal as casual reading to those interested in the enforcement of criminal law, or followers of the Mafia and its impact on our society. We can recommend it as an interesting experience.

ALSO SEE . . .

State v. Antoine, 155 La. 120, 98 So. 861 (1924). The defendant promised Ulysse and Prosper Duhon that he could obtain "a magic or mineral rod which would locate, beneath the surface of the earth, hidden treasure; that he would produce the magic rod within 30 days; . . ." He was charged with receiving \$600 from Ulysse and \$300 from Prosper. The charges were quashed because "a promise is not a pretense, and that a promise which a man makes, and which he does not intend to keep, does not fall within the scope of the legal definition of a false pretense."

Meints v. Huntington et al, 276 F 245 (1921). In 1918, a mob composed of the defendants and others to the total of 75 or more, forced the plaintiff to accompany them to the state line where he was whipped, tarred and feathered, and threatened with hanging if he returned. His "offense" was alleged to be disloyalty, and failure to buy sufficient war bonds. The defense also claimed that this action was taken to prevent others from injuring the plaintiff. Held for the plaintiff on false imprisonment.

Scott v. Feilschmidt, 191 Iowa 347, 182 N.W. 382 (1921) the defendant, a police-officer, made improper advances to the plaintiff, a minor girl. As she tried to walk away, he followed, so she called him "You big prune." He proceeded to arrest her and detain her in personal custody for approximately an hour. The court held this to be false imprisonment since by statute an officer can arrest only with a warrant or when an offense is committed or attempted in his presence or when an offense has been committed and he has reasonable ground to attribute it to the suspect.

Ellen Lloyd