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PROCEEDINGS OF THE EIGHTIETH ANNUAL CONVENTION OF THE TENNESSEE BAR ASSOCIATION

MEMPHIS, TENNESSEE
JUNE 9-10, 1961

FRIDAY MORNING SESSION, JUNE 9, 1961
PRESIDENT WILLIAM P. MOSS, PRESIDING

The Eightieth Annual Convention of the Tennessee Bar Association convened in the Continental Ballroom of the Hotel Peabody, Memphis, Tennessee at nine-thirty o'clock a.m., Mr. William P. Moss, President of the Association, presiding.

PRESIDENT MOSS: Ladies and gentlemen, the Eightieth Annual Convention of the Tennessee Bar Association is now in session. One of my old friends whom I had invited to say the invocation for us this morning, Dr. W. C. Newman, Pastor of St. Luke's Methodist Church in Memphis, formerly in Jackson, telephoned that due to his illness he could not be here. I have pressed into service your convention chairman, Mr. Shepherd Tate, who will now give the invocation.

MR. SHEPHERD TATE: Our Heavenly Father, who has brought us to the beginning of this day, defend us in the same with Thy mighty power, and grant, we pray Thee, that all things we think, say and do will be pleasing in Thy sight. We ask Thy blessings upon this Association and upon this Convention, and ask that Thou be with us in all of our deliberation, through Jesus Christ our Lord, Amen.

PRESIDENT MOSS: Those of you who have been around here for two or three days, as I have, have already received a very warm, gracious and cordial welcome from the lawyers of Memphis. We now have the pleasure of having greetings and an address of welcome from the Mayor of Memphis, the Honorable Henry Loeb, whom I am now proud to present to you.

MAYOR LOEB: Mr. President, distinguished guests, ladies and gentlemen, and attorneys. As a public official I have come to know many of you, to know you well, and to regard you highly. Knowing that you attorneys love to talk, I prepared an hour's discussion of welcome for you, and I am going to get into it in a minute. But before I do so,

I can not help but reminisce just a little on some of the dealings that I, as a public official, have had with lawyers.

Not long ago one of your distinguished colleagues came in front of the City Commission the ninth time on a zoning matter. The first eight times he had represented people who were trying to overrule the Planning Commission. Each time he came in, a very fine gentleman and close friend of mine and a little bit on the bombastic side, he would pound the wall and talk about the men on the Planning Commission who were volunteers, amateurs, not full-time, inexperienced, et cetera, asking for an overruling of our Planning Commission. But on the ninth trip then he pounded the wall just as loud and spoke just as bombastic on the opposite side of the fence.

As an ex-garbage man and ex-laundry man, I was amazed to see how vehement and how strong a spokesman he could be on both sides of the fence. He is not here this morning so I am not pulling anybody's leg.

In the last several weeks we had attorneys in front of the City Commission on a beer matter, both of them ex-senators, both of them with tremendous elocution, diction, ability to speak, and both of them with a habit of talking at the same time. Again, as a laundry man and a garbage man, it was very hard to follow both of them, particularly when both of them kept addressing each other and talking concurrently.

I had the exquisite pleasure at that particular City Commission meeting of asking them, in a very unlawyer-like way, would you two senators — they kept addressing each other as senators — would you two senators mind shutting up and talking one at a time.

Not long ago I wrote to a Mayor of another city who had been having trouble with sit-ins. Of course, you know I am referring to the Mayor of Jacksonville, Florida, who had some very violent trouble. I wrote asking him some advice on this difficulty, expecting some day we would be having it here. Being a Mayor, he was a little bit on the long-winded side. He answered me with three pages of advice. But he started off by telling me, "Dear Mayor, I have plenty of advice on the subject whereof you questioned, and I am complimented you wrote and asked for that advice. Essentially my advice is, don't worry. I don't worry about a thing in Jacksonville."

I was out in town the other day, a lady stopped me and asked me, was I worried? I said, no ma'am, I am not worried. She said, what are you doing standing in the ladies' room?

Certainly, I am not going to talk for an hour. It is a pleasure to be here today and to tell you of the very high regard that I have for people in your field. We are a government of law and order. It is my

firm resolve as Mayor that if the particular difficulty that I mentioned in the story comes to Memphis, and well it might, we are going to handle it legally. I know of no other way.

When I ran for office I stated I was a segregationist. Nothing has happened to change my thinking after being in office. Yet I know that the answer to that problem and the answer to most of the problems that we face lies on the firm resolve to go down the track with law and order.

Knowing of your value to the community and to all communities, it is a privilege to be here as Mayor and say welcome. I hope you have a very fine productive meeting. I hope during the year that none of you sue me, and I hope that you come back to Memphis. Thank you very much.

PRESIDENT MOSS: I am not supposed to respond to addresses of welcome. We have a man who is going to do that better than I could. But I cannot resist taking note of the fact that the Mayor mentioned something about lawyers having to do with beer matters. I know that is true, and that those who have had legislative experience are qualified on that subject.

I recall that when I was in the State Senate in 1933 we first legalized beer with 3.2 alcoholic content. I remember very well that some lawyers and other members of that body who were politically opposed to anything pertaining to alcohol, and voted against the measure, said later on at cocktail parties that their consciences forbade them drinking beer because they voted against it, so they had to choose whiskey.

Now we will have another formal address of welcome and greetings from your good friend and mine, the Honorable Larry Creson, President of the Memphis and Shelby County Bar Association.

MR. LARRY CRESON: Mr. President, distinguished guests, fellow members of the Bar, ladies and gentlemen: It is my privilege, on behalf of the Memphis and Shelby County Bar Association, to extend to you our warm and sincere greetings to this Annual Meeting of the Tennessee Bar Association.

Entertaining the feeling that the best we could do for you is the least we should do for you, the local Association has expended its best energies in affording to your distinguished President every assistance at our command to the end that to the furtherest extent of our humble abilities you may be both edified and entertained.

Incidentally, if there is anybody here from the Judicial Conference Meeting they might as well leave. All of this preparation has not been of our own local initiative. Mr. Moss can conceive of jobs faster than General Motors can produce automobiles. I had innumerable calls and

letters from Mr. Moss, and I tried to explain to him that he had already assigned me several jobs, that I was finding it difficult to find the time to do properly, and that I felt I had done a great deal for him. His only response was that, you have not done anything for me lately. And I found that his interpretation of the word lately does not exceed ten minutes.

Seriously speaking, a very great many members of our Local Association have enjoyed the generosity, fellowship and gracious hospitality of the lawyers of East Tennessee and of Middle Tennessee. We feel that today we are only showing some small token of our appreciation for what you have so many times done for our pleasure and enlightenment.

Our most fervent wish at this time is that our efforts shall provide for you the grand meeting which you so richly deserve; and our fondest hope is that when this convention is over, that you will feel that you would like to return and visit with us again in that incomparable fellowship of the bar.

PRESIDENT MOSS: Thank you very much, Mr. Creson. I said I had a good man to do the response to the addresses of welcome, and I have. You know, formerly it was the custom to have all three vice-presidents respond to the address of welcome and they would make reports on Mid-Winter meetings. They are going to do that later this morning, but last year Erby L. Jenkins, President of this Association, scheduled the President-Elect for the response. I thought I would turn the tables on him this time, not only to get even with him, but because I think he is the best man to do the job.

You all know Mr. Jenkins. He is our immediate Past President, one of the best Presidents we ever had. Under him I have learned how to try to be a President of the Tennessee Bar Association. He is, in addition to being a Past President of this Association, the sage of Raccoon Valley. I now present him to you, Erby Jenkins.

MR. ERBY JENKINS: Mr. President, Mr. President Seymour, Mayor Loeb, Members of the Association and distinguished guests, we are deeply moved by your magnificent words of welcome.

The red carpet has been rolled out, and we intend to take advantage of it. We think we know what to do with it. I am, of course, over-whelmed that I should be chosen to respond to your cordial welcome. After last year, I figured I could relax and enjoy this Convention, for Past Presidents never die — they just act that way.

We, of course, always enjoy coming to West Tennessee and to Memphis. We remember the Convention three years ago and the wonderful Regional Meeting of the ABA. You, as usual, did yourself proud, and we had a wonderful time.

On the way down from East Tennessee on the train, I got to thinking of the many changes that time has wrought since we met here in the Annual Convention – some for the betterment of mankind, some not so good, and some open to question.

1. A monkey and a man have been launched into space. Among other things, this could prove that monkey goeth before man.

2. I have served you as your President, that is good or bad depending on whether you are talking to a member of the Association or to me, but regardless of the answer, I was in orbit for one year – the original man in space.

3. Gloom and sorrow have come to my valley. Legal liquor has finally come to the mountains of East Tennessee. It is a noble experiment that will not work. What are those poor displaced persons, the moonshiners and the bootleggers going to do for a living? Or course, they could go on relief or strike for a four day week, as is now so common, but they are an independent lot, would spurn a governmental handout, and, as one put it to another, "wonder how folks in this country are going to live when they all quit work and go on relief." This is something to think about. Perhaps Milton's prophetic phrase "they also serve who only stand and wait" has really come true.

But regardless of the answer to the great economic question posed by the noble experiment legalization, we can now buy the necessities of life at home, but without half as much fun, for forbidden fruit is sweeter, they say. So we now do less travelling and our bags are much lighter when we return home. So this trip was not necessary – we really came to see you this time.

4. Since the last Annual Convention here, I have become a grandfather two times and now going on three. There is no debate but what this is on the good side.

5. The new frontier has descended upon us over loyal opposition from Raccoon Valley. I have suddenly been shorn of my political manhood, not a single lawyer has asked me on this trip to endorse him for United States Attorney or District Judge. Three years ago it was, "Old Buddy, politics don't count", but I suddenly find that it does, and that I'm what you might say in the political outhouse – but I started out that way so it is not too bad.

And now after eight long years of indecision and soul searching and frustration on our part, we Republicans have found out that General Eisenhower is now a Republican, – this revelation comes a shade late to do us any good.

Incidentally, our weekly newspaper in Raccoon Valley tells us of a

prediction by our young and ambitious Attorney General of things to come in forty years. We had a meeting at the Academy (Racoon Valley Academy, that is) a night or so after that and decided that we still prefer to go to our gypsy fortune tellers for our predictions.

6. And most of Harvard University has been moved to Washington, and what is left has done gone to talking in the unknown tongue — Latin, that is. Oh, for the return of the spirit of E. PLURIBUS UNUM.

7. And we are now witnessing members of the Supreme Court engaged in a great Civil War, testing whether that Court or any other court so constituted and so dedicated can long endure, and how many of you lawyers my age or over thought you would ever live long enough to see Justice Frankfurter branded as a Conservative. Live a little longer and you will hear Harry Truman called a Republican.

Thank you again for allowing us to visit you. We bring you greetings from the outside world.

PRESIDENT MOSS: I certainly would not dare comment on that. I knew Erby would do it fine, and he did.

Now, at this point, the printed program says it is time to recognize distinguished visitors, and we have a number of them here. I am only going to recognize the very most distinguished three or four. I would like for the gentlemen whose names I call to please stand and be recognized. First, the Honorable Whitney North Seymour, President of the American Bar Association, who will speak to us at noon. Mr. Jackson Wright of Pulaski, Missouri, the President-Elect of the Missouri Bar Association. There has just arrived the gentleman who will speak to you at the evening banquet, Rear Admiral William C. Mott, the Judge Advocate General of the United States Navy.

There are a number of members of the Judiciary here. We are so pleased that they have joined with us today. I would not think of trying to ask all of them to stand. In fact, I might not even see them all, for we have a large crowd here today. But there is one whom I know you will agree can represent them all, a gentleman whom we have all admired and revered so much, the Honorable A. B. Neil, Retired Chief Justice of Tennessee.

Now, it is my pleasure to present to you another old friend of mine. Incidentally, one of the fine things about him is that he is a native of Jackson. He is a former Mayor of Memphis, a former member of Congress, author of the Chandler Bankruptcy Act, member of that body of great men who gathered on Capitol Hill in the Constitutional Convention of 1953, in which I participated (and all members agreed that it was a great intellectual group), a former President of this Asso-

ciation, one who has been greatly interested throughout the years in this Association and in the American Bar Association, interested also in historical matters and, I believe, a member of the Tennessee Historical Commission, who will now introduce the speaker, — the Honorable Walter Chandler.

MR. WALTER CHANDLER: Mr. President, thank you very much for a gracious introduction from another native of Madison County. Chief Justice Neil, our present Chief Justice, the Judges of our Courts, the members of the Bar, our ladies and friends:

It is a great pleasure for me to have the opportunity to introduce a warm friend and distinguished Tennessean. In these days when the pressure of the specialties of the law: Anti-trust, Administrative Law, Taxation, Labor Law, and the others, press so heavily on our minds, we are inclined to forget the sources of our liberties from which this profession has had the privilege and the opportunity through the centuries of doing more for the development of civilization and for the preservation of human rights than any profession in history.

So, today, we are going back to one of the button hooks of our liberties, the jury system.

We have invited here to state his story one with an intricate study of that question, who has been entertaining it for a long time, and who, as we all know, although not a lawyer, has been interested in questions pertaining to our profession through the years.

So it is a great pleasure today that we have with us the Honorable Dr. Robert H. White, who is the State Historian, who is a native of Tennessee Commonwealth and from Crockett County, our neighboring county of Madison, and a West Tennessee county as we all know, and also a distinguished graduate of Vanderbilt University. I do not know whether he became a Bachelor of Letters, but looking at him I think he has qualified for that, too. But, at the same time, we are happy to have him, we appreciate his being here, and it is a real pleasure for me to present him to you, Robert H. White, our State Historian.

(Dr. White's address is presented on page 8.)

PRESIDENT MOSS: I am sure you will join me in thanking Dr. White for this splendid, interesting, informative and educational address. Doctor, we appreciate very much your being here with us. Mr. Chandler is recognized again.

MR. WALTER CHANDLER: I would like to express our thanks and appreciation to Dr. White by electing him to honorary membership in our Association. I move that Dr. Robert H. White be made an honorary member of the Tennessee Bar Association.

The motion was duly seconded and it was unanimously voted that

Dr. White be made an honorary member of the Tennessee Bar Association. (Then followed the President's address — printed herein at page 77.)

PRESIDENT MOSS: I would like to present to you now Mr. Charles Cornelius, Jr., our Secretary-Treasurer, and Mr. John C. Sandidge, our Executive Secretary, whom all of us know and appreciate.

It is my pleasure now to present to you the Honorable Alfred W. Taylor, Vice-President, who will tomorrow be your President-Elect, who will say a few words to us at this time.

MR. ALFRED W. TAYLOR: President Moss, members of the Judiciary, distinguished guests. I noted a while ago that the Vice-Presidents are no longer to respond to the greetings of the Mayor and the President of your Memphis and Shelby County Bar Association. However, I think I would like to say this, coming from the mountain country, to the east and further up the hollow than my friend Erby Jenkins. I heard a new term down here a while ago when Mr. Creson said that he hoped that we would all be adequately beveraged. Up home I think that is the same thing they call being liquored up. But I will say this, in the vernacular, some of the folks I ran into last night were so intoxicated I could hardly see them.

My report is very brief. Unfortunately, on January 27 and for two days preceding in Chattanooga, some of the weather from Siberia moved in and glazed over the highway with a sheet of ice. If it had not been for the strong support of the Chattanooga Bar and some of the close surrounding towns I am afraid that our Mid-Winter meeting in Chattanooga might have been a failure.

However, we were fortunate in having over 100 in attendance even under those adverse weather conditions. I might say that President Charles Coffey, Jr., and the Board of Governors of the Chattanooga Bar Association did a marvelous job as hosts.

We had two fine speakers on our afternoon program, one was Mr. Charles Warfield of the Nashville Bar, who gave an excellent talk on Family Courts, what they can do for the community and for the lawyer. His talk reflected a great deal of preparation and hard work. Our second afternoon speaker was Mr. Robert Miller, Director of the Division of Securities of the Tennessee Department of Revenue. His subject was, "What Every Lawyer Should Know about Corporations under the Tennessee Blue Sky Law."

For those of you who were fortunate enough to attend, I am sure you will agree with me that you probably have never heard any more learned or scholarly paper delivered. I might say that this paper has

been printed in the spring edition of *The Tennessee Law Review,* and I commend it to your reading.

After the usual hospitality hour we had a fine banquet which was presided over by President Moss, and then that was followed by a most enjoyable address by Mr. John Satterfield, the President-Elect of the American Bar Association.

In closing, I would like to say, once more, we were sorry that weather prevented more of you from attending our meeting. We thought it was a fine one, and I would like, once again, to thank the members of the Chattanooga Bar Association, and particularly their President and the Board of Governors, for being such fine hosts.

PRESIDENT MOSS: I know Alfred Taylor is going to do as well as Prsident a couple of years from now. Now, I want to present to you the Honorable Malcolm C. Hill, who is the Vice-President from Middle Tennessee. I remember when Malcolm was elected a year ago, he said that was his reward for keeping silent for twenty years. He said he had never opened his mouth on the floor for twenty years, so we elected him Vice-President. We are going to let him speak now. I present to you Malcolm Hill.

MR. MALCOLM HILL: Mr. President, and the few faithfuls that are in the hall, for my part, I would just as soon that we had passed up this report of the Vice-Presidents because, as stated, it was my aversion to making speeches that got me where I am. So I do not want to spoil that.

We had our Middle Tennessee meeting at Shelbyville. I was tempted to insist that it be held at Sparta, because Sparta has everything and more. But we are up there right on the eastern edge of Middle Tennessee, and I thought that it would be an imposition on the Bar, and that it might be that they might not be willing to come so far even for so much. So we decided that we would ask Shelbyville to entertain the Bar. So we contacted the Bar at Shelbyville, and they very kindly undertook to entertain us, and did a wonderful job in that respect. We had a wonderful program there.

I had had the pleasure of attending the West Tennessee meeting and enjoyed it very much, and had two very profitable experiences. One was Captain Murrah was presiding, and we had a fine meeting over in Middle Tennessee, because I followed just exactly what he did, and he did so well that we had a good meeting over in Middle Tennessee.

At this West Tennessee meeting we had some young fellows who were West Tennessee lawyers, and they presented a program there on the economics of law practice. I was so impressed with it that I persuaded them to bring that same program over to Middle Tennessee, which they did. Lloyd Adams, Jr., and Hewitt Tomlin did an excellent job

with their charts, and those who have not heard that have missed something.

Then we had the subject of products liabilities, a panel led by Dean John W. Wade, of Vanderbilt, who did a wonderful job in presenting the subject, and he was assisted by my old friend David Wade, Jr., from Pulaski, and Bill Tomlison.

Dean Wade was seated over there a moment ago. He did a wonderful job there, but that was before he lost that part of his anatomy that he recently had, and I do not know how he would do now.

But we had a wonderful program and I do, again, want to extend my thanks to John Sandidge, and Charles Trabue, and the local Bar in Shelbyville that cooperated and worked so hard in making it a success. Now, I do not know how many of you are in the habit of attending these Mid-Winter meetings. But, to me, I am not sure but that I enjoy and feel that I get as much or more benefit out of the Mid-Winter meetings than out of the Annual meetings. So, as a parting remark, I want to encourage those who have not attended, to attend, and I am sure that you will then agree with me.

It has been nice to have served as Vice-President. It would have been all right with me to pass this up, but I suppose the Vice-Presidents should be seen at some time. I have enjoyed being Vice-President and working with this wonderful group.

Any time I can be of any assistance to the future officers, I stand ready to do anything that I can.

PRESIDENT MOSS: Captain Murrah, I believe that Malcolm Hill has reported very fully on the West Tennessee meeting as well as the Middle Tennessee meeting, but we would certainly like to have remarks from you supplementing his or anything else you want to say. It is indeed a pleasure, ladies and gentlemen, to introduce to you the distinguished Vice-President from West Tennessee and from Memphis, the Honorable William F. Murrah, known to us old Vanderbilt friends as Babe.

MR. WILLIAM F. MURRAH: Mr. President, distinguished guests, and the few that remain among the lawyers: When I saw that I was the last one on the program for the morning session I had hoped that everyone would be gone by then and I would be excused. But I did not quite make it. So I have to make a report for the record, at least.

I was also pleased to have my report largely made for me by Malcolm Hill when he gave the main feature of our meeting up there, and that was my presiding.

The Mid-Winter meeting at West Tennessee was held February 10, 1961. We were fortunate in having delightful weather. If I could sum up in one sentence a report of that meeting I would say that entertain-

ment was furnished by the Jackson and Madison County Bar Association. That would be enough said. Their hospitality is unsurpassed. Many Memphis lawyers, I have heard say, would rather go to that meeting than to come to this one. At this particular meeting, with one of their Past Presidents, the President of the Tennessee Bar, they outdid themselves.

The program opened with a lunch of the Board of Governors. Then the business session began and we had the welcome by Mr. Harlan Martin, the President of the Jackson and Madison County Bar, and the response by Mr. Larry Creson of the Shelby County Bar. Then the report of the activities by our President Moss and Executive Secretary Sandidge. Charlie Morgan made a very vigorous and illuminating report of the committee to study the method of selecting Appellate Judges, and I expect that report and the way it was presented and the effect it had had something to do in securing the speaker we had yesterday for lunch. Senator Keith Short of the State Legislature gave us a very sparkling account of the then pending session of the Legislature. The rest of the afternoon was taken up with a forum sponsored by the Junior Bar Conference. Lloyd Adams is President, of Humboldt, Hewitt P. Tomlin, of Jackson, and Irvin Bogatin of Memphis.

For about two hours we heard more ways and means about how a lawyer could make a living than any of us older lawyers had ever dreamed of. Those that were there, I think, put many of them into practice, because they seemed to be a little more prosperous in the last few weeks.

Then there was a social hour which is always a delightful part of it. This was followed by the banquet presided over by President Moss. You see, he gets to preside over all these banquets that we have. That is one of the great advantages of being President.

For our speaker we had the Honorable Francis Hare from Birmingham. He is one of the outstanding and most successful trial lawyers. He gave a most interesting and instructive address on trial technique, and spiced it with humorous delightful stories of incidents from some of his cases.

The Memphis lawyers were on their way back home before nine o'clock. A good time was had by all.

I want to join Malcolm Hill in stating, I hope it goes in the record, that we believe that these winter meetings are doing more than anything to keep up the interest of the Bar and for the special interest and special attention of the West Tennessee members, if you want to have a jolly good time and learn to be a better lawyer at the same time, attend the West Tennessee Mid-Winter Conference at Jackson.

PRESIDENT Moss: In closing, I thank these three gentlemen, these three Vice-Presidents, for their cooperation with me during the past year. Incidentally, while I did preside over two of the banquets, or maybe all three, the Vice-Presidents are the ones who get up the programs and do all the work. And they did it during the past year. They are the ones who make or break the Mid-Winter meetings, and they were all very successful during the past year. (The session then adjourned.)

SATURDAY MORNING SESSION, JUNE 10, 1961

The meeting convened at the Hotel Peabody at nine-thirty o'clock, President William P. Moss presiding.

PRESIDENT Moss: Let us come to order, gentlemen. The morning meeting is now commenced. As the first order of business, I want to take up a matter that is not on the printed program. Each year the Association awards a citation to the local Bar Association whose interest and activities have been the most outstanding during the year. We have had four or five applications submitted, with interesting statements of the work of these respective organizations. I had appointed what I thought was the finest and most competent men, a most disinterested and unbiased committee to pass on the matter. Mr. Trabue, Mr. White and some other Nashville lawyers were my appointees. Among the applicants were the Memphis Bar and the Jackson Bar, which certainly should have gotten the award, but the committee had the audacity to give it to somebody else, and after their duty is performed, I am going to fire that committee. I would like to call on Mr. Weldon White at this time.

MR. WHITE: Mr. President and gentlemen of the Association, and also Mrs. Davis, whom we are glad to see here: Mrs. Davis is not a lawyer, but her husband is a fine one. This award, if I may refer to these notes, goes to the Kingsport Bar Association. As President Moss said, he appointed this committee and we examined real closely the reports filed by other Associations. We concluded that the Kingsport Bar was entitled to the Award of Merit for the best and most outstanding work of any Bar Association in the State for the year 1960-61. After his election as President of the Kingsport Bar Association, Ben C. Davis named a Committee on Goals, which set forth specific aims for the Kingsport Bar Association to accomplish during the year. By striving to achieve these goals, new life sprang into the Association.

A creed was formulated and adopted by the Kingsport Bar Association, setting forth a sense of purpose in its community, and the creed was recited at each meeting of the local group.

Special attention was devoted to the attendance at monthly meetings by dividing the group into competing teams.

The Association had an extremely active and successful "Law Day U.S.A." program covering a period of one week in which, per capita-wise, perhaps more active attorneys participated than any association of its size in the south. There were approximately 25 members of the local Bar who appeared in the pulpits of local churches, in schools, civic clubs, and other organizations, and also made appearances on radio with panel discussions.

For the first time the Association was successful in distributing the Tennessee Bar Association's "A Manual for Jurors in Tennessee" to prospective jurors.

The Kingsport Bar Association passed a resolution recommending the use of judicial robes, which are being used by the new courts.

It also uses a committee system to select and nominate one set of new officers for each year, but, of course, with the privilege of other nominations being made from the floor, if anyone so desires.

In studying the entry of the Kingsport Bar Association for the Award of Merit, and becoming familiar with its many and varied activities, it is apparent that the activities and accomplishments of the Kingsport Bar Association during the past year have been such that they have improved the status and standing of members of the legal profession in the community of Kingsport, that as a profession they have contributed to the general welfare and good of their community, and that they have enhanced the public interest and confidence of the general public in lawyers, in the Courts, and in our government and way of life under law.

Mr. Chairman, that is the report of the committee. There are some reports on the desk there that set out what the Kingsport Bar Association has done, and I believe they should be passed out.

PRESIDENT MOSS: I hope you can ask someone to help you distribute those. I suppose there is nothing we can do, despite my objection, except approve the report. Mr. Ben Davis will please come up here and bring with him any of his committee workers of the Kingsport Bar Association that he would like to receive this award. To Mr. Davis, the President, and to the Vice-President of the Kingsport Bar, we are very proud to present this Tennessee Bar Association Award of Merit. (Reading) "This is to certify that the Kingsport Bar Association has been duly selected under the rules approved by the Board of Governors of the Tennessee Bar Association to receive this Award of Merit for the most outstanding and constructive work in its field during the current year." That is

signed by the officers of the Association, and the Award is dated June 7, 1961. It is a pleasure to present this to you, Ben.

MR. DAVIS: Thank you very much.

PRESIDENT MOSS: Among our committee reports, there is the Committee on Constitution and By-Laws, of which John H. Tipton is Chairman. (The Report of the Committee on Constitution and By-Laws appears on page 87.) I know that John has already field his report saying that nothing has come to the attention of that Committee during the year. However, there has been a matter which has arisen which we did not have time to refer to that Committee, but which was approved by the Board of Governors yesterday, an amendment to the By-Laws which will now be presented to you by Mr. Trabue, the President-Elect.

MR. CHARLES C. TRABUE, JR.: In the past the committees are appointed for one year. At the end of the year they all go off and you get a brand-new bunch, and some people stay on for four or five years and do all the work. We thought it might be worthwhile to try a system of having each member serve for a term of three years on the committees and have one term of the committee expire each year. In that way we would get continuity of representation on the committees and you would find out what they are trying to do and, I believe, might get more effective help from the committees.

We also thought it would be a good idea to have the man who was elected Vice-President today from West Tennessee and who two years from now will succeed to the office of President make the appointments for three years from West Tennessee so that he will have effectively appointed him a Chairman who will have had two years of experience when he comes in office. He would not necessarily be the Chairman, but he would have that advantage.

To that end, we would like to consider this motion:

I move the Convention that we amend the By-Laws to strike the first paragraph of Article VI of the By-Laws and substitute in lieu thereof the following:

"There shall be the following standing committees, each composed of nine members, three of whom shall reside in each grand division of the State. In June, 1961 one member of each committee shall be appointed from each grand division to serve for a term of one year, another for a term of two years, and the third for a term of three years; and thereafter as the term of each committee member expires, his successor shall be appointed from the same grand division to serve for a term of three years.

"In the case of death or resignation of any committee member, his successor shall be appointed from the same grand division of the State to fill out the unexpired term.

"All appointments shall be made by the President, provided, however, that the newly elected Vice-President from the grand division where the latest convention is held and who will succeed to the office of President, shall appoint the committee members of his grand division of the State.

"The President shall appoint one member of each committee to serve as Chairman thereof."

Mr. President, I move the adoption of this amendment to the By-Laws.

PRESIDENT MOSS: Is there a second to that motion?

(Seconded by several members.)

PRESIDENT MOSS: The motion has been seconded by several members that the amendment offered by Mr. Trabue be adopted. Is there any further discussion? . . . Any questions? . . . If not, all in favor of the motion to adopt this amendment will now signify by saying aye. Those opposed, signify by no. The ayes have it, and the amendment is adopted.

The next order of business is the matter of reports of the various committees, and some of them have been printed and you have doubtless seen them. Some were filed too late to be printed in advance of the meeting, and perhaps a few reports have not been filed. I think a good many of them may be just considered as received and filed. I am familiar with them, and will go down the list.

The first one is the Committee on American Citizenship and Law Day. Mr. Lucius E. Burch, Jr., was Chairman of that Committee, and he has filed a very splendid report. I happen to know that that Committee did a lot of fine work, especially in reference to Law Day. There will be no necessity for any action on that report, and it will be received and filed. Thank you, Mr. Burch, for the work of this Committee under your active leadership. (The Report of the Committee on American Citizenship and Law Day appears on page 86.)

The Committee on Continuing Legal Education, I know has done a fine job this year. The meeting held here a couple of days ago was one of the finest that I have ever attended. Mr. Robert E. Lee was the Chairman of that Committee and the report will be received and filed as approved. (The Report of the Committee on Continuing Legal Education appears on page 87.)

PRESIDENT MOSS: The Committee on Group Insurance. I know the Chairman of that Committee has filed a printed report, a comprehensive and detailed report of what has happened in the past year with reference

to our group insurance of all kinds, and if you have not read it, I suggest that you do so. It needs no action from the Convention; it simply reports on the various kinds of group insurance which we have. (The Report of the Group Insurance Committee appears on page 88.)

The Committee on Inter-Professional Code. That report is printed also and it is worth reading. The Committee recommends, I recall, that the next Committee do something about a Code between the lawyers and accountants. We now have a good one between the lawyers and doctors. (The Report of the Inter-Professional Code Committee appears on page 93.)

The Committee on Judicial Administration, Remedial Procedure and Law Reform. Mr. Armstrong is the Chairman of that Committee, and I believe he is here.

MR. WALTER P. ARMSTRONG, JR.: Yes, sir.

PRESIDENT MOSS: Mr. Armstrong, would you like to speak on that report?

MR. ARMSTRONG: I have a report which I would like to file in written form at this time, and I believe that the Association is already aware of our situation. Our only recommendation is that efforts should be continued to vest the rule making power in the Supreme Court. (The Report of the Committee on Judicial Administration, Remedial Procedure and Law Reform appears on page 94.)

PRESIDENT MOSS: I believe that those of you who were here yesterday may have listened to my report on that same subject. We will receive the report, and thank you very much, Mr. Armstrong.

Next we have the Committee on Legal Education and Admission to the Bar. Is Mr. Tom Steele here?

MR. STEELE: Mr. President and members of the assembly, our report has been printed. This report was actually an interim report made back last February as I recall. We had a very fine Committee composed of ten or eleven outstanding lawyers all over the State, and the report was a unanimous report of the Committee without dissent on anybody's part. The Committee felt that it considered all of the recommended American Bar Association standards for law schools in Tennessee, and felt that one that we would recommend the adoption of — was that in Tennessee we should have in the law schools a requirement of three full-time instructors.

We also asked that the fee for application for admission to the Bar be increased to an appropriate amount so that the Board of Law Examiners could employ an executive secretary that they now have the authority to employ, and to use that secretary to make a more thorough examination of the character of the applicants for admission to the

Bar of Tennessee. The power to do this has been there for some time, but the means to do so have apparently not been. We are recommending that the Board itself under the rule fix an application fee which will enable them to employ help which they so badly need.

I doubt if the members of the Association know the debt of gratitude we owe the Bar Examiners. We have three men. They have a continous, astronomical task of discharging this very important function of examining all applicants for admission to the Bar of this State. It is often a thankless task, but we should always recognize and commend them for their sincere work.

Mr. Thomas, the President of the Board of Law Examiners, was a member of our Committee. He not only concurred in our report, but he recommended the adoption of even more of the minimum ABA standards. All this was the consensus of our Committee, and we have made a recommendation to the Board of Governors of the Bar Association, and now to the assembly, Mr. President, that the Supreme Court of Tennessee be petitioned to clarify or to define its rules to mean that a competent staff of instructors for the law schools of Tennessee be defined to mean at least three full-time instructors, and also that the Board of Bar Examiners be given power to raise its application fee so that it may in turn continue its thorough examination of applicants for admission to the Bar.

PRESIDENT MOSS: Mr. Steele, I turned aside to say something to Mr. Sandidge, and you may have mentioned this. Did you mention the change in reference to the bachelor's degree?

MR. STEELE: Yes, there was one other thing, and apparently there was some confusion about what was meant by three years in college work which is required prior to the admission to a law school and obtaining of a law degree. We felt we might as well define what we endorsed as the required three years of study, that being defined to mean satisfactory completion of at least three-fourths of the work acceptable for the bachelor's degree. It is the consensus of the Committee that these are the rules intended, and to clarify it, we might as well put that into the rules so as to be more clarifying. I now move the adoption of the report.

PRESIDENT MOSS: Mr. Steele moves the adoption of the recommendations of this Committee. The motion has been seconded. It is a very important committee, gentlemen. As I said, I know the Committee has met several times, and in fact I have met with them and with Dean Wade of Vanderbilt and Dean Wicker of U.T. College of Law. Is there any further discussion? . . . If not, all in favor of the motion to approve this report and the recommendations of the Committee will

now signify by saying aye. Those opposed, say no. They ayes have it, and the report is approved. (The Report of the Committee on Legal Education and Admission to the Bar appears on page 96.)

The Committee on Legislation is next. Is Mr. Olin White here?

MR. OLIN WHITE: Mr. President, the Committee got the help of everyone except the legislators. We were able with some difficulty to get all seven bills introduced. Your President and Vice-President came to Nashville, and we met with the Governor on several occasions. We met with the leaders of both houses, who are usually lawyers, and as with all lawyers, there was some disagreement even among them. We had a little trouble, and I am very sorry to say that we passed only one bill and deserve no particular credit for that. We recommend a new Chairman for the Legislation Committee.

PRESIDENT MOSS: I am fairly familiar with the work of that Committee, and I am not as disconsolate over it as Mr. White. After all, as I said in my letter in the "Tennessee Lawyer" a few months ago, we aimed high on two matters but we did not succeed. That is, the rule-making power and the increase of salaries of judges. We are not through. That will be done, we think, by the people in the next legislature. We did get a bill passed which provided that the Judges of our Courts must be lawyers. That is a step in the right direction.

That brings me to the next item very appropriately, which is the Liaison Committee with the Judicial Conference, of which Mr. Charles G. Morgan of Memphis is Chairman.

MR. MORGAN: As a brief report, the Judiciary seems to be happy. That is all.

PRESIDENT MOSS: That is a fine report.

I know Mr. John Thomason of Memphis has filed a report that is printed for the Committee on Membership. That shows good progress in the matter of increasing our membership, an increase of about one hundred and we now have about 2,750 in membership. (The report of this Committee appears on page 101.)

The Committee on Obituaries and Memorials, of which my fellow townsman, Mr. Roy Hall, is Chairman. Will you please come up here, Mr. Hall?

MR. ROY HALL: Mr. President and members of the Convention: Your Committee on Obituaries and Memorials has been furnished with a list of lawyers who have passed away since our last meeting. Fifty-four attorneys have closed their cases for both the plaintiff and for the defendant and have gone to meet The Great Judge for their last and final decision. Thirty-one of those were members of our Association,

and twenty-three were non-members. Many of those who have passed away forever had distinction as Judges, Chancellors, and Congressmen and other public officials, as well as distinguished members of the Bar. Many of them in their outstanding service are well-known among us. Others of them were more renowned in their own community but were loved and will be missed by all who knew them. We who have been privileged to continue at least, may we measure up to and take part in the preservation of honor, justice, integrity and public service which they have left us.

It is fit and proper that we pause here in the activities in this Convention for a moment to pay tribute to those who have gone on before us. Let us again be thankful that we have been privileged to have known and been associated with those of our departed brothers, and I will now read the list of those who have passed away since our last annual meeting. (Thereupon, Mr. Roy Hall read a list of 54 attorneys' names. See Report of Obituary and Memorial Committee on page 102.)

MR. HALL: Have I missed any others?

MR. FRANK COBURN: You missed Ralph W. Dugan of Athens.

PRESIDENT MOSS: Thank you, Mr. Hall, and Mr. Coburn, and I will ask that in approval of this resolution, we stand in silent tribute.

PRESIDENT MOSS: I can briefly state for the Committee on Professional Ethics and Grievances that while the report has been filed, naturally it does not mention many, if any, of the matters that the Committee has considered during the year. Mr. James Manire of Memphis, however, is the General Chairman of that Committee, and Mr. Foster Arnett of Knoxville and Mr. William Woods of Nashville are sectional Chairmen. They have given careful attention to a number of problems that have arisen and which have been referred to them by me or Mr. Sandidge. They have done a magnificent job of ironing out all of these problems without the necessity of any action in this meeting. (See Report of this Committee on page 104.)

The Committee on Publications, Mr. O. B. Hofstetter, Jr., has filed a report, and it will be received and filed. (The Report of the Committee on Publications appears on page 105.)

The Committee on Public Relations. Mr. Leo Bearman is Chairman, is he here?

MR. LEO BEARMAN: I filed a report with the Secretary last week, Mr. President, and the only action we are recommending is that a full time person be employed as the public relations man. We think we need it and need it badly. (The Report of the Committee on Public Relations appears on page 105.)

PRESIDENT MOSS: Thank you, Mr. Bearman. That is a position on which the Convention and the Board took some action last year. This report will, of course, be considered, and the recommendation will be put up to the next Board of Governors and I hope will be put into effect.

Mr. Charles C. Crabtree of Memphis is Chairman of the Committee on Resolutions. I know that no resolutions had been sent to the Committee prior to noon yesterday as required by the By-Laws, so there is no report necessary from that Committee.

The Committee on Unauthorized Practice of Law is next. Mr. J. D. Senter, Jr., the Chairman of that Committee, is recognized.

MR. J. D. SENTER, JR.: Mr. President and Members of the Assembly: We are filing this report this late because it would really require action before the Board of Governors. The action was taken yesterday in conformity with a recommendation of the Committee. This is a joint report with Mr. Leo Bearman's Public Relations Committee, and they join with us on this. (The Report of the Committee on Unauthorized Practice of Law appears on page 108.)

PRESIDENT MOSS: The Chairman of the Unified Bar Committee, Mr. John W. Apperson, is here and has filed a report. Would you like to come up now, Mr. Apperson?

MR. JOHN W. APPERSON (Memphis): Mr. President and gentlemen: Regretfully, this Committee used to be known as the Committee on Integrated Bar, but due to the activities of the NAACP and Mr. Justice Warren, we have had to change the name of it to the Committee on Unified Bar. You will notice in the report which we have filed that we do not use the word "integrated" in any part of it. I personally have been a great advocate of the Unified Bar for years. Being a member of the American Judicature Society, I have been reading the literature in that publication for a long time. I am convinced that we would profit by a Unified Bar, and I think Mr. Bearman's proposition about the Public Relations Committee's need of funds would be amply supplied if we had a Unified Bar. That is one of the big things which a Unified Bar has been able to do, and that is to conduct very fine public relations for the public and to educate the public of the need for lawyers and for legal advice.

This year we decided that there was very little that this Committee could do. For one reason there is a case pending in the Supreme Court of the United States attacking the validity of the Wisconsin Unified Bar, and we think that until that case is decided, that there is very little use of spending the lawyers' time and effort in trying to unify the Bar of the State of Tennessee. We also think that now that our

Bar Association is larger than it was at the time we took that vote, that we have a much greater chance of getting the Supreme Court to approve a Unified Bar. I do not know whether you remember it or not, but a vote was taken among the members of the Tennessee Bar Association, and the vote was, I think, just about one or two majority. The Supreme Court held that it was not sufficient majority to justify them approving it.

These are the few things that this Committee recommends for this coming year. If in that Supreme Court case, the ruling is in favor of the Unified Bar, then the incoming President, Mr. Trabue, will be instructed to instruct the Legislative Committee of the Association to prepare an Act to be passed by the 1963 Legislature along the lines suggested by the 1954 Unified Bar Committee, which is very similar to the same Act passed in several of the Unified Bar States, except that it shall provide that all laws in conflict shall be superseded.

If you recall, the 1955 General Assembly passed that most peculiarly worded Bill which said that "No person shall be granted or denied the license or right to practice law in Tennessee because he or she is not a member of any lawful club, association or guild."

The Committee recommends that the Unified Bar Committee to be appointed by the incoming President be authorized and directed to organize a campaign to be carried on during the year 1962 intensively in every County in the State by personal calls on all attorneys in an effort to educate them on the advantages of a Unified Bar.

I find that lawyers who object to the Unified Bar, do not really know what the Unified Bar is. They do not take the time to study it and learn about it and its advantages. They just object to anything that is new that they do not know anything about. The Committee recommends that sufficient funds be allocated for the benefit of this campaign and that a capable speaker from one of Unified Bar States be requested to speak on the subject at the 1962 Convention. There are 29 States that already have Unified Bars. They are all successfully operating, and the lawyers that operate under them are very well-pleased with it. (The Report of the Unified Bar Committee appears on page 109.)

PRESIDENT MOSS: We are very grateful to you for your interest in this matter of a Unified Bar, Mr. Apperson, and perhaps we ought to progress now to calling it an Incorporated Bar. I am interested in it myself, but I have not encouraged Mr. Apperson to make the fight again this year. We have had a bit of fighting over it, as he said, several years ago, and in order to have a little better chance for success the next time, I thought we would let it simmer for a while longer.

The report will be approved and its recommendations will be duly presented to the incoming Board of Governors.

The Committee on Uniform State Laws of which Mr. Hearn Spragins was chairman, is next.

SECRETARY SANDIDGE: He has filed a report. (The Report of the Committee on Uniform State Laws appears on page 110.)

PRESIDENT MOSS: I happen to know that he and his committee did not recommend the adoption of any more Uniform Laws at this time.

As to Ways, Means and the Budget, these matters now are handled by the Board of Governors, and need not come to the attention of the Convention.

The Special Committee Investigating Solicitations of F.E.L.A. Cases has filed a printed report. (The Report of this Committee appears on page 111.) I believe that brings us to the conclusion of Committee Reports unless there are some others whose names are not printed on the program and which I have overlooked. Are there any such?

Now, I am going to break into what might be referred to, for loss of a better style of expression, the monotony of the printed program to present some certificates to members of the Board of Governors and the Officers for their work during the preceding year and in some instances three years. Members of the Board of Governors, I will call your names and would appreciate it if you would stand and be recognized, and at you convenience come up here and get the certificates.

Mr. Lloyd S. Adams, Jr., the President of the Junior Bar Conference. Lloyd's Junior Bar Conference was in session last night across from my room, and they worked diligently until at least two-thirty. I thought about them a while ago while I was taking a drink of this water. I have never seen the water so good as it is in this hotel on Saturday morning. I wish I could have for you the description of water that I heard Mr. Seymour read in Chicago last February at an appropriate moment during the Mid-Winter Meeting of the American Bar.

MR. EDWARD KUHN: He will be glad to read that again for you.

PRESIDENT MOSS: Mrs. Rose L. Bartlett, the President of the Women's Bar Conference. Is Mrs. Bartlett here?

MRS. ROSE L. BARTLETT: Thank you very much.

PRESIDENT MOSS: Sam E. Boaz, a member of the Board of Governors. David Ballon, another member of the Board of Governors, who has been a mighty busy fellow around here working on registration. Mr. U. L. McDonald, a member of the Board of Governors and Mr. Victor Barr, Jr., who completed a sentence of four years as Secretary-Treasurer of this Association last year.

Now, we would be happy indeed to have Mr. Whitney North Seymour, President of the American Bar Association, who has made us such a fine visitor, read to you that little matter on the subject of water to which I made reference. Mr. Seymour.

ABA PRESIDENT SEYMOUR: Mr. President, by a happy coincidence, considering its relevance this morning, I do have a copy of this little piece on water. I picked it up in Mississippi last June just about a year ago.

We were down there at the Mississippi Bar meeting, and my nice wife got stuck in an elevator for an hour and a quarter. We then retired to the room of the President of the Mississippi Bar, where we met his cousin who is the United States District Judge for the Northern District of Mississippi, and we shared a little nerve tonic with him. He then gave me this little piece on water. To the toast, water, the purest creation of God, this is the response. (Reading) "My friends, I have seen water crested in tiny teardrops on the sleeping lids of infancy. I have seen it trickle down the dimples of youth and on the whitened cheeks of age. I have seen it sparkling like a shower of gems from the blades of grass in the resplendent dawn of a new day. I have seen it tumble down mountain sides in cascades as freely as a bridal veil, and I have seen it in the majestic rivers, now pearly, now rolling in the mad rush to join the great father of waters coursing to the ocean's broad expanse, and I have seen it in the seven seas on whose bosom float the vast fleets of the Navies of the world and the commerce of the world, but, my friends, I want to say to you that water as a beverage isn't worth a damn".

PRESIDENT MOSS: Well, I still say that the water in this hotel on Saturday morning is a pretty good beverage. I suppose we have now arrived at the point in the schedule of the morning's activities where we should elect Officers. I believe we will take up first an office which by inadvertence is not listed on the program, that of the Secretary-Treasurer. That is not the Executive Secretary, but the Secretary-Treasurer, now Mr. Charles Cornelius, Jr. Does anyone want to place a name in nomination? . . . Mr. Matthews.

MR. MATTHEWS: I would like to place in nomination to succeed himself Mr. Charles Cornelius, Jr.

MR. BALLON: I move the nominations be closed and that Mr. Cornelius be elected by acclamation. (Mr. Cornelius was unanimously elected.)

PRESIDENT MOSS: Now, we have three Vice-Presidents to elect — we will take them in the order as they appear on the program, first the Vice-President for East Tennessee.

MR. BISHOP: (Chattanooga) Mr. President.

PRESIDENT MOSS: The Chairman recognizes Mr. Bishop of Chattanooga.

MR. BISHOP: We in East Tennessee are proud of the man to bear our leadership from that area. From Cleveland, Tennessee there comes this year a young man, a fine lawyer, the present President of our local Bar, the Mayor of Cleveland. I am proud to place the name of Mr. William K. Fillauer in nomination as Vice-President from East Tennessee.

JOHN GOINS (Chattanooga): Mr. President, I want to second the nomination.

PRESIDENT MOSS: Are there any other seconds? . . . Any other nominations?

MR. BALLON: Mr. President, I move the nominations be closed and that he be elected by acclamation.

PRESIDENT MOSS: You have heard the motion, gentlemen. All in favor of closing the nominations and in favor of the motion for election by acclamation will signify by saying aye. (Many ayes recorded.)

Well, we are moving right along. The next is the Vice-President for Middle Tennessee.

MR. HOWELL FORRESTER (Pulaski): Mr. President, I would like to place in nomination the name of Sam Boaz as Vice-President of the Association for Middle Tennessee. Sam has worked in the Association for a number of years and has recently been very active as a member of the Board of Governors. (The nomination was seconded by Mr. Sam Moore and others, Mr. Keith Crawford moved that the nominations be closed, which motion unanimously carried, and Pres. Moss declared Mr. Boaz elected Vice-President for Middle Tennessee.)

PRESIDENT MOSS: Now, the next Vice-Presidency, as you know, is a little more important, for whomever we elect Vice-President for West Tennessee will automatically become the President-Elect next year and the following year the President of the Association. I want to remind you again that I was the first man to be elected under this system which became effective three years ago at this Convention here in Memphis, and I think it is a fine system. It has given me the opportunity to get into harness for two years before I assumed the office of President. It was a very worthwhile apprenticeship. Three years ago you had two elections, and you elected Erby Jenkins President-Elect and me to this important Vice-Presidency at the same time. Erby and I have both agreed that we have perhaps been the best Presidents this Association has ever had up until now.

Do I hear any nominations for Vice-President for West Tennessee? The Chair recognizes Captain William Murrah, the present Vice-President for West Tennessee.

MR. WILLIAM MURRAH (Memphis): Mr. President, and members of the Convention: Just a week ago I was at a lunch in Nashville for the Vanderbilt Alumni Association in which Freddie Russell, whom you may know as the Vice-President and sports writer of the *Nashville Banner,* was the presiding and retiring President. When he left the stage to turn over his duties to the new incoming President, he made this statement, "Nothing succeeds like a successor." That struck me rather forcibly. It also may be of interest to you to know that the man that came to be his successor was the man who is the incoming President of the Tennessee Bar Association today, Charlie Trabue. After the meeting, I saw Charlie and I said, "How in the world are you going to handle both of these jobs at the same time?" Charlie said, "Well, when I arranged to be President of the Tennessee Bar, I also arranged to retire from the active practice of law for the duration, and one or two extra jobs won't make any difference."

Now, I am here to nominate my successor, so according to Freddie, he is assured of success. I know these nominations should be brief, but I also feel that the members of the Convention should have some general knowledge of the background and qualifications of the man who in two years will become the President of this great Association.

It is an extraordinary pleasure for me to make this nomination. The man whom I nominate is a personal friend of many, many years, and whose friendship I prize highly. I know of no one who has as many of the necessary qualifications to fill this important post and who can better discharge the duties that will be incumbent upon him. In the first place, he is a natural born lawyer. His grandfather was one of the great lawyers of two generations ago, and he inherited all the qualifications of a great lawyer. He attended and graduated with a fine record from one of the leading law schools of this nation. He then served an allotted time as a law clerk for a Judge in the Circuit Court of Appeals of the Sixth Circuit Court of the United States. He then went into the active practice of law in Memphis and soon became one of the busiest lawyers at the Bar. It would have taken all his time and then some to have attended to his practice, but he is not content with that. He realized what our President of the American Bar Association told us yesterday. You must, in order to be a well-rounded lawyer, take active interest in your organization and the law. He got active in our local organization, our Bar Association, and in a short time became the Secretary, which is the hardest job, I think, in the whole organization and

around which rotate all of the business and activities of the Bar. He did such a superb job of that during his many years of serving that he was elevated to the Vice-Presidency and then to the Presidency.

He has served as Special Judge in the Courts of Shelby County on many occasions, but he did not confine his activities solely to his local Bar. He has been active and interested in the State Bar; he has been active and interested in the American Bar. He has attended the meetings of the American Bar at their annual meetings and in our mid-winter meetings and at some of our regional meetings, and he is thoroughly familiar with the top echelon of the American Bar, which is quite an advantage to the President of any State Bar. But he did not even confine his activities and interests solely to the practice and organization of the lawyers.

He has been one of the outstanding leaders in civic and welfare organizations in Memphis, and in addition to that, he is an outstanding church man. He is now the President of the Laymen of the Diocese of the whole State of Tennessee for the Episcopal Church.

He has a charming and cultured wife, and he is just now concluding and completing one of his tremendous assignments, that of General Chairman of this very successful convention. He has been one of the most popular lawyers of this Bar, and I say with all sincerity I cannot conceive of this man doing a small, unfair act of any kind. What more could you ask for a President of the Tennessee Bar? So I have the high honor and privilege of nominating S. Shepherd Tate for Vice-President for West Tennessee, to become President of this Bar in two years.

MR. LEO BEARMAN (Memphis): Mr. President.

PRESIDENT MOSS: Mr. Leo Bearman is recognized.

MR. BEARMAN: I would like to take the privilege which I consider a personal pleasure to second the nomination of Shep Tate, who was my Secretary when I had the privilege of being the President of the local Bar. I have watched his career, and whatever Captain Murrah said, I want to second it. He is an outstanding citizen and a well-rounded lawyer, who will be a wonderful President of the State Bar. Therefore, it is a privilege to second his nomination.

PRESIDENT MOSS: Thank you. Mr. Wyatt.

MR. WYATT: Mr. Chairman, I take pleasure in seconding the nomination of Mr. Shepherd Tate as Vice-President for West Tennessee.

MR. FOSTER ARNETT (Knoxville): It is my personal pleasure to also second the nomination of a fine Christian gentleman and an able lawyer, Mr. Shepherd Tate.

MR. LOUIS ADAMS (Selmer): Mr. President, it is a very great pleasure for us in Selmer and McNairy County to second the nomination of

Mr. S. Shepherd Tate, and the Selmer and McNairy County Bar Association unanimously seconds his nomination.

MR. MULLINS: I move that nominations be closed and that we elect Mr. S. Shepherd Tate by acclamation. (Seconds of the motion from the floor.)

PRESIDENT MOSS: The motion has been made and seconded that nominations be closed and that we elect Mr. Tate by acclamation. All in favor say aye.

I just want to say, now that we have held the election, that I, too, agree with everything that Captain Murrah has said about Shepherd Tate. He has been working on and planning for this Convention, I know, ever since the last Convention in Gatlinburg. He has called me more than a Jackson man would have called me if we were having the Convention in Jackson. He has done a marvelous job, and I am personally very grateful for the support he has given me this year. He certainly knows how to put on a convention, and I am sure that three years from now we will have another good one here.

MR. EDWARD KUHN (Memphis): Let us see him; let us hear him.

PRESIDENT MOSS: I am going to bring him up here when we install him.

We now must elect three members of the Board of Governors, one from the Third Congressional District. First, do I hear nominations for the Board of Governors for the Third Congressional District? Mr. U. L. McDonald is the present incumbent.

MR. RICHARD DIETZEN: (Chattanooga) Mr. President.

PRESIDENT MOSS: The Chair recognizes Mr. Richard Dietzen, President of the Chattanooga Bar.

MR. DIETZEN: I wish to place in nomination the name of Mr. James S. Waterhouse. Mr. Waterhouse has served most conscientiously and most ably as a member of the Board of Governors of the Chattanooga Bar Association, and I am certain that he would continue his service well and ably for the Tennessee State Bar.

PRESIDENT MOSS: That was Mr. Richard Dietzen, who is President of the Chattanooga Bar, and he nominates Mr. Waterhouse.

MR. JOHN BOWEN: I would like to second the nomination.

PRESIDENT MOSS: Mr. John Bowen seconds the nomination. Are there any other nominations? . . . If not, those in favor of Mr. Waterhouse as a member of the Board of Governors, signify by saying aye. Those opposed, no. Mr. Waterhouse has been elected.

Now we need to elect one from the Sixth Congressional District. That is the District now represented by Mr. Boaz.

MR. JERRY COLLEY (Columbia): I nominate Mr. Howell Forrester of Pulaski.

PRESIDENT MOSS: Any other nominations?

MR. SHELBY COFFEE (Columbia): I would like to second the nomination of Mr. Forrester and I move that the nominations be closed.

PRESIDENT MOSS: The motion is made that the nominations be closed and that Mr. Forrester be elected by acclamation. Those in favor say aye. Those opposed, no. Mr. Forrester is elected.

Now we should elect a man for the Ninth Congressional District, which is Memphis and Shelby County.

MR. EDWARD W. KUHN (Memphis): Mr. President, I would like to place in nomination for a full term, since the gentleman is already serving the unexpired term of Judge Quick, the name of Mr. David Ballon, of Memphis, a most wonderful registrar.

PRESIDENT MOSS: Any other nominations?

MR. LEO BEARMAN (Memphis): I second the nomination and move that nominations be closed and that Dave be elected by acclamation.

PRESIDENT MOSS: All in favor of electing Mr. Ballon by acclamation, signify by saying aye.

PRESIDENT MOSS: Mr. David Ballon is elected, and I am very grateful to him also for his fine work as the chief "high knocker" of the registration department for this convention.

MR. EDWARD KUHN (Memphis): Now, I may be out of order, but I do not want to overlook electing some other gentlemen. I want to place in nomination for honorary membership the names of Mr. Whitney North Seymour, President of the American Bar Association, Mr. Paul Carrington, President of the Texas Bar Association, Mr. Jackson P. Wright, President-Elect of the Missouri Bar, and Admiral Mott.

MR. BEARMAN: Mr. President, I have heard some rumors that since Mr. Seymour has been down in Memphis, that he has changed his name from "North" to "South". I think he ought to be granted his honorary membership under his correct name.

PRESIDENT MOSS: I have been around these Conventions a long time, and I always enjoy and profit by the visits of the American Bar Association's Presidents who speak to us, and we have had a number of visiting Presidents of the American Bar with us on former occasions. However, we have never had a more pleasing or better speaker than Mr. Seymour, and never more genial or congenial official visitors than Mr. Whitney "North and South" Seymour and his lovely wife, Lola. They are both elected.

And as for Mr. Jackson Wright, Mrs. Moss and I have also had the pleasure of being with him and his charming wife a great deal

during this Convention, and we have not in my memory had any finer visitors from that State. I want to say to you, without a chance of objection, he is duly elected an honorary member of this organization right now, and let us give him some applause.

Mr. Carrington is not here. I believe he had to leave early. I had the honor of going to the Texas Bar Convention last year in Houston as your representative, and if you have never been to a Texas Bar Convention and been entertained by those Texas lawyers, you just have never been anywhere or done anything. Mr. Carrington of the Texas Bar will certainly be elected an honorary member, as well as Admiral Mott.

Now, there is another matter which I believe should come up at this time. Mr. Weldon White has advised me that he wants to say something to us. Mr. White.

MR. WELDON WHITE: Mr. President and ladies and gentlemen of the Association, you have been extremely kind to me over the years in electing me to serve in various capacities representing the Tennessee Bar Association either actively in Tennessee or in representing the Bar Association as a delegate to the American Bar Association. I now serve each year as a delegate to the American Bar Association. That is, I represent the Association along with Mr. Frank Bratton, and you have recently done me the greater honor by electing me as the State Delegate to the ABA, which is elective, but as you know, the office is filled by the ABA representation in the State of Tennessee.

I want you to know, Mr. President, and ladies and gentlemen, I appreciate the honor very much, and it will be a great pleasure to be a part of the great family of Mr. Seymour, but Mr. President, I think it proper that I resign as Bar Association delegate of Tennessee, or East Tennessee Bar Association Delegate, because I should not hold two offices. Therefore, I submit to you, sir, my resignation as the Bar Delegate from the State Bar Association.

PRESIDENT MOSS: I have already fired and discharged Mr. White from one committee, as you heard me say this morning, so I suppose there is nothing we can or should do but accept his resignation as a Bar Delegate since he already is the State Delegate. As he explained, he automatically succeeded to that position when Mr. Kuhn, who was then the State Delegate, was elected a Director of the American Bar Association. There are two or three classes of delegates to the American Bar Association, as Mr. White explained. He is now the State Delegate, elected by ballots of the Tennessee members of the ABA. In Tennessee we have two Bar Delegates, the position which Mr. White has just resigned, and the other Bar Delegate is Mr. Bratton. They represent

this Association, and we elected them. We have another Delegate, the Assembly Delegate, Mr. Walter Armstrong, who is elected by the House of Delegates.

I think we should fill the vacancy created by the resignation of Mr. White at this time, and I shall now entertain nominations for that office.

MR. ERBY JENKINS: Mr. President.

PRESIDENT MOSS: Mr. Jenkins is recognized.

MR. ERBY JENKINS: At this time I would like to place in nomination to succeed Mr. Weldon White a Past President of this Association, a man who has been interested in bar work for many years, a fine lawyer and gentleman and one who will represent us well, Charlie Morgan.

PRESIDENT MOSS: Mr. Jenkins has nominated Mr. Charles G. Morgan of Memphis.

MR. EDWARD W. KUHN: I move nominations be closed.

MR. LLOYD ADAMS: I move that the nominations be closed and that Mr. Morgan be elected by acclamation.

MR. KUHN: I yield to Mr. Adams.

PRESIDENT MOSS: All in favor of closing nominations and electing Mr. Charles G. Morgan as one of our two Bar Delegates to ABA will now say aye. The ayes have it, and Mr. Morgan is elected.

Now, according to my schedule, my program and my memorandum, the business has all been done except to install Officers. I believe Mr. Frank Bratton, though, has a resolution which he wants to present, and I will be glad to recognize the gentleman at this time.

MR. FRANK BRATTON: I think I can talk loud enough from here. From the number of committee meetings that have been held on the ninth floor and from my general observation of the Convention I think that everybody has had a wonderful time. I move sir, that we go on record as extending our thanks and appreciation to the Memphis and Shelby County Bar Association for this fine and warm hospitality in the preparation of this Convention.

PRESIDENT MOSS: You will notice that I am applauding as you are, and I know that motion would be unanimously adopted. No one in the Association has enjoyed the hospitality and the help and work and assistance of the Memphis Bar Association more than I, and I am certainly grateful to them. It is a pleasure indeed for me to declare the motion made by Mr. Bratton unanimously carried.

Now, is there anything else that I have overlooked? Is there anything else anyone would like to bring up before we install officers?

MR. JAMES F. SCHAEFFER (Memphis): Mr. Chairman, I have a resolution which I would like to offer that was discussed by quite a

number of lawyers Friday. It has not been typed up formally, but it has been formally written out by our personnel previously and will be put in typewritten form if it is adopted. This resolution has been discussed, and most of those with whom we have discussed it have felt that it is worthy of the Association's consideration. We feel that it will be of benefit to future meetings of the Convention. I will read the resolution; it is not too lengthy.

PRESIDENT MOSS: It was not handed in to the Resolutions Committee?

MR. SCHAEFFER: No, sir, it has not been. The purpose of it has to do with combining the insurance section meeting with the plaintiff's section.

PRESIDENT MOSS: That will be referred to the Board of Governors; however, you may read it.

MR. SCHAEFFER: All right, sir. (Reading)

"WHEREAS, for the past several years this Association at its Annual Conventions has presented a program consisting of a division into separate sections of attorneys who principally represent defendants and/or insurance companies and attorneys who principally represent plaintiffs; and

"WHEREAS, this method of presenting a program of continuing education to lawyers has led to conflicts, detracting competition and complaints referable to objections to failure of achieving the optimum of value and advantage to lawyers who desire attending the two section meetings;

"NOW, THEREFORE, Be it Resolved that the Insurance Section and the Plaintiff's Section of the Tennessee Bar Association be and they are hereby combined into one single section to be known as The Negligence Section of the Tennessee Bar Association; and

"BE IT FURTHER RESOLVED, that the Chairmen of said sections be and they are hereby decreed to be and by these presents are declared co-chairmen of this now constituted Negligence Section of the Tennessee Bar Association; and

"BE IT FURTHER RESOLVED, that the Chairmen of all future annual Conventions of this Association be and they are hereby directed to set aside on the annual Convention programs at least two successive sessions to make available sufficient time to achieve more substantial results in the continuing education of lawyers."

We feel that if this is done, those lawyers who desire to avail themselves of this continuing education can derive benefit from the defendants' addresses and the advantages to be derived from both Sections. We do not feel too strongly about it except from the standpoint of enabling the Convention to plan the talents of outside speakers and make those

talents available to all lawyers so that there will be no conflict.

PRESIDENT MOSS: That is a matter in which I know we are all interested, and I think it is something that could be ironed out as to the time of the Section meetings, but the proper thing to do with it now is to refer it to the Board of Governors who have in their charge the matter of the Sections and calculating the time of meetings and to make this information that you recommend available to them, so that will be done. The resolution is referred to the Board of Governors.

MR. WELDON WHITE: Mr. President.

PRESIDENT MOSS: Mr. Weldon White is recognized.

MR. WELDON WHITE: We have all been captivated by the presence of Mrs. Whitney North Seymour. We have expressed our appreciation at his being here these three or four days with us, but you know he has a very fine and very attractive and very gracious wife. She came down here with him and has been down here throughout this entire Convention, and my wife had the pleasure of meeting and being with her. She is very charming, and I think we ought to convey to her through Mr. Seymour our appreciation and pleasure for her presence during this Convention. Now, I think Ed Kuhn wants to make some more comments.

MR. EDWARD KUHN (Memphis): Mrs. Seymour is already a member of the Mississippi Bar, and I think the Georgia Bar, so let us make her an honorary member in the Tennessee Bar Association.

PRESIDENT MOSS: That motion is adopted unanimously. I believe I have referred to Mrs. Seymour in speaking about both of them being such gracious visitors with us, and I know Mrs. Moss would join me in endorsing the sentiments expressed by Mr. White and Mr. Kuhn.

Now, I will ask the newly-elected Officers to come forward, and I want to present them to you. Will Mr. Fillauer of Cleveland, Mr. Sam Boaz — I know he is here — and Mr. S. Shepherd Tate, Stonewall Shepherd Tate, come forward? For the Board of Governors, Mr. Waterhouse, Mr. Forrester, and Mr. David Ballon.

Gentlemen, I just want to present to you your newly-elected Officers, Mr. Fillauer of Cleveland, Mr. Forrester of Pulaski, new members of the Board of Governors; Mr. Ballon, an old and new member of the Board of Governors, Mr. Sam Boaz, Vice-President for Middle Tennessee. Mr. Waterhouse is not here.

I am reminded to announce that Miss Bess Blake of Nashville has been elected President of the Women's Bar Conference, and Mr. William Willis of Nashville, President of the Junior Bar Conference.

I am asked to announce that pictures of the various banquets and events have been taken by professional photographers, and now are for sale by the photographer over here on the left. We have something

else to do here right now. The representative of Bobbs-Merrill Co. is going to give away something. Mr. Howard Bates is not here, but he has authorized us to draw a name, and the lucky one will get a set of Tennessee Code Annotated. Miss Mildred Lunn, please come up here and draw this lucky name. The winner has to be here, too, to win it. (Miss Mildred Lunn, Director of the Women's Bar Conference for Middle Tennessee, the drew the names of two persons not present, and then the name of Mr. T. R. Bandy, Jr., of Kingsport).

PRESIDENT MOSS: You know, it looks like Kingsport gets everything. Here I get Miss Mildred to do the honors, and she gives it to Kingsport again.

Now, is there anything else, Mr. Secretary, that we should do? I believe we ought to have a few words from Mr. Boaz and Mr. Fillauer, our Vice-Presidents. Would you like to say something to us. You know, just about a five-minute summary of the work of the Board for the last year would be in order.

MR. BOAZ: I have been most directly requested not to make a speech. I would like to thank all of you for this honor, and I look forward to working with Charlie Trabue and the President-Elect, "Alf" Taylor in the coming year.

PRESIDENT MOSS: Now, Mr. William Fillauer, the Vice-President from East Tennessee. If he is willing, we would like to see how he speaks and looks.

MR. WILLIAM K. FILLAUER (Cleveland): Thank you. I just want to thank the members here for electing me Vice-President for East Tennessee. The first thing that they told me was that we were supposed to have a meeting over there in the wintertime and I would be in charge of it. I know we all want to get away. We have a long way to go to get back to the mountains of East Tennessee, so we have to get away, and we are going to close this meeting. I say again I appreciate your electing me, and I will work with your President and the other Officers in any way I can. Thank you.

PRESIDENT MOSS: I believe I will change my mind for I know you would like to hear from one or two of the new members of the Board of Governors; so, Mr. Forrester, if you will come up and say a word or two.

MR. FORRESTER: I will let Dave do the speaking for me, but I just want to say thanks for the honor.

MR. DAVID BALLON: Thank you, Mr. President, and I yield to "Stonewall".

PRESIDENT MOSS: It is now my pleasure to present to you the newly-

elected Vice-President from West Tennessee, the Honorable S. "Stonewall" Shepherd Tate.

MR. TATE: Mr. President and members of the Association, to serve one's fellow lawyers in any capacity is a high honor, and indeed to be elected a Vice-President who will ultimately succeed to the office of President, to me is the highest honor. I accept this office with deep thanks, humility, and I appreciate the confidence that you have placed in me. I look forward with a great deal of pleasure to working with Charlie Trabue, Alf Taylor, and the other officers and members of the Board, and with you, and I promise you that I will do my best to uphold the high traditions and principles of the Tennessee Bar.

PRESIDENT MOSS: I ran Vice-President Alf Taylor away a little prematurely. I forgot he was one of the newly-elected officers. He is automatically now President-Elect, and I want to present him to you, and Alf, I know we will be glad to have a word or two with you.

MR. ALFRED TAYLOR: Having to travel some 600 miles back on beyond Raccoon Valley, I am not going to say very much this morning, but I do want to thank you for the confidence you have placed in me, and I want to try to do everything I can to further the aims of this Association and to try to follow in the footsteps of Bill Moss, who has done a magnificent job, and to help Charlie Trabue, who, I am sure, will do a similar fine job. Thank you.

PRESIDENT MOSS: Well, now, will Mr. Charles Trabue, Jr., come forward.

I have said to the Convention on at least twice yesterday morning and last night in the best style of expression that I could think of how very much I have appreciated your letting me serve as your President during the preceding year. It has been a busy year. I have had to sacrifice some time — I shouldn't say sacrifice, but I have spent some time in the very pleasant duties of this office. I surrender the office with a great deal of reluctance, although I will have the opportunity to resume the practice of law, but I will always look back on it as one of the happiest years of my life.

I now surrender the office to Honorable Charles C. Trabue, Jr., who is the first man in the history of the organization, I believe, to follow in the footsteps of his father, the distinguished lawyer of Nashville who 30 years ago was the President of this Association. Mr. Trabue, I surrender to you the ring which was handed to me, and I know you will wear it with honor. I wish you well and pledge you my full cooperation.

MR. CHARLES C. TRABUE, JR.: Let me see if this ring will fit. Bill, a little while ago Captain Murrah had quoted Fred Russell as saying

that nothing succeeds like a successor. I can think of no more difficult undertaking than to try to successfully follow in the footsteps of you and Erby Jenkins and many others, including my father, believing as I do that Tennessee lawyers are the finest people there are. I think that this is the highest honor that can come to anybody, and I am very grateful. I will do the very best I can this year, and I will do my best to serve in this position.

I do not think there is any further business, so I would like for the newly-elected officers and members of the Board of Governors to gather up front here immediately following the adjournment. It will not be a long meeting, but it will be an important meeting and we will be away in just a minute.

MR. EDWARD W. KUHN (Memphis): I think we should go on record as thanking the *Commercial Appeal* for the fine publicity, and the Peabody Hotel for the excellent service rendered us and make it a part of the record.

PRESIDENT TRABUE: I know that everybody here feels that same way, and that will be spread on the minutes.

MR. ERBY JENKINS: Mr. President, Bill Moss has done an outstanding job as President of this Association. He has spent a lot of time, and I think we should go on record as extending to him our deepest appreciation, and give him a rising vote of thanks for his services. (Standing ovation).

MR. WILLIAM MOSS: Thank you very much, gentlemen. I should say to you that I contacted Erby Jenkins and arranged for him to say that when I hired him to make the response to the addresses of welcome.

PRESIDENT TRABUE: If there is no further business we will stand adjourned. (Whereupon, the Convention was adjourned at 11:42 a.m., June 10, 1961.)

REPORT OF THE PRESIDENT

At this point in the 1932 convention of this Association in Nashville, after the addresses of welcome and the response, the President, a great Nashville lawyer named Charles C. Trabue, said:

> "That concludes the amenities of the situation. We now proceed without intermission to the heavier and more deadly item of the President's address."

Then our constitution prescribed an address by the President on subject of legislation enacted by the preceding General Assembly or advice on the subject to the next one. Now the requirement is that the President make a report. I have written three, and am not sure that I shall deliver any of these. The first draft was a report on my activities and the progress and achievements of the Association and its committees, during the year now closing. But that soon involved matters that started several years ago, and I composed another on the matters that have concerned my two immediate predecessors and their administrations, and so I broadened the document to cover a three year period. That would be logical, for you may recall that I was the first to be elected two years in advance of assuming the office of President, when the amendment to our by-laws so providing became effective in Memphis three years ago. And I have a word of praise for that system. The activities of this Association and the many problems which confront your governing board and officers have been increasing year by year. While Vice-President and President-Elect, under the leadership of Presidents Lon MacFarland and Erby Jenkins, I absorbed some degree of acquaintance and familiarity with the problems, responsibilities, — and privileges of the Presidency, — without which I would be only now beginning to learn, and might have to run for an endorsement term. I believe that I recall President Jenkins saying in his report last year that there are now such demands upon the President's time that it is almost a full time job.

My final decision, however, was and is to cover a period of thirty years, so as to set a good precedent for the next speaker, Dr. White, who will have to start his subject somewhere in the neighborhood of the Middle Ages. Do not be alarmed, for I shall touch only on the high spots.

The first convention of this Association I attended was in Jackson thirty years ago. Hon. Wardlaw Steele of Ripley was President, and to vary the monotony of having the West Tennessee Convention always in Memphis he invited the Jackson Bar to entertain the convention, which we were pleased to do. As I recall, the older Jackson lawyers

raised a fund of about $300.00, to which I may have contributed five dollars, to provide the lemonade of that age for the entertainment of the crowd of about 250 or 300 who attended. We had the meetings in the Supreme Court Room of the old Court House, and it was never overcrowded. We now have almost that many every year at the West Tennessee Mid-Winter meeting. Our membership has increased from about 600 then to approximately 2,750 at this date. This is an increase of about 100 during the past year, a tribute to the fine work of our Membership Committee under the Chairmanship of John Thomason of Memphis. I remember well, also, the humorous and interesting response to the welcome addresses in that 1931 convention by another silver-tongued orator from East Tennessee, the Hon Sullins Stuart.

From then until now the Tennessee Bar Association has progressed not only in number of members, but in increased activity and interest in matters essential to the improvement of our system of administering justice, so gradually that we who have come along with this progress do not realize it unless we indulge in retrospection. Then we convened one and one-half days, Friday and Saturday morning, with a speech Friday morning, maybe another in the afternoon, a banquet speech, and committee reports and election on Saturday morning. Since the section system started about six or seven years ago, when the Hon. Edward Kuhn filled this position, we have been convening three days, with much of the time devoted to instructive speeches and panel discussions on various topics of the law and practice. And last year we had that fine four day meeting at Gatlinburg.

Another forward step was taken in the administration of my fellow country lawyer from West Tennessee, Lloyd Adams, when we obtained an office and headquarters in Nashville and employed a full-time Executive Secretary. Also at that time our group and hospitalization insurance program was started, and within the past three years we have added to it the group major medical and life insurance programs, under the leadership of Harry Phillips, Chairman of the Insurance Committee.

I must not fail to mention another landmark of the past – the beginning of the sectional Mid-Winter meetings about twelve years ago, under the leadership of President Raymond Denney. I think we will all agree that these meetings have done more to increase the interest of the lawyers of Tennessee in the organized bar than anything else that has taken place in the eighty years of the Association's existence.

I mention these events of the past simply as a prelude to the main thesis of this report, not that they are by any means the only significant incidents in our history, but simply to emphasize that while our develop-

ment has been gradual, our objectives have been sound and along fundamental lines.

Another committee that deserves commendation for a progressive step this year is the Committee on Legal Education and Admission to the Bar, under the Chairmanship of Thomas Wardlaw Steele of Nashville. There was a time when anyone could be licensed to practice law in Tennessee who could pass an examination. Then, step by step, it has been required that the applicant must be a graduate of a law school, requirements as to the faculty and library of the law school have been made, then a high school education became a condition, then two years of pre-law college education, now three before entering Law School.

This committee has had several meetings and I have met with them. Striving toward full compliance with the American Bar Association's recommended standards, our committee with the Board of Governor's approval has recommended to the Supreme Court a revision of Rule 37, Section 5, which clarifies the requirement of three years of study toward a bachelor's degree to mean that the candidate must have completed at least three-fourths of the work acceptable for the bachelor's degree with a scholastic average equal to that required for graduation; more clearly defines the requirement as to a staff of competent instructors, and, what is to me of most importance, recommends that a more thorough and complete investigative procedure be followed to determine the qualifications and fitness of applicants from the standpoint of character. To that end we have recommended that the Board employ a fulltime Executive Secretary. We hope the Supreme Court and the Board of Law Examiners will adopt these recommendations. It is now an old and well known aphorism that the three main requisites of a lawyer are learning, diligence and integrity, but the greatest of these is integrity. Lawyers have traditionally been leaders in governmental affairs and have been the stabilizing influence of this nation. My own opinion is that a good, sound education in the humanities and the fundamentls of cultural study required for a A. B. or B. S. Degree are much more important in the preparation for a legal career than the technical study of the law.

It is proper that while on the subject of legal education, we make note of the unhappy recent news that Cumberland University Law School must close its doors. In fact it graduated its last law class one week ago. Cumberland has furnished Tennessee and the nation many of their finest lawyers, statesmen and leaders in all walks of life, and it saddens us to realize that this great law school has now passed from the scene.

We have not always succeeded in our efforts at reform in the first, or second, effort. I recall very well spending about a week in Nashville

during the legislative session of 1941 as a member of a special committee of this association bent upon persuading the legislature to increase the compensation of our judges so that the increases could be effective with the new terms of office beginning in 1942. We had no slight degree of success, but finally some increases were made for the term which began in 1948, and there have been subsequent increases, so that now our judges receive, before taxes, about twice their salaries of thirty or forty years ago. We have again failed in an effort to obtain further increases, to the level of at least the average of other states, and to amounts commensurate with the continued advance in cost of everything that affects all segments of our economy.

Realizing that no increases could be effective until the beginning of the next terms of office, September 1, 1966, we proposed a measure to increase the salary of only the appellate judges, members of the Supreme Court of Tennessee, to $22,500, the same as a judge of the United States District Court, and the Court of Appeals to $17,500 each. This would have involved an increase in the State's budget of only about $85,000 per year. Since the budget would be affected in no way until 1966, it was our considered judgment that our proposal might be easily adopted, and that equitable increases for Circuit Judges, Chancellors and Attorney Generals would easily follow during the legislative sessions of 1963 to 1965. What we feared happened. A bill was introduced to increase all judges and attorney-generals, calling for a budget increase of $300,000 or more. Neither measure passed. However, Senate Joint Resolution No. 13 was adopted, providing for an interim study by the Legislative Council concerning many phases of the judicial branch of the state government, including specifically the matter of salaries. The Legislative Council have already begun their study. Certainly this organization will cooperate with them in every way possible, and it is my belief that we may take credit for starting something this year that will be concluded satisfactorily before judges and attorney generals take office on September 1, 1966.

Another subject which has concerned us and about which the Association has made serious but unsuccessful campaigns at least once each decade is the matter of procedural reform. You will recall that in the convention last year you unanimously endorsed the recommendation of the Committee on Judicial Administration, Remedial Procedure and Law Reform, concurred in by the Judicial Conference, that this Association sponsor a legislative enactment that would improve the present laws in reference to the power and authority of the Supreme Court to make rules of practice and procedure from time to time as the Court might desire. The existing laws on the subject are embodied in TCA Sections

16-513, 16-514 and 16-627. The committee's report, which was approved, recognized that local rules of procedure vary greatly in the trial courts throughout the State, that changes in procedure should be made from time to time to meet changing conditions in the practice, and that the method of leaving it entirely to the legislature is unwieldy and inadequate. I worked on this subject with a special committee of the Judicial Conference, of which Chancellor Ceylon Frazier of Memphis was Chairman. I wish to thank and commend him at this time for his painstaking labor in drafting a measure that would have done the job. We were not successful in obtaining passage of this bill. Perhaps we waited too late to introduce both this and our bill to increase the salaries of the Judiciary. We should have known that in the last two or three weeks of a legislative session there is not time for deliberate consideration that such important measures deserve.

Your committees thought that Tennessee should follow in a general way the plan or method of the Supreme Court of the United States in adopting the Federal Rules, changing them from time to time as changing circumstances and conditions warrant. It was not our plan to advocate substitution of the Federal Rules in their entirety for our own rules of practice and procedure, but it was the system, that is, able lawyers and judges appointed by the Supreme Court and working with the Court, recommending necessary or proper changes that we had in mind. I was present in the Tennessee Senate on the day the rule making measure was introduced by Senator Robert Taylor of Nashville. He and Senator Albert Rickey of Memphis were the only members of the Senate, a third of whom were lawyers, to give the measure any substantial support. I had explained the purpose of our proposal to the members of the Judiciary Committees of both Houses at a dinner the evening before, and had referred to the system followed by the Supreme Court of the United States. When the measure was debated on the floor of the Senate, one of the senators referred to the fact that we would have the Supreme Court of Tennessee follow the Supreme Court of the United States, and stated he was opposed because he did not like anything at all about the Supreme Court of the United States. That is understandable, although not a very logical or plausible reason for postponing action indefinitely by reference to a committee.

It is my recommendation that our Liason Committee with the Judicial Conference and other appropriate committees of the Association continue to work toward a simplification and more uniformity in our rules of trial practice. Juries and litigants should not have to wait while lawyers spar about non-essential, trifling matters of procedure before solving problems involving the property, rights or liberties of litigants.

A lawsuit is primarily for the purpose of solving problems and difficulties of laymen, and is not a contest between their lawyers or a race to see which can first set a trap or find a pitfall into which his adversary might tumble. We should recognize it is our place, and duty as lawyers, to improve and make more efficient the administration of justice and to help the courts coordinate their functions in a proper way with the business life of the country. Judge Brandeis said that the law has a tendency to lag behind the facts of life.

Workmen's compensation commissions have been established in many states because the courts were not handling such cases promptly and efficiently. Arbitration agreements and administrative bodies have taken from the courts many matters that involve the attainment of justice simply because of the courts delays.

Many years ago Honorable John J. Parker, Federal Judge and then Chairman of the American Bar Association's Committee on Improving the Procedure of the Courts, said that courts ought not to waste time on questions of practice and that a trial should be an inquiry into truth, "in which the machinery of justice will operate so quietly and efficiently that it will be noticed no more than the running of the motor on a well equipped automobile. The purpose of a trial is to arrive at justice, and that purpose is largely frustrated if too much attention must be paid to the way in which the wheels go round."

In closing, I wish to commend two other committees, the Committee on Public Relations under the Chairmanship of Leo Bearman, and the Committee on American Citizenship and Law Day, of which Lucius Burch is Chairman. Both have been quite active, especially in reference to Law Day. The importance of our taking advantage of Law Day as an appropriate means of calling attention of the public to our system of government and the role of the Legal Profession is realized more and more each year. This year lawyers spoke to many schools and civic clubs throughtout Tennessee on the subject of liberty under law and our system of government.

Referring again to the statement of my predecessor that the increased activities of this Association now make such demands upon the President's time that it is almost a full time job, I admit that I have not been in position to give the task my full time, but I have given it much of my time and all of it at times. For the opportunity to do my best in your behalf I now express my thanks to you and all members of the Tennessee Bar Association, especially to my own friends in Jackson and Memphis. They have cooperated in every way throughout the year. Committees have been working here for months in planning this

Convention, and I do not believe that the lawyers of Memphis could have worked any harder for one of their own number than they have for me. It has been a busy year but one of the most pleasant since I began the practice of law, and I shall always be grateful to you for letting me serve. I repeat what I said when taking office last June at Gatlinburg. To be President of this great Association is the highest honor that any lawyer in Tennessee can receive from his fellow lawyers.

WILLIAM P. MOSS

REPORT OF SECRETARY-TREASURER

The financial condition of the Tennessee Bar Association is shown by a financial statement forwarded to the Association on August 31, 1961, by John S. Glenn and Associates of Nashville, Tennessee. The statement and letter of transmittal are as follows:

> Gentlemen: We have examined the statement of cash receipts and disbursements of the Tennessee Bar Association for the year ended June 30, 1961.
>
> Cash receipts were traced into the depository from duplicate deposit slips without further verification. Cash disbursements were verified from cancelled checks and other supporting data.
>
> Cash in bank was verified from statements furnished by the depository and satisfactorily reconciled to the balances reflected on the statement of cash receipts and disbursements.
>
> Respectfully submitted,
> John S. Glenn and Associates
> CERTIFIED PUBLIC ACCOUNTANTS

Statement of Cash Receipts and Disbursements for the Year Ended 6-30-61

Cash in Bank July 1, 1960		$20,604.18
Receipts		
Dues	$16,814.75	
Group Insurance	3,532.33	
Advertising — Tennessee Lawyer	1,001.08	
Interest on Savings Account	405.00	
Miscellaneous	175.00	
Total Receipts		21,928.16
Total to be Accounted For		$42,532.34
Disbursements		
Salaries	$13,202.80	
Payroll Taxes — Net	245.47	
Rent	1,774.12	
Telephone	1,045.79	
Supplies and Equipment	2,077.44	
Postage	1,242.88	
Tennessee Law Review	5,000.00	
Tennessee Lawyer	1,277.46	
Legislative Bulletin	696.16	

Auditing	550.00	
Press Clippings	286.02	
Officers Traveling, Convention, and Other Expenses	2,708.34	
Mid-Winter Meeting	386.03	
Grievances	373.16	
Dues and Contributions	269.50	
Service Contracts	125.93	
F.E.L.A. Investigation	1,000.00	
Miscellaneous	1,069.85	
Total Disbursements		33,330.95
Cash in Bank June 30, 1961		(1) $ 9,201.39
(1) Cash in Third National Bank Regular Account	$ 4,101.39	
Cash in Home Federal Savings Account	5,100.00	
Total		$ 9,201.39

REPORT OF COMMITTEE ON AMERICAN CITIZENSHIP AND LAW DAY

Your committee reports that it has been active in the discharge of its assigned duties.

The principal emphasis in our work has been upon Law Day, as nationally sponsored by the American Bar Association, and upon Law Week which is sponsored by the local associations in several of the larger cities in the state. The committee believes that the observances carried out in connection with these events furnish one of the best possible opportunities to advise the citizens of the inestimable value of the concept of government under law and of the importance of the profession as servitors of that concept and tradition.

The programs and activities carried out in many parts of the state would be too extensive to narrate in the report but some of the more promising projects which have been carried out will be briefly mentioned. It should be remembered that all of these have been carried out with funds raised locally, there having been no expenditure whatever of the association's funds in connection therewith.

In many places, attention has been initially directed to Law Day or Law Week by a proclamation by the mayor of the municipality. Thereafter, it is kept before the public by billboard advertisements, by poster displays, public transportation advertisements, by radio and television spot announcements.

Exercises conducted or sponsored include mailing pieces to ministers; essay contests conducted in senior high school classes on such subjects as, "Why I Am Glad I Live In A Land of Law"; the establishment of a speakers' bureau, furnishing speakers to civic and luncheon clubs; articles upon legal subjects carried in the daily press as a public service; conducted tours of the courthouse; mock trials; and the holding of banquets and honorary meetings for distinguished members of the local association, such as those who have practiced for more than fifty years. All are practices that have been successfully tried in various localities. As might be expected, the more extensive programs have been carried out in the larger cities and not all of the foregoing activities are adaptable to the smaller communities but many of them are suitable for enactment anywhere. The programs of the larger bar asociations not only indirectly benefit but directly benefit the smaller centers that are within reach of the daily papers, TV and broadcasting stations located at the larger points.

Very successful programs have been carried out in Memphis, Jackson, Knoxville, Nashville, Elizabethton, and Martin.

It is the consensus of the committee that accumulated experience establishes the wisdom of the program which was first suggested in a general way by the American Bar Association some years ago. It provides one opportunity for calling to the attention of the entire population of the importance of the legal profession in the preservation and advancement of the liberties of the people. As the American Bar Association has increasingly recognized the importance of this activity, it is our feeling that the state association should do likewise and that, perhaps, some modest provision might be made in the budget, at least to the extent of obtaining manuals, literature, and mailing pieces from the American Bar Association for use by committee members. We believe that the legal profession should not overlook any successfully demonstrated method for the improvement of public relations and for the enhancement of the stature and prestige of the lawyers throughout the state.

Respectfully submitted,
LUCIUS E. BURCH, JR., *Chairman*

REPORT OF COMMITTEE ON CONSTITUTION AND BY-LAWS

Your Committee on Constitution and By-Laws respectfully reports as follows:

1. Your Committee was requested to advise if any changes in the Constitution and By-Laws should be suggested.

2. No proposals for changes have been received from any source.

3. This Committee makes no recommendations for changes at this time.

4. We believe that you are in good shape constitutionally.

Respectfully submitted,
JOHN H. TIPTON, *Chairman*

REPORT OF COMMITTEE ON CONTINUING LEGAL EDUCATION

The Committee on Continuing Legal Education of the Tennessee Bar Association came into existence in June of 1959. George W. Morton, Jr. served as first Chairman. He stated the objectives of the Committee then as being: first, to establish a permanent program of Continuing Legal Education; and second, to sponsor specific programs.

The 1960-1961 Committee has continued an attempt to carry out the specific objectives set out by Mr. Morton. In spite of the fact that members of the Committee met in Nashville during February of 1961 for the purpose of determining how a state-wide program could be

set up and although many ideas were proposed and an effort was made to work out a program with Dean Wade of Vanderbilt, no state-wide program has been established.

In this regard, it is the suggestion of the Committee that four, or even possibly five, divisions of the State be made with Continuing Legal Education Co-Chairmen in each section charged with the responsibility of carrying out this program.

With reference to the second objective, however, great strides have been made and many specific programs have been presented to the Bar. The Knoxville Bar Association's Continuing Legal Education Committee meets twice a month and has succeeded in establishing a creditable Continuing Legal Education effort.

The Memphis and Shelby County Bar Association's Forums Committee has continued a weekly luncheon program with outstanding results.

The Junior Bar Association under the leadership of Lloyd Adams, Jr. likewise has presented programs of an educational nature similar to those established in Knoxville and Memphis.

Though we are most disappointed that we have failed to meet the number one objective set out by our predecessors, we suggest that the two basic objectives of the Committee remain the same and that our successors continue this very worth-while program.

Respectfully submitted,
ROBERT EDWIN LEE, *Chairman*

REPORT OF INSURANCE COMMITTEE

Your Committee on Insurance respectfully reports as follows:

The five insurance programs sponsored by the Tennessee Bar Association are:

1. A combined group hospitalization and life program;
2. A group health and accident program;
3. Life Insurance program;
4. A group major medical plan; and
5. A group plan of professional liability insurance available for firms and individual attorneys who are members of the Association.

Improved coverage was provided in the group hospitalization program as of February 1, 1961, providing increased benefits to meet mounting costs of hospitalization.

1

PILOT LIFE GROUP HOSPITALIZATION AND LIFE INSURANCE PROGRAM

This program, which is underwritten by the Pilot Life Insurance Company of Greensboro, North Carolina, makes group hospitalization

and term life insurance available to members of the Association, their dependents and employees, in the following amounts:

	Members Under 60	*Members Over 60*	*Employees*	*Dependents*
Life Insurance	$5,000.00	$2,500.00	$1,000.00	From $500 to $1,000 depending on age
Hospitalization	15.00 per day	15.00 per day	10.00 per day	12.00 per day
Maximum Additional Allowances for Other Costs	150.00	150.00	100.00	120.00
Surgical Expense	300.00	300.00	300.00	300.00

The above schedule reflects increased benefits which became effective on February 1, 1961, including the following: Hospital per diem for members increased from $10.00 to $15.00 per day, for dependents from $8.00 to $12.00 per day, and for employees from $6.00 to $10.00 per day; maximum allowance for other costs increased for members from $100.00 to $150.00, for dependents from $80.00 to $120.00, and for employees from $60.00 to $100.00; surgical benefits increased from $200.00 to $300.00 in all categories. The revised plan also provides for reimbursement for ambulance expenses, not to exceed $20.00 per continuous period of confinement, and revised maternity benefits.

This program is administered by the Executive Secretary of the Bar Association under the control of three trustees appointed by the Association, and the Association receives from the company a fee of five per cent of the gross premium.

Pilot Life reports the following statistics with respect to this program as of February 1, 1961:

1. Number insured as of 3-1-60	225 firms with 637 insureds
2. Premiums paid during life of plan	$479,334.00
3. Premiums paid from 6-1-60 to 2-1-61	42,132.00
4. Health claims paid from 6-1-52 to 2-1-61	204,801.00
5. Health claims paid from 6-1-60 to 2-1-61	18,789.00
6. Death claims paid from 6-1-52 to 2-1-61	167,000.00
7. Death claims paid from 6-1-60 to 2-1-61	15,000.00
8. Total reserves accumulated 6-1-52—6-1-60	13,805.00

Pilot Life has agreed that a maximum percentage of premiums will be retained by the company for administration, and all premiums in excess of these figures will be returned to the Association, according to

a schedule which is set forth in detail in the 1960 report of your Committee, published in 28 Tennessee Law Review, page 69.

No member's policy under this plan can be cancelled so long as he remains a member of the Tennessee Bar Association and within the covered age group, unless the company elects to cancel the master policy.

2

HEALTH AND ACCIDENT INSURANCE PROGRAM INSURED BY COMMERCIAL INSURANCE COMPANY OF NEWARK, N. J.

This plan is administered by the firm of Smith, Reed, Thompson and Ellis, Nashville Trust Building, Nashville, Tennessee. As revised in 1959, the plan provides monthly indemnity to members under 70 years of age, up to a maximum of five years for any one accident or sickness, ranging from $200 per month to $500 per month, except that for disability commencing on or after age 60 due to illness, the monthly indemnity is payable up to a maximum of two years for any one sickness. The insured has a choice between two types of coverage, one of which would provide accident benefits beginning on the first day and sickness benefits beginning on the eighth day, or from the first day of hospital confinement, whichever occurs first; and the other at a substantially lower premium, provides accident and sickness benefits beginning on the 91st day. This plan also includes $1,000 for accidental death and dismemberment benefits, and optional hospital benefits.

The revision of this plan which was made in 1959 was designed to make the plan more attractive to younger lawyers, as compared to the health and accident coverage formerly in effect, and to provide lower premiums for lawyers in the lower age group. A number of older lawyers remained insured under the group health and accident plan as originally written in 1941, which is also administered by the same agency.

The report of Commercial Casualty Insurance Company for the 12-month period beginning April 1, 1960 through March 31, 1961, shows an encouraging increase in participation in this plan, as demonstrated by the following figures:

Policies in force April 1, 1960		572
Policies lapsed:		
Non-payment of premium	20	
Not a member of Association	2	
Retired	1	
Deceased	4	
Age	3	30

New Policies Written	127	
Net Increase in Enrollment		97
Policies in Force March 31, 1961		669
Total Number of Claims		75
Total Claims paid during this period		$40,035.54

3

LIFE INSURANCE PROGRAM WRITTEN BY NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY

At the inception of this plan on January 15, 1960, each member of the Association 69 years of age and under was offered $10,000.00 of convertible and renewable term life insurance, whether individually insurable or uninsurable. After the closing of the initial enrollment period, any member of the Association can obtain this coverage, by furnishing evidence of insurability. Supplemental policies of renewable and convertible insurance to age 70 in multiples of $5,000.00 up to a maximum of $40,000.00 are available to individual lawyers who have enrolled under the plan, provided evidence of insurability satisfactory to the company is submitted with the application.

The right to renew is guaranteed under all term policies at the attained age premium rates, up to the policy anniversary nearest the insured member's age 70, provided the insured continues as a member of the Bar Association. All term policies issued under this plan can be exchanged and converted at any time prior to the age 70, at the option of the insured, to any standard form of participating life or endowment policies currently issued by the company at the insured's then attained age, or at the insured's age at the date of original issue.

Each individual policy is noncancellable, except for failure to maintain membership in the Bar Association. Either the company or association could cancel the plan in the future, but such cancellation would not affect any existing policy. Premiums on new insurance cannot be increased during the first five years of the plan, but can be increased by the company after that date. Such increase would not apply to any existing policy.

Each policy is participating and dividends go to the insured. Each policy provides for double indemnity up to age 65. In the event of permanent and total disability occurring prior to the age 60, the premiums are waived during the period of disability. In the event of permanent and total disability, the term policy is automatically converted to a whole life policy at the end of ten years of disability at the insured's

then attained age, with continuance of waiver of premiums thereafter so long as such disability remains. A member can change the beneficiary at any time and can assign the policy or transfer ownership to another person. Each policy contains standard settlement options. A total of 806 attorneys were enrolled under this plan as of March 31, 1961. The total premiums collected during the previous twelve months was $123,727.13, and total claims paid aggregated $100,000.00. The total amount of additional coverage purchased during this period was $710,000.00. A total of $210,000.00 was converted from term insurance to ordinary life or other type of policy contract.

4

MAJOR MEDICAL PLAN OF UNITED STATES LIFE INSURANCE COMPANY

This plan is written through Galbreath Insurance Agency of Memphis and is designed to supplement ordinary hospitalization and medical insurance so as to take care of protracted illnesses or injuries of the catastrophe class. The plan is available to members of the Association and their wives, as well as dependent, unmarried and unemployed children between 14 days and 22 years of age, inclusive. The expenses actually incurred up to $10,000.00 for each accident or illness are covered as follows:

After the insured has paid a certain initial amount, according to his choice of deductible, the plan pays 80 per cent of the next $3,750.00, and then pays 100 per cent of the balance of the expenses, provided the total aggregate sum paid by the company does not exceed $10,000.00. The member has a deductible choice of either $250.00 or $500.00. The coverage continues until the member attains the age of 70. Premium rates vary according to the age of applicant.

This plan is noncancellable as applied to individual insureds. No member's policy can be cancelled so long as he remains a member of the Tennessee Bar Association and within the covered age group, unless the company elects to cancel the master policy.

Participation of attorneys in this plan has proved to be disappointing. As of March 31, 1961, only 136 members are covered, a gain of only two during the preceding 12 months. Of this number, 106 lawyers purchased coverage for both themselves and their families. Total premiums received from April 1, 1960, through March 31, 1961, amounted to $8,152.13. Total premiums received under the plan from its inception through March 31, 1961, amounted to $14,889.74. Total benefits from April 1, 1960, to March 31, 1961, amounted to $677.44, and a total of $1,702.16 has been paid under the plan to date.

5

PROFESSIONAL LIABILITY INSURANCE WRITTEN BY ST. PAUL COMPANIES

This plan for professional liability or "malpractice" insurance written by the St. Paul Fire & Marine Insurance Company has been in effect since early 1958. This program makes available professional liability coverage from a minimum of $5,000.00 to a maximum of $100,000.00 to any member of the Bar Association. The plan can be purchased from any agent of the company.

As of March 31, 1961, the company had 407 policies in effect, covering 159 firms and 497 individual lawyers. Since the inception of the plan, the company has collected premiums of $61,344.00 and has incurred losses of $39,701.00. Each professional liability policy is cancellable in accordance with its terms, 30 days' notice of cancellation being necessary in lieu of the 10 days' notice customarily specified in this type of coverage.

CONCLUSION

The Insurance Committee is of the opinion that all five of the foregoing plans provide coverage in areas that are needed by the lawyers of Tennessee, and that all of these plans should be received with increasing support and enthusiasm on the part of the members of the Bar.

Respectfully submitted,

HARRY PHILLIPS, *Chairman*

REPORT OF THE INTER-PROFESSIONAL CODE COMMITTEE OF THE TENNESSEE BAR ASSOCIATION

The only inter-professional code having official status with the Tennessee Bar Association at the present time is that code adopted by the Tennessee Bar Association and the Tennessee State Medical Association. Predecessor committees, membership on which somewhat overlaps the present committee, spent a great deal of time in numerous meetings with a similar committee from the Tennessee State Medical Association in an effort to iron out some of the inter-professional problems existing between the two professions and to come up with a set of ground rules which the respective committees could recommend to the respective state associations for adoption and the code was ultimately adopted. At the outset of this administration a request was made for any complaints concerning this inter-professional code or any suggestions or constructive criticism of said code to be channeled to the Committee. Your Committee is pleased to report that it has received no complaints of reported violations of the Inter-Professional Code and no criticisms of it, and

your Committee believes that the code is serving the purpose for which it was enacted satisfactorily.

Recently a suggestion was channeled to the Committee by the Honorable William P. Moss, President of the Tennessee Bar Association, suggesting that the Committee explore the possibility of developing an Inter-Professional Code with accountants and certified public accountants, with one of the purposes of such code being to undertake to define the fields of the respective professions. Since By-Law Provision VI (7) states:

> "This committee shall work with comparable committees of other professional associations, which by their nature must work frequently with the legal profession in evolving codes of conduct in their inter-professional relations,"

it was felt that this Committee had the authority to do an investigation and some such investigation has been done. The Committee points out, however, that since this Committee is about to go out of existence with the new administration taking office, that it would be impossible to hold enough meetings of committees from the respective professions to reach an agreement, if such agreement can be reached, on a code, that could be recommended to this association. It is believed that committees from the Tennessee Bar Association, as well as representatives of public accountants and certified public accountants, should contain committee members representing the various geographic locations of the state. Past experience indicated that in the development of the Inter-Professional Code between the Tennessee Bar Association and the Tennessee Medical Association it took many months of work and required several meetings before tentative agreements could be reached by the respective committees as to what they could recommend to their respective state associations. It is, however, recommended that the new committee further investigate the problem and make recommendations back to the Tennessee Bar Association Membership.

Respectfully submitted,

GEORGE T. LEWIS, JR., *Chairman*

REPORT OF COMMITTEE ON JUDICIAL ADMINISTRATION, REMEDIAL PROCEDURE AND LAW REFORM

The Committee on Judicial Administration, Remedial Procedure and Law Reform respectfully reports that, following the 1960 Annual Meeting of the Tennessee Bar Association and the adoption by that Association of the report and recommendation of the predecessor of this committee, the present committee accepted as a mandate the recommendation of its predecessor and as adopted by the Association to

the effect that the Association sponsor in the 1961 Tennessee legislature, enactment of legislation which would specifically vest in the Supreme Court rule making power for all of the courts in Tennessee. This thereupon became not only the primary but the sole objective of the present committee.

Accordingly, your committee, after considerable correspondence and investigation, formulated a bill to be introduced in the State Legislature to accomplish these purposes, in the form of amendments to Sections 16-513, 16-514, and 16-627 of the Tennessee Code. This bill provided that §16-627 should be repealed, and that §16-513 and §16-514 should be amended to read as follows:

> 16-513 Rules promulgated by Supreme Court. — The Supreme Court may, from time to time, adopt, promulgate and publish rules to regulate the procedure, practice and pleading in the circuit, chancery and superior criminal courts for the purposes of simplifying same and of promoting the speedy determination of litigation upon its merits. Such rules shall not become effective until so declared by the Supreme Court. However, nothing in this section shall be construed to vest in the Supreme Court power to abrogate, suspend or modify any statute of substantive law. The Supreme Court is authorized to appoint an advisory commission, whose duty it shall be to study the administration of justice in the said courts, and to advise the Supreme Court, from time to time, respecting desirable changes. No compensation shall be paid any member of the Supreme Court for such services. Nothing in this section shall be construed to deprive the circuit, chancery or criminal courts of power to formulate their own rules, supplementary to and not inconsistent with those so promulgated.
>
> 16-514 Rules by circuit, chancery and superior criminal courts. —The circuit, chancery and superior criminal courts may make all such rules of practice as may be deemed expedient, consistent with law, and with such rules as may be made by the Supreme Court, and may revise as often as thought proper, the rules by it so made.

This bill was referred by your committee to the Committee on Legislation, which undertook to introduce it in the 1961 session of the Tennessee Legislature. However, when the bill was introduced, it encountered such opposition in the Legislature that on the recommendation of the President of the Association and the Legislative Committee it was withdrawn, so as not to endanger other acts being sponsored by the Association in the Legislature. Your committee therefore regretfully reports no progress on the mission assigned to it.

Your committee recommends, however, that efforts to obtain legislation of this type be continued, with a view to the re-introduction of such legislation in the 1963 Tennessee Legislature. In view of the fact that the coming year is not a legislative year, your committee further

recommends that the Tennessee Bar Association during that year conduct an educational and informative program in regard to the benefits and advantages of legislation of this type, so that when these bills are re-introduced in the 1963 session of the Tennessee Legislature, they will meet with a more favorable reception.

WALTER P. ARMSTRONG, JR., *Chairman*

REPORT OF COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR

The Committee on Legal Education and Admission to the Bar of the Bar Association of Tennessee, having met in Nashville on February 9, 1961 with a quorum present, and having reviewed and considered the present rules of the Supreme Court of Tennessee regarding licensing of attorneys in the Courts of this State does hereby recommend to the Board of Governors of the Bar Association of Tennessee that the present Court Rules, and particularly Rule 37, Sec. 5 of the Supreme Court Rules, be revised and amended so as to, (1) define what is meant by "at least three years of study" which is required in the present Rules before an applicant commences the study of law, and (2) define what is meant by "a staff of competent instructors" which is required by the present Rules of approved law schools.

The Committee has drafted and recommends a revised Rule which will accomplish the recommended changes in the present Rules. This revised Rule which is the present Rule 37, Sec. 5, with additions or changes therein indicated by underscoring, is as follows:

"5. The applicant shall file with the Board 30 days before taking the examination as part of his application, satisfactory evidence that prior to beginning the study of law he had completed with a scholastic average equal to that required for graduation, at least three years of study and at least three-fourths of the work acceptable for the bachelor's degree, in a college on the approved list of the Southern Association of Colleges and Secondary Schools or the equivalent regional accrediting association or the National Commission on Accrediting; also a certificate from the dean or supervising authority of the school of law in which he is enrolled, that the school is accredited by the American Bar Association or is approved by the Board of Law Examiners and that the applicant has completed all the requirements for graduation, or that he has the average required for graduation and will have the number of credit hours required for graduation by the date of the bar examination. If the latter type of certificate is furnished, a supplemental statement by the dean or other supervising authority must be made showing

completion by the date of the examination of all the requirements for graduation, or (2) if not accredited, that the said applicant has completed three years full time study of law covering generally the subjects mentioned in Section 6, with a scholastic average equal to that required for graduation, and that an adequate library has been at all times at his disposal. The executive secretary of the Board of Examiners shall have authority to investigate and report to said Board as often as may be desirable, as to the extent of the course of study required for graduation and whether or not any school has failed, or is failing, to teach the subjects required and set forth in Section 6, and whether or not the instructors are sufficient in number and are competent. He shall also report to the Board any school refusing to furnish any information requested by the secretary upon a matter deemed germane to the observance of these rules. Upon receipt of such information the Board shall notify the Court, who may, after a hearing of all parties, take such action as the facts disclosed may justify.

All applicants to take the examination must have completed a course of instruction in and graduated from a regularly organized law school which has the approval of the Board of Law Examiners. By an approved school is meant one that is accredited or approved by the American Bar Association and which teaches the subjects required in section 6, or one which requires its students to pursue a course of study of three years' duration of the subjects mentioned in Section 6, and devote substantially all of their working time to their studies, and which requires that prior to entering school said students shall have completed three years of college work, and at least three-fourths of the work acceptable for the bachelor's degree, all in a college on the approved list of the Southern Association of Colleges and Secondary Schools or the equivalent and not less than twenty-seven calendar months must have elapsed after the date the applicant begins the study of law and before the date of award of the first law degree. In addition to providing an adequate library for the use of students, it must have a staff of competent instructors who give their personal attention to the education needs of all students. A "staff of competent instructors" shall consist of at least three full-time instructors, giving their entire time to the school. It shall not be conducted as a commercial enterprise, and the compensation of any officer or member of its teaching staff shall not depend on the number of students or on the fees received. The Board of Law Examiners shall be the judge of when any school has met the foregoing requirements and should be approved or disapproved. It is authorized to make such other and additional require-

ments, with the Court's approval, as in its judgment the educational needs of students may require.

Any regularly organized part-time law school, holding evening classes exclusively, shall be approved by the Board of Law Examiners (1) when it is properly staffed with at least three full-time instructors giving their entire time to the school and with a sufficient number of part-time instructors who are lawyers of known ability and integrity and who have been enrolled as members of the Supreme Court bar in actual practice for at least three years; (2) when suitable classrooms and other needed facilities are provided, including an adequate library, which must be available to students at all reasonable hours; (3) when it requires three years of college work and the satisfactory completion of at least three-fourths of the work acceptable for the bachelor's degree, as herein prescribed as prelegal education before enrollment of the student; (4) when it requires at least 1080 class hours (of at least 50 minutes each) as a minimum course of study for graduation and covering four years from the date of the student's enrollment.

The Board is authorized to make such additional requirements as in its judgment the educational needs of the student body may require, and which shall be subject to the Court's approval. The school shall not be conducted as a commercial enterprise, and the compensation of any officer or member of its teaching staff shall not depend on the number of students or on the fees received.

The Board of Examiners shall be the judge of when any such part-time school has met the foregoing requirements and is entitled to be approved.

No correspondence course will be accepted by the Board of Law Examiners as any part of an applicant's legal education.

Any school which advertises in its catalogue or otherwise that it is approved by the Supreme Court shall not be recognized by the Board of Law Examiners as other than a substandard school and will be so classified, and disapproved.

Any school (whether full time or part-time) which permits the enrollment of students without first having obtained the written approval of the Board of Law Examiners shall be classified as a substandard school. Its graduates shall be denied permission to take a bar examination?"

The above recommended additions and changes are in accordance with American Bar Association's Recommended Standards. The Committee will continue its study of other ABA Recommended Standards and the desirability of seeking their adoption in Tennessee.

The Committee further recommends that the Board of Governors of the Bar Association of Tennessee petition the Supreme Court of

Tennessee to revise its present Rules in accordance with the above recommendations.

As a part of this report the Committee adopts as its finding the contents of a letter from W. Neil Thomas, Esq., President of the Board of Law Examiners of Tennessee, setting forth certain comparative statistics regarding the experience of the Board of Law Examiners with applicants for admission to practice in the Bar exams given in 1960 and in 1959. Said letter is attached hereto as an exhibit to this report.

The Committee further recommends that the fee required to be paid by each applicant for admission to practice be increased to an appropriate amount and that the additional revenue to be obtained therefrom be used by the Board of Law Examiners of Tennessee to employ and pay a full-time Executive Secretary under the authority now granted it so to do in Rule 37, Sec. 14 of the Supreme Court Rules; and, further, that the Board of Law Examiners adopt a more thorough and complete investigative procedure to determine the qualifications and fitness of each applicant to be admitted to practice similar to the procedure now being employed and used by the Memphis and Shelby County Bar Association, copies of which are attached hereto as an exhibit to this report.

Respectfully submitted,
THOMAS WARDLAW STEELE, *Chairman*

BOARD OF LAW EXAMINERS
OF TENNESSEE

February 8, 1961

Mr. Thomas Wardlaw Steele
White, Gullet, Phillips & Steele
Seventeenth Floor
Life & Casualty Tower
Nashville 3, Tennessee

Dear Tom Ward:

I am not going to be able to make it to the meeting of the Committee on Legal Education and Admission to the Bar on February 9, because a Circuit Court case which I had set here for February 7 cannot start now until February 8, which will take it over into the 9th. However, I do have some thoughts concerning the subject matter of the meeting, for whatever they may be worth.

First of all, I have gone over the results of the bar exams given in February and June, 1960, and February and June, 1959. The statistics set forth hereafter are unofficial, but I believe they will be quite accurate. Analysis of these tests shows that of those taking the tests who graduated from A.B.A. approved Tennessee law schools, 177 passed and 21 failed. Of those taking the tests who graduated from non-A.B.A. approved Tennessee law schools, 57 passed and 59 failed. Of course, several of those who failed were those who were taking the exam for the second or third time. I have checked back again, and I find that in the case of the applicants who graduated from Tennessee A.B.A. approved law schools, 12 of the 21 who failed were "retakes." In the case of the applicants from non-A.B.A. approved Tennessee law schools, 27 of the 59 who failed were "retakes."

Obviously, the disparity in the degree of success in passing the bar exam between those graduating from A.B.A. approved and those graduating from non-A.B.A. approved schools cannot be based entirely upon the quality of the law schools themselves. The ability of the personnel attending the two types of schools undoubtedly plays a heavy role in leading to these results. However, is it entirely fair to the law student in the non-A.B.A. approved school to let him spend four years of hard work at night when about one out of every three will be unable to pass the bar exam even after completing all of this law school work?

I note that your notice of January 17 specifies that the Committee will consider recommendation of the adoption of certain A.B.A. standards for all law schools in Tennessee. This could be accomplished in one of two ways: Either by requiring that all law schools approved by the A.B.A., or by requiring that all law schools meet either all or some specified portions of the standards set up by the A.B.A.

The former recommendation would appear to me to have more merit, principally because it would put the job of investigating the qualifications of the law schools and policing them after they first meet the specified standards under the supervision of the A.B.A., which has the facilities already established to handle the job. The latter method would leave the job of investigation and supervision up to the Board of Law Examiners. I personally do not believe with the limited number of three persons on the Board, all of whom are actively practicing attorneys, that the Board can, or could be expected to, adequately investigate and police all of the law schools in the state to see that they meet the requirements of the A.B.A. For example, I do not know of any Board member, including myself, who would be able to take

the time from his practice to count the volumes in the law libraries of each of the law schools to see that they had 12,500 volumes, all of which were of current material.

However, if it is considered desirable not to try to go the entire way to the requirement of A.B.A. approval, I wonder if it would not be more desirable to pick out one or two of the most vital of the A.B.A. qualifications and insert that as one of our qualifications. For example, if the A.B.A. requirement of three full-time faculty members were adopted as one of our requirements, this might be a step along the road. It would seem to me desirable to make the whole trip, rather than just one step, but if that is all that could be accomplished at the present time, I would be in favor of taking that step.

I am sorry that I will not be able to meet with you, and I hope that these random remarks may be of some assistance to you.

Very truly yours,
W. NEIL THOMAS, JR.

REPORT OF COMMITTEE ON MEMBERSHIP

The Tennessee Bar Association Committee on Membership respectfully reports as follows:

Although the final figures for the Bar Association year ending 1961 are not complete as of the writing of this report, it is obvious that the year 1960-1961 represents the largest percentage increase in membership for any similar period in the history of the Association. As of May 1, 1961, the Tennessee Bar Association Membership Roll lists 2,632 attorneys. Since April 15, 1960, 128 new members have been admitted to the Association. During the same period 26 were lost through death which makes a net increase in membership of 102 members. In addition, at the time of the writing of this report there is in progress a membership campaign addressed to the approximately 60 attorneys who successfully completed the Tennessee Bar examination, as announced on the first of April, 1961. It is anticipated that a large percentage of these newly licensed lawyers will become members of the Association; such additional memberships will make the year 1960-1961 even more successful than can now be accurately reported.

The significance of this record-breaking membership increase is even more noteworthy when viewed in the light of the fact that there was no general membership drive, new insurance program, or other inducements offered to encourage association with the organized Bar of Tennessee during the year. However, continuing efforts have been made in all

areas where it was felt that gains in membership might be expected, especially among the newly licensed attorneys and senior students in the various colleges of law throughout the state. Every attorney receiving a license to practice law in Tennessee in the year 1960-1961 has received either a personal letter from a member of the Committee or the Committee Chairman and in addition many have been personally solicited by Committee members. Over 100 applications attached to personal correspondence have been distributed by Committee members.

In addition, the Committee has worked through the Junior Bar Conference of the State Bar Association and by the assistance of its able president, Lloyd Adams, Jr. of Humboldt, Tennessee, has made arrangements for membership applications to be distributed among the senior graduating students of every law school in the State. Much appreciation and credit is due to the Committee Members as a whole and to the officers of the Association, the officers of the Junior Bar Conference, the Board of Governors, and the executive secretary.

All of which is respectfully submitted.

JOHN J. THOMASON, *Chairman*

REPORT OF COMMITTEE ON OBITUARIES AND MEMORIALS

Your Committee on Obituaries and Memorials has been furnished with a list of lawyers who have passed away since our last meeting. Fifty-four attorneys have closed their cases both for the plaintiff and the defendant, and gone to meet the Great Judge for their last and final decision. Thirty-one were members of our Association, and twenty-three were non members.

Many of those who have passed away served with distinction as Judges, Chancellors, Congressmen, and public officials and distinguished members of the Bar. Many of them, and their outstanding services, are well known to all members of us. Others of them were more renowned in their home committees, but were loved and will be missed by all who knew them. We who have been privileged to continue to live, may we measure up to and carry forward the precepts of honor, justice, integrity and public service which they have left to us.

It is fit and proper that we here in the activities of this Convention for a moment pay tribute to those who have gone before us. Let us again be thankful that we have been privileged to have known and been associated with these our departed brothers. The list is as follows:

Members:	*Date of Birth*	*Date Adm. to Prac.*	*Date of Death*
D. S. BEELER Rutledge	1889	1927	9/24/60
JOHN M. BOGGAN Memphis	1888	1913	10/8/60
J. P. BUCHANAN Nashville	1903	1931	3/14/61
RUFUS CAMPBELL Ripley	1903	1925	11/12/60
ANDREW CARPENTER Nashville	1889	1915	3/1/61
WIRT COURTNEY Franklin	1889	1911	4/6/61
E. BRALY CRAIG Lewisburg	1913	1934	6/24/60
LINDSEY M. DAVIS Nashville	1902	1925	11/23/60
J. J. DOLAN Memphis	1904	1931	1/22/61
N. D. ELLIS Nashville	1897	1926	9/2/60
J. S. FLETCHER Chattanooga	1879	1905	3/27/61
HOMER A. GODDARD Maryville	1891	1914	12/25/60
J. L. HARRINGTON, JR. Jackson	1913	1940	4/16/61
WALTER HOYLE Chattanooga	1905	1930	12/7/60
JOHN F. KILLEBREW Nashville	1902	1933	11/10/60
MALCOLM L. MCLEAN Chattanooga	1901	1924	12/11/60
E. F. MCCLURE Memphis	1898	1921	1/20/61
J. D. MOSBY Nashville	1890	1915	5/29/60
JOHN A. OSOINACH Memphis	1890	1913	8/24/60
ROBERT E. PARK Dyer	1910	1939	7/7/60
RAYMOND R. RAMSEY (Brig. Gen.) Chattanooga	1905		10/2/60
JAMES B. REAGAN Jamestown	1888	1931	9/24/60
B. CARROLL REECE Johnson City	1889	1931	3/19/61
R. B. ROBERTSON (Chancellor) Sevierville	1885	1911	5/17/61
E. R. SLOAN Madisonville	1899	1947	3/9/61
CHARLES A. STAINBACK Somerville	1879	1901	4/15/61
LOWELL W. TAYLOR Memphis	1895		1/15/61
D. A. VINES, (Judge, Circuit Court) Johnson City			6/20/60
HOMER B. WEIMAR, (Judge, Criminal Court) Nashville	1899	1933	9/24/60

Non-Members of the Association:

MISS JOSEPHINE L. BARRY	Memphis
D. CLYDE BOGART	Sevierville
ISHAM P. BYROM	Shelbyville
JAMES G. CATE	Cleveland
WILLIAM H. CROWELL	Shelbyville
H. J. DENTON	Dayton
R. C. DONALDSON, SR.	Tiptonville
E. W. ESSARY, SR.	Lexington
SAMUEL H. FORD	Chattanooga
A. V. GREENE	Sneedville
I. C. HEWGLEY	Knoxville
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JAMES W. HOLMAN	Fayetteville
WINSTEAD JOHNSON	Memphis
ROBERT M. JONES	Knoxville
W. H. LINDSEY	Lawrenceburg
PHILIP MACDONALD	Nashville
JOHN D. MOSBY	Nashville
ED C. PARKER	Shelbyville
NEAL G. SPECER	Lenoir City
S. J. THORNBURG	Knoxville
CHARLES H. WALKER	Lynchburg
EDWARD D. WHITE	Johnson City

REPORT OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

This committee has handled a variety of matters during the year, although no disbarment proceedings were instituted or disciplinary measures of a formal nature taken.

Several complaints were brought to the attention of the committee from various sources, some of which were handled in cooperation with local bar associations in accordance with the Rules of Procedure of the Tennessee Bar Association.

All of the grievances which were reported were resolved by handling directly with the attorney concerned or by explanatory and cooperative measures with the complaining persons.

On several occasions, members of the committee were called upon to give opinions on ethical questions. Also, members of this committee worked in cooperation with committees of local bar associations in instances where such cooperation was appropriate.

The committee gave consideration to a proposed act to amend Sections 29-309 and 29-310 of the Tennessee Code Annotated, the history of which has been reviewed in 27 Tennessee Law Review 110 and 28 Tennessee Law Review 83. Full reports were made by members of the committee, and it was decided that no recommendation calling for legislation of any kind at this time would be made to the Board of Governors. This conclusion was reached mainly in the light of the reinstatement of Rule 40 by the Supreme Court of Tennessee, and the decision of that

Court in the case of *Ex Parte Chattanooga Bar Association,* 330 S.W.2d 337, empowering the chancery courts to make general investigations of alleged unethical practices and for a hearing before special masters with subpoena powers. The strengthening of the disciplinary powers of the Bar as a whole by these developments is manifest.

This committee has no specific recommendations for legislation or other proposals at this time.

Respectfully submitted,
JAMES M. MANIRE, *Chairman*

REPORT OF COMMITTEE ON PUBLICATION

The Committee on Publications respectfully report that it has examined the present agreement between our Association and Tennessee Law Review Association, Inc., and investigated the possibility of making a more favorable contract with another publisher or group. It was, and is, apparent that no other group is so well situated to furnish the services needed as is the Tennessee Law Review Association, Inc.

It has offered to renew our present contract on the same terms and conditions, that is, mail each of our members a copy of its four issues at a cost of 50c per copy, including the publication of the proceedings of our annual convention. In no event, however, would the Tennessee Bar Association be required to pay in excess of $5,000.00. At the same time, we are requested to eliminate from our mailing list all non-active members.

Your Committee on Publications feels that this is the best contract which can be made and is entirely fair from our standpoint. It, therefore, recommends that the offer of the Tennessee Law Review Association, Inc., as stated, be accepted.

O. B. HOFSTETTER, JR., *Chairman*

REPORT OF COMMITTEE ON PUBLIC RELATIONS

The Committee on Public Relations met on Saturday, March 8, 1961, at the offices of the Tennessee Bar Association in Nashville.

It became soon apparent from the discussion among the members of the Committee, that there was great concern throughout the State, not only among those attorneys associated directly with the problems of public relations, but among numerous other members of the Tennessee Bar, because the status of our profession, in the eyes of the laymen, was at an undesirably low ebb.

Analysis of the problem revealed three basic sources which brought about this diminishing status:—

(1) Ignorance and misunderstanding on the part of laymen concerning the duties, responsibilities, and role of the attorney; and

(2) A lack of effort or concern on the part of some members of the Bar to dispel this ignorance and misunderstanding; and

(3) Isolated incidents of unethical practice by members of the Bar which received an exceptional amount of publicity in the press.

It was the thought of the Committee that sources (2) and (3) could be eliminated or substantially curbed by a more intensive effort on the part of law schools throughout the state, both full time schools and night schools, to intensify the teaching and particularly the discussion of the Canons of Professional Ethics, and problems of professional obligations to clients.

It was the Committee's feeling that too often the young attorney entering the practice of law looks upon the field of law as a trade by which to make a living, rather than a learned profession with its accompanying high standards and obligations to the public. It was agreed however, that the ultimate responsibility lay with each individual attorney, it being realized that even the smallest instance of unethical practice tended to reflect unfavorably upon the entire profession because of the unusual amount of publicity which ordinarily accompanied such acts.

In this connection, many members of the Committee expressed dissatisfaction with what upon occasion seemed unfair handling by the press of these instances, it being pointed out that similar situations involving members of other professions, seldom, if ever, found their way into the newspapers.

The chief item of business before your Committee was a positive effort to deal effectively with what has been described above as the first "source" which has been resulting in the diminishing status of the legal profession among laymen, that is, the laymen's ignorance of the law, and the lawyer in the community.

The Committee then was of the definite opinion that the Association should hire a full time professional public relations man to engender a public relations campaign, and to sell the role of the attorney to the general public.

The Committee further suggested the running of a weekly legal column in the daily newspapers in Tennessee, each column to discuss a particular legal problem which might frequently arise among laymen, explaining the existing holdings in the area. The column would be written by attorneys, and then reworked by the public relations man

to make it appealing to the public. Such a column would always close with the *caveat* that it was written to inform and not to advise, and that all legal problems should be referred to an attorney in order to achieve the most accurate advice possible.

A discussion was brought up by members of the Committee in respect to a "Clients' Security Fund". Such a fund would be used to reimburse laymen who were monetarily damaged by the unethical practices of their attorneys.

Some of the members of the Committee pointed out that such a fund had been successfully maintained in some states, and the existence of such a fund would show the laymen that the legal profession was prepared to and was desirous of protecting the laymen from misconduct within the profession.

This suggestion was vigorously opposed by other members of your Committee, it being argued that the very existence of the fund implied to the laymen that such an implication was misleading and unnecessarily prejudicial to the very purposes for which the Committee was striving.

The discussion on this subject was merely from the public relations viewpoint, and it was felt that until the matter of a security fund was presented to the Association, that such a discussion was premature.

Your Committee sensed that no time had ever been more propitious than the present to educate the public to the legal profession. It was recognized that there is existing among the public an intense interest, indeed a fascination, with the lawyer and the legal profession. The recent popularity of movies, books and television programs, which for the most part, present the attorney in a favorable, even heroic light, attest to this, and your Committee was hopeful that a public relations campaign at this time would achieve the desired results.

Your Committee is painfully aware however, that the final responsibility for good public relations must inevitably lie with the individual attorney himself; that each of us is placed in the position of being an advertisement for our own profession; and that no amount of activity by a professional public relations man can succeed without sincere and continuous effort on the part of every member of our profession to abide by the Canons of Professional Ethics, to realize that it is a profession and not a trade, and to feel and reflect the pride in being a member of a profession which has deserved and which must continue to deserve the respect of all men.

Respectfully submitted,

LEO BEARMAN, *Chairman*

REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE OF THE LAW

The attention of this Committee has been directed by the Executive Secretary of the American Bar Association Committee on Unauthorized Practice of the Law to an activity that seemingly is wide spread in the Southern and Western States particularly, that is, the publication by the various State Agricultural Extension Services in cooperation with the United States Department of Agriculture of farm leases and rental contracts between landlords and tenants, together with "Suggestions" for their use. Also considerable attention is devoted to this subject in the pamphlet they circulate entitled "Rental Arrangements for Progressive Farming." There is a discussion of the legal phase of these contracts and advice given thereon. The authors are not lawyers and no where is there any reference to a lawyer or to seeking legal advice.

The Committee of the Texas Bar Association met with the Agricultural Extension people advising them that this project constituted the Unauthorized Practice of Law and after discussion an agreement was reached that the Extension Service would cease to advertise and distribute these forms and that in the future they would work in this line in conjunction with the State Bar. This Committee has appeared before the Board of Governors of the Tennessee Bar Association requesting authority for the new Committee on Unauthorized Practice of the Law of the Tennessee Bar Association to make the necessary investigations, entering discussions and seek to reach a satisfactory agreement in line with the result achieved by the Texas Bar Association. This Committee recommends that pursuant to this authority the new Committee investigate and enter into discussions with the proper officials of the Tennessee Agricultural Extension Service.

Spreading areas of specialization has increased the problem of lawyers in combating unauthorized competition. A number of these activities would present border line cases, technically, as to whether these parties were engaging in the unauthorized practice of the law. Specifically, this is true with certain of the title companies, insurance adjusters and others. Some are tenacious in acquiring and holding a client, our client, perhaps, exclusively; specifically, non-lawyer tax specialists.

We will continue to be confronted with the usual practice of small banks, small realtors and rural magistrates writing deeds, wills and other legal instruments; and offering legal advice and counsel.

Our problem is this encroachment and our question what is the best remedy. Although salutory, enforcement by legal proceedings has not always proven satisfactory.

It is the opinion of this Committee that perhaps a better remedy would be an increased effort in education and public relations. We believe and recommend that this can be best acquired by a close liason between the Committee on Unauthorized Practice of the Law and the Committee on Public Relations. Education by publicity, with talks before civic clubs and articles in lay magazines and newspapers can remind the public of the fallacy and danger of accepting services and advice on legal matters from non-lawyers.

After conferences between the two Committees, the Committee on Public Relations joins in these specific recommendations with this Committee and on this phase of this report, it is agreed that this shall be considered a joint report of the two Committees.

J. D. SENTER, JR., *Chairman*

REPORT OF UNIFIED BAR COMMITTEE

This Committee of eleven, composed of J. Malcolm Shull, Elizabethton; Jewell K. Watson, Knoxville; Aubrey F. Folts, Chattanooga; G. Nelson Forrester, Tullahoma; Weldon B. White, Nashville; M. E. Queener, Columbia; John J. Ross, Savannah; Allen J. Strawbridge, Dresden; Richard H. Allen, John S. Porter, and John W. Apperson, Memphis, has been unable to have any meetings of the whole committee as the members are too widely scattered. Most all confering has been by correspondence. Eight members are strongly in favor of a unified bar, one is strongly against, one is doubtful, and one has not been heard from.

Many fine articles have appeared in the *Tennessee Law Review* on the subject and many committee reports have been made over the years. Two recommended articles are by Dean Wicker. The first is in Vol. 21, No. 7, April 1951 at page 708 and the second is in Vol. 23, No. 5, December 1954 at page 457. For all doubters and uninformed, these articles are recommended. Dean Wicker shows that the English bar has been unified for centuries and that North Dakota became the first state to unify its bar in 1921. Today, 29 states, including Alaska, Puerto Rico and the Virgin Islands, have unified bars. Some by rule of court and some by statutes giving the court the authority to make rules. Dean Wicker lists the following five principal reasons for favoring the unification of our bar: (1) conservation of membership manpower hours, (2) a larger and more reliable source of income for association purposes, (3) a better means of supervising the entire bar, (4) more productive legislative programs, and (5) a more effective organization for dealing with unauthorized practice.

Many reports of committees have been filed from time to time. Two recommended for reading are: The 1954 Committee report headed by W. E. Quick as Chairman in Vol. 23, No. 5, December 1954 Law Review to which a proposed act and set of Rules and Regulations is appended. The 1955 Committee report, Vol. 24, No. 1, December 1955 Law Review in which Chairman Thomas Wardlaw Steele reports on efforts to inform the lawyers on the subject, the poll taken, and the petition to the Supreme Court, which was unsuccessful.

A case is now pending in the U.S. Supreme Court involving the constitutionality of the Wisconsin bar unification and, until that case is decided, we do not recommend any active proceedings for Tennessee. However, should the Court sustain the Wisconsin unification, then we recommend:

That the incoming President instruct the legislative committee of the Association to prepare an act to be passed by the 1963 legislature along the lines suggested by the 1954 committee, except that it shall provide that all laws in conflict shall be superseded. This is in order to nullify Chapter 54 of the Acts of the 1955 General Assembly which provides:

> "That no person shall be granted or denied the license or right to practice law in Tennessee because he or she is not a member of any lawful club, association or guild."

That the Unified Bar Committee to be appointed by the incoming President be authorized and directed to organize a campaign to be carried on during the year 1962 intensively in every county in the State by personal calls on all attorneys in an effort to educate them on the advantages of a unified bar; that sufficient funds be allocated for the purpose. Too many lawyers will not take the time to acquaint themselves with this subject and they must be convinced by personal interviews.

That a capable speaker from one of the unified bar states be requested to speak on the subject at the 1962 convention.

Respectfully submitted,
JOHN W. APPERSON, *Chairman*

REPORT OF COMMITTEE ON UNIFORM STATE LAWS

Upon appointment, this Committee sought to ascertain what Uniform Laws had been approved by the National Conference of Commissioners on Uniform State Laws which had not been adopted in Tennessee. It was found that, through the effective action of prior Tennessee Bar Association Committees on Uniform State Laws, and of the Commission

For Uniform Legislation, appointed by the Governor under T.C.A. 4-901 and which at the time of this Committee's appointment was composed of Messrs. Walter P. Armstrong, Jr., Miller Manier, and Dean Grissim Walker, there had already been adopted in Tennessee practically all of the Uniform Laws of significance with the exception of the Uniform Commercial Code.

The Tennessee Commission For Uniform Legislation recommended to the Eighty-Second General Assembly for adoption the following Uniform Acts:

1. Uniform Testamentary Additions to Trusts Act.
2. Uniform Divorce Recognition Act.
3. Uniform Facsimile Signature of Public Officials Act.

The Uniform Testamentary Additions to Trusts Act was adopted and will appear as Public Chapter No. 303. The other two failed to pass. The Uniform Gifts To Minors Act was amended so as to include a definition of "Court" (Pub. Chap. No. 232).

A Resolution was introduced whereunder the Legislative Counsel Committee would be directed to study the Uniform Commercial Code and make recommendations with respect thereto to the Eighty-Third General Assembly, but this Resolution was not adopted. The Uniform Commercial Code is a tremendous work prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Law, the various Sections and the comment thereon extends over 700 pages. It covers a wide field and supplants the Uniform Laws on Negotiable Instruments, Warehouse Receipts, Sales, Bills of Lading, Stock Transfers, Conditional Sales, and Trust Receipts.

As of this time, the Uniform Commercial Code has been enacted in eleven States. It has not been adopted in New York, where it is under study by a legislative committee. It is anticipated that, when that occurs, adoption in many States will quickly follow, and it is thought inevitable that, sooner or later, it will be and should be adopted in Tennessee.

R. H. SPRAGINS, *Chairman*

TENNESSEE BAR ASSOCIATION SPECIAL COMMITTEE ON FELA INVESTIGATION

This Committee continued the work began in 1959 and 1960 throughout 1960 and 1961. After the members of this Committee had been appointed, we took some positive action in Knoxville by subpoenaing witnesses in September 1960 and obtained the testimony of witnesses behind closed doors. This continued all throughout the fall up until

the middle of December at various intervals. The bulk of this testimony is from FELA cases arising from injuries on the Southern Railway System. The members of this Committee in this area have been appointed as Special Masters to hear all of these witnesses and in accordance with the provisions of the original bill, there are two Special Masters sitting whenever any witness is heard.

We have had assistance from the American Association of Railroads insofar as obtaining information is concerned. Information is now being compiled on FELA cases on the other railroads operating in East Tennessee and these cases will be investigated in the very near future. After all the witnesses have been heard, a resume of the testimony will be presented to the Chancellor for his decision. In the event the Chancellor finds that there have been laymen guilty of chasing FELA cases, we expect to file injunction suits against them. In the event the Chancellor finds that certain non-resident attorneys have been guilty of chasing FELA cases, we expect to file an original bill before the Supreme Court of Tennessee requesting that comity be denied to these attorneys, and that the results of our investigation and the Chancellor's decision be forwarded to the respective local Bar Associations. In the event the Chancellor finds that local attorneys are guilty, that information will be furnished to the Grievance Committee of the local Bar Association requesting that immediate disciplinary action be taken.

It was the hope of the Special Masters here that we would be able to conclude the investigation in the Knoxville area some time this spring but for various reasons there have been delays. We do hope that we can complete the questioning of all witnesses in the very near future and submit a resume of their testimony to the Chancellor for a decision.

The Chattanooga Bar Association requested that we wait for a while until its investigation had an opportunity to make some progress and it should not be too long before some action should be taken there. At the present time, the members of this Committee in Memphis are checking with the Memphis and Shelby County Bar Association about beginning an investigation of FELA cases in that area and it is hoped that definite plans will be completed at the meeting of the Bar Association there in June.

This work is slow and it has to be done when the members of the Bar can spare time to do it. All in all we believe that we have had a successful year.

Respectfully submitted,
F. GRAHAM BARTLETT, *Chairman*

TENNESSEE BAR ASSOCIATION
ROSTER OF OFFICERS AND MEMBERS
1961-1962

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* Denotes expiration of term

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Chester C. Coker, Lafollette, Tennessee
John M. McCloud, 101½ Central Avenue LaFollette, Tennessee
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Harry B. Brown, Jellico, Tennessee
Herman K. Tramell, Jr., Jellico, Tennessee
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Dick L. Johnson, Dungan Arcade Bldg., Elizabethton, Tennessee
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Dan M. Laws, Jr., Seiler-Hunter Bldg. Elizabethton, Tennessee
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Jack R. Musick, Riverview Building, Elizabethton, Tennessee
Roy C. Nelson, 202-5 Arcade Building, Elizabethton, Tennessee
Miss Hallie K. Riner, Carter Co. Bank Bldg., Elizabethton, Tennessee
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Claiborne County

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Boyd Mason, Tazewell, Tennessee
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Cocke County

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Edward F. Hurd, Merchants & Planters Bank Bldg., Newport, Tennessee
J. Kenneth Porter, Porter Building, Newport, Tennessee
James C. McSween, Jr., Newport, Tennessee
Donald M. McSween, Minnis Bldg., Newport, Tennessee
Fred L. Myers, Newport, Tennessee
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Conway Maupin, Greeneville, Tennessee
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F. H. Parvin, Greeneville, Tennessee
Herbert R. Silvers, Greeneville, Tennessee
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James P. Anderson, Jr., 1112 Volunteer Building, Chattanooga, Tennessee
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Sam J. McAllester, Jr., 809 James Bldg., Chattanooga, Tennessee
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J. Thomas Mann, 115 Provident Bldg., Chattanooga, Tennessee
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John W. Martin, James Building, Chattanooga, Tennessee
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Harry J. Joyce, Wartburg, Tennessee
J. H. McCartt, District Attorney General, Wartburg, Tennessee
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Walter Harwood, 515 Nashville Tr. Bldg., Nashville, Tennessee
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William Waller, American Tr. Bldg., Nashville, Tennessee
William Waller, Jr., American Tr., Bldg., Nashville, Tennessee
Edmond J. Walsh, Commerce Union Bank Bldg., Nashville, Tennessee
James F. Walsh, Jr., 4th Flr., American Tr. Bldg., Nashville 3, Tennesssee
Charles H. Warfield, 602 American Tr. Bldg., Nashville, Tennessee

Robert J. Warner, Jr., 605 Commerce Union Annex Bldg., Nashville 3, Tennessee
Lowe Watkins, Commerce Union Bank Bldg., Nashville, Tennessee
Thos. G. Watkins, 718 Stahlman Bldg., Nashville, Tennessee
J. B. Watson, Jr., 405 Stahlman Bldg, Nashville 3, Tennessee
A. E. Wehby, 200 Union St., Nashville, Tennessee
Ben West, Nashville, Tennessee
Wilson N. West, 312 Commerce Union Bank Bldg., Nashville, Tennessee
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Charles H. White, 17th Floor, Life & Casualty Tower, Nashville 3, Tennessee
Edward C. White, 107 DeMoss, Nashville, Tennessee
Jack P. White, 525 Stahlman Bldg., Nashville 3, Tennessee
Raymond C. Whiteaker, Jr., 310 Green Hills Office Bldg., Nashville 12, Tennessee
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William H. Woods, 600 American Tr. Bldg., Nashville 3, Tennesssee
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Ravil J. Connor, Hermitage, Tennessee
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DeKalb County

Edward L. Jennings, Main St., Liberty, Tennessee
Herschel N. Capshaw, RFD #1, Smithville, Tennessee
McAllen Foutch, Herndon Bldg., Smithville, Tennessee

Dickson County

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William W. Hall, Jr., Ray Bldg., Dickson, Tennessee
Clark Leech, P.O. Box 28, Dickson, Tennessee
Robert L. Littleton, Box 307, Dickson, Tennessee
Ray Stuart, Dickson, Tennesssee
J. B. White, 217 Ray Bldg., Dickson, Tennessee
Henry Newton Williams, 304 High St., Dickson, Tennessee

Franklin County

Walter M. Haynes, Winchester, Tennessee
Joe R. Hickerson, Winchester, Tennessee
Pat Lynch, Winchester, Tennessee
L. F. Stewart, Winchester, Tennessee
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L. G. Thompson, Winchester, Tennessee
Henry B. Scott, Box 266, Sewanee, Tennessee

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Thomas F. Dunlap, Box 911, Pulaski, Tennessee
Chas. E. Hagan, Pulaski, Tennessee
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Joe W. Henry, Jr., 10 South 1st Street, Pulaski, Tennessee
D. Clayton Lee, Pulaski, Tennessee
Tom W. Moore, Union Bank Bldg., Pulaski, Tennessee
D. R. Wade, Jr., Pulaski, Tennessee

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Hickman County

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James R. Brown, Centerville, Tennessee
Ira H. Rich, 110 Murphree St., Centerville, Tennessee
Claude B. Stephenson, Centerville, Tennessee
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Houston County

Roy H. Barnes, Erin, Tennessee
William C. Knott, Jr., Erin, Tennessee
William H. Nabors, Erin, Tennessee

Humphreys County

Noble L. Freemon, Jr., Waverly, Tennessee
Bill T. Murray, Waverly, Tennessee
William J. Peeler, Turner Bldg., Waverly, Tennessee
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Jackson County

Robert Lee Johnson, Gainesboro, Tennessee

Lawrence County

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Howard Irwin Carrell, Lawrenceburg, Tennessee
Lloyd Comer, Pulaski St., Lawrenceburg, Tennessee
Elmer L. Cooke, Massey Bldg. West Side Square, Lawrenceburg, Tennessee
John G. Crews, Lawrenceburg, Tennessee
Howard P. Freemon, Lawrenceburg, Tennessee
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Aaron D. Lindsey, Lawrenceburg, Tennessee
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Lewis County

William C. Keaton, Hohenwald, Tennessee

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William C. Sugg, Lincoln County Bank, Fayetteville, Tennessee
Fred I. Womack, Fanning Bldg., Fayetteville, Tennessee

Macon County

James W. Chamberlain, Lafayette, Tennessee
William P. Smith, Sullivan-Smith Bldg., Lafayette, Tennessee
Guy E. Yelton, Lafayette, Tennessee

Marshall County

Knox G. Bigham, Lewisburg, Tennessee
Malcolm R. Brandon, Second Ave. So., Lewisburg, Tennessee
Shelby L. Haywood, 101-A East Commerce St., Lewisburg, Tennessee
James M. Jones, Jr., Lewisburg, Tennessee
William N. Lloyd, General Sessions Court, Lewisburg, Tennessee
Henry Grady Wade, Lewisburg, Tennessee
John L. Wallace, Cathey Bldg., Lewisburg, Tennessee
Curtis R. Waters, 206 West Commerce St., Lewisburg, Tennessee

Maury County

William B. Cain, Middle Tennessee Bank Bldg., Columbia, Tennessee
J. Shelby Coffey, Jr., Brown Bldg., Columbia, Tennessee
Jerry C. Colley, Middle Tennessee Bank Bldg., Columbia, Tennessee
Robin S. Courtney, 810 S. Garden St., Columbia, Tennessee
William House Dale, Dale Bldg., Columbia, Tennessee
Beverly Douglas, Jr., Middle Tennessee Bank Bldg., Columbia, Tennessee
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R. L. Harris, Jr., 104 West 7th St., Columbia, Tennessee
Thomas E. Humphrey, Jr., 806 So. Garden St., Columbia, Tennessee
Sam D. Kennedy, Box 291, Columbia, Tennessee
Ross Love, General Sessions Court, Columbia, Tennessee
Lon P. MacFarland, Columbia, Tennessee
Henry C. McCall, 812 S. Garden St., Columbia, Tennessee
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M. A. Peebles, Brown Bldg., Columbia, Tennessee
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Hugh T. Shelton, Jr., Columbia, Tennessee
Pride Tomlinson, Jr., Dale Bldg., Columbia, Tennessee
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Montgomery County

Noel R. Bagwell, Clarksville, Tennessee
Richard H. Batson, Daniel Bldg., Clarksville, Tennessee
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Alexander W. Cortner, Glenn Bldg., Clarksville, Tennessee
James C. Cunningham, Glenn Bldg., Clarksville, Tennessee
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Collier Goodlett, Jr., Glenn Bldg., Clarksville, Tennessee
Fletcher Evans Harvill, Daniel Bldg., Clarksville, Tennessee
Dempsey H. Marks, 1st Nat'l. Bank Bldg., Clarksville, Tennessee
James O. Noland, 112 Glenn Bldg., Clarksville, Tennessee
John H. Peay, Glenn Bldg., Clarksville, Tennessee
Waldo E. Rassas, Clarksville, Tennessee
John M. Richardson, 110 Glenn Bldg., Clarksville, Tennessee
Chas. V. Runyon, Glenn Bldg., Clarksville, Tennessee
Frank J. Runyon, Glenn Bldg., Clarksville, Tennessee
Howell C. Smith, Jr., Glenn Bldg., Clarksville, Tennessee
Paul D. Welker, 1st Nat'l. Bank Bldg., Clarksville, Tennessee

Overton County

B. H. Hunt, Livingston, Tennessee
Tony Maxey, Realty Bldg., Livingston, Tennessee
Millard Vaughn Oakley, Livingston, Tennessee
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B. F. Speck, Livingston, Tennessee

Perry County

Ewell Lee, Linden, Tennessee

Putnam County

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H. H. Clark, 104 E. Broad St., Cookeville, Tennessee
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Wesley P. Flatt, P.O. Box 515, Cookeville, Tennessee

George F. Henry, Jr., 21 Arcade Bldg., Cookeville, Tennessee
T. Eugene Jared, 201 Whitson Bldg., Cookeville, Tennessee
J. Jared Maddux, 201 Whitson Bldg., Cookeville, Tennessee
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Vernon Neal, Cox Bldg., Cookeville, Tennessee
John H. Poteet, First Nat'l Bank Bldg., Cookeville, Tennessee
Marvin E. Snow, 203 Smith Bldg., Cookeville, Tennessee
John W. Gill, Monterey, Tennessee
Charles B. Hayes, Jr., Monterey, Tennessee

Robertson County

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Lynn B. Freeman, 109 5th Ave. West, Springfield, Tennessee
John R. Long, Jr., Box 474, Springfield, Tennessee
Allen M O'Brien, Springfield, Tennessee
Harry L. Pepper, Springfield, Tennessee
James M. Porter, P.O. Box 451, Springfield, Tennessee
John D. Sprouse, Springfield, Tennessee
W. Earl Swann, Springfield, Tennessee
George W. Yost, Springfield, Tennessee

Rutherford County

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Wilkes Coffey, Jr., Scott Bldg., Murfreesboro, Tennessee
Alvin B. Colllins, Commerce Union Bank Bldg., Murfreesboro, Tennessee
Clarence L. Cummings, Murfreesboro, Tennessee
Barton Dement, Jr., Commerce Union Bank Bldg., Murfreesboro, Tennessee
Harold Earthman, Murfreesboro, Tennessee
John T. Holloway, Commerce Union Bank Bldg., Murfreesboro, Tennessee
Wiley J. Holloway, Commerce Union Bank Bldg., Murfreesboro, Tennessee
Alfred B. Huddleston, Murfreesboro, Tennessee
Thomas M. Hull, 910 Huddleston Drive, Murfreesboro, Tennessee
John J. Jewell, Mid-State Bldg., Murfreesboro, Tennessee
Ben Ransom Kerr, Murfree-Clark Bldg., Murfreesboro, Tennessee
William E. Mason, Ferrell Bldg., Murfreesboro, Tennessee
Miss Margie Fay Pitts, Box 960, Murfreesboro, Tennessee
C. J. Raper, P.O. Box 281, Murfreesboro, Tennessee
Granville S. Ridley, Murfreesboro, Tennessee
John R. Rucker, Mid-State Bldg., Murfreesboro, Tennessee
Edward Seddon, P.O. Box 278, Murfreesboro, Tennessee
Nancy Smith Sellers 128½ W. College, Murfreesboro, Tennessee
William T. Sellers, 128½ W. College, Murfreesboro, Tennessee
Ewing E. Smith, Murfreesboro, Tennessee
Ewing Smith, Jr., Murfreesboro, Tennessee
Whitney Stegall, Ferrell Bldg., Murfreesboro, Tennessee
James C. Swack, Jr., 1515 Sherrill Blvd., Murfreesboro, Tennessee
Andrew L. Todd, Jr., Scott Bldg., Murfreesboro, Tennessee
William C. Wright, Mason Court, Murfreesboro, Tennessee

Smith County

Clint Beasley, Carthage, Tennessee
Solon W. Fitzpatrick, Courier Bldg., Carthage, Tennessee
Baxter Key, Carthage, Tennessee
Nat Baxter Key, Jr., Carthage, Tennessee
Edward Myer Turner, Carthage, Tennessee
W. H. Turner, Carthage, Tennessee

Stewart County

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William D. Howell, Dover, Tennessee
Sidney Clinton Lewis, Dover, Tennessee

Sumner County

Thomas Boyers, Gallatin, Tennessee
Thomas Boyers, IV, 114 Public Square, Gallatin, Tennessee
Robert F. Brinkley, Gallatin, Tennessee
Luther Creasy, Gallatin, Tennessee
William F. Durham, Gallatin, Tennessee
Billy Joe Fulks, Gallatin, Tennessee
W. Thomas Goodall, Jr., Guthrie Bldg., Gallatin, Tennessee
Allen T. Guild, Langley Hill Farm, Gallatin, Tennessee
Richard H. Harsh, Gallatin, Tennessee
Harold Howser, Gallatin, Tennessee
James M. Hunter, Roxy Bldg., Gallatin, Tennessee
Fred A. Kelly, III, Harsh Bldg., Gallatin, Tennessee
J. C. McMurtry, Guthrie Bldg., Gallatin, Tennessee
Woodall Murrey, Jr., 1st & Peoples Nat'l. Bank Bldg., Gallatin, Tennessee
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Trousdale County

James Donoho, Hartsville, Tennessee
William Russell Wright, Hartsville, Tennessee

Warren County

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Frank Davenport, McMinnville, Tennessee
William M. Davis, McMinnville, Tennessee
James W. Dempster, Box 332, McMinnville, Tennessee
William A. Donaghy, Brown Hotel, McMinnville, Tennessee
Walter H. Griswold, Whiteway Bldg., Morford St., McMinnville, Tennessee
Clarence E. Haston, McMinnville, Tennessee
John H. Hobson, Box 225, McMinnville, Tennessee
W. G. McDonough, Box 422, McMinnville, Tennessee

Wayne County

R. R. Haggard, Jr., Waynesboro, Tennessee

White County

Harry W. Camp, Camp Bldg., Sparta, Tennessee
Jim Camp, Sparta, Tennessee
Lucius H. Camp, Sparta, Tennessee

Scott Camp, Sparta, Tennessee
C. C. Geer, Sparta, Tennessee
Malcolm C. Hill, Sparta, Tennessee
Oliver J. Hill, Box 60, Sparta, Tennessee
Richard Wm. Lykens, Sparta, Tennessee
David H. Snodgrass, Sparta, Tennessee

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Earl Beasley, Franklin, Tennessee
Tyler Berry, Jr., Franklin, Tennessee
Richard Courtney, Franklin, Tennessee
E. Mabry Covington, Jr., Franklin, Tennessee
Frank Gray, Jr., 236 Public Square, Franklin, Tennessee
John H. Henderson, Franklin, Tennessee
T. P. Henderson, Franklin, Tennessee
Ward Hudgins, 302 Adams, Franklin, Tennessee
Cletus W. McWilliams, Public Square, Franklin, Tennessee
Robt. L. Richardson, Jr., Franklin, Tennessee
Edward K. Sanders, P.O. Box 304, Franklin, Tennessee

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Vincent Cason, Public Square, Lebanon, Tennessee
Sam B. Gilreath, Lebanon, Tennessee
Willard Hagan, Lebanon, Tennessee
Alfred T. MacFarland, 104 W. Main St., Lebanon, Tennessee
A. B. McNabb, Public Square, Lebanon, Tennessee
James J. Mynatt, 114 So. Clearview Dr., Lebanon, Tennessee
Phillip Reed, 104 West Main St., Lebanon, Tennessee
Grissim H. Walker, Cumberland Univ., Labanon, Tennessee
Elmer R. Woolard, Lebanon, Tennessee
Robert L. Forrester, 200 Griffin Bldg., Watertown, Tennessee

West Tennessee

Benton County

A. Bradley Frazier, Bank of Camden Bldg., Camden, Tennessee

Carroll County

Hugh W. Roark, 308 Elm St., McKenzie, Tennessee
Gordon Browning, Huntingdon, Tennessee
W. H. Lassiter, Huntingdon, Tennessee
J. Ross McKinney, Spring St., Huntingdon, Tennessee
W. Poe Maddox, Huntingdon, Tennessee
Dwayne D. Maddox, II, Huntingdon, Tennessee
R. M. Murray, Bank Bldg., Huntingdon, Tennessee
Jimmie Lee Taylor, High St., Huntingdon, Tennessee
John L. Williams, Box 283, Court Square, Huntingdon, Tennessee

Chester County

Willard E. Smith, Henderson, Tennessee
Lloyd Tatum, Henderson, Tennessee

Crockett County

Harry S. Avery, Alamo, Tennessee
J. B. Avery, Jr., Alamo, Tennessee
Theo J. Emison, Alamo, Tennessee
C. R. Jerman, Alamo, Tennessee
Robert G. McLean, Alamo, Tennessee

Decatur County

J. L. England, Decaturville, Tennessee
Edwin C. Townsend, Parsons, Tennessee

Dyer County

Barrett Ashley, Dyersburg, Tennessee
R. A. Ashley, Jr., Dyersburg, Tennessee
J. M. Boyd, Jr., Box 156, Dyersburg, Tennessee
Jimmy M. Evans, Box 292, Dyersburg, Tennessee
M. Watkins Ewell, Dyersburg, Tennessee
M. Watkins Ewell, Jr., Masonic Bldg., Dyersburg, Tennessee
Fleming Hodges, Box 386, Dyersburg, Tennessee
David W. Lanier, 1st Citizens Nat'l. Bank Bldg., Dyersburg, Tennessee
Rodgers Menzies, 504 First Nat'l. Bank Bldg., Dyersburg, Tennessee
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Latta Richards, Box 316, Dyersburg, Tennessee
Alvy Donald Walker, Jr., 207-B West Court St., Dyersburg, Tennessee
Melvin T. Weakley, Dyersburg, Tennessee
Ewell T. Weakley, Dyersburg, Tennessee
Richard Thomas Moore, Newbern, Tennessee

Fayette County

Joe N. Cocke, Somerville, Tennessee
J. P. Matthews, III, Somerville, Tennessee
Preston Parks, Somerville, Tennessee
Troy W. Tomlin, Somerville, Tennessee
John S. Wilder, Somerville, Tennessee

Gibson County

Lloyd S. Adams, Humboldt, Tennessee
Lloyd S. Adams, Jr., Merchants State Bank Bldg., Humboldt, Tennessee
Thomas D. Dunlap, Humboldt, Tennessee
James D. Senter, Jr., Humboldt, Tennessee
James D. Senter, III, 2407 East Main, Humboldt, Tennessee
J. Frank Warmath, Humboldt, Tennessee
Jere C. Gordon, Kenton, Tennessee
Currie Drake, Main St., Milan, Tennessee
William J. Flippin, Milan, Tennessee
Lloyd A. Utley, Milan, Tennessee
Robert V. Utley, Milan, Tennessee
Robert P. Adams, Trenton, Tennessee
L. L. Harrell, Court Square, Trenton. Tennessee
Thomas E. Harwood, Box 247, Trenton, Tennessee
Marion H. Holmes, Jr., W. Court Square, Trenton, Tennessee
Richard Holmes, Citizens Nat'l. Bank Bldg., Trenton, Tennessee
W. R. Landrum, Trenton, Tennessee
Ralph R. Lawler, Trenton, Tennessee
Gayle I. Malone, Trenton, Tennessee
John C. Nowell, Jr., North Court Square, Trenton, Tennessee

Hardeman County

H. B. Denton, Bolivar, Tennessee
Woodson J. Savage, Jr., 107½ W. Market St., Bolivar, Tennessee
Dewey C. Whitenton, Bolivar, Tennessee

Hardin County

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William W. Lackey, Savannah, Tennessee
Edwin Ledbetter, Box 110, Savannah, Tennessee
R. B. Mangum, Savannah, Tennessee
John J. Ross, Savannah, Tennessee
E. W. Ross, Jr., Savannah, Tennessee
W. H. Sloan, Savannah, Tennessee

Haywood County

W. W. Bond, 217½ S. Washington, Brownsville, Tennessee
A. M. Carlton, Brownsville, Tennessee
A. H. Gray, Brownsville, Tennessee
Miss Rosa Haywood, Brownsville, Tennessee
Carmon T. Hooper, III, Brownsville Bank Bldg., Brownsville, Tennessee
L. W. Morgan, Brownsville, Tennessee
John W. Norris, Brownsville, Tennessee
L. K. Matherne, Brownsville, Tennessee
Marne S. Matherne, Brownsville Bank Bldg., Brownsville, Tennessee
Herbert D. Sternberger, 18 So. Court, Brownsville, Tennessee

Henderson County

Joe A. Appleby, Lexington, Tennessee
W. L. Barry, Lexington, Tennessee
Joe C. Davis, Lexington, Tennessee
Elmer L. Stewart, County Judge, Lexington, Tennessee

Henry County

Aaron C. Brown, Paris, Tennessee
Richard L. Dunlap, Jr., Commercial Bank Bldg., Paris, Tennessee
Hugh K. McLean, 303 Commercial Bank Bldg., Paris, Tennessee
Charles C. Montgomery, McNeil Bldg., Paris, Tennessee
Fisher Neal, Paris, Tennessee
Charles G. Neese, Box 127, Paris, Tennessee
Claude C. Toler, Toler Bldg., Paris, Tennessee
James W. Van Dyke, Commercial Bank Bldg., Paris, Tennessee

Lake County

William B. Black, 104 South Court St., Tiptonville, Tennessee
Joe Glenard Riley, Ridgely, Tennessee

Lauderdale County

Noel H. Riley, Ridgely, Tennessee
B. C. Durham, Jr., Ripley, Tennessee
Herman L. Reviere, Ripley, Tennessee
John W. Sanford, Ripley, Tennessee
Robert Spicer Thomas, Box 107, Ripley, Tennessee
Joe H. Walker, Jr., Ripley, Tennessee

McNairy County

Will Terry Abernathy, 224 Court Ave., Selmer, Tennessee
Will Tom Abernathy, 175 W. Court St., Selmer, Tennessee
James Louis Adams, Selmer, Tennessee
Thomas G. Morgan, Jr., 165 West Court Ave., Selmer, Tennessee
Glenn H. Whitlow, Selmer, Tennessee
William J. Long, Bethel Springs, Tennessee
Lemuel G. Vaughan, Ramer, Tennessee

Madison County

Hugh G. Arnold, 209 National Bank of Commerce Bldg., Jackson, Tennessee
George O. Benton, Jackson, Tennessee
L. W. Birmingham, III, 207 E. Main St., Jackson, Tennessee
J. D. Bledsoe, 114½ N. Market St., Jackson, Tennessee
James H. Boswell, 207 Pythian Bldg., Jackson, Tennessee
James P. Diamond, 202 Nat'l. Bank of Commerce Bldg., Jackson, Tennessee
William T. Diamond, Jr., Nat'l. Bank of Commerce Bldg., Jackson, Tennessee
Edward C. Duke, 206 Pythian Bldg., Jackson, Tennessee
L. L. Fonville, Nat'l. Bank of Commerce Bldg., Jackson, Tennessee
Billy J. Goodrich, 211 E. Baltimore St., Bond Bldg., Jackson, Tennessee
Roy Hall, Jackson, Tennessee
Charles L. Hancock, Jackson, Tennessee
John F. Harrington, 126 Hurt St., Jackson, Tennessee
Walter Baker Harris, Elks Bldg., Jackson, Tennessee
Hugh Harvey, Court House, Jackson, Tennessee
Robert J. Holt, Jr., 202 Bank of Commerce Bldg., Jackson, Tennessee
Harold F. Johnson, 105 South Market St., Jackson, Tennessee
Oliver H. Jones, Pythian Bldg., Jackson, Tennessee
Walter J. Key, 706 First Nat'l. Bank Bldg., Jackson, Tennessee
Whit Lafon, Box 884, Jackson, Tennessee
William E. Leech, Elks Bldg., Jackson, Tennessee
Jack Manhein, Jackson, Tennessee
Harlan Wayne Martin, 203½ Main St., Jackson, Tennessee
William R. Menzies, Jr., Elks Bldg., Jackson, Tennessee
Joe C. Morris, 104 Lawyers Bldg., Jackson, Tennessee
G. L. Morrison, First Nat'l. Bank Bldg., Jackson, Tennessee
William P. Moss, Jr., First Nat'l. Bank Bldg., Jackson, Tennessee
Carmack Murchison, Bond Bldg., Jackson, Tennessee
John F. Murchison, Bond Bldg., Jackson, Tennessee
David P. Murray, 209 E. Baltimore, Jackson, Tennessee
Roger G. Murray, 209 E. Baltimore, Jackson, Tennessee
Claire B. Newman, 101½ So. Market St., Jackson, Tennessee
E. J. Nunn, 201 Pythian Bldg., Jackson, Tennessee
Hughie Ragan, Box 1830, 207½ Baltimore, Jackson, Tennessee
Thomas H. Rainey, Jr., 206 Pythian Bldg., Jackson, Tennessee
Russell Rice, 201 Lawyers Bldg., Jackson, Tennessee
Mrs. Ann Harris Schneider, Elks Bldg., Jackson, Tennessee
Victor F. Schneider, 118 Elks Bldg., Jackson, Tennessee
Robert H. Spragins, Jackson, Tennessee
Sidney W. Spragins, Box 1358, Jackson, Tennessee
Keith Short, Jackson, Tennessee
T. Lamar Spragins, Jackson, Tennessee

Hewitt P. Tomlin, Jr., 109½ E. Main St., Jackson, Tennessee
John Van den Bosch, Jr., First Nat'l. Bank Bldg., Jackson, Tennessee
Homer H. Waldrop, Jackson, Tennessee
B. E. Walker, 6 Webber, Jackson, Tennessee
Donald Weaver, Jackson, Tennessee
August W. Wilde, 121 Walnut St., Jackson, Tennessee
H. Barton Williams, 189 Russell Road, Jackson, Tennessee
Pierce Winningham, Jr., 104-106 Lawyers Bldg., Jackson, Tennessee
Albert J. Woodall, Jackson, Tennessee

Obion County

David G. Caldwell, Union City, Tennessee
George C. Cloys, Jr., Union City, Tennessee
Tom Elam, Union City, Tennessee
Charles B. Fields, Union City, Tennessee
Hardy Moore Graham, Old & 3rd Nat'l. Bank Bldg., Union City, Tennessee
John W. Hart, Andrews Bldg., Union City, Tennessee
Fenner Heatncock, Union City, Tennessee
E. H. Lannom, Union City, Tennessee
Charles W. Miles, III, Union City, Tennessee
W. M. Miles, Union City, Tennessee
Sam C. Nailling, South First St., Union City, Tennessee
Paul G. Hudgins, Union City, Tennessee
J. Paul White, South First St., Union City, Tennessee
Randall P. Burcham, 129 Paschall St., South Fulton, Tennessee
Mrs. Ruth Forcum Lannom, Obion, Tennessee
Ben W. Morris, Obion, Tennessee

Shelby County

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Benjamin Chinn Adams, 1500 Commerce Title Bldg., Memphis, Tennessee
Grady A. Agee, 1600 Columbian Mutual Tower, Memphis, Tennessee
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William L. Allan, 622 Exchange Bldg., Memphis, Tennessee
James H. Allen, 1001 Columbian Mutual Tower, Memphis 3, Tennessee
J. Seddon Allen, 800 Commerce Title Bldg., Memphis, Tennessee
Newton P. Allen, 800 Commerce Title Bldg., Memphis, Tennessee
Richard Allen, Commerce Title Bldg., Memphis, Tennessee
John W. Apperson, 1830 Exchange Bldg., Memphis, Tennessee
William E. Armour, Jr., Columbian Mutual Tower, Memphis, Tennessee
Homer L. Armstrong, 2201 Sterick Bldg., Memphis, Tennessee
Walter P. Armstrong, Jr., 800 Commerce Title Bldg., Memphis, Tennessee
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Mrs. Nell Sanders Aspero, 21st Floor, Columbian Mutual Tower, Memphis, Tennessee
Thomas B. Avery, 725 N. Auburndale, Memphis, Tennessee
John Knox Aycock, 725 Columbian Mutual Tower, Memphis 3, Tennessee
Eric Babendreer, Sterick Bldg., Memphis, Tennessee
Isadore B. Baer, 226 Dermon Bldg., Memphis, Tennessee
W. Howard Baker, 2nd Floor, Columbian Mutual Tower, Memphis, Tennessee
Charles E. Barentine, 1504 81 Madison Bldg., Memphis, Tennessee
W. Carlton Barnes, 219 Adams, Memphis, Tennessee
Harry D. Barnett, 403 81 Madison Bldg., Memphis, Tennessee
Lewis T. Barringer, P.O. Box 87, Memphis, Tennessee
Edward F. Barry, Commerce Title Bldg., Memphis, Tennessee
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Charles G. Black, 1126 Falls Bldg., Memphis, Tennessee
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James D. Causey, 1201 Edway Bldg., Memphis, Tennessee
James J. Challen, 213 S. Cooper St., Memphis, Tennessee
Walter Chandler, Edway Bldg., Memphis, Tennessee
Wyeth Chandler, Edway Bldg.. Memphis, Tennessee
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James N. Clay, III, 2111 Sterick Bldg., Memphis, Tennessee
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Judson Richard Cox, 1106-81 Madison Bldg., Memphis, Tennessee
Charles C. Crabtree, Sterick, Bldg., Memphis, Tennessee
Henry Craft, 1401—81 Madison Bldg. Memphis, Tennessee
J. Lester Crain, Jr., 2205 Sterick Bldg., Bldg., Memphis, Tennessee
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H. C. Tanner Davis, 1606 Exchange Bldg., Memphis, Tennessee
Wils Davis, 1606 Exchange Bldg., Memphis, Tennessee
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Lewis R. Donelson, III, Commerce Title Bldg., Memphis, Tennessee

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William H. Douglass 1808 Exchange Bldg., Memphis, Tennessee
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Glenn M. Elliott, 2111 Sterick Bldg., Memphis, Tennessee
Richard T. Ely, Home Federal Bldg., Memphis, Tennessee
Miss Helen G. Emmons, 1525 Airways Blvd., Memphis 14, Tennessee
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W. H. Fisher, Madison Bldg., Memphis, Tennessee
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Millsaps Fitzhugh, 2105 Sterick Bldg., Memphis, Tennessee
William M. Fitzhugh, 182 Lafayette St., Memphis, Tennessee
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James E. Fleming, 386 Shrine Bldg., Memphis, Tennessee
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Jack B. Franklin, 213 South Cooper St., Memphis, Tennessee
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William E. Friedman, Porter Bldg., Memphis, Tennessee
Henry H. Fuqua, Commerce Title Bldg., Memphis, Tennessee
John Galella, Sterick Bldg., Memphis, Tennessee
Jim C. Galloway, 614 Columbian Mutual Tower, Memphis, Tennessee
Morris E. Gannon, Jr., 804 Dermon Bldg., Memphis, Tennessee
Marvin B. Gambill, 1840 Exchange Bldg., Memphis, Tennessee
Braxton C. Gandy, c/o Criminal Court Office, Memphis, Tennessee
James O. Garner, 620 Commerce Title Bldg., Memphis, Tennessee
Ned R. Garner, 102 Porter Bldg., Memphis, Tennessee
Riley C. Garner, Shelby Co. Courthouse, Memphis, Tennessee
James L. Garthright, Jr., 601 Exchange Bldg., Memphis, Tennessee
Ricco Gatti, Jr., 1031 Sterick Bldg.. Memphis, Tennessee
Elisha Gee, Jr., 1002-04 Commerce Title Bldg., Memphis, Tennessee
Arthur J. Gemignani, 800 Sterick Bldg., Memphis, Tennessee
Gavin M. Gentry, 800 Commerce Title Bldg., Memphis, Tennessee
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Frank M. Gilliland, Jr., 2710 Sterick Bldg., Memphis 3, Tennessee
James S. Gilliland, 2710 Sterick Bldg., Memphis, Tennessee
John R. Gilliland, Commerce Title Bldg., Memphis, Tennessee
Edgar H. Gillock, 217 Falls Bldg., Memphis, Tennessee
Frank J. Glankler, Jr., Commerce Title Bldg., Memphis 3, Tennessee
Charles L. Glascock, Commerce Title Bldg., Memphis, Tennessee
Herbert Glazer, Commerce Title Bldg., Memphis, Tennessee
William A. Glover, 1416 Exchange Bldg., Memphis, Tennessee
Marvin C. Goff, Jr., 1420 Commerce Title Bldg., Memphis, Tennessee
Benjamin Goodman, 800 Commerce Title Bldg., Memphis, Tennessee
William W. Goodman, Commerce Title Bldg., Memphis, Tennessee
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Leon Halski, 81 Madison Bldg., Memphis, Tennessee
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Henry H. Hancock, 128 North Court, Memphis 3, Tennessee
David Hanover, 219 Adams, Memphis, Tennessee
Jay Alan Hanover, 219 Adams, Memphis, Tennessee
Joseph Hanover, 219 Adams, Memphis, Tennessee
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William D. Haynes, 1420 Commerce Title Bldg., Memphis, Tennessee
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Erie S. Henrich, Sterick Bldg., Memphis, Tennessee
Emil William Henry, 901 Edway Bldg., Memphis, Tennessee
George Davis Herring, 726 Dermon Bldg., Memphis, Tennessee
Luther D. Herring, 3438 Radford, Memphis 11, Tennessee
James H. Hicks, 305 Baltimore Bldg., Memphis, Tennessee
Irving L. Himes, Sterick Bldg., Memphis, Tennessee
C, A. Hodges, 4570 Poplar, Memphis, Tennessee
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Lee Dameron Jones, 326 Commerce Title Bldg., Memphis, Tennessee
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Hunter Lane, Jr., 727 Commerce Title Bldg., Memphis, Tennessee
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Erich William Merrill, 638 Sterick Bldg., Memphis, Tennessee
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John C. Moore, Federal Compress Bldg., Memphis, Tennessee
John Thomas Moorhead, 1112 Commerce Title Bldg., Memphis, Tennessee
Charles G. Morgan, 638 Sterick Bldg., Memphis, Tennessee
H. B. Moriarty, 647 Commerce Title Bldg., Memphis, Tennessee
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W. F. Murrah, Sterick Bldg., Memphis, Tennessee
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Charles E. Nearn, 224 Sterick Bldg., Memphis, Tennessee
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Jack Petree, Commerce Title Bldg., Memphis, Tennessee
Eugene J. Phelan, 714 Dermon Bldg., Memphis, Tennessee
Milton C. Picard, Jr., 1909 Sterick Bldg., Memphis, Tennessee
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Leonard D. Pierotti, 724 Commerce Title Bldg., Memphis, Tennessee
Alfred B. Pittman, 2710 Sterick Bldg., Memphis, Tennessee
John Cox Pope, 155 North Second, Memphis, Tennessee
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TENNESSEE LAW REVIEW

Volume 29 WINTER, 1962 Number 2

CURRENT MEDICO-LEGAL PROBLEMS

INTRODUCTORY REMARKS*

CHARLES C. TRABUE, JR., *President, Tennessee Bar Association*
WILLIAM WICKER, *Dean, College of Law, University of Tennessee*
RICHARD STAIR, *President, Knoxville Bar Association*

CHARLES C. TRABUE, JR.: It is my privilege this morning, on behalf of the Tennessee Bar Association, to welcome all of you lawyers and doctors to this Institute conducted by the University of Tennessee. As all of us know, whatever our professions, the need of continuing education is very important, and we in the Tennessee Bar Association recognize the essential importance of institutes like this, if we are going to keep abreast of what the legislature and the United States Supreme Court and even some of the other courts are doing. This is the same thing that the doctors do. Really, the main burden of this continuing legal education has been carried on by the fine law schools of Tennessee, and this is a continuation of that. I think we are all faithful and indebted to the University of Tennessee for putting this Institute on. I hope all of you are as glad to be here as I am, and appreciative of that fact.

Next, I shall introduce the people whom you all know better than I do. It might be a little bit more in order if they introduced me. But the first man is the man who arranged this program and is largely responsible for us being here today with this fine panel — the Dean of the University of Tennessee Law School, Dean Wicker.

DEAN WILLIAM WICKER: This is the Twenty-second Annual Institute of U.T.'s College of Law. It is my high privilege, acting on behalf of the College of Law, to welcome our distinguished guests and visitors to this institute on current medico-legal problems. The heart and soul of the Planning Committee is its Chairman, Martin Feerick, but all members of that Committee have worked and all of them feel that having as our cherished guests the kind of an audience now in this room is

* Presented at the opening of the Twenty-second Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association held at Knoxville, October 6, 1961.

reward enough for the time and effort spent in arranging this Institute. It is a genuine pleasure to have such a group on the U.T. campus. I hope this conclave will be a group that will have a feeling of close friendship, and that you will get an answer to a medico-legal problem which has been bothering you.

Most of the contacts between law and medicine are made between lawyers and doctors. These contacts often involve conflicts and difficulties in the fields of both communications and objectives. Doctors and lawyers speak different languages. It is sometimes difficult for them to understand each other, and for the jury to understand either the doctor or the lawyer. A doctor's chief objective is effective medical treatment. A lawyer's chief objective is to prove a claim or a defense. That claim or defense may require dogmatic answers to questions. Some of these questions may be of such a nature that even a skillful physician, when using the modern scientific procedures and stimulated by the most modern legal techniques, cannot arrive honestly at a positive diagnosis and prognosis. Mutual respect and complete integrity of thought and conduct are the only common grounds upon which the lawyer and the doctor should meet. All medico-legal education should be of the type that tends to engender those qualities in both the doctor and the lawyer.

Where the contact between the professions is between a good lawyer and a good doctor, the contact is usually in the interest of justice. I am using the modified *good* in the sense of lawyers and doctors who are well-informed in their respective specialities, and who are also well-intentioned. Justice according to law requires lawyers and doctors who are not only good technicians, but who are also "honest in the dark and virtuous even when there is no witness." Lawyers and doctors of that breed can meet in court and aid in the administration of justice, and still be happy and unashamed.

The "good old days" were the days of second-rate medicine. Thirty years ago the drugs available for use by physicians were not very efficacious in the treatment of injuries and diseases. As compared to some of the drugs now available, they were, however, comparatively harmless, not habit-forming and non-irritating. This picture has been greatly changed by relatively recent break-throughs in sulfanilamides, followed by more recent spectacular discoveries in the antibiotics, especially penicillin, and in the steroids, in particular, cortisone. These new drugs are more effective, when properly and skillfully used, but they are certainly not characterized by innocuousness from the standpoint of safety.

The law requires a physician to keep up with advancements in his

specialized field and to use that information in his practice. Patients are not, however, guinea pigs and should not be given prescriptions of unproved medicines. The physician should keep constantly in mind the fact that the law also requires him to refrain from making experiments on his patients. The current flooding of the market with the so-called "wonder drugs" has put the physician in an unfortunate medico-legal squeeze. Hindsight is nearly always better than foresight. The lawyer should realize that the introduction of an enormous number of potent new drugs places a physician who has a perplexing case in such an unenviable position that a high degree of both discretion and caution should be exercised before instituting a malpractice case. Dr. Frankel, the distinguished orthopedic surgeon who is with us today from the University of Virginia, will present this evening some of the observations on malpractice which he recently made before the American Medical Association. I am sure that Dr. Frankel's animation and sincerity will leave a deep impression on all of us.

On the legal aspects of the problems that we have before us for consideration during this institute, we have four of the finest lawyers, lecturers and writers in the negligence field. Representing the plaintiff's bar will be Leo Karlin of Chicago, Immediate Past President of NACCA, and Al Averbach of New York, whose recent treatise, entitled *Handling Accident Cases,* received deserved acclaim. On the defense side of the table will be a brilliant young lawyer from New York, Bill Geoghan, and from Cleveland comes Harley McNeal, who is well-known to many of you here today. I am sure that you are eagerly awaiting their presentations.

Before turning the microphone back to our good friend, Charlie Trabue, I would like to express the appreciation of our Law Institute Planning Committee to the Edison Voicewriter representatives, Mr. Norman and Mr. Hale. These gentlemen have graciously agreed to contribute their services and the use of their fine equipment, so that Institute Proceedings would be properly and accurately transcribed for publication in the *Tennessee Law Review.*

In closing we also wish to express our personal appreciation to the men who have served so well in putting this program together: The Honorable Charles C. Trabue, Jr., President of the Tennessee Bar Association; to the Honorable Alfred W. Taylor, President-Elect of your state bar association; and to the Honorable Richard Stair, President of the Knoxville Bar Association – all of whom are here with us today as Co-ordinators of the Institute. To our distinguished moderators also, we do express our gratitude: E. Bruce Foster, Warren W. Kennerly,

S. Frank Fowler, and Taylor H. Cox – all of the Knoxville Bar, and to the members of our Planning Committee: F. Graham Bartlett, Robert L. Crossley, Charles E. McNabb of the Knoxville Bar Association; and to our College of Law representatives: Harold C. Warner, Elvin E. Overton and particularly to Martin J. Feerick, our Law Institute Director and Editor of the Proceedings.

CHARLES C. TRABUE, JR.: Thank you, Dean Wicker. The next man I want to introduce is actually so well-known over here that he is the President of the Knoxville Bar Association, Mr. Richard Stair.

RICHARD STAIR: Ladies and Gentlemen, the broad complexion of this audience this morning is the best tribute that could be given the U.T. Law College and our Bar Association for the practical appeal of the program in this Medico-Legal Institute. It is a matter of coming to grips with the everyday litigation out of which so many lawyers make a living. I have had the pleasure this morning of shaking hands with orthopedic specialists, insurance agents, adjusters, hearing examiners, trucking company and railroad company claimsmen and Veterans Administration representatives. This Institute promises to be the very finest we have ever had. To our distinguished guests, Dr. Frankel and the five lawyers from out of the city, to our lawyers from over the state and throughout the Southeast, and to our local lawyers we extend a cordial welcome.

"WHIPLASH" INJURIES

PANEL: CHARLES J. FRANKEL, M.D., LL.B., *Professor of Orthopedic Surgery, University of Virginia Medical School*
ALBERT AVERBACH, *of the New York Bar*
HARLEY J. MCNEAL, *of the Cleveland, Ohio, Bar*

MODERATOR: E. BRUCE FOSTER, *of the Knoxville Bar*

CO-ORDINATOR: CHARLES C. TRABUE, JR., *President, Tennessee Bar Association*

CO-ORDINATOR CHARLES C. TRABUE, JR.: Judge Richard Dues, Circuit Judge of Nashville, who retired a year or two ago, said that one time when a colored gentleman was in his court seeking a divorce, the lawyer said: "What is your complaint about your wife?" He replied: "Well, all she does is talk, talk, talk, all the time." And Judge Dues said, "Well, what does she talk about?" He answered: "She don't say." Now there is going to be a good deal of talking here today, but I think the men who are on this program know what they are talking about, and we will not have that complaint about them when the day is over. The Moderator in charge of the Morning Session is Bruce Foster of the Knoxville Bar, who is well-known to all of you. We will now turn the meeting over to Bruce.

MODERATOR E. BRUCE FOSTER: The only thing I need to say about our topic for discussion is to mention the title: "Whiplash Injuries." The lawyers, doctors, and insurance men in the group know what "whiplash" injuries are, and the law students are certainly going to find out what they are in a hurry.

We will be running a little bit late on this program and rather than go into any further detail I shall introduce the first speaker whose topic is "The Medical Aspect of Whiplash Injuries." The gentleman has a particularly fine educational background. He not only has a Bachelor of Science degree, a Master of Science degree, an M.D. degree; he also has a law degree. Besides the usual medical societies that most doctors belong to, this gentleman is a member of the Academy of Orthopedic Surgeons, he is the Vice-president of the American Board of Orthopedic Surgery, he is Associate Professor of Orthopedic Surgery at the University of Virginia, he is an Instructor in Legal Medicine at the University of Virginia, and he is an Instructor in Medical Law at the University of Virginia Law School. In addition to all that, he is the editor of the recent multi-volume work: *Lawyers' Medical Encyclopedia of*

Personal Injuries and Allied Specialities. Ladies and Gentlemen, your next speaker is Dr. Charles J. Frankel of the University of Virginia.

DR. CHARLES J. FRANKEL: The term "whiplash injury" has been used and abused by lawyers since 1953 when Gay and Abbott published an excellent paper in the *Journal of the American Medical Association.* A California neurosurgeon claimed that in his experience the most frequent injury in motor vehicle accidents was the whiplash of the cervical spine. This claim comes amidst a clamor by many physicians to diagnose and classify the injury more specifically, *i.e.,* as a sprain, strain, fracture dislocation, myositis, etc.

Ashe, a prominent plaintiff's attorney, stated that the term 'whiplash' is a vague entity; that it is neither a medical term, nor a scientific term. He says that "Whiplash injuries" involve multiple, complex, vague, confusing symptoms, and that "whiplash injury" has been met with cynicism and doubt by jurors, judges, and defendants because medicine at the present time does not fully appreciate or understand the real scope of "whiplash injury". Ashe is aided and abetted by the California neurosurgeon who stated, "And those of you attorneys and those of physicians who refuse to give credence to the "whiplash injury", a beautiful term, and are like unto King Canute who stood upon the shore and commanded the approaching tide to recede."

The editor of a well-respected law journal advised his readers, "From the point of view of medical terminology and 'whiplash' there are advantages in using one of several accepted medical terms for 'whiplash' disability. Certain plaintiffs' medical terms in the form of 'whiplash' injury or disc injury in the neck will give an implication of a greater amount of disability. On the other hand, medical terms like "neck strain" or "cervical syndrome" could effectively be used by the defense and imply less disability. Since all of these terms are accepted medical diagnoses today, it is important that the case should be prosecuted or defended on the basis of such specific diagnoses depending upon whether one is representing the plaintiff or defendant."

The scope of this paper is intended to encompass the treatment of injuries to the neck, and to point out to the medical practitioner who first sees most of these cases and treats them that he has a duty to remain objective. He must understand that this type of injury is apt to be litigated and that he will probably be called upon to give either factual or expert testimony. He must also understand the necessity for a thorough examination, for good and complete records, and he must be aware of the possible need for consultation with the orthopedic surgeon, the neurosurgeon, the roentgenologist, the ear, nose and throat man, the neurologist and, on occasion, the psychiatrist.

Before these injuries can be adequately treated, it is necessary to dissect the problem and understand the component parts, and then proceed to discuss what both the patient and the doctor should desire most, *i.e.*, a rapid and successful treatment.

I. Anatomy of The Neck

The anatomy of the neck is complex. The important features to remember are:

1. The neck has seven cervical vertebrae; it can tilt forward, backward and sideward. It rotates by a gliding motion in the facets.

2. Extremes of motion are limited by the anterior, posterior and lateral ligaments and by the capsule and fibrous tissue structures which surround the joints.

3. The ligaments are lax enough to allow normal movements. Abnormal laxity may give rise to dislocation or permit increased stress on the joints.

4. The atlas and the axis are so designed as to permit nodding, rotation and lateral bending movements of the head.

5. Excessive movement of the atlanto-axial joints is controlled by strong check ligaments.

6. The odontoid process of the axis is susceptible to fracture. When the fracture is accompanied by ruptures of the check ligaments and the capsule, posterior dislocation of the axis may occur. Anterior dislocation may occur when the ligaments alone are injured or torn.

7. The shape and inclination of the primary articular processes and the slight laxity of the ligaments and capsule structures contribute to the range of normal motion. The so-called joints of Luschka are small prominences which measure 2x4 to 3x6 millimeters. They are situated between the five lower cervical vertebrae and lie antero-medial to the mixed nerve root and postero-medial to the vertebral artery, vein and sympathetic nerve supply. The significance of injuries involving these joints or pseudo-joints is based on their proximity to the important nerve and vascular structures as well as to the ligaments. The lower cervical nerve roots, being relatively fixed in position, may be exposed to trauma or compression — particularly when the neck is flexed at the moment of impact or when a vehicle is struck from behind. It is thought that the Luschka prominences, or joints, restrict lateral flexion of the neck and may prevent lateral herniation of the nucleus pulposus. Morton states that nerve symptoms are more frequently caused by Luschka joint exostoses than by osteophytes arising

from the apophyseal joints. Exostoses from the Luschka joints may encroach on the vertebral artery and be partially responsible for the common complaint of headaches and referred pain to the occiput. The complications from lateral or oblique flexion forces must not be minimized since such forces are responsible for many injuries to the so-called Luschka joints and to the surrounding sensitive and important soft tissue structures. It has been suggested that many of the hard protrusions removed by neurosurgeons are spurs and calcareous deposits formed on or near the Luschka joints. It may be that the clinical symptoms pertaining to the cervical nerve roots are more often due to the arthritic and degenerative changes of synovial joints of Luschka.

8. The joints between the sixth and seventh cervical vertebrae are freely movable. However, the less mobile joints between the fourth and fifth and sixth cervical vertebrae appear to be more vulnerable to stress and injury.

9. The absence of posterior joints between the head and the atlas and the atlas and the axis leaves the first two spinal nerves without an inter-vertebral canal. The other five vertebrae have foramina through which passes a spinal nerve. The lower cervical nerve roots, being relatively fixed in position, may be exposed to trauma or compression, particularly when the neck is flexed at the moment of impact. Pain may be referred from the nerve roots which, as they leave the bony outlet or foramina, are compressed by inflamed ligaments and capsules, adhesions and pressure from osteophytes and thickened soft tissues, including a thickened ligamentum flavum.

10. The cervical nerve roots are composed of motor and sensory fibers only. The dorsal and upper two lumbar roots contain specialized communicating elements which, in the case of the upper two dorsal roots, serve to join the cervical roots and proceed upward to the cervical ganglion. From the cervical ganglion, fibers pass to the cervical nerves, the cranial nerves, the heart, the arteries of the head, neck and arms, and other important structures. Other fibers contact or communicate with small special meningeal nerves before they run back through the intervertebral foramina to supply the dura. The special meningeal nerves also supply a portion of the sensation of the ligaments. Irritation directly to the sympathetic nerves may give rise to symptoms which are identical with those arising from primary injury or irritation of the cervical roots. Conversely, primary irritation to the roots may secondarily irritate the sympathetic innervation and cause thorough confusion.

11. The secondary joints or intervertebral discs are narrower in

the cervical region. The nucleus pulposus is more anterior than in other discs and is less subject to rupture than is the nucleus in the lumbar disc. When the disc, which has a high water content, degenerates with the aging process there is a concomitant loss of height and an altered mechanical alignment of the cervical spine. Surrounding the whole disc is the tough ligamentous structure, the annulus fibrosis, which may be torn or ruptured during the movement of the neck. There may result abnormal compression force on the posterior ligaments through which the peripheral and autonomic nerves must pass; hence, the not uncommon sensory, motor, and sympathetic nerve manifestations which are also demonstrable by electromyographic studies.

12. The vertebral artery which supplies blood to the brain and the brain stem is susceptible to injury and may be compressed and produce symptoms of headache, vertigo and ataxia. The most common site of involvement is at the level of C-2.

13. The second cervical spinal nerve root terminates as the great occipital nerve and supplies the major portion of sensation to the scalp and the upper part of the neck. The root is very vulnerable to injury since it is not protected by pedicles as the lower cervical roots are. An injury to C-2 may be responsible for the severe headaches that follow many injuries to the neck.

II. Mechanics of The Injury

The mechanics of the injury are of greater interest to those with an academic background and to the engineering students than to the general practitioner. It is of interest, though, to note that those who insist on the acceptance of the term 'whiplash injury' have been unmindful of more accurate recent engineering observations which are rather contradictory in nature.

Proponents of the term state that when the average car weighing about 3,500 lbs. traveling at only ten miles per hour strikes another vehicle, it can transmit to this car a force of 50,000 lbs. The body of the person in the forward car continues to move forward while the head, being hinged at the neck, snaps backward with the equivalent of several tons of force, and even before he can recover from this, the head is suddenly snapped forward. The late Duncan McKeever has shown very definitely through surgical and autopsy examination of persons critically injured as the result of rear-end collisions that the neck injuries are compression evulsion injuries and are not traction injuries such as the whiplash mechanism is supposed to develop. The

following illustration used by McKeever demonstrates the fallacy of providing any single term to describe neck injuries:

> "We will assume that the distance of center of gravity of the head which weighs 15 lbs. to the center of motion between the seventh cervical vertebra and the thoracic spine is 10 inches. We will further assume that with the subject sitting behind the wheel the center of gravity of the head is 5 inches in front of the cervical-thoracic joint. On impact the body moves from this position to a position where the center of gravity of the head is 5 inches behind the cervical-thoracic joint. The key to the whole situation lies in the following fact: When one voluntarily moves the head from the first of these positions to the second, the center of gravity of the head and the head itself moves through an arc during which the neck length is maintained. But when the rear-end collision occurs, the motion from one position to the other takes place so rapidly that inertia holds the head in a fixed position while the body moves forward in a straight line. The injury produced is an avulsion injury and it occurs as the head passes the vertical position and not at either extreme of motion."

III. Classification of Injuries

Injuries to the neck, whatever the mechanism of injury happens to be, should be classified as:

1. Sprains and strains
   a. Transient
   b. Prolonged
2. Dislocation
3. Fractures
4. Fracture – dislocations
5. Injuries to the spinal nerves or the sympathetic nervous system
6. Injuries to the vascular system
7. Aggravation of pre-existing arthritis or pre-existing anomaly
8. Degeneration or rupture of a disc
9. Psychoneurosis

IV. Diagnosis, Symptoms and Treatment

A careful history and examination is of utmost importance, particularly since these injuries are potential sources of litigation. The physician must realize that his duty does not end with the examination and treatment of this patient. The eyes, ears, throat, neck and low part of

the back and extremities must be examined. The neurological changes, if any, should be noted on special charts which should be available. The X-ray examination should include routine antero-postero- and lateral views. Special views to visualize the lateral masses of the vertebrae as well as the odontoid and the bony ring around the odontoid should be taken if symptoms persist despite adequate treatment. Flexion and extension views of the cervical spine may reveal a dislocation that has spontaneously reduced itself. Myelographic studies should be ordered only in cases with vague persistent findings, or when a ruptured cervical disc is a suggested but inconclusive diagnosis.

Sprains. Eighty percent of the injuries to the neck have been reported to be transient sprains or strains of the ligamentous and muscular structures surrounding the cervical vertebrae. Spasm may be palpable, the sternomastoid muscle may be injured by direct stretch from an oblique type of injury or from involvement of the spinal accessory nerve. Pain in the angle of the jaw near the ear is not an uncommon complaint. The X-rays may show only a loss of the normal cervical lordosis. An uncommon finding associated with transient sprains is pharnygeal edema. Treatment requires the use of a collar or some supporting material, the use of muscle relaxants either given orally or intramuscularly, mild sedation, the application of wet heat and rest for a few days. If the symptoms persist for more than two weeks, it may be necessary to institute cervical headhalter traction, massage, and to continue with muscle relaxants or inject local anesthesia into the spastic muscle groups. Ultrasound given daily for 5 to 7 days may be helpful. Small neuromas or fibrocytic nodules which create painful trigger points may often be located in the suprascapular area. Local injection of 3-5 cc of 1% Xylocaine is useful. Prolonged supportive measures may be responsible for the development of fibrosis, and may lead to as many complications as prolonged and unrelieved muscle spasm. Persistent spasm and persistent loss of the normal cervical lordosis calls for a re-examination and consultation with a neurosurgeon, orthopedist and/or a roentgenologist for special views of the spine. It is particularly important to look for a reversed cervical curve at C-4 to C-6.

Dislocations. The dislocations which spontaneously reduce themselves are frequently accompanied by marked muscle spasm and by root pain. Lateral X-rays taken with the neck in flexion and extension may reveal the increased excursion of the involved vertebrae. Infrequently with mild dislocations there may be cord involvement either by contusion and swelling with transient paralysis, or by severance of the cord and subsequent irreversible paraplegia or quadriplegia.

Pharyngeal edema is more likely to be seen following dislocations than with transient sprains. The treatment of the spontaneously reduced dislocation requires immobilization usually by a well-fitted Thomas collar or by a Calot jacket, depending upon the laxity of the surrounding structures and the stability of the vertebrae. Patients with persistent dislocations will require hospitalization, reduction of the dislocation by the use of tongs, and immobilization for at least three months in a supportive apparatus. Case with cord involvement require the services of a neurosurgeon and should not be handled by the average general practitioner.

Fractures. Compression forces and avulsion injuries may fracture or crush to varying degrees the vertebral bodies, particularly the fifth and sixth cervical veterbrae which are relatively immobile. Fractures of the odontoid process, while rare, are often overlooked. Fractures of the spinous processes are also rare, but they do and can occur. Dislocations can accompany the fractures of the arches. Torsional stresses are thought to be responsible for this more serious type of injury. Routine and special X-ray techniques may have to be used to identify fractures of the ring about the odontoid and also the fractures to the lateral masses of the vertebrae. Fractures unaccompanied by nerve involvement may be treated by immobilization in collars, or Calot jackets, or may be placed in traction for periods of from three to six weeks and then immobilized in the proper apparatus. Immobilization is usually for two to three months. Unstable fractures may require surgical arthrodesis. Physiotherapy is a useful adjunct in the late treatment of serious injuries.

Fractures accompanied by dislocations offer a more guarded prognosis though they are treated in very much the same manner as fractures and dislocations.

Cervical Disc Involvement. The use of the term *cervical disc* unfortunately has been taken to indicate that a rupture has taken place and is responsible for irritation of nerves which are thought to, but do not, lie immediately posterior to the discs. Immediate symptoms of pressure on the cord or the nerve roots are most unusual from injuries to the neck. Gay and Abbott have estimated that 20% of their patients developed full-blown cases of the ruptured disc syndrome eighteen to twenty-four months after the initial injury. It is my belief, and others agree, that symptoms from the so-called ruptured cervical disc syndrome are more often caused by injuries to the lateral intervertebral "joints of Luschka" which are in continuity with the important nerves and arteries. Where there is a severe tear in the annulus and posterior longitudinal ligament, ruptures of the cervical disc may be more likely

to compress the cord rather than the cervical nerve roots. The symptoms of nerve root involvement will be recognized by radicular pain in the arm following the course of the injured nerve root. There will be marked muscle spasm, pain on extension of the neck, diminution of the reflexes in the arm, hypesthesias, and weakness of grip. On occasion, the pupils of the eyes and the associated structures can provide many valuable clues in the diagnosis of the injuries to the nerve roots or to the sympathetic nervous system. There may be an interruption or dysfunction of the sympathetic pathway which may produce a Horner's syndrome; *i.e.,* dropping of the upper eyelids, constriction of the pupil, loss of ability to tear or water. Conversely, there may be blurred vision, difficulty with focusing and dilated pupil with a flattened lens. The patient may have difficulty in adjusting his balance. It must be understood that the tonic reflexes act in adjusting the tone of postural muscles throughout the body. A change in position of the head brought about by even a slight asymmetrical tension in the head or neck may make tasks requiring accuracy very difficult. Injuries to the nerves, muscles, and tendons of the neck can seriously decrease the quality of performance of highly skilled industrial workers.

These patients may also exhibit evidence of cerebral concussion. It is thought that the deceleration force is responsible for concussions to the frontal and occipital areas of the brain. Torsional forces may likewise involve the brain stem. The symptoms range from a loss of consciousness for a varied period to confusion, dizziness or vertigo, headache, inability to concentrate, and disorientation. Some of the symptoms have been found to last for several years. Rest, observation, blood pressure readings, awareness of the "lucid interval" which follows meningeal vessel injury, avoidance of narcotics which may mask symptoms, and recognition of the need for possible consultation are the important steps in the treatment.

Psychoneurosis. Emotional upsets may be immediate or delayed. Stoic persons may show little or no change. People, though, differ physically and emotionally, and resistance to disease varies as does response to injury. Many patients develop a fear reaction over the knowledge of possible complications from injuries to the spinal cord and brain. Hostility toward the driver of the other car is common and is often the basis of an emotional reaction. Frustration from an obvious or imagined lack of interest by the physician or an accusation of malingering may produce a state of tension which protracts the period of pain and may lead to psychoneurotic reactions.

It is necessary not to confuse nervous tension with intentional malingering. Most patients do show some marked improvement after

two years following the injury, and since two years represents the average time before litigation is completed, there have been some attempts made to coordinate the timing of disappearance of symptoms with the settlement of the case. The average general practitioner should be warned against involving himself with problems that require the services of a competent psychiatrist. The term *compensation neurosis* is an unfortunate one because too much emphasis is placed on the monetary gain to the exclusion of the other, more valid, motivating factors whose understanding is essential for proper prevention and treatment of the unfortunate reactions. All of you have seen employees accept pittances in monthly disability payments rather than accept a much more gainful job. Obviously dollars and cents fail to explain this. An injury received from behind by surprise is more disastrous to the victim than a frontal one in that it is more of a threat to the integrity of the ego and consequently potentially more conducive to the development of a post-traumatic neurosis, whether compensation is involved or not. Malingering is not a medical diagnosis. It should be avoided by the physician who should only list his findings and pass the onus of making a legal decision to those with the necessary competence and background.

Pre-Existent Conditions. Individuals past thirty years of age and those with a history of trauma or disease of the bony or soft tissue elements of the neck often may show evidence of degenerative changes about the articular processes of the lateral "joints of Luschka" or on the forward lips of the vertebral bodies. These spurs or osteophytes decrease the normal flexibility and mobility of the ligaments and joints and tend to give the neck a diminished resistance to the shock of severe forces which may have been applied to the area. Spurs may be broken loose, and when such an injury is so demonstrated by the X-ray examination the examiner should be alerted to the presence of injuries to the contiguous ligaments and soft structures. What is seen by X-ray then may be only the minor manifestations of a more serious injury to the soft tissues. The history should be carefully taken to elicit the presence or absence of previous complaints. A great many cases are litigated on the basis of aggravation of a pre-existing arthritis or injury. Discs which have undergone previous degeneration and which have become dehydrated may also be aggravated by a severe trauma. The medical witness often concludes his testimony by stating that there has been an aggravation of a pre-existing arthritis. The witness must be prepared to explain to the judge and jury exactly how he arrived at that conclusion. Was there X-ray evidence which led him to believe that there was an aggravation? Does the aggravation lead to a permanent disability, and if so, on what basis? It is my opinion and the opinion

of many judges that the term *aggravation* is too loosely used. Certainly it is to be expected that an individual who has been thrown about in a poorly engineered vehicle is going to sustain some painful injuries which persist for varying periods depending on the severity of the injury. It is often unnecessary to further confuse the lay jury by stating that there has been an aggravation of a pre-existing condition. The latter conclusion is often reached following a chat with a lawyer who indicates that the state compensation rules permit compensation of an individual whose original injury, though it had nothing to do with the alleged accident, may have been aggravated by the accident. Ambiguities in the law are not helped by physicians who further muddy the waters.

Patients who have had long debilitating illnesses may be subject to dislocations because of the increased laxity in the muscles and ligaments which surround the vertebrae. It must be emphasized that distress or physical signs need not have been observed prior to the neck injury despite X-ray evidence of degenerative processes which must have been present for a long time. Congenital anomalies such as congenital fusion usually of the second and third cervical vertebrae may be responsible for throwing undue stress on the vertebrae above and below. Arteriosclerosis, particularly of the vertebral artery, may make the vessel more vulnerable to compression. Sclerotic vessels are subject to tearing and may be responsible for hemorrhage, swelling and secondary irritation to contiguous structures.

Electromyographic studies may help localize the site of injury but the method is still subject to many sources of error in application and interpretation. These studies can furnish information about stages of nerve degeneration and signs of regeneration. Often signs of nerve regeneration may be demonstrated two months before voluntary movement in a muscle occurs. The electromyogram will not show whether or not an affected nerve will proceed to complete degeneration.

Resumé of Treatment. Prevention is the best therapy. Better engineering in cars, the use of seat belts, and driver education would be helpful in reducing the tremendous number of accidents which occur on the highways. The danger from use of certain drugs, including tranquilizers, antihistamines, and barbiturates, must not be minimized. They should be eliminated in the diet of the average driver. Patients who have persistent symptoms and complaints should be evaluated by a team of physicians. Ideally, such an examination should be done early and repeated after various forms of treatment have been tried. The general practitioner is fully capable of handling 90% of these injuries. Where the general practitioner fails is in the acts of omission rather

than commission. A thorough understanding of the anatomy will make possible a diagnosis in most of these cases.

The treatment should be individualized and should begin immediately after the completion of the examination. Hospitalization for one or two days or longer is useful for disturbed patients who have been subjected to a severe crash injury. Complaints that are not noticed immediately after injury may come to light in twenty-four to forty-eight hours or later. The patient is advised to rest on a firm bed for at least twenty-four hours. Analgesics and sedative may be given at regular intervals. Where neck muscles are painful, a Thomas collar or other type of plastic or cotton collar is applied to place the muscles at rest. Traction of an intermittent type may be used with weights varying from seven to twenty pounds. Wet or dry heat may be applied to the neck and painful muscles may be injected. Oral or intramuscular relaxants may be used. Avoid manipulation or excessive movement of the neck unless or until it is absolutely certain that there is no fracture or dislocation. If the physician has been thorough in his examination and honestly feels encouraged, he should reassure his patient and educate him to understand the process of injury, healing and convalescence. If the practitioner does this, he may relieve the patient's need for later psychotherapy.

Summary and Conclusion. The term *'whiplash injury'* should be replaced by a more accurate and descriptive terminology. The anatomy of the cervical area is complex and it must be understood before the complaints of the patient can be evaluated. Injuries to the neck are common and fortunately are not usually severe. Cursory examinations of the patient may lead to a misdiagnosis and protracted symptoms. Neurosis and medical-legal complications may develop in badly handled cases. Evaluation in prolonged cases requires medical teamwork. Pre-existing conditions may light up the symptoms of neck injury. Such pre-existing conditions may have been entirely without symptoms and unknown to the patient. Most of the injuries are minor sprains and respond to treatment quickly. The cases with delayed convalescence offer a more guarded prognosis. An accurate evaluation in these cases cannot be made in less than twelve to eighteen months. Treatment should be begun early; reassurance and psychotherapy, not necessarily by a psychiatrist, are important. Pain from tension heightened by neurosis should not be confused with malingering. Physicians should keep accurate records and refer patients to specialists when necessary. The treatment of an injured patient does not always end in the physician's office. The just settlement, which often depends upon his testimony, may be more therapeutic than medication.

Cervical disc ruptures are an uncommon, immediate complication of neck injuries. Injuries of the so-called joints of Luschka are thought to be the most common complications and cause of cervical radiculitis.

Physicians need not be drawn into the academic controversy about the mechanics of this injury. It should be sufficient that the patient has been injured and that the physician is interested in the patient's injury and in making a diagnosis as well as a differential diagnosis. When the physician is asked to appear in court on behalf of his patient, there should be no reluctance; he should cooperate freely with the attorney, he should state his findings clearly in language that the jury and judge can understand, and he should bring with him adequate records and other tools, such as anatomical displays, which will help the jury understand the case more thoroughly.

Physicians who handle injuries must begin to think in terms of symptoms such as sprains, fracture, dislocations, radiculitis, concussion, psychoneurosis, and so on. The physician must remain a physician and not become an advocate for either the plaintiff or the defendant.

Neck injuries are most frequently seen and treated by general practitioners. Only 20% require specialized care. Errors in diagnosis are by the way of sins of omission rather than by sins of commission.

The following excerpt from *Time Magazine,* October 31, 1960, nicely illustrates what is basically wrong with medical thinking about so-called "whiplash" injury.

> Nobody really knows when the term "whiplash" injury originated, and U.S. insurance companies, which each year pay out substantial damages to supposed whiplash victims, undoubtedly wish it never had. The sudden backward snap of the head to which whiplash is ascribed generally happens in rear-end automobile collisions; these annually result in thousands of cases of alleged neck injury. Yet standard medical dictionaries do not even mention whiplash, and in the District of Columbia's *Medical Annals,* Washington Surgeon Francis D. Threadgill insists that it is usually only a synonym for 'malingering and self-delusion.'
>
> Many people who complain of whiplash, reports Dr. Threadgill, "do not have anything more than a temporary indisposition. They have no real injury to muscle, nerve, tendon or bone." In examination of 88 supposed whiplash victims, Threadgill found only 14 cases in which patients' subjective complaints (*e.g.,* neck pains, headaches, loss of sensation, restricted arm movements) could be medically confirmed. His sardonic conclusion apart from clear-cut cases of bone or nerve injury, 90% of 'so-called whiplash injuries' will disappear within six weeks "if legal settlement can be quickly obtained.
>
> *What Hit Him?* But whiplash should not be so lightly dis-

missed, insist Drs. Robert Leopold and Harold Dillon of the University of Pennsylvania's Department of Neurology and Psychiatry. In a study of 47 whiplash victims, Drs. Leopold and Dillon found a considerably higher incidence of actual physical injury (14 "severe" cases, 26 "moderate") than did Dr. Threadgill.

More important, they also concluded that the degree of a patient's emotional reaction to an accident usually bore little relation to the severity of his physical injury. One 52-year-old woman, bothered by persistent neck pains after a minor collision, twice attempted suicide although she had no previous record of neurosis or depression. A 37-year-old ex-Marine was so bewildered by the accident in which he suffered a mild whiplash injury that one month later "he did not know what had hit him, or why."

Threatened Control. The human personality is peculiarly vulnerable to the shock of a sudden assault from behind, argue Drs. Leopold and Dillon. This, they theorize, may trigger a "denial mechanism that prevents the victim from coming to terms emotionally with the meaning and discomfort of his injury. They add: "The fact that the head and neck are the sites of injury adds to this distortion . . . almost as if the ego unconsciously perceives that the control (head) can be severed from the body. It is our thesis that the whiplash injury is psychologically unique in that both its suddenness and its unconscious meaning tend to mobilize greater anxiety in ordinarily stable and well-integrated individu-

(Courtesy TIME; Copyright Time Inc. 1960)

MODERATOR E. BRUCE FOSTER: Thank you very much, Dr. Frankel. That was certainly educational to all of the lawyers here, and I am satisfied it was also to the members of our medical profession.

The next speaker on the program is going to talk with you about the legal aspect of whiplash injuries from the standpoint of the plaintiff. The speaker is a man who has been a trial lawyer since approximately 1923. He has spent most of his time representing plaintiffs. He is a member of the firm of Gair, Averbach, Mahley, and Hoffmann in Syracuse and New York City, and maintains his own offices in Seneca Falls, New York. He is Past President of the International Academy of Trial Lawyers. He is also a former Vice-president and Governor of the National Association of Claimants' Counsel of America. He is an Associate Editor of *NACCA Law Journal,* and Advisory Editor of *Negligence and Compensation Service.* He is the author of a recent three-volume work entitled *Handling Accident Cases* and a brand new book entitled *Tort and Medical Yearbook* of which he, along with Melvin Belli, is the Editor. Because of his extensive lecturing and writing activities, as well as his activities in the normal process

of law, his biographical data has been listed in "Who's Who in America". Ladies and Gentlemen: Mr. Albert Averbach of New York.

MR. ALBERT AVERBACH: Mr. Moderator, Leo Karlin, Harley McNeal, Dr. Frankel, and lest I forget, the man who made all of this possible — Professor Martin J. Feerick: I came here this morning to talk with you about a very serious problem: How you, as trial lawyers representing the plaintiff, can project injuries to a jury. Our time is limited this morning to forty minutes, and in forty minutes I am going to try to condense what it has taken me two or three hours to talk about on my last two seminars.

Seventy to eighty per cent of all the litigated cases in the country turn upon medical issues, and not on legal issues at all. It is important for you as trial lawyers to know that when you are dealing with a lay jury listening to your proof as it comes to them in the courtroom, they can only retain, according to statistics, 30 per cent of what they *hear,* but they do retain 50 per cent of what they *see.* For that reason I am going to try to impress upon you the absolute obligation that you, as trial lawyers representing the plaintiff, have to make that jury see in order to make that jury understand, to make that jury feel, the personal injuries, and the sorrow, and tragedy. You men who are representing the plaintiffs, when you are in that courtroom, are the salesmen of sorrow, of pain, and of tragedy. It is important for you to get across to that jury just what you are talking about.

Our first subject today is the "Whiplash Injuries", so-called. Well, there is a great deal of literature today saying the "whiplash" is a misnomer, and Dr. Frankel properly alluded to that fact in his part of the presentation. I do not care what name you apply to that injury. Personally, I, at the present time, do not use the phrase "whiplash injury". When I represent a plaintiff, I would rather call it a cervical spine injury because the minute you have the word *spine* in there, you are projecting something to a jury that is far more emphatic, far more devastating, than the phrase "whiplash". So you can call it a cervical spine injury, a dorsal spine injury, a lumbar spine injury, or you can call it a neck sprain or a neck strain.

When you get into a courtroom, particularly the courtrooms such as you men from this area are operating in — and I have checked this with some of your trial judges and I find that this is correct to your law and to your procedure — you have a great deal of leeway as to demonstrative evidence. Now when you are talking about a cervical spine, why do you not do what you ought to do? Get a medical drawing exhibit showing the small size of the cervical spinal bodies

as distinguished from the larger sizes of the lumbar and the dorsal. Here are some exhibits which we introduced in a recent trial. If, for example, you are talking about a fracture in the neck of the femur, let the jury understand what you are talking about. This drawing was introduced in evidence in a case that we tried, where the neck of the femur became necrotic and an Austin-Moore prosthesis head was put in it. We went a step further. We brought the prosthesis in that had to go in there. We introduced it in evidence as a replica of what was used when the head of the femur became necrotic and required a replacement with an Austin-Moore prosthesis. If you are talking about an intramedullary nail, or a Smith-Petersen nail – get it before the jury so that they know what you are talking about. A McLaughlin plate – get it before the jury so that they can understand that you are talking about a metal plate; and get in the hardware – the screws they put in there, the instruments that are used by the doctors. In my opinion, this is your responsibility of "projecting" to a jury what it is you are talking about.

These suggestions that I have are only suggestions because I am not here trying to pontificate this morning about the best manner of doing anything. I am talking about what I have found from 37 years in the courtroom, from my experience at least, to be the most effective way of telling your story to a jury. Now these are methods – some of them may be applicable in your jurisdiction; some of them may not. Frankly, in 37 years I have never brought a skeleton into the courtroom. If I have women on the jury, I do not want to bring a skeleton in because it is too grisly. I would rather bring a plastic reproduction. These that I now hold up, by the way, are not plastic. These are actual cadaver bones. I think, if you are going to use a portion of the spine, a plastic reproduction is a better method of doing it.

Using visual demonstrative aids such as I suggest *must* be reserved for an important case. Do not go in there with a series of these demonstrative aids that I am talking about in an ordinary ankle sprain because you are spoiling it for the next man that comes up, and also spoiling it for yourself. Reserve these for major injuries, and when the appropriate time comes, always clear in chambers with the court what you intend to do in advance, so that there is no dispute about it.

Now, I want to give you some leads, and only leads, as to methods by which you can utilize this type of technique. Today we are using what are known as "medical illustrations." We are doing it almost routinely, and the method of using such drawings is very simple. Let

us talk about a particular case, and these are actual exhibits in this case. Here is a quadriplegic boy who suffered an injury nine days after he went on a fire-fighting mission — a three-alarm. He ended up as a "quad" — the only thing he could move for the first thirty days was his eyebrows. He was removed to the Rusk Institute after 31 days and 16 operations were performed upon him. At the time of trial in Rochester, the surgeon who did the repair work was in Ireland; and the man who took all the X-rays was unavailable (being out of the country also). I was trying the case with a neurosurgeon who examined after the operations. I wanted to put medical illustrations in so that the jury could understand the severe injuries suffered. Now, I produced the X-rays. Here is a copy of the X-ray. My medical illustrator, in San Francisco, made a tracing of it. This tracing was introduced in evidence. The X-ray was placed in the shadow box. I asked the neurosurgeon in the courtroom whether this was an exact tracing, exclusive of the color. He said it was. I offered it in evidence. I asked him to look at this exhibit and asked him whether or not that was a colored enlargement of the tracing, and he said it was. I offered it in evidence and it was received. Now, that showed that there was an extensive crushing of the cervical spine which was repaired by operative intervention; some of the laminae were removed but there was some overlapping of C-6 and C-7. At the same time this poor, unfortunate boy had a crushing injury in the thoracic spine at T-5, 6, and 7; and when they tried to repair it, after stripping the paravertebral muscles — (they could not give this man anesthesia) — he screamed so much they had to sew him up. One juror raised a hand and said, "Doctor, what would have happened if you continued with the operation?" He said, "We would have lost the patient." This man is now a wheel-chair cripple and will be for the rest of his life.

This is another chart of the same thing and here again is the tracing introduced in evidence which cost us $125. There is not any amount of testimony that we could have given in the courtroom that would have been as graphic, or as emphatic, as these two exhibits.

Now let me show you what you can do with a whiplash injury. One of the most common things that you hear about is muscle spasm which causes a straightening of the normal curvature of the spine which is shown graphically here. This was introduced in evidence in a case involving a woman who was a passenger in a bus hit in the rear end by an oil tanker. The bus was standing still taking on a passenger. This woman was fifty-six years of age. The doctor for the defense had taken X-rays. There were some osteoarthritic changes as you would expect in a 56-year-old individual because we all get spurring and

lipping or osteoarthritic changes after the fourth decade of life. This was the defense, one of the most common defenses introduced in courts where there are osteoarthritic spinal changes caused by the ageing process, not by the accident. Well, for you men who are of the plaintiff's persuasion, let me suggest that you take that doctor to the X-ray shadow box. You use one of these China-red marking crayons, and you make him sketch by putting a little red dot where he sees that spurring. It will be a small dot. Then your next question is: "Does that in any way interfere with motion? Could she have had that spurring or lipping without knowledge at all that she had osteoarthritic changes in her spine, and was she able to work even with that?" Now that destroys this entire business of pre-existing osteoarthritic spurring and lipping.

You must understand the significance of medical charts. Here is a chart over here known as a Froshe Medical Chart. I like the Dr. Michel charts a little better and use them quite frequently. How do you get them in evidence? Very simple. These are the key questions: 1. "Doctor, are you able to explain adequately the injury suffered by your patient — without a medical illustration?" You should in advance prepare him for this at his office. His answer to question Number 1 should be, "No." 2. "Doctor, I show you a medical illustration, marked Exhibit Number 1, for identification." (Have it rolled up. Do not show it to the jury. Do not flash it. Be sure you clear with your trial judge as to whether or not it is going to be admissible.) 3. "Doctor, I show you Plaintiff's Exhibit 1 marked for identification. 4. Have I shown it to you previously?" "Yes." 5. "Have you examined it?" "Yes." 6. "Is it anatomically correct?" "Yes." 7. "Would it aid you in explaining the injury to this jury?" "Yes." "I offer it in evidence as an aid to the jury."

This is the same procedure to be used in offering a medical illustration — the same way that you go through the procedure on hardware and to introduce anatomical models and plastic reproductions. Today in the trial of whiplash cases we frequently introduce in evidence, if the trial court permits, (and most of them do in our state and in many states in which I have appeared), the cervical collar (the Thomas collar), which has been worn by the patient so that the jury can understand what it is. We use the traction apparatus (or harness) and introduce that in evidence. The jury then can understand what you are talking about when you talk about the "neck stretching". If a Crutchfield tong was used where borings were done within the skull and the apparatus applied in order to get skeletal traction where there actually are fractures of the spinal processes, introduce that in evidence, too, so that the jury can understand the significance of it.

You cannot expect to project injuries to a jury unless you yourself

understand a bit about medicine. So let me supply you with some very inexpensive aids. I suggest that every one of you carry a set of these "Data-Guides" in the courtroom with you in your trial bag. These cost you 79 cents each. They are plastic, and they give you all the names and locations of bones, nerves, arteries, lymph glands, and internal organs. These are called "Human Anatomy 1, 2, and 3", and are published by Data-Guide Inc., 40-07 107 Place, Flushing, New York. Now, here is something that your youngsters buy in the supermarkets. They buy it exactly the way they buy the books upon reptiles, and rocks, and birds. You probably have not seen one of these. You can buy this "Wonder Book of Human Anatomy" for 50 cents in any supermarket. You can read it in an hour, and it will tell you more about the human body than anything I know. I recommend it to you. Here is what we call a "transparency." We introduce this in court, too. This is what the surgeon sees as he cuts down, layer by layer, into the human body. You can read these forty pages of text in less than an hour and understand more about what makes the body work and why than any volume I know. This is called "The Human" (distributed by Lawyers Co-operative Publishing Co., Rochester, New York). As to whiplash, here is something that I recommend to you. I recommend the *Journal of the Michigan State Medical Society* article on whiplash injury, "Lesions of the Cervical Intervertebral Discs." Although this has been out of print, it is now going to be republished, and you can write to the M.D. Publications in New York and find who the new publisher is. This entire issue, January 1956, of the *International Record of Medicine* tells you all about the soft tissue injury aspects of the cervical neck injury; and the tremendously worthwhile article by Dr. Myron Middleton, showing the significance of injuries to the optic nerve is also contained in here. I also refer you to the book by Ruth Jackson, titled *The Cervical Syndrome,* and also to a book entitled *The Spine* by Dr. Lee Hadley. Here is something that the doctors get, a house organ of the Lederle Division of the American Cyanamid Company. Unfortunately, they throw it away. You ought to ask your doctors to save it for you. This particular one is called "The Normal Blood Supply to Principal Bones", and it shows the common fractures. It is tremendously worthwhile. Here are three papers that I have selected from the *AMA Journal*: "Whiplash Injuries", by Dr. Sullock, a very worthwhile article; "Medical-Legal Aspects of Head Injuries", by the very gifted Dr. A. Earl Walker, head of neurosurgery at the John Hopkins Hospital. If you have a doctor friend who owns Tice-Sloan's *Practice of Medicine,* an encyclopedia set, or Lewis-Walter's, he has the right to go to the Consulting Bureau of W. F. Prior, Inc. of Hagerstown, Maryland, and ask for a

reprint of any article on any given subject. We lawyers who subscribe to this type of library get requisitions for such articles. Here are some of the articles they sent me within the last few days: "Traumatic Neurosis" by Ben Bernstein, and "Anatomy and Psychology for Lawyers". Here is a color print of the *Atlas of Human Anatomy* published by Fred C. Rosselot, Cincinnati, Ohio. Here is an article from *The Journal of Trauma* – the significant point of this recent article is merely that hyper-extension of the cervical spine is still called a "whiplash", as late as September, 1961.

On the other side of the coin, *The Revolt Against Whiplash;* published by the Defense Research Institute of Syracuse, New York, contains a great number of the articles that have appeared in print saying that "whiplash injury" is a misnomer – that it actually does not describe anything except the mechanics of it. I am not going to quarrel with my friends on the other side. I, personally, do not like to use the phrase "whiplash" as I stated before; and most of the men who are in the courtroom as frequently as we are have followed the same pattern. I wish that I could get most of you to get your doctors to let you have, on their letterhead, a request upon Lederle for the *Atlas of Normal Anatomy*. This is a most graphic set of drawings done by Paul Peck, and I do not think there is anything I have ever seen that gives you a clearer picture. Let me point this particular drawing out: here is a bulging of what we call the "nucleus pulposis". In the courtroom never call it that; never let your doctor call it that. That is the jelly that oozes out of the doughnut and that is the way you describe it. You take every medical word the doctor uses and translate it to something that a juror can understand. This is the bulging of the jelly impinging upon a nerve which causes a pain usually rotating down the sciatic nerve – in that area. Here are disc lesions.

I notice that the program mentions that we are going to talk about malingering. You defense lawyers might want to note this item. The late Doctor Foster Kennedy, in 1946, in a courtroom battle in which my partner was cross-examining him, gave birth to a phrase that has been in the literature since that time. He defined "compensation neurosis" as a "state of mind, born out of fear, kept alive by avarice, stimulated by lawyers, and cured by verdict." Dr. Hans Selye, who is probably the most gifted writer on what we call the "Stress Theory" has a magnificent book published by ACTA called *Stress,* a book about 1,800 pages long, some of which is a little too deep for anybody, including the doctors, to really understand. But he has another one that anyone can understand and read, and it is called *The Stress of Life*. Now, in a *Reader's Digest* article, he has given expression to the view that all

ills are caused by the stresses of life. In other words, where you have an injury, particularly one that is a rear-end injury, to a vulnerable part of the human body that everybody respects and fears – the head, (the master-organ of the human body) – and it is an unexpected blow, the worry about what that can do to the mentality and the ability to work causes nightmares, cause worries about what is going to happen to the children while he is in traction at the hospital. That type of concern, that stress, causes metabolic changes, an excessive outpouring of the adrenal glands. All of these things have an effect upon the human body, and the system.

Now this phrase "malingering"; this phrase "simulated"; and this phrase, "secondary gain" – have been stated by medical literature in the *AMA Journal* and in other respected medical journals to be merely an opinion by a doctor that he does not believe an individual, and he has no right to express such an opinion in a court of law because it is not a medical opinion. The question of believability is for the jury and the trial court. The best article that I have seen on that is by Dr. Charles G. Aring of Cincinnati, who wrote in the *AMA Journal* of May 24, '58 an article entitled "Sympathy and Empathy." He says there is an old saying that goes back to Spinoza to the effect that Paul's idea of Peter tells us more about Paul than Peter. A diagnosis of malingering tells us nothing so much as the physician's moral condemnation of the patient, and it tells us as much, if not more, about the physician than it does about the patient. Now Doctor Thomas Szasz of Syracuse, head of the Psychiatric Department at the Upstate Medical Center, has written extensively on this subject; and he has stated that "malingering is not a diagnosis in the usual sense of the word and must be eliminated from the psychiatric and medical writing as an item in the differential diagnosis of certain disesases."

Now I know, because I have examined your Code here in Tennessee, that you have in many respects come a long ways further than we have in our state. We still publish in the back of our Civil Practice Act the American Experience Table of Mortality. That was enacted by our laws in 1878. The U.S. Government has published a great number of publications showing today's present expectancy table, and they give you an enlarged life span of 30 years or better. I suggest to you who are not from Tennessee that when you deal with expectancy tables, you send to the U.S. Printing Department, and ask for a copy of the latest government table. Then send it with 65 cents to the U.S. Department of Health, Education, and Welfare and ask them to certify and authenticate it. They will send it back to you, and they will put a lovely gold seal with a red ribbon on it; you can introduce this in

evidence in any court anywhere as a public document, and the jurors are impressed by it. Suppose you are dealing with a woman. You want to show that she was taken out of the work force. This time get the same kind of document from the U.S. Printing Office for 60 cents. Send it to the Department of Labor. This time you get a lovely gold seal with a blue ribbon for free, and you introduce this in evidence. This is the Table of the Working Life of a Woman; there is one comparable to it for a male.

Some of your youngsters have the *Encyclopaedia Britannica.* In Volume I is the article on "Anatomy"; it is very useful, but you may need a little help on the translation of the names of the bones and the arteries and the nerves and the muscles from Latin into English. There are graphic transparencies. Here are some more of the periodicals. I strongly recommend Dr. Frankel's article in Volume 4 of *The Defense Law Journal.* I do not usually recommend *The Defense Law Journal* articles, but in this instance I make an exception as I think it is tremendously worthwhile.

Now, my friends, I know that this question of the effects of injury to the cervical spine is grossly misunderstood by even experienced trial lawyers. As a matter of fact, it would amaze you, probably, to know about a case in Florida, *Modesta v. Pepsi-Cola Bottling Co.,* 107 So. 2d 43, a 1958 case. Here is a woman with no objective signs. Rear-end hit. Yet she becomes depressed, and she has to go into shock treatments. The ad damnum was 100 thousand dollars, the summation was for a hundred thousand dollars, the verdict was a hundred thousand dollars. Look it up. That indicates the significance of what these neck injuries really are. They are grossly misunderstood. I would like to have you remember this phrase, "Trauma is injury, not only to flesh and bone, but to the nervous system — to the mind, the heart, and the soul of humanity." And who wrote that? Dr. Sullecks in the *Journal of International College of Surgeons,* April, 1960, page 416. This morning's paper carries the story of a $375,000 verdict for throat injury which probably will be a subject of our discussion tonight.

Let me conclude with these observations. Trial advocacy is the art of persuasion. The defendant in no part of the United States is entitled by law to inflict damage only on a 100 per cent healthy individual. He takes the injured person as he finds him and is liable in law for inflicting traumatic neurosis upon him or her. I know of a case of a passenger on the *Andrea Doria*; we had some of these cases. This ship was struck by the Stockholm, and this claim was evaluated by the Evaluation Committee of Proctors as a case worth but $400. It was a case of a young girl in her teens, with an ankle

injury, and that was all. A month after that case had been evaluated at that figure, this young lady was sitting at a TV enactment of the sinking of the *Andrea Doria.* She screamed; she went into a coma; she was hospitalized and is in an institution at the present time. That same case was settled by a Cleveland firm of attorneys for $75,000. Fear! Traumatic neurosis! At a symposium in New York on "Stress", in which Bill Geoghan and I participated, we discussed with the doctors who were on the program the effect of trauma to the mind as well as to the body. Doctor Larry Kaplen, who is frequently a lecturer at PLI, conceived in his very active, fertile mind the concept of fear which became the most significant court case of 1958: *Ferrara v. Galluchio,* 5 N.Y.2d 16, 152 N.E.2d 249 (1958) – the cancerophobia case. That case, just to digress for a moment, was a suit against a doctor for a burn caused in treating bursitis of the shoulder. The patient went to a dermatologist who merely stated to her that he wanted to see her every six months to watch for cancer signs. She developed, according to Doctor Kaplen's testimony, a full-blown cancerophobia. She did not have cancer, but she was worried about it. In the trial of the case, a special verdict was rendered for that cause of action; $15,000 was the award. It went all the way to our Court of Appeals and it was sustained.

Just last month our Court of Appeals came in with another fright case, *Battalla v. State of New York,* 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961), in which a youngster riding in a ski-lift was frightened. Our entire concept of fright without physical contact, which goes back to *Mitchell v. Rochester Railway Co.,* 151 N.Y. 107, 45 N.E. 354 (1896), has been done away with by the *Battalla* decision.

My friends, 9,000,000 persons were injured last year. A death every six minutes, an injury every three seconds, a computable cost of at least 11 billion dollars annually resulted. It is imperative that you, as trial lawyers, when you step into that courtroom and plead for your client, realize that you are talking about two levels of the human body – the anatomy and the mind; and this has significance, I feel, in this subject that we are going to talk about all day. Thank you for listening to me.

MODERATOR E. BRUCE FOSTER: The next speaker will discuss the legal aspects of whiplash injuries from the standpoint of the defendant. He is a relatively young man who has come far in a short time. He has been practicing law since 1936; he is a member of the law firm of McNeal and Schick, in Cleveland, Ohio. Besides the usual affiliations, he is a member of the National Association of Railroad Trial Counsel; he is on the Executive Committee of International Association of the

Insurance Counsel; he is a Fellow in the American College of Trial Lawyers, the Academy of Forensic Sciences, and a Founding Fellow of the Law-Science Academy. Ladies and Gentlemen, I give you Mr. Harley J. McNeal of the Cleveland Bar.

HARLEY J. MCNEAL: At the outset, I want to say it is always a great pleasure to have Al Averbach on the other side of these panels because it demonstrates so very well the line of demarcation that exists between the plaintiff's side and the defendant's side. I have nothing to sell on the defense except hard work and sincerity, with a complete disclosure of all the evidence, the facts, and, I hope, a good medical picture which can be understood by the average jury. Rudyard Kipling wrote some lines that I always remember: "I have six honest serving men. They taught me all I knew. Their names were Where, and What, and When, and Why, and How, and Who."

That best illustrates, I think, what the defense has to do in personal injury cases. It demands complete investigation with painstaking attention to all details. It demands close cooperation with the physicians who are going to examine and who will be expected to testify in these cases. I was somewhat dismayed to find after talking with Bruce Foster that, in some instances here in Tennessee, some of your good physicians can refuse to come into court and testify and you have to take it; that some of your doctors prefer to have depositions taken and are not disposed to appear in court. However, as Bruce stated, if the case warrants it, in most instances your physicians do cooperate and do testify so that the jury may observe and appraise them as witnesses. Therefore, it behooves the defense to make painstaking selections of physicians who are going to testify and choose them not only for their ability to do the examination which is required but also for their personality and their ability to demonstrate to the jury what the case is about, so that the jury will understand the problem at the outset.

In order to get the proper physician, the defense has to start in very early with investigating the plaintiff. This is not for the idea really of disproving what the claims may be although that may be the ultimate result. The idea is to find the true picture – how the facts lie.

This morning we are dealing with the neck and the injuries that might be caused to that area. So the deposition of the plaintiff is very necessary. And in that deposition I think the defense counsel should resort to every question possible in order to find out about the plaintiff: his background, employment, the kind of work that has been done; previous injuries that the plaintiff may have had; hospitalization; difficulties in work; whether there have been compensation claims – anything that will be of advantage in appraising the case and enabling

your examining physician to find out if there are causes other than the one which is complained about in your law suit.

In the appraisal of the medical, you will want to inquire of the plaintiff concerning his early symptoms after the rear-end collision or even the right-angle collision in which there may be claims of injury to the neck. You will want to find out if there was unconsciousness; whether the individual was dazed, or if he knew what he was doing immediately after the accident; whether he got out of the automobile immediately; whether he gave assistance; or whether, immediately after the accident, he was not oriented or did not seem to have a full command of the situation. You will want to inquire if there was a blurring of vision; whether immediately he felt pain or a stiffness of the muscles of the neck; whether he had later symptoms of neck pain; whether he had headaches, pains in his shoulders, pains in his arms or hands, whether he experienced any numbness. And still later, whether or not this pain in the neck about which he complained remained constant; whether it came and went; whether he had radiating pains from the neck into one or other of the arms or any of the fingers of the hands; whether or not he had a weakness of one or more of the hands. Also, you will want to note whether the individual has a large head, average-sized head, or a small head; whether or not he has a long, thin neck, or heavy muscles with a short neck set well between the shoulders. All of those factors will be important for your physicians, and you should convey this information to them. I am told that the average head weighs about 7 pounds. You can imagine in a rear-end case what a weight of seven pounds will do on a long, thin neck or on a short, squat, heavily muscled neck. I believe it is true that in most cases women have more difficulty in these neck sprain or neck strain cases than do men because of the lack of muscle or the ability of the muscles to counteract the back-to-front motion which is usually testified to in such cases. One of the things that I believe is important is the fact that there is no real normal range of motion that can be established — I have not seen discussion of it in any of the texts — so that it is important to examine the physicians as to whether or not there is a normal range that they can look to in order to say that this individual has 45 per cent normal or 50 per cent normal function. The ability to move the neck or to turn the head depends upon the individual, and that should be stressed in connection with the defense of such a case.

You should become aware of the distribution of the nerves through the various portions of the arm so that if an individual is complaining of numbness of one or more of the fingers, you can ascertain whether or not it is anatomically supported. The individual may claim numbness

of the thumb and first finger whereas, actually, the injury would be to the middle or little finger if you have some injury in the region of the neck.

The type of headache that the individual complains of is important. Sometimes these individuals will complain of frontal headaches, whereas if there has been an injury in the region of the neck, it is the occipital nerves in the back of the neck, the head, that are being stretched and the headaches should extend from the back of the head toward the front.

The weight of the individual is also involved in these injuries. The weight of the individual will control the amount of pressure that is put upon the spinal column, the discs, and also will control the ability of the individual to move about. Thus, whether there are stresses or strains in that individual may depend upon his weight. Also important is whether the individual has a straight spine or whether the spine is curved or whether normally the individual has a diminution of the lordotic curve or the normal curve of the spine. Here again, no normal curve can be established, and I think that most physicians will readily admit that this deviation, if it can be called deviation from the normal, varies from individual to individual. It depends a great deal upon the individual's early life, the type of work that he has done and the like. It is not unusual, I am told, to have a limitation of rotation of the head from left to right — again depending upon the individual characteristics. It is important, also, in these cases to ascertain whether the individual has arthritis and how old he is. Age begins to bring about degeneration of these various portions of the anatomy.

You want to inquire as to whether the X-rays, which have to be carefully taken, show any dislocations of the cervical spine or a sub-location, a partial dislocation; and whether the discs spaces are narrow — whether from viewing the entire spine there seems to be a narrowing of all the disc spaces. It can sometimes be advanced or suggested that the disc spaces vary from morning to night, depending upon the work of the individual or how long the individual has remained in one position. Sometimes the disc spaces vary with the individual. The bulging about which Mr. Averbach talked varies from morning to night. All of those things can be suggested in defense of these cases.

Cervical ribs are also important. The physician should be questioned about whether there is a cervical rib which may stimulate a condition which is attributed to a neck strain or a neck sprain; whether there are congenital conditions of the vertebrae; whether the individual was born with some defective vertebrae or vertebrae which are not anatomically perfect.

It is important, also, I think, when you have a plaintiff come to

you for deposition in your office, that you shake hands with him. Find out if he gives you a firm grip and then later complains that he has weakness of the hand or arm, or numbness of fingers. You can learn quite a bit by observing the individual.

Coming to the facts of the accident, you will want to know whether the brakes were applied, whether the plaintiff – if he was the driver – had the brakes on or whether, as far as the passenger is concerned, the brakes were on in the car. You will want to know whether the car was in motion, and how fast it was going because at increased speeds the body tends to recline more, and that counteracts the force of a rear-end collision. It also tends to increase the force when the individual is seated in a car that collides with the rear-end of another car. Also important is the position of the individual in the automobile – whether he was reclining or asleep. All of these factors tend to aid in the defense of these cases and to minimize the claims.

New X-ray techniques have also been developed. There is a group of roentgenologists in California who now are able to take X-rays to indicate any swelling of the pharyngeal areas, the back pharyngeal area, and they have stated in some literature that if these X-rays are obtained, they can show some swelling in that area which tends to support the claim of a neck injury. Conversely, if there is no evidence of swelling, then you have something to talk about in so far as disclaiming neck injury.

All people begin to show degeneration of the discs and disc spaces as they grow older because of the loss of tissue fluid, and age is important as I have already indicated. I think medical practice now is tending to get away from prolonged traction in these cases because the prolonged traction of the neck muscles tend to stretch the trapezius muscle, tends to weaken the muscles of the neck so that you get an inability of the muscles to support the head. The same is true of the use of the Thomas collar. A prolonged wearing of the Thomas collar tends to create a difficulty in so far as recovery is concerned. So those procedures can be somewhat questioned when you are defending such cases – whether there was prolonged traction over a period of time; whether it was intermittent; whether the individual was asked to wear the Thomas collar for a prolonged period of time and relied upon that support rather than give nature the chance to get the muscles in tone and to do the work they are supposed to do.

I think it is true that the greatest number of these disc cases in the cervical area are treated conservatively. No well-meaning surgeon will operate in a cervical disc case unless it demands such procedure. I think it is also true that manipulations of the neck in any of these

so-called sprain or strain cases is not indicated. If you can get some testimony or evidence that the individual went to physicians who manipulated the neck or cracked a bone, as some of them have said, or have given such kind of manipulated treatment, I think a fair number of other physicians will say that such treatment only continues and aggravates an injury which, left to itself and treated conservatively, would probably heal within a reasonable period of time.

There has been a lot said about such terms as myositis, myofascitis, and fibrositis — all of the "itises". I think the tendency now is to get away from such terms as not being supportable medically. In preparing for your law suit, you should try to get away from terms such as that, such as "whiplash" which is not a diagnosis but a descriptive term.

I think it is fair to say that in these neck cases the average range of motion in bending forward is about 65 per cent; in extension, or backward, about 50 per cent; in side to side flexion, about 40 per cent; and on rotation, about 55 per cent or degrees if you want to use that term. When you try to approximate the range of motion from a hundred per cent, you must take into consideration that it is not anatomically possible to go through these ranges of a hundred per cent. You must realize that the average individual cannot do these things anatomically because the head and the neck and the spine just will not permit it, along with the musculatures. In X-rays where the claim is made of the straightening of the lordotic curve, one should inquire as to the position of the individual when the X-ray was taken. Much care should be devoted to an inquiry as to that because the individual, by dropping the chin on the chest as far as possible, can normally straighten what is known as the lordotic curve or the average curve of the neck and the spine in that area.

It is important to take serial X-rays — take them early and also immediately prior to trial to see if there have been any changes in the bony structure. Your roentgenologist, if he is skilled, will try to get the individual in the same position as in the first X-ray so that you can make an overlay of the first X-ray on the later one and then compare to see whether there are any changes whatsoever in the bony structures.

Time is running, so I will just cover some other things very rapidly. You will want to inquire about infections. Infections of the teeth, throat, or glands of the neck, mumps, the thyroid gland, salivary gland, meningitis, poliomyelitis, even carbuncles, goiter, syphillis of the larynx or pharynx, tumor of the cervical spine, angina, or a corroded artery, hypersensitivity — all give the same symptoms as the average neck sprain or neck strain, so that you must be circumspect

in taking your deposition and inquire about such conditions so that you will be able to show, if possible, that the accident was only incidental and that really the cause of these things goes back to conditions other than the accident which is advanced as the cause for complaint.

Individuals who wear bifocals and have worn bifocals for a long period of time sometimes will have conditions which can be attributed to an accident because of a necessity of looking up and down. Note also whether the individual is engaged in work requiring a drooping of the shoulders with the neck thrust forward – a bookkeeper, a painter, a carpenter, a fellow who does paper-hanging, an individual who works under machinery or cars. Short people tend to raise their chins which narrows the vertebral spaces. Round-shouldered people have a perennial stoop and the head is thrown backward. People who do typing and sewing all have characteristics which can be related, technically, to these complaints about neck pain. Illnesses at the time of an accident can be used to disprove a lot of the complaints because illness causes a laxness of the ligaments and the musculature of the neck, and you can use that to offset some of the complaints. As I have indicated, most individuals have variations in the size and shape of the intervertebral bodies of the spinal column. The angle of the articular processes varies with the individual. There may be a growing together of the second and the third cervical vertebrae which is a developmental or even a congenital condition. Rheumatoid arthritis and sore throat and allergies all play important parts in defending these cases.

So, in conclusion I think, as I indicated at the beginning, that all I can say to you and sell to you is hard work in exploring these things, going to the basic elements that are involved, trying the case with sincerity and developing it completely for your jury. I think that if you are honest and sincere with the jury and reveal everything that is in the lawsuit, you will do much better with the average juror than you will with a picture or an attempt to expand or develop a situation that really is minimal in nature.

LOW BACK INJURIES*

PANEL: CHARLES J. FRANKEL, M.D., LL.B., *Professor of Orthopedic Surgery, University of Virginia Medical School*
LEO S. KARLIN, *of the Chicago Bar*
WILLIAM F. X. GEOGHAN, JR., *of the New York Bar*

MODERATOR: WARREN W. KENNERLY *of the Knoxville Bar*

CO-ORDINATOR: ALFRED W. TAYLOR, *President-Elect, Tennessee Bar Association*

CO-ORDINATOR ALFRED W. TAYLOR: Our first topic this afternoon is "Low Back Injuries." After hearing some of our panelists this morning, I am quite certain that they are experts.

It is my pleasure to introduce to you the Moderator for the first session this afternoon, a distinguished member of the Knoxville Bar, Warren W. Kennerly, the son of a prominent lawyer. He graduated from the U-T School of Law and is a member of the firm of Donaldson, Montgomery, and Kennerly. He has been called a lawyer's lawyer. His practice is specialized in the corporate field, and particularly in the field of insurance contracts. He is counsel for the Knoxville Utilities Board and a former President of the Knoxville Bar Association. It is my pleasure to introduce your Moderator, Mr. Kennerly.

MODERATOR WARREN W. KENNERLY: All of you who have a program know that the first part of this session will be devoted to "Medical Aspects of Low Back Injuries." I am not going to take any time from Dr. Charles J. Frankel in introducing him because he was presented this morning, and his background was given; and, what was far more important to me, and I am sure to you, his presentation this morning established his competence in this field and his expertness at making an interesting presentation.

DR. CHARLES J. FRANKEL: I will not spend a great deal of time again going over the complex anatomy of the injuries to the low back. The complex anatomy is something that you will have to go over and over again when time permits. The injuries to the back play a large part in the litigated cases but they are being replaced by whiplash injuries so that they are now second in popularity. But they will come back again because the back is larger than the neck and is more frequently injured. They will have their day in court again.

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The important thing about back injuries is that the doctor, for the most part, has to do a lot of guessing. Most of his diagnoses are made by physical examination, by X-ray examination, and by laboratory examination; and he is not often able to prove his diagnoses by doing an autopsy. When a person, for instance, has pneumonia, and an X-ray is taken, it will show the pneumonia present in the lungs; then there may be some complicating factors, and you make the diagnosis of the complicating factors; then the patient becomes so ill that he dies. An autopsy is done and then you verify your findings. That is the only way that you can really, as a physician, keep up with the accuracy of your diagnoses. Fortunately, with injuries to the low back, though they may be serious, very few of the patients die and have to be autopsied. We have no method, then, of finding out whether our diagnoses are absolutely accurate although we get valuable help from the physical examination, from the X-ray examination, and from the other sources.

The history is important, and I would like to stress again the necessity for reading all the doctors' charts. The importance of a careful history cannot be belittled. The doctor must take his time to get an accurate history. In medical school the students are taught to take histories. A history is something that has to appear on the record — but students and physicians often lose track of the relevant facts in their attempt to get a long history. A patient who comes in with a back injury may be asked whether he ever had smallpox and the usual childhood diseases. These are all routine. But somewhere along the line you have to have a specific history — a relevant history. The doctor who treats these cases, and who knows that most of these cases are potential causes for litigation, must bear in mind that he has to have a history that can be understood by a layman — who often might be a lawyer. We ask questions like these: "Have you lost any weight?" Now what is the idea of asking the question: "Have you lost any weight?" A patient who has lost a great deal of weight for no good reason must be suspected of malignancy, cancer somewhere in the body. This does not prove it, but at least it means that you are alert to the possibility. "Have you ever been exposed to tuberculosis? Is there any tuberculosis around in your area . . . in your home?" A patient who is exposed to that sort of thing may have tuberculosis of the bone. "Have you been doing any kind of work that is different from what you have been used to doing?" A patient may have been sedentary and suddenly got himself a job driving a truck and lifting heavy weights. This means that he is going to be subject to strains and injuries to which he ordinarily would not have been subjected. You

have that down in your history, and it gives you a lead as to the possible diagnosis. "Have you gained a great deal of weight lately?" The addition of weight may mean that he is throwing more than ordinary stress and strain on bones, joints, and ligaments. We want to know that. Has it been just a recent increase in weight? Has there been a history of previous injury? Was he in an accident some time ago? We ought to know that. Very frequently the patient will not volunteer information; it has to be dragged out of him.

I stress again the necessity of talking to the patient in a language that the patient can understand. I have had interns who have asked a patient: "Have you ever had any ruptured intervertebral discs?" You might just as well ask them whether he knows how to fly a DC-8; it is just Greek to him. He does not know what you are talking about half of the time – at least, our patients do not; most of them are of common, average intelligence, and they have to be told what you are talking about. So the questions have to be worded carefully.

Then we get the age of the patient. Now what difference does that make? We know that osteoarthritis usually starts around the third or fourth decade. We know further that in the short, squatty individual it will start at around 30 or 35. This is not the crippling type of arthritis, but it is a type of arthritis, and with wear and tear, you may get a little cracking in the intervertebral disc area. The intervertebral disc, you will remember, is something like jelly in the middle of a doughnut. The doughnut, then, may become cracked and allow the fluid to disappear. The disc is made up of about 85 per cent or 88 per cent water so that it dries out when it cracks and degenerates and becomes smaller. When this occurs, it is liable to rupture. This is the process of the so-called ruptured disc.

Now let us get back to our patient. If he is a short, squatty individual and he is 35, we can expect him to have some arthritis. We ask him: "Do you ever have any pain when you arise in the morning?" "Well, not pain, but I am stiff." "Does your stiffness get better after you move around a little bit?" These are relevant questions and they have a purpose. If he says, "Yes," you can be fairly certain that he has some arthritis because this is a typical history. "Do you have any pain that runs down your leg?" You do not ask the patient "Does it radiate?" He does not know what you are talking about when you say radiation. You ask him: "Does the pain run down from your back all the way down into your leg?" He may tell you, "Yes." "Does it run down the side of your leg, the front of your leg, the back of your leg? Do you have any loss of sensation? Do you find it difficult to feel? Do you have feelings of pins and needles in your leg?" He will

tell you, "Yes" or "No". Does it hurt you when you cough and sneeze; or when you strain? He may tell you, "Yes." So now you are setting the stage to enable you to make a possible diagnosis of a disc injury. There are other things that simulate it, but at least you are getting your history into a relevant pattern — where you are trying to find out what this patient has, simply by the history.

After you have done that, then you do a thorough examination of the patient. We like to watch a patient walk even though he does not realize we are watching him. You see if he has a limp. You see if he has some stiffness in his back, or whether he is leaning to one side or the other. You can see whether one leg is shorter than the other from the way he stands. Then we like to watch him get undressed. This is not being facetious because we tell all of our intern residents never to be in the room when a female is being undressed. All female patients should be examined with a chaperone. So when the doctor examines the female, she should be undraped except for unnecessary areas that can be left covered, for modesty purposes.

The doctor must examine the whole body — and for the next few minutes I shall talk of what the doctor has to do. When you are examining the back you do not just uncover a little portion of the back and look at it. You have got to examine the legs, and the arches to see whether they are out of balance, whether they are flat; you have got to examine the knees, to see whether they are knock-kneed or bow-legged. You have to examine the whole back to see whether there is a curvature. Then you examine your patient by observation. You examine your patient by putting him through motion, and you see whether or not he can bend forward and bend backward. When you bend him backward and you find that he has pain in a certain area of the back it suggests to you that on painful hyper-extension (straightening out the back) there is a possibility of an involvement of a disc or lumbo-sacral joint. It only suggests it to you. If there is pain on leaning to one side, it suggests a possibility of a strain of a muscle on the opposite side because you are putting that muscle on a stretch. So you put the patient through all these motions. Then you lay the patient down and you go through the various signs which indicate that there may or may not be some pathology in the lower back. These signs only help in arriving at a diagnosis, but they are an important part of a complete examination; they have to be done, and they have to be listed in the chart. The doctor who tells you that he has done these things but has not put them in the chart is going to be subject to some severe cross-examination on the basis

of his memory because no doctor can remember every patient that comes into his office.

Then we do what we call a partial neurological examination. Part of the neurological examination is simply to test the patient with a pin prick. You take a sharp pin, you touch along the side of the leg, and you run your pin all around the leg. You ask: "Can you feel this? Is it sharp? Is it dull? Do you feel it at all?" Then you can chart it. We have our anatomical charts which tell us exactly what nerve is involved should there be a lack of sensation in a certain area.

Then we try the reflexes. You are all familiar with reflexes — you have had your knee tapped and your knee will jump. If the knee reflex is absent, it suggests the possibility that the third lumbar nerve is involved. It only suggests it. If you test the reflex around the heel — where you tap the back of the heel and the foot goes down — it suggests the possibility that the fifth lumbar or the first sacral nerve is involved. This again is all part of your examination and should be in your chart. After you have done that, you measure the circumference of the legs, right leg, left leg — in the same area — two inches above the knee, middle of the thigh and calf, to see whether there is any discrepancy. A patient with a nerve lesion, if it is fairly long standing, will usually have some loss of the size of a muscle group. Then you test them; and again, when I say *you* I do not mean you as lawyers because this is not your job, I am talking about what the doctor has to do.

The doctor then must test the patient to see whether he has any muscle weakness. Does he have any actual paralysis? This again suggests a lesion. I can give you a good example of a case that was missed. Some very high-priced neurosurgeons in New York examined a young man and made a diagnosis of ruptured disc. The young man was an ex-Navy flier who liked his whiskey very much but handled it well. When they operated on him, they could not find any ruptured disc. They attributed his continuous pain to the fact that he was an alcoholic. What he had, they said, was an alcoholic neuritis. This fellow came home to Virginia and we checked him, and what we noticed on him was that he had anesthesia around the tail area, (around the sacrum and coccyx) and that he had had a progressive loss of weight. It was obvious that this patient had a malignancy. We were not any smarter than the surgeons in New York; the only thing we did was to take more time with him. We X-rayed this fellow and he was riddled with cancer. He died at the age of 33. This is a diagnosis that was made only on the basis of a routine, careful examination.

A routine, careful examination can be made by any physician. You do not have to be a specialist to do that. You do not have to be brilliant. The only thing you do have to do is to persevere. So if I had my choice of doctors, I would select the one that I thought was thorough rather than the one who is brilliant and arrives at his diagnoses by guesswork. When we do our examination, we should rely on the thorough routine.

After we measure for muscle weakness, we measure for discrepancy in leg length. A discrepancy in leg length may give you back pain because it throws you out of balance. A knock-knee can give you some pain because again it throws you out of balance when you are walking. A bow-leg and flat feet do the same thing. If the patient is flat-footed, the normal weight-bearing line is shifted, and so the patient then gets chronic strain across the low back. All of these things have to be checked.

Then we get our X-rays. The X-ray examination usually requires four to six views of the low back. After we get the X-rays, we look over our physical findings, and we merge them with our other findings and then make a tentative diagnosis. Note that you can only make a diagnosis of *possible* ruptured disc — not ruptured disc, but possible ruptured disc, because there is only one way that you can absolutely be certain of a ruptured disc, and that is by operation. The myelogram, an injection of an opaque oil into the spine which shows up on the X-ray and may show a defect, is effective in only about 80 per cent of the cases — that is, it will give you an accurate diagnosis only 80 per cent of the time. In 20 per cent you may get an equivocal reading which will not tell you anything.

There are many things that will simulate the ruptured disc: tumor, arthritis with impingement in the joint area and irritation of the nerve root, congenital deformities, disease, and injury — but you ought to be able, on X-ray at least, to rule out many of the conditions. On X-ray, you can rule out the fact that there is or is not arthritis with impingement on that nerve. If you do not see it, the chances are it is not there. X-ray will rule out the possibility of there being a congenital anomaly, such as a slipping of the vertebrae. It is either there on X-ray or it is not present. X-ray will usually rule out the presence of disease. X-ray will not tell you anything about the presence of tumor unless there is bony structure involved. The X-rays, then, are helpful in aiding you at arriving at a final diagnosis. But remember, when you are in court, that there is only one way that the doctor can prove that this was a ruptured disc, and that is by open operation. The doctor who sits and tells you that he has made the diagnosis on the basis of physical examination, and is absolutely certain of it, is

either misinformed or he is working for one of the two parties involved. He is not being completely honest.

Now, what will we do about this patient? How do we treat this patient? Since 80 per cent or more of the injuries to the back are only sprains or strains to the muscles, they can be treated very conservatively. Fractures of the spine without dislocation do not need operative procedures. Many doctors operate on fractures of the spine and I have no comment to make about that except to refer you to an article that will be published soon and which was put out by the American College of Surgeons in which it states without equivocation that 50 per cent of the surgery that is done in this country is done by unqualified personnel and is unnecessary. That is quite a statement. Of course, the lawyers need not be to haughty about this sort of thing because I suspect that 50 per cent of the legal cases are handled by unqualified personnel too — but the patient loses only the case and not his life. There is too much surgery being done by unqualified personnel and too much surgery being done by qualified personnel. It is absolutely true that you can get more money by operating than you can by not operating, but I suspect that only a small percentage of qualified doctors operate for fees. This is not to say that they operate for nothing; I mean they do not operate basically for the fees.

Before we arrive at a conclusive diagnosis in low back injury we have to subject our patient to a thorough going-over. This may again require the use of consultants. We consult with the neuro-surgeons — the doctors who operate on nerve injuries. They are different from the neurologists who are the people who handle the medical end or non-surgical treatment. The neuro-surgeons are surgeons primarily, and they are frequently called in — in fact, we work hand-in-hand on these cases.

Then we get into the so-called traumatic and compensation neuroses cases. The differential diagnosis between psychosis, neurosis, compensation-neurosis, and malingering is difficult. I keep away from the diagnosis of malingering; I even keep away from the diagnosis of psychosis and neurosis because that is a diagnosis that I think has to be backed up by a competent neurologist or a neuro-psychiatrist. I do not think that the average doctor who stands up in court will have his testimony hold up if he testifies to the fact that he is not a neurologist or a neuro-psychiatrist and that he thinks that the patient does have a neurosis. He can give that testimony — any doctor, who is licensed, can be an expert — but the weight of the evidence is going to be determined by the jury.

When I have a question of neurosis or psychosis or conversion hysteria, I send for the neuro-psychiatrist. I sometimes avoid sending them to the Freudian psychiatrist. There is a difference. The Freudian psychiatrists, you know, deal a lot with the subconscious, and they believe in psychoanalytical treatment. There are other psychiatrists who call themselves biological psychiatrists.

We find a fair number of cases who do have an actual neurosis. A neurosis is an illness, by the way. A neurosis is not pain . . . a neurosis is a real illness, just as a psychosis is. It is a real illness, and it must not be pooh-poohed. It is a difficult diagnosis to make, and again, it is necessary for the doctor who handles this type of case to be ready to call in consultation.

Before I close I just would like to say that those of you who have low back injury cases must be willing to take the time to instruct your expert witnesses in what to expect in court. A great many doctors do not like to come to court — you heard that this morning — simply because they hate to be embarrassed. A doctor is king of all he surveys in the hospital, but when he comes to court they make a monkey out of him because he is not prepared. I think that you will get more cooperation from your doctors if you will take the time to prepare your expert witness. I do not mean feed him the answers — just prepare him for all the possibilities and see to it that he brings his records. It is ignorance on the part of both parties that creates some of the difficulties that exist. I think they can be and will be overcome with a little education and co-operation from both sides.

MODERATOR WARREN W. KENNERLY: Thank you, Dr. Frankel, for another interesting presentation of the physical aspects of this subject. Now let us turn to the legal aspects of these low back injuries. Our first speaker on this subject is the senior partner in the Chicago law firm of Leo S. Karlin and Daniel Karlin. He graduated from De Paul College of Law in '32 and has been practicing as a member of the Illinois Bar in Chicago since 1933. He has been active in Bar Association work at the city, state, and American Bar Association levels. He has been officially connected with state committee work, including being Chairman of the Negligence Section of the Illinois State Bar Association. He has been officially connected with NACCA for many years in various capacities and is the immediate Past President of that organization. He has participated in a number of institutes and seminars of this type throughout the country. He has success as a trial lawyer — this is attested by the fact that he is a Fellow in the American College of Trial Lawyers and also in the International Academy of Trial Lawyers. We will now hear from Mr. Leo S. Karlin.

LEO S. KARLIN: This audience is made up basically of three different types of persons: lawyers of both great and limited experiences; medical men; and law students. In all of you there must have arisen the thought, the realization, that there is something that all of us collectively must sometimes analyze and understand. What I am driving at is this. Although much has been written, medically and legally, about the various methods of analyzing and presenting medical problems, although much has been written and spoken by way of lectures about proper evidentary procedures, trial techniques, and things of that type and kind, very little has been said, very little has been done, very little has been written, toward creating on the part of the lawyer and the doctor a proper understanding of their function as to each other as they work toward a common purpose in what we are discussing today — the presentation of evidence relating to the medical facts of a case in the trial of a case. It is something that I feel should be analyzed in the law schools and medical schools long before men have reached practice in the profession.

Perhaps I can best describe it in this way. If we read of the biography of a doctor, whatever field he may be in, and then that of a lawyer, we will immediately begin to realize the difference in the philosophy upon which they are raised, trained, and prepared for the work they engage in. From the time the doctor begins to study in his classes, and the time he spends in the laboratories and schools during his internships, during his postgraduate work and the years of his practice, a doctor is impelled by one basic philosophy. It may be described in two words: "Absolute certainty." What do I mean by that? I mean simply this. When the doctor is studying how to, or when he is in practice attempting to make, a diagnosis relating to a condition, a method of surgery, a description of a drug, a new treatment of therapy of any kind, he cannot be concerned with reasonable probabilities or the more reasonably inferred of two opposite theories of effect. Dealing as he does with life and death, with health of body and limb, this doctor in his work must look for absolute certainty. He cannot use a method in the treatment of a patient, whether it be by medicine or surgery, that has not been authenticated by the profession, that has not been so documented that he is certain that the benefit that will be derived from the treatment or diagnosis or surgery is one that is certain to result in benefits to the life of the person involved.

Now let us go over to the other side of the fence. We lawyers who try cases — how are we educated? How are we trained? How are we raised? When we go to court to prepare and present a case involving a medical problem in which this doctor will later play so important

a part, what is the foundation of our thinking? We do not look for absolute certainty. The law does not require it. The doctrines of law do not even discuss it. We begin on the assumption that in every case that we try there are two sides. We proceed on the theory that there are two opposite sets of facts from which inconsistent inferences or theories can be derived, and are satisfied in law when one of those theories is accepted by a court or jury as more believable – as being supported by the greater weight of the evidence.

We have two functions in law when we try cases. The first is to make out what we call a prima facie case. And what is that? Merely to present enough evidence – it is variously stated in the different states – merely to present enough evidence so that the court will rule that there is evidence fairly tending to state and support our cause of action. And then to end the case ultimately, we must only prove by the greater weight of the evidence. You are dealing now with reasonable probability, inferences, and conclusions that proceed on the theory that there are other equally reasonable inferences or conclusions to be drawn from the same set of facts.

At the time we are about to try a case, when we get into some of these low back injuries where you have questions of causation, aggravation, precipitation, when you get into some of the other things involving obscure diseases such as the relationship between trauma and cancer, multiple sclerosis, muscular dystrophy, infantile paralysis, and others, or the impact of stress upon the organs of the body resulting from trauma, we lawyers in preparing that case are not thinking in terms of a certain answer – we are only concerned with finding out if in medicine there is a set of medical facts from which we can raise an inference in the mind of the judge or of the jury reasonably leading to the conclusion that there is cause or connection.

Now we need a doctor to prove those things, normally, don't we? This is where our problem begins. This is where the misunderstanding arises. Most lawyers approach the medical man whom they need in court for that purpose without themselves realizing the difference in the two philosophies and the need for understanding. Can you imagine how the doctor must feel when the lawyer calls him on the phone and says, "Now, Doctor, we are going to go ahead in this case. And in our state the theory for causation is such and such." And Tennessee, as I understand the case of *National Life and Accident Insurance Company v. Follet*, 168 Tenn. 647, 80 S.W.2d 92, decided in 1934, follows the logical rule of causation. Your courts hold that since the doctor who testifies is merely giving an advisory opinion, he can be asked the question that directly gives him the right to answer whether there

was a cause or connection, whether there could be a cause or connection, or whether there might be a cause or connection regardless of the formula you use because it is only advisory. The jury is going to decide the ultimate question. In other states they hold that you cannot ask the doctor whether there "was" a connection because that invades the province of the jury – you have to say "might" or "could". Some other states say "might" or "could" is too speculative and you have to say "was". Your court follows the same rule our state of Illinois does – that is, that whatever the doctor's opinion is, the jury will decide it ultimately and he is merely advising.

I mention all this because it points or leads to the ultimate problem. Here is a doctor sitting in his office. He has treated this patient, he has made a diagnosis, he may have operated on him, and now the case comes up. We want him to go to court, and so we call him up and, depending on the jurisdiction you are in, you say to him: "Doctor, may I discuss this with you?" Some men, and many of them, do not even think it necessary to walk to his office, pay him for a visit and discuss it with him. Do not do it on the telephone; go to his office. Here we have the lawyer with a philosophy of merely needing enough proof to raise reasonable inferences within a reasonable degree of medical certainty, even though there may be inconsistent inferences, trying to convince this doctor, bred and raised and living in an atmosphere that requires absolute certainty, to come in and testify in these cases where there is such a clash in the difference of philosophy. You can see what happens. What has happened in many states of the country is this. By reason of refusal of the medical profession to accept the difference in philosophy or to attempt to understand the difference in the requirements of law and the requirements of medicine, and by reason of the failure of lawyers to understand their own problem and properly explain and condition the medical profession for what is coming in court, the courts are faced with a problem. Doctors will come into court and when asked the question, whatever the formula, whether it is in Tennessee or anywhere else, they will hesitate to give an opinion which they personally may believe in that there "was" or "is" or "might be" or "could" be a cause or connection, because of the fact that in the entire field of medical learning no one had yet reached a full documentation as to whether or not this is so.

What I mean is this. Let us take something really controversial; let us take cancer. You know what has been going on all over the country for years. A certain group of doctors takes the position that we cannot say that trauma in a single act either causes, aggravates, or precipitates

cancer because there is not yet enough medical knowledge from which to reach an opinion. What they are really saying is that they do not know enough to give an opinion, but they so word it that they say that for lack of knowledge they are impelled to say that there is not or could not be a cause or connection. There are doctors, on the other hand, who realize the meaning of the legal language, and who understand that all that is necessary is to logically raise inferences based on reasonable medical certainties that to the mind lead you to the normal conclusion that there must be a connection, who will say that they believe it individually, although the profession does not, and who will testify according to their individual convictions.

So the courts have done this in various states in the country — they did it a long time ago in my state — they have developed what is called the "sequence of events" theory. The Supreme Court of Illinois was faced with this kind of problem in the case of *May v. Chicago Union Traction Co.*, 22 Ill. 530, 77 N.E. 933 — it was decided a long time ago — in 1906. We had there a situation where a woman was injured on a streetcar and suffered a broken back. Among other injuries, a cancer developed in a certain part of her body. Three doctors gave the opinion that they did not think there was any cause or connection. One doctor gave the opinion that there might be a cause or connection. Nobody gave any absolute opinion of reasonable certainty. The evidence was that up to the day of the occurrence the woman was perfectly healthy; that she received a definite blow within the part of her body where the cancer later developed; that within a period of time that was normal for development there was a malignancy there. It was diagnosed, and it was there at the time of the trial. The Supreme Court of Illinois said this in effect: "Recognizing the difference" — and they did not say "in philosophy between the two professions," — "recognizing the difference of opinion and the difficulty in obtaining a certainty of opinion, we are inclined to the belief that a jury question is still made out — given a healthy person and an occurrence involving trauma, an injury, and a sequence of events that leads us as laymen to logically believe that there is a cause and connection."

That is going on all over the country. There is not any Tennessee case that I have been able to find, but there are any number of cases leading to the same ultimate result. It is said in a way that the courts must reach their conclusion by such a line of reasoning because the two most important professions of civilization have not themselves realized the need for sitting down together, for analyzing the difference in their philosophies, their common problem, and the obligation they jointly have for the public, to assist the public in what is the lawyer's

work. The doctor is concerned with health and life. The lawyer, too, if the doctor will stop to realize it, serves a great function. It is he who, when the doctor is done treating the patient, undertakes the social task of economic, social, and moral rehabilitation of his patient by proceeding in the courts of law to attempt to restore this patient as a client to the closest similarity to his former state that the law permits by attaining for him, if possible, an adequate result by prompt re-evaluation by way of compensation for the loss he sustained in an attempt to restore him in his place in society so that he may once again carry on.

There is more involved in this than merely the problem that I have stated. Among the doctors and the lawyers there are other great questions that it is the duty of the trial lawyer to, in the first instance, realize and take into contemplation, although they deal not only with the low back or the neck or elsewhere. Sometimes many of us do not stop to think of what we are doing to the medical man when we are in the midst of the trial of a case. He has an office full of patients. Do we need him? Do we keep him waiting? Sometimes, if we lose the case, there are those who think he should not be paid, who think he ought to be a partner in the gamble. That is all wrong.

There are certain rights that doctors have and there are certain obligations that we of the law owe to these doctors. We should start out on the premise, at the very beginning, of letting them know that we on our part, having taken the case, think it is worth our effort, and that we will do what we feel is right, and proper, and fair to the doctor who is involved in the case. Then we can ask of him the same kind of cooperation toward reaching a common end.

Leaving for a moment the question of philosophy, one comes to the next point. Having already discussed with the doctor in the best way that one can reconcile the difference in our philosophy, the difference in the requirements of law and medicine for the ultimate object of these professions, what do we do next? You have now a doctor who, presumably understands that the formula of the law is not made by the lawyer but is an outgrowth of centuries of developments of law in an attempt to fashion a social scheme that is fair and just. What do you do next? Of course, it goes without saying that as much as we read medical books, as much as we read law books, none of us can ever replace the knowledge that we will gain in a simple consultation with the doctor who is going to testify. And so you talk to him – you do more than talk to him; you analyze his records in his office, every report he has written, whether to you, or to health and accident insurance companies, or to others. You find out everything

this doctor may have written about your client and his patient so that you will not, later, while standing in a courtroom have something like a wet blotter slapping your face – something that neither you nor he knows about. Having acquired all this knowledge, you then go to court with the doctor.

When you go to court with the doctor, what is more important than proper communication? We are talking not about communication between the doctor and the lawyer, for that is simple. Those men who try many cases and those doctors who appear in court, even infrequently, have a method and a way of understanding each other. That is one of our basic troubles, for sometimes they seem to forget that the twelve people on the jury have not had the benefit of reading the files, have not had the benefit of the consultation in the doctor's office. So, although the lawyer and the doctor enjoy showing how much they know and what beautiful language they can use, they run into situations where the jury does not really know what is going on.

Let me give you an illustration that happened to me in the long years ago when I was defending the cab companies in Chicago. I had occasion to be the defense lawyer in a case where a plaintiff's lawyer had a doctor on the stand and was attempting to prove an injury. The lawyer was an old-timer who knew his business and the doctor was rather a pompous sort of man. For thirty minutes there were questions and answers about a narrowing of the intervertebral space between L4 and L5, a projection anteriorly and somewhat laterally of the nucleus propulsus between L4 and L5 causing a distention of the nerve at the point where it came out of the foramen going down toward its branch conjunction with the sciatic nerve causing pain. I knew what was going on. The plaintiff's lawyer did. I know the judge did. But a strange thing happened. Just about the time the plaintiff's lawyer said he rested, and I stood up to try to squirm my way out of this – it was an open-and-shut liability case – a juror raised his hand and said, "Your Honor, can I ask a question?" Well, in Illinois the jurors are not allowed to ask questions, but you know what happens to you – sometimes you let them do what they want to because neither side knows what is going to happen. So we all said O.K., and he said, "Mr. Z, I know you and the doctor, and Mr. Karlin all know what you are talking about, but what is this propulsus stuff, where is it at, and what does it do, and what does it mean?" Maybe this illustration sounds like it is exaggerated but it happens every day of the week. Unfortunately the jurors usually do not ask the question but go out and find an answer for themselves that does not match the evidence. All of you know this actually happens and it gives an

indication that knowledge in the minds of the jury implanted by the lawyers and by medical men in the case is the prime purpose and target of the proceedings.

There is one other factor that has already been touched upon, and I think is of great importance in the handling of the kind of cases that become involved. Al Averbach this morning gave rather a full and complete discussion of what the older lawyers call demonstrative evidence and of what the old lawyers merely call visual aids because to them visual aids are an old and established part of the trial technique of a case. They become very important in the presentation of medical testimony. It has been my good fortune by reason of some of the bar association positions that I have occupied to have traveled to many parts of the country to engage in meetings of this kind. In meeting different lawyers and doctors in various geographical parts of the country, one begins to see what is taking place with reference to the so-called field of demonstrative evidence. It is strange that when one goes into the plains of the Middle West in the country towns, lawyers will say to you, "We would not dare use these techniques because the farm people would resent it." One goes into the Southeastern part of the United States, in the Virginias, and West Virginias, and even here in Tennessee, and one hears lawyers say, "The mountain people, they would think we are overdoing it." One goes out West and in the smaller cities hears the same thing. Basically, one must realize the fundamental concept that whether they be mountain people or plains people or farming people or factory people, whether they be rural people or urban people, all people have one common denominator: a desire for learning – a desire to understand when they sit in judgment and an ability to accept the truth more swiftly by picture than by words. It takes a realization on the part of the lawyer that he, too, must understand that sometimes the holding back in the use of these techniques is not really because of the farm people or the mining people or the mountain people or the city people or the country people who resent the use of something that has a touch of glamour in it. It is because of our own innate fear to be the first in the commuity in which we work to try a technique that we know has been properly used and legally used in other jurisdictions because we feel, "Why should I be the guinea pig; why should I be the one to handle the appeal; why should I be the one to take the risk of a court later saying, that it should not have been done?" The answer is simple. In the same way that men of science – the doctors, practicing in orthopedics, in pathology, and in all the other fields of medicine – have a dedication to research and to study and to develop-

ment of the concepts and theories of their profession, we who take from the law our livelihood should have, and ought to have, the same kind of dedication to the proper development of the law and the communities in which we work, not for the making of money, not for self-aggrandizement, but for the development of a body of law for the benefit of the people that not only we, but all the other lawyers in our community and the lawyers who follow us, will be able to use for the purpose of better serving the public.

If in other states a technique has been approved by a court of review that sounds logical, that appears to be one that in the proper case should be used, a lawyer should, rather than have fear of using it, have the courage and the strength to move forward in an attempt to use it for the purpose for which it is ultimately destined — for a fuller development of the body of law and for the better interests of the people in whose behalf that law is used.

Let me explain what I mean. When one talks of photographs, it goes without saying that in every part of the country black and white photographs are, by standard rule, competent in evidence. Some years ago arose the then controversial question of color photography. Color photography has a recognition value and an absolute value that is not present in black and white. So some defense lawyers thought: "Why should these flamboyant plaintiffs' lawyers be permitted to show burns, torn tissue, or other serious injuries by color to a jury and get more money?" The answer is simple. No one has a right by any law or moral concept to keep a judge or jury in a state of ignorance of the truth if the truth can better be presented in color than in black and white. As you analyze the cases, the cases do not say what color photographs should be. The cases do not say whether they should be little ones or large ones. The same argument was used against large photographs. The cases merely hold that the photographs must be a true and accurate reproduction or representation of the person, thing, or object that you are trying to portray in a photograph. If the color photograph truly and accurately portrays a condition for which a person is entitled to be reimbursed, then why should it be kept from a jury? Why should a defense lawyer have the right to say it shows more than a black and white, if it does? And if it is a true and accurate reproduction, then the black and white is improper. The black and white is keeping the truth from a jury because in shades of gray, and black and white you do not show what is in the photograph in color. What about the motion pictures that the defense lawyers, and the insurance companies, and the railroads, use to prove that the man with the broken back can do more work than he claims he can,

to show that he carried groceries when he said his wife carried them, or to show that once a year he put a screen in the building when he perhaps could not work that hard. Do those photographs by way of motion picture and black and white, or color, have any less recognition or enhancement value than the photographs used by plaintiffs' lawyers? This is not the property of one side of the bar or the other. This is the property of both sides of the negligence bar – to use the technique to portray, and show, and present the truth as the truth really is and which is the basis for the decision that will ultimately be made.

One of the leading cases in the country on color is out of Minnesota. It is *Knox v. Granite Falls,* 245 Minn. 1, 72 N.W.2d 67 (1955), in which the court says that color photography, when it is a true and accurate reproduction, is proper. This goes a step further, carrying out a doctrine that came out of Illinois a long time ago in *Fuller v. Kelso,* 163 Illinois Appellate 576 (1911), where both courts had in effect stated it this way: "If the photograph shows a condition that tends to cause compassion, sympathy, and reaction on the part of the judge or jury, then that does not make the picture improper, for if that is what the defendant through his fault did, the jury or the court ought to see it because that is the condition for which they must make compensation, if it be true and if it be accurately portrayed in the photograph." This runs true of the whole field and the whole gamut of the visual aids. One must understand not only the right to use it properly but the philosophy upon which the right is based. This is the philosophy – that it belongs not to one side or to the other but to all lawyers in all branches of the law who use this medium for the purpose of presenting truth.

There is one more important factor in the field of medical trial techniques that I would like to discuss as briefly as I can, and then I shall not impinge upon anybody's time. Incidentally, the leading case in the country on medical drawings came out of Arizona last year, *Slow Development Co. v. Coulter,* 88 Arizona 122, 353 Pac.2d 890 (1960), where they held that a colored medical drawing, if it is an exact tracing of the injury, is competent as a primary exhibit; and if it is not, it is competent as an auxiliary exhibit which may be used for the purpose of explaining, when it is a reproduction of the normal parts of the body. The thing I wanted to talk about briefly before I close was the demonstration of an injury to a jury. Many lawyers do not seem to realize the purpose of such a procedure. In almost every state, including Tennessee, the law provides that the injured person may demonstrate a condition for which he seeks compensation to the jury. A leading Tennessee case is *Arkansas River Packet Co.*

v. Hobbs, 105 Tennessee 29, 58 S.W. 278 (1900). Your court held that while the plaintiff is on the stand his lawyer can interrogate him — ask him to move the limb and show what he could do before and what he cannot do now. The court further went on to say about the apparent exaggerated grimace that the jury is smart enough to know what is going on and will evaluate that from the standpoint of credibility.

I do not know whether your court words the doctrine like ours used to, but most of the states have the doctrine worded this way: that a plaintiff has the right to demonstrate the injury, and a defendant has the right to demonstrate the plaintiff's injury, subject to the sound discretion of the court. In Illinois for many years we tried to find out what "sound discretion of the court" means. We ultimately realized this — that if the judge felt that you had a very good liability case and you were going to win, he would let you show the injury to the jury. If he thought it was close and that looking at a serious injury might throw the balance over, he would exercise his discretion in letting the jury see the injury. Actually, in law that is wrong because the injury is separate from the liability; and if the jury improperly finds for a party on the liability, the remedy is the motion for a new trial on the weight of the evidence; but no court has the right to control the liability by controlling the admission of evidence as to the injury. After some attempts to reach a common denominator, we finally convinced one appellate court in Illinois which gave an opinion in *Stegall v. Carlson,* 6 Ill. App.2d 388, 128 N.E.2d 352 (1955), that this discretion of the court cannot be arbitrarily exercised.

One more anecdote about a case of demonstration of the injury and then I will turn the floor over to Bill Geoghan. I found one case where an enterprising defense lawyer did something that no plaintiff's lawyer ever tried to do. And this happened 57 years ago in Iowa — *Garvik v. Burlington, Cedar Rapids & Northern Ry.,* 124 Iowa 691, 100 N.W. 498 (1904). A woman passenger claimed that a brakeman on the train, whom she identified, walked into the ladies' rest room of the train and commited what is commonly known in law as the act of rape. Ultimately, this case came up for trial in a little country town in Iowa, and the plaintiff proved a very perfunctory case — no pictures, no skeletons, and the like. He just proved his case by word of mouth. Now, out there at that time the plaintiff could not know what the defense was going to do until they made their opening statement after he rested. The railroad lawyer — the defense lawyer — got up and said, "Your Honor, and Gentlemen of the Jury, the defense is this. Three years before this happened this brakeman was injured in a railroad accident, receiving certain injuries to the parts of his body ordinarily

involved in the act of rape that make him medically incapable of committing the act alleged." And they proceeded to prove it. Now you would think, would you not, that the way to prove that with all the resources of the railroad, is by doctors, by partial skeleton, by neurologists, and the like. Not this railroad lawyer. Along about the middle of the defense, he stood up and he said to the old country judge, "Your Honor, since these plaintiff's lawyers can demonstrate an injury, I claim that what is good for the goose is good for the gander. You have got all men on the jury so there's no problem if I demonstrate the injury. We want to let this jury look at the parts of this man's body that we say were injured in the accident so they can tell by observation whether he could have done what the plaintiff says he did." The judge had a problem. He went to the books, and, being an impartial judge, decided what's good enough for one is good enough for the other. So he ordered the so-called demonstration. Well, then came a little problem. The plaintiff, as you know, in the act of rape has to be a woman, and she said, "Your Honor, I want to be present when this demonstration is made because if I cannot be present, that is not decent." But he ordered her out although she claimed she had a constitutionally guaranteed right to be there. He permitted the jury to observe whatever demonstration took place. On appeal, the first thing that the Supreme Court of Iowa held was that although they realized that there was a right to demonstrate an injury, they thought that this was the kind of demonstration that, in and of itself, could not materially bear upon the issue because without additional expert testimony – and they did not say what kind of expert – the jury could not get full knowledge of what the apparent condition would mean by way of relation to what they were trying to prove. Second, they held that the plaintiff should have been there because she has a constitutional right to be present. And third, as some of you may say when I finish, the court said that it was just plain indecent. I mention this to show though only one thing – that in the whole field of law where there are enterprising minds, whether they be plaintiff or defendant lawyers in the field of medicine, whether they be lawyers in other fields of law, there are enterprising minds who study the techniques and will sometimes find ways and means to leave lessons for the rest of us to gather to ourselves and better do the job when we reach the time to do it. Thank you.

MODERATOR WARREN W. KENNERLY: Thank you, Mr. Karlin, for a most delightful and profitable dissertation of the aspect from the standpoint of the plaintiff's position. We now turn to the defendants' table. Our speaker on this subject specializes in the personal injury

field usually on behalf of the defense but he also appears often for the plaintiff. He is a graduate of Georgetown University in Washington and Fordham University Law School. He has appeared on many institute programs of this nature and lectures at the Practicing Law Institute, and at Fordham, St. John's and Brooklyn Law Schools. He is Vice-President of the Metropolitan Trial Lawyers Association. It gives me great pleasure to present to you William F. X. Geoghan, Jr., of New York.

WILLIAM F. X. GEOGHAN, JR.: Today, I am scheduled to represent the defendants' viewpoint. Well, I am going to start off by saying that I am not a defendant's lawyer. I do not know of any such thing. I do not recognize any such thing as a defendant's lawyer. I am not a plaintiff's lawyer — I do not recognize any such breed either. I am a lawyer — I am a trial lawyer who happens to represent the plaintiff and the defendant, and I say this — that whether you never represent a plaintiff in your life or whether you never represent a defendant in your life, I think if we can approach our particular profession by looking upon ourselves as lawyers and not lawyers representing a particular side of an industry, we will be more effective in the long run.

What do I mean by that? I do not know whether the atmosphere has developed here in Tennessee, but I know we have an atmosphere in New York where certain attorneys, not all attorneys, representing insurance companies or railways or representing trucking companies that are self-insured, are so misguidedly, and I use the word advisedly, wrapped up in their own particular field in representing particular interests that they cannot see — and therefore are not as effective since they cannot — those things on the other side of the Bar and, particularly in particular cases, which are of value, which are of importance. You too must have attorneys down here who can see nothing in the average case litigated by the complainant, who exhibit a willingness to jump to conclusions and see under every case litigated by a plaintiff, fraud and deceit. Now we have to recognize, and it is self-evident, that many cases prosecuted in behalf of the plaintiff are fraud, and are just that. But they are not won by the defense in the courtroom by disparaging, by being suspicious — they are won as Harley McNeal said this morning, by good hard work and preparation.

If you have the fear that a particular case has in it exaggeration, start using your tools. Find out every hospital that this plaintiff has been in over the years. You can find it out through your discovery procedures, as we call them in New York, through your depositions, throught your investigations, and get these hospital records whether the person was in for a hernia operation, a gall bladder operation, or even for having a baby because very often prior hospital records, even

though they have nothing to do with the particular case at hand, might give you leads as to prior conditions. I am speaking now from a defense standpoint. But I am speaking also from the plaintiff's standpoint because any plaintiff who does not acquaint himself with the past history of his client is being lax and is not being careful of his preparation.

I have said in the past that the one person whom you should discuss the most and whom you should not believe at all and whom you should cross-examine is your client. If you go in with that attitude, you will never be caught short. If your clients tell you that they were never in a hospital before, check up on them. Perhaps they had forgotten; maybe they are withholding. If they tell you they have been out of work for three, four, five weeks, check it. You can go to the employer to check; check the past hospital records, and see what you can find in those records. In past hospital records you have a past history, and you may pick up in past histories reference to prior accidents, too. I think this is something that is important not only from the defense point of view, as they say, but from the plaintiff's point of view.

Next, look at the collateral aspects of your case where you feel that somebody is exaggerating, where you feel that a case is being puffed up out of all proportions. When you get the claim that one is having constant pain over the months, and over the years, see what that person's physical activity is, not only in his job but in his outside activities as well. And these can be determined because it is through the collateral attacks on a case that you are going to impugn the good faith of the complainant in defending your particular personal injury case. And with respect to the history in your hospital record as to the type of value, many things told in there as indicating the severity of the accident are all tools which you have an obligation to use, rather than just looking at the cases with a biased point of view.

You can also gain much from your employment records. These are also tools that you should use. See what a man's work records have been, not only since the accident but for prior years. If a fellow has had a spotty work record over the years, this certainly might be indicative of some past trouble, past medical trouble, so you can relate that and use these tools in a collateral attack.

There are some other matters that I would like to talk about and one is the question, which certainly Leo Karlin covered so well — that of the lawyer-doctor relation. I certainly agree with what has been said here. Doctors too often are exposed to opposing counsel in a courtroom without adequate preparation. Certainly you should sit down with

your doctor prior to going to court. Go through his chart, and review with him those things which you know may come up in the trial. How often has a doctor gone to trial, and has not even been told about prior conditions, prior medical conditions, which have come up in the trial? How embarrassing this can be for a doctor to be hit with a condition such as that without any warning at all.

I say, too, that certainly a doctor should not be kept waiting at any time when it can be avoided. Get your doctor in the court with the least possible time involved since he is so needed in his particular practice. And very often we are presumptuous when we sit down with the medical doctor and get his medical advice — we forget that he is giving of his time. A fee certainly should be paid for that. In our office we make the practice of — I certainly hope I am not starting a trend here, but if I am, I think it would be a good one — whenever we ask a doctor for a report or for any advice, we expect him to forward his bill, charging for that professional advice and that professional service. It goes beyond the courtroom itself. And, in closing, I would like to mention something about malpractice. As lawyers we should be very, very certain of the facts before starting any law suit involving malpractice. I think it is important because we can all recognize, certainly, it is not the usual type suit. It is not the type where you are merely suing an individual, or a corporation, or a construction company. And I think before we, as lawyers, start any suit of a malpractice nature, we should have established through competent medical opinion — even if it has to be off-the-record opinions by doctors who may not be willing to come to court — you can get that — it should be sound medical opinion, that you do have a case. I think that we have gotten away from that. I think we must recognize our responsibility in our particular profession and our responsibility to our brother profession as well. So I say, before any suit is started in malpractice, we should be positive that we are on solid ground and have a meritorious cause of action. I think the reasons are obvious. I think, occasionally, when this is not done, there is a legitimate complaint from our brothers in the medical profession. There are many more things I could talk about. We could hit many more subjects, but I think we are going to do that in a few minutes in the next panel discussion.

TRIAL TACTICS IN HANDLING THE MEDICAL EXPERT WITNESS

PANEL: ALBERT AVERBACH, *of the New York Bar*
LEO S. KARLIN, *of the Chicago Bar*
HARLEY J. MCNEAL, *of the Cleveland Bar*
WILLIAM F. X. GEOGHAN, JR., *of the New York Bar*
CHARLES J. FRANKEL, M.D., LL.B., *Professor of Orthopedic Surgery, University of Virginia Medical School*
WADE BOSWELL, M.D., *Neuro-psychiatrist, Knoxville*

MODERATOR: S. FRANK FOWLER, *of the Knoxville Bar*

CO-ORDINATOR: ALFRED W. TAYLOR, *President-Elect, Tennessee Bar Association*

CO-ORDINATOR ALFRED W. TAYLOR: The Final Session of the afternoon will be devoted to *Trial Tactics in Handling the Medical Expert Witness.* The Moderator for this panel is another distinguished member of the Knoxville Bar, a member of the firm of Fowler, Rountree, and Fowler. He comes from a family of many lawyers. He had a most distinguished father who served as an Assistant Attorney General of the United States. He was graduated from Harvard University Law School. He is an expert in the corporate tax field and has presided as a special judge in many complicated suits. He has in times past been an instructor here at The University of Tennessee College of Law. It is my pleasure now to introduce to you, your Moderator, Mr. Frank Fowler.

MODERATOR S. FRANK FOWLER: Unfortunately, these gentlemen who are bringing to us today all of these interesting and educational statements have been so busy up to this point on the program, that we have not been able to get together to work up an agenda. So we are embarking on a sort of informal, uncharted presentation which we believe will be of interest to you. It was suggested by the members of the panel that since each of them has already made a speech of some duration in prior panels that we proceed by having Mr. Averbach introduce the subject with perhaps ten minutes of discussion of hypothetical questions and perhaps other matters within the scope of the subject. Then I am going to ask Mr. Averbach to fire some questions to the other members of the panel as to how they handle particular situations. In the meantime, if any of you in the audience would like to have a question answered on trial tactics, please write your question down and send it along to me and I will channel it to the proper panelist. Mr. Averbach will now lead off the discussion.

ALBERT AVERBACH: One of the most troublesome courtroom procedures is the proper technique in using the hypothetical question. If you have a treating physician on the stand, you do not need the hypothetical question at all. You can ask the treating physician whether he has an opinion that he can express with reasonable medical certainty as to causation, activation, precipitation, and permanency. You can also ask an opinion as to his prognosis. However, if you intend to use the hypothetical question even though you have a treating physician, possibly because your judge expects the use of a hypothetical, then I suggest that you, by all means, consult with your doctor in advance and tell him what you mean by a hypothetical question, because the doctor may not understand lawyers' language, as Leo Karlin pointed out earlier. On causation, activation, or precipitation, the doctors are thinking of differential diagnosis; we lawyers in the courtroom are only thinking of an opinion that the doctor can express with reasonable medical certainty. This is foreign to the thinking of doctors and must be explained to them.

What do you do with a consulting surgeon, or a consulting specialist, who has not treated this patient or client? There are two approaches. One, have the general practitioner, through channels, send this person to a neuropsychiatrist or to an orthopedic surgeon for evaluation. Then that doctor, because he is expressing an opinion as to future conduct or procedure, is, in substance – at least in our state – a treating physician and can be asked questions about subjective complaints, pain and future course of living. But if he is not alerted to that procedure and he is purely an examiner for the purpose of testifying, obviously you have to use the hypothetical question.

If you do use the hypothetical, break it down into short compartments or segments. Do not read it, but discuss it with your doctor in advance. And the segments should be: "Doctor, are you able to express an opinion with reasonable medical certainty whether or not the accident of November 6 was *a* competent producing cause? – "That is the phraseology used in our state. In some states, it is "*the* competent producing cause of the pain and suffering and discomfort." Use the phrase "and discomfort" because a great number of the doctors will give you a "No" answer on pain alone, unless you couple it with the word "discomfort." They seem to be hesitant about the words "pain and suffering", even on the question of whether or not a cast is a competent producing cause of pain and suffering.

Now, take the next sequence in the hypothetical: "Are you able to express an opinion with reasonable medical certainty as to the probable duration of the conditions? Now each of these two component

questions should be answered to the effect that the doctor can express an opinion. Then you have to ask him what is his opinion. The third question on *direct* is: "Why is that your opinion?" The jury has a right to know the validity of the opinion and upon what it is based. But never ask a "why" question on *cross-examination* of a doctor because you may get your "ears pinned back."

The hypothetical question is a delicate instrument; properly used, it is in effect a second summation. I like to construct it walking around in the courtroom, picking up exhibits, asking my assistant at the table whether it was 17 days of fever of over 100 degrees. I like to construct that question physically in front of the jury; others like to read it. I suggest that you try to learn the facts of the case so that you do not have to read it.

These are views of a plaintiff's advocate. I agree with Bill Geoghan that there is no such thing as a plaintiff's lawyer or a defendant's lawyer. We are *trial lawyers.* But I would like to ask Bill whether he has any additional views on the hypothetical question from his experience on the defendant's side of the table, as distinguished from those cases that he has tried for the plaintiff.

WILLIAM F. X. GEOGHAN, JR.: I take it your question is a hypothetical that must be posed by the defense counsel to the defense counsel witnesses. Number 1, I find that very often throughout your defense, when you have your own doctor on the stand, you can put a hypothetical to him based upon part of what has been testified on the plaintiff's side. This is something that is going to favor your case. Let us say you have a low-back case. The doctor for the plaintiff, upon cross-examination, has had to admit that such things as growing older, and the necessary or ordinary incidental strains of life, bending over, the traumas of life in everyday activities, are things that will cause arthritic changes. Then I put this to my own doctor: "Assuming, Doctor, that there were such changes here, would you agree with Doctor *X* who testified here for the plaintiff that these things would cause thus and thus?" I would like to have my doctor – here the defense doctor – in agreement with the plaintiff's doctor on as many things as possible, and I think you could do it in the form of a hypothetical.

I also agree that reading a hypothetical is horrible. You lose all the effect. You certainly should know your case well enough to be able to rattle off a hypothetical and include all of your facts in it. The next thing I would like to comment on is that in New York you do not have to get every dot and dash into a hypothetical. You can highlight the facts of the case; you do not have to say "Assume

this" and "Assume that" every two minutes. Just say: "Assume, Doctor, the following: . . ." and then take off and present your hypothetical. That is the way I like it.

ALBERT AVERBACH: I call your attention also to what may happen if you use a long hypothetical question and you come before an inexperienced judge. You have reeled off a question that takes forty minutes and there is an objection. The judge says, "What is the nature of your objection?" Defense counsel says: "It omits facts in evidence and includes facts not in evidence." The judge: "In what respect?" Then there is a recital of some of those that are not in evidence, and the questioner is hung in mid-air and he has to do this all over again for another forty minutes. Therefore, you take it in what we call plateaus. You break it down into simple segments. You are far better off in the event of such an objection since you do not have to repeat a long question.

HARLEY MCNEAL: I agree that hypothetical questions, in and of themselves, can be helpful, but at the same time, if they are prolonged and too detailed, I think that not only does the effect of the hypothetical lose its import, but also that the jury, not being advised of the purpose of the hypothetical, wonders what it is all about. I feel that a few facts distinctly stated, asking for an opinion on such facts, will probably serve the case much better than a long, detailed explaination or rehashing of the evidence. And I feel, as Bill Geoghan does here, that it is dangerous and fatal to pose a question using the word "assume" constantly because the jury will finally get the idea that this is not this case at all, but that it is some other matter not in issue; and sometimes they are going to disregard what has taken a lot of time and energy to produce.

LEO S. KARLIN: Illinois is somewhat different from New York. From the way Al Averbach describes it, I understand that in New York you can ask the attending physician the question as to causation without stating a hypothetical based on his knowledge. Our state does not permit it, so that where it is necessary, you must give the hypothetical.

Approaching the whole question of hypotheticals, I avoid them whenever I can for this reason: By the very giving of a hypothetical question, that is, submitting it to the doctor, you are by inference raising the proposition that there is a question as to causation — that is, putting it in issue. You should first analyze the medical facts to see if under the law you really need the hypothetical. A lot of lawyers will ask in cases where they do not need it. If you have a sequence of events that factually leads to a logical conclusion, you really do not need it. When you do need it, however, it should be given in such

a way, as the other gentlemen have said, that it is not an assumption but rather a conclusion. What I mean is this. It is much like approaching an opening statement. Just once do you have to say to the doctor: "Assume, the following facts to be true. . . ." From then on, you are no longer assuming; you are stating the facts in your questions as though they were proven and thereby creating acceptances by the jury.

In giving the hypothetical facts to the doctor, I feel the best way is to state all of the things that are necessary to your conclusion. In every state where you use a hypothetical, the law is the same. You do not have to include those things that are not necessary to your conclusion. You can pick the facts that you use as a basis for the theory or fact that you are trying to prove. On the objection as to a fact being omitted, in Illinois we do not have to restate the question. We handle it very simply. Your law is that if the other counsel objects to your statement of facts and hypothetical because you have omitted something, you have a right to request: "What have I omitted?" We do it differently. We say: "What do you want included?" He then states the facts that he thinks you have omitted. If they can go in without hurting you, it is very simple to say, "All right now, Doctor, amending the hypothetical fact by including therein the statement of facts that has been added by Mr. Geoghan or Mr. McNeal or by whoever the lawyer may be, now assuming all those facts contained in that hypothetical, as amended, to be true, do you have an opinion?"

I know of situations where a hypothetical can ge of great benefit. We had a case once where we needed a hypothetical. A man is crossing the street, he is hit by one car, thrown across the other side of the street and hit by another car. Of course, the first has $100,000 coverage, and the other only has $20,000. What happens to him – he has a fracture of both bones in a leg, a mild concussion, and he goes to the hospital. Five days later they are trying to set his leg, closed reduction, no operative procedure, he is under anesthesia, and all of a sudden he has a respiratory arrest. Pulse is normal, pressure is normal, but he stops breathing. They use oxygen, they revive him, but he comes out of it paralyzed. What caused the paralysis? It was the theory of the doctor for the plaintiff that from the broken leg a blood embolism had broken off and gone through the whole system and hit the brain stem at about the time that the leg was being reduced. It was the theory of the doctors for the defense that this was an anoxia – that something in the methods which the doctors, the anesthetists, and the nurses had used in giving the man anesthesia had caused him to go under in such a way that he had a lack of oxygen and then had a development in the brain. Well, that issue went along in the trial,

when one of the neurologists said to me, "When you ask me the hypothetical, what will you ask me after the regular question?" I replied: "Will the fact that he had an anoxia, if you admit it, alter your answer?" Now I do not know if that made it clear. We were fighting to prove that this was from the embolism and not from an anoxia which was a fault of the doctors. In Illinois that would still be liability on the defendant, but the jury would discount it. So we asked the hypothetical in the ordinary way. We left out any assumption or supposition of anything being done improperly by the doctors or the nurse in the giving of the anesthesia. His answer was that there could be a causal connection. When he was asked, "Now Doctor, assume further in addition to these facts that he was improperly given too much of this particular drug, or too much of the anesthetic agent that was used, so that there was an anoxia, would that alter your answer to the question?" He said, "No." Then, when I said, "On what do you base your answer?", he answered it this way. He asked me a question. He said, "If the man had not been hit by the automobile, would he have been in the hospital?" Objection: "Who is asking the questions?" I said, "It is all right." Then I asked: "All right, Doctor, assume he would not have been, what are you driving at?" He said, "It is very simple, Mr. Karlin. If he had not been hit by the automobile, he would not have been in the hospital. If he had not been hit by the automobile, he would not be getting anesthesia. If he would not have been hit by the automobile and would not be getting anesthesia, whatever caused this, it never would have happened. Now do you understand me?" And it was left that way.

ALBERT AVERBACH: Doctor Frankel, I know that you must have some definite views about some of the trial lawyers, in various parts of the country, calling a doctor up on the telephone about twenty minutes before he has to go on the stand, saying: "You are on, Doc, in the case of *Smith v. Jones* — you know that is the case you wrote me about last year." Now what do you think of a trial lawyer who tried to put a hypothetical question to you when he has never discussed the words that he intends to use?

DOCTOR CHARLES J. FRANKEL: The only thing you can do in court is to answer the question to the best of your ability. You are under oath to tell the truth, and to try to answer the questions as well as you can. But what you can do, and what I do, is make it known to the court that I have not had the opportunity to look over the material in this case, and that had I had the opportunity, I could have given a more intelligent answer. The client is being ill-served by his attorney. It is my duty to let the court know that I cannot

give an intelligent answer. I think perhaps that I am doing the client a favor by bringing that out to him.

ALBERT AVERBACH: Now let me point out one other phase of the hypothetical. This happens quite frequently and for the benefit of the doctors in the room I throw it out to you, and also for the benefit of the lawyers. The question is asked of the doctor in the hypothetical sequence: "Doctor, are you able to express an opinion with a reasonable medical certainty whether or not the excess strain of the work produced the coronary occlusion which resulted in a myocardial infarction and death?" The doctor says, "Yes.", and he gives his opinion.

Now assume he is *not* a courtroom-wise doctor. The plaintiff's men are doing this:—Question: "Doctor, you were just asked a question about causal relationship. Were you giving a differential diagnosis?" Well, obviously, he was not. The man was dead and he is the pathologist. "Well, were you giving a 100 per cent perfect opinion?" Answer: "Oh, I was not thinking in terms of percentages." Question: "Well, was this an 80 per cent perfect opinion?" Answer: "I was not thinking in terms of percentages." Question: "Was it a 60 per cent opinion?" Answer: "I told you I was not thinking in terms of percentages." Question: "Was it a 50 per cent opinion?" Answer: "I was not thinking in terms of percentages." Well, the minute he says that, in our state at least, we have cases holding that if the opinion is not *more likely, more probable,* it is speculative, and therefore, must be stricken. I say that you must prepare your witness for this kind of new approach. So much for hypotheticals.

We now take up the question of "subjective and objective". We get into the field of Doctor Boswell on this one, right off the reel. Doctor Boswell, is it not true in your studies of neuropsychiatry and of the brain that you can have a situation with no unconscious interlude, where a flat plate of the skull shows no fracture lines, normal neurological findings, without any abnormality noted, and EEG within normal limits, and still have within the so-called "silent areas" of the brain a tumor the size of my fist?

DOCTOR WADE BOSWELL: It depends upon what you refer to as a "silent area" of the brain. In my own personal experience of what you presented I think it would be impossible for you to have this because according to your own statement you said that there were no neurolgical symptoms. Since there were no symptoms, no findings, I would question very strongly that you would have a tumor any larger than a beginning one, no larger than, perhaps, a marble in any area without some symptoms or some findings — because if you did not have symptoms you would not come to the doctor. Now is

this not an example of what we have been talking about – the fear of a hypothetical verdict?

ALBERT AVERBACH: Let us talk about the so-called "silent areas" of the brain. How much of the brain do you feel presently is known by any man of science? Is it two-thirds of the brain that is classified as silent? Is it half, a third? What percentage?

DOCTOR BOSWELL: Again, I would say that there are only very small areas of the brain that are not understood to the degree to where we, with our present diagnostic studies, can determine an expanding lesion. Now, in the past there have been opinions that there are large areas of the brain of which we know no function. But again this will depend upon the competency of the examiner and the various techniques he uses.

ALBERT AVERBACH: Now is it also true, Doctor, that you can have gross injury to portions of the brain without any objective signs?

DOCTOR BOSWELL: This is correct if you are speaking of the clinical findings – by that I mean the examination that has been referred to earlier as the neurological examination: the examination of the reflexes, the sensation, and the things of this nature. You can have considerable damage to the brain, in fact you can have a large lesion that would show very little upon the usual examination. Yesterday afternoon I was talking with one of the neuro-surgeons here. He told me of a patient we had seen earlier, a week before. He had removed a large subdural hematoma from this man. He had practically no clinical findings and it was only on the basis of the brain-wave tracing with a little difference on the two sides that this was strongly suggested.

ALBERT AVERBACH: Now, Doctor, going one step further, and then we will switch to the law side of it with the lawyers participating – is not it true, Doctor, that you men of the medical profession will be treating patients daily by asking them what their complaints of pain are, – where they hurt; and then from that try to work up an opinion or a diagnosis of the condition from the subjective complaints of pain?

DOCTOR BOSWELL: This is entirely true. Pain is a symptom and it is a starting point to go from, depending upon your knowledge and the signs along the way, just as when you are going home this afternoon there will be certain sign posts along the way. Starting with the symptoms of pain, one moves on.

ALBERT AVERBACH: To the trial lawyers representing the plaintiff, I suggest that when you establish from a doctor this kind of answer – that doctors daily take complaints of pain from their patients – that you throw this one out as a fast curve: "Doctor, the only man of science that does not have the benefit of talking to his patients and finding out what hurts them is a veterinarian." I think the minute

you have done that your jury begins to understand what you are talking about.

A great number of the defense men do a great deal of record building on the fact that there are no "objective signs"; that there are only "subjective complaints". This is one of the fields in which there is great medical controversy. Doctor Frankel, you had better lead off on this phase. You have written on this subject and spoken on it. Briefly, would you state your views on this controversy: "subjective complaints and objective findings."

DOCTOR CHARLES FRANKEL: Well, my views are that, given a completely thorough examination, and following that, the complete absence of any objective signs, I become a little suspicious. But I pass the buck and call in consultation. Now, that does not mean I call in psychiatric consultation. Just because I do not find something does not mean that the patient has not an injury. I have learned a little humility which I did not have when I was younger. What do I do if I have an orthopedic complaint and I cannot find anything at all that will account for the complaint? I have the patient seen by another orthopedist first and see if he comes up with anything. If he finds nothing, then we may consider sending the patient to a psychiatrist; but we first check thoroughly to see whether there has been a test or a portion of the examination that may have been overlooked. Now, we also must be humble about the fact that we have not as yet perfected our own little speciality of orthopedics and that there are many things that will be developed in the future, and so we sometimes speculate that perhaps this man has something that we simply have not been able to pick up.

When we say lack of objective findings, we mean the lack of real findings, but, on the other hand, you may have findings which would lead you to believe that the patient is "putting on" or is hystrical. For instance, in a low back injury you will examine the sensation of the leg: if we have what we call a "stocking type" of anesthesia, that is, it follows the whole course of the leg, we know that that type of anesthesia can come only from involvement of a wide segment of nerves. If you find no pathology or nothing to indicate that these nerves are involved, then it is suggestive to you that this patient is either hysterical or is simply faking. From there on you may have to refer your patient again to the neuropsychiatric people.

ALBERT AVERBACH: Doctor, something you said, and I do not mean to question your opinion, reminded me of what we fellows face in the courtroom year in and year out. In analyzing the question of this "stocking-type anesthesia", apparently what we are getting to is the

kind of anesthesia that is hysterical as distinct from organic. It does not follow the pathways of the nerves so that it is not a type that you doctors would call "objective" neurologically. You use the phrase: "We do not find any real symptoms." I have often felt that to the patient who has a true hysteria, a true neurosis, or a true condition in the field of psychiatry, the condition and illness is just as real as any other. I know this expression is not intentional; yet it is something that happens in court. I heard a very eminent neurologist at a seminar I participated in where they had a psychiatrist sitting next to him use the expression: "When I examine them and I do not find any neurological symptoms, then they are in the English Channel as far as I am concerned." The psychiatrist next to him jumped up and said, "Wait a minute. I am the English Channel." I think the audience deserves a detailed explanation both from you and from Doctor Boswell as to where we go from there because I think the people that end up with psychiatric conditions are entitled to have the public that serves on juries understand when they are real and when they are not.

DOCTOR FRANKEL: I will not make the diagnosis or the differential diagnosis between hysteria and malingering or even neurosis. What I do is enter on my chart that there is present a "stocking-type anesthesia." I can find no functional basis for this finding; therefore, I am referring the patient to the neuropsychiatrist. It is up to him to make that diagnosis – I do not feel competent in that field.

DOCTOR BOSWELL: Let us take this very example of the person with the "stocking-type" of anesthesia. I am a neuropsychiatrist, so therefore, when a person comes to me who has a "stocking-type" of decrease in sensation in their lower extremity, I know that this can be on an organic basis because you can get what is known as a peripheral neuritis which any good orthopod would have already picked up. Let us say this person has a "stocking-type" of decrease in sensation, but his reflexes are normal. That means those two do not go together. That is why the good orthopod would have sent him to see me – because the person who has a "stocking-type" of decrease in sensation that is on the basis of peripheral neuritis will have an absence of the reflexes.

But now let us say that he has normal reflexes. In other words, he comes to me with subjective symptoms, and he has complaints. The question, of course, is "Why?" When a person comes to me with a symptom, I have to recognize first why they came, and this is the situation that you get into in medico-legal problems because if this person is sent to you by one side of this litigation to try to prove he is malingering, I am faced with what you people term as "a hostile

witness." Now under that circumstance, I really cannot get very far with the person. I can do as well as I can to try to distinguish whether this is on the basis of a hysterical reaction — what we technically know as a conversion reaction, or whether this is a part of — there was a combination of words used earlier today — something on the basis of secondary gain. Or perhaps, and this I want to present to you lawyers, it is something that has been suggested in one sense by an over-aggressive, ambulance-chasing lawyer.

When a person comes in and has subjective symptoms and I have a co-operative person, I go into the background history; and I try to determine these very things that these excellent attorneys here have described this afternoon about a person's past history because if you sit and listen to a person long enough you will get the whole story. The psychiatrist is supposed to be a listening doctor, so if you listen and go into the background history and if the patient knows that you are sincerely interested in him as an individual, he will give you the background history, and you will have enough to go on to form a clinical impression. That is, I think, as far as the psychiatrist can go in forming a clinical impression. Just as we were told earlier that where the person has a herniated disc, you cannot make the diagnosis before you see it. You make a presumptive diagnosis. This is what the psychiatrist does on the basis of the symptoms presented — whether this is a part of background that is aggravated by the accident or something that has been far, far deeper and nothing of it has shown before. In other words, he may have been a normal person; by "normal" I mean not abnormal — that is the only definition I know of it.

ALBERT AVERBACH: Now we have a great number of areas that we want to explore so let us get to the next one quickly. I have a doctor on the witness stand — Doctor Frankel. I am for the plaintiff. I am starting to qualify Doctor Frankel. The lawyer for the other side stands up and says, "If the Court please, I concede that Doctor Frankel is eminently qualified to express an opinion." What do you do?

WILLIAM GEOGHAN, JR.: Your answer probably should be, "If you can concede that, you can also concede the conclusions that he is going to reach." You ought not accept the concession, naturally. The jury is there and they want to hear the qualifications.

ALBERT AVERBACH: That is exactly the point. You should turn to the court and say, "If the Court please, it was very gracious of counsel to concede the qualifications of Doctor Frankel. This jury, however, is entitled to know his qualifications so they can pass judgment on the validity of his opinion."

Next, Dr. Frankel comes in and he has his notes or report in

front of him, and he is reading from his notes. You are about to stand up to cross-examine him, and you say, "Doctor, may I see your report?" Doctor Frankel – I know he would not do it beacuse of his courtroom experiences – turns to the judge and says, "Judge, do I have to give him these private reports? These are private papers." Number one – no doctor should turn to the judge and ask for his help because in our state if he is reading from a memorandum, cross-examining counsel has the right to see the memorandum.

One other point before we move on – Doctor Frankel used a very good authority to the effect that only on the operating table can you tell whether there is a herniated or ruptured disc and that myelograms are only proof of rupture in a vertebral disc in about 20 per cent of the cases. There is authority in the *Annals of Surgery* §115.514 for a higher figure of 35 per cent. Myelograms as proof of rupture in a vertebral disc may be negative in as high as 35 per cent of actual ruptured discs which can really only be proven on operation.

DOCTOR FRANKEL: That report is of necessity a report of a series of cases collected by one or a group of doctors so that the writer merely states that in his experience, or in the experience of a group of people with whom he is working, 35 per cent of the myelograms were equivocal. Now, in the other series that was reported, it was 20 per cent. So that you need not take those figures as being contradictory; I do not think you should.

ALBERT AVERBACH: They are not contradictory, Doctor, but I ought to point out to you how these statistics can be used. Doctor Gotten's report about the fact that there were 80 per cent of malingering cases in the cases reported by him was based on 100 cases. Is that not true? So when you lawyers and doctors deal with statistics, be sure that you read the article that is referred to, to see whether or not the man is talking about 100 cases, 20 cases, or 30 cases or 1,000 or more cases.

Let us talk about another subject: medical photography. This is one of the most neglected fields in the tort horizon. There are 350 hospitals in the United States that have regularly constituted medical photography departments, and most of the lawyers, and a great number of doctors, do not even know that they exist. In fact, there are about 1,500 medical photographers in the country. Routinely, in one hospital in our area they take this type of photographic coverage and give it to the attorney at a very nominal charge. I have many exhibits here for you to look at. This exhibit is gas gangrene in a leg. This is the scarring in the leg. These are black and white. This is the type of splint that was used for a foot drop. This is the area from which they took the grafting. This is a "positive of a negative" – a photograph

of an X-ray. In our state the X-rays cannot go into the jury room because they require a shadow box, and they need expert interpretation. So you take a photograph of the X-ray. The photograph can be marked as an exhibit and go in as other exhibits do. This the appearance of that leg after all the operative procedures. Here is another one of the rear of this young lady's leg. And here is another one; and in addition to that, these are colored slides. Now these are all ordered by the doctors, the treating doctors. I did not order them, but when I subpoenaed the records, I subpoenaed the medical photograph records in the medical photography department. The whole portfolio cost me $125. In dealing with the carrier on this case, I just gave them the folder. They sent it to the home office, and the case was settled at the policy limit.

I suggest, therefore, that you know more about medical photography. This is an important trial aid, and yet it is missed even in various areas where there are wonderfully equipped medical photography departments. They use motion picture cameras showing "gait abnormalities", a photograph by motion picture of the gait abnormality of a person who has been injured. They show scarring, they show operative interventions in some hospitals, and various orthopedic types of "pinning". Leo Karlin has done a lot of work with photography; Leo tell us about a typical case.

LEO KARLIN: We had one case about six or seven years ago, which was one of the first times, even in a metropolitan area like Chicago, that medical drawings were used to any great extent. A little girl about four years old was playing in the alley behind her house where one of these garbage grinding trucks which has a blind snub-nose left front end was parked, picking up garbage. She got in front of it, and the truck ran onto her so that the left wheel stopped on her abdomen. Actually, she had no broken bones. What she had was a tearing of the abdominal tissue and the femoral artery and vein. A young surgeon received her at the hospital in the emergency room, tried to fix up the femoral artery and vein — but he could not find either one so he tied off the ends he could see and he sewed her up and waited to see what would happen. Being young and knowing this was an unusual case, he began to draw cartoons into the hospital record of what took place. He drew a rough sketch the first day of where he had found the incision, where he had found the artery torn, and as time went on, drew cartoons of what was happening. Any doctor knows what happened. Without the artery and the vein, the leg became necrotic and dead and gradually, the tissue in the other parts of the leg began to become gangrenous and so, ultimately, the

leg was taken off at the hip. Later, they had to take off a little bit of the edging of the hip so that the gangrene could be removed, too. By the time he was done, he must have had about 15 drawings.

We were retained by another law firm early in the case and went out to talk to the doctor. When he showed us his records, in a kidding vein, I said, "Doctor, you can get a girl at the medical school to draw these things in color but larger than you have. It might help in the case." The next thing I knew a girl walked in with a bill for $1,900. But she did have about 17 drawings. About ten of them could not be used because either she or the young doctor were ambitious. These drawings were made in color, but what they drew was not only tracings of the X-rays with the tissues super-imposed, but as the leg began to grow black, she would make a drawing black for half the leg, then black for three-quarters of the leg.

We checked out the law. Medical drawings come under two classifications. The two leading cases are Illinois cases: *Chicago and Alton Railway Company v. Walker* 217 Ill. 605, 75 N.E. 520 (1905), and a much later case, *Smith v. Ohio Oil Company,* 10 Ill. App.2d 67, 134 N.E.2d 526 (1956) in which our supreme courts and appellate courts have held that any technical witness, doctors included, may use anything by way of explaining a testimony. If you can make an exact reproduction of what was there, it goes in as an original exhibit, like an X-ray. The problem in drawings, even such as Al had here, is this. When you make the tracing of the X-ray and then color it, that is all right because that is what you really have. When, however, you begin to draw on the outlines of the tissue, the color of the tissues, locations of the veins, or things like that, since you cannot exactly reproduce the identical location of these organs in this person, you cannot use them as a primary exhibit. These can only be used as adjunct or auxiliary evidence. It is marked the same way, but it is only used for the purpose of explanation and does not become a reproduction or a true reproduction of what it shows. Now, in this particular case, sifting it out, we ended up with finally a drawing showing the little girl's skeleton full-length. After it was all over with the leg removed, part of the pelvis removed, and then organic drawings showing normal veins and arteries where the doctor superimposed on celluloid the place where they had been cut so that the whole explanation could be made. Actually it was not on the reproduction of these drawings that the case was disposed of – as I said before, *Slow Development Co. v. Coulter,* 88 Arizona 122, 353 P.2d 890 (1960) is the only case in the country that clearly describes those things.

An example of where these things are used the other way occurred

in a very famous criminal case in Ohio. You may all remember the case of *Ohio State v. Sheppard,* 165 Ohio St., 293, 135 N.E.2d 340 (1956) where Doctor Sheppard was indicted for the alleged murder of his wife. When the prosecutor came into the house and found her on the floor there, dead, he immediately had colored negatives taken of the condition of the body on the floor, and converted them into slides. At the trial for murder, those were put into a projector and shown on a screen as big as the whole front of this room and everybody in the courtroom, and most of all the jury, could see every single detail — every bruise, every cut, every bit of blood in color. The right to use it was affirmed in that case by the Supreme Court of Ohio in 165 Ohio St. 293, 135 N.E.2d 340 (1956). So those things in the proper kind of case become very definitely important means of conveying to the jury what you are after.

FRANK FOWLER: At this point I have invited Mr. McNeal to make a few observations in this field of trial strategy.

HARLEY MCNEAL: In commenting on the strategy at trial in the direct and cross-examination of medical experts as was set forth in the program, I feel that any lawyer who is representing one side or the other on direct examination of the medical expert must make the direct examination as short as it can be, hitting the essential points which have to be brought out in so far as the examination is concerned and in so far as that side of the case is concerned. On cross-examination of a medical expert, I feel that counsel on the adverse side must be extremely fair with the expert being cross-examined. No attempt should be made to trap the expert on the other side. The questions put to the expert by cross-examination should be so worded as to develop from that expert the points which will substantiate the direct examination. I feel that it is a mistake on the part of counsel on the other side to deliberately try to trap a medical expert because he leaves himself open, I think, to an experienced expert who is capable of surmounting such a trap, and going forward with the answer that it is necessary to explain his answer. In such a manner he can cut down any attempt to trap him and thereby make the counsel who intends to trap him look very foolish in the eyes of the jury.

No question should be asked on cross-examination of an expert that permits the expert to get into a field of explanation. The only way I know to hold an expert on cross-examination is to propound only questions that will elicit a "yes" or "no" answer. Counsel must be quick to step in and object if the witness tries to run away with the answer so as to get in an explanation which would be improper.

Questions should be put simply, I feel, so that the jury will under-

stand the import of the question. They should not be put in medical terms but should be put in phrases that are easily understandable. If the doctor answers in medical terms, he should be asked to explain them in lay language.

WILLIAM GEOGHAN: Harley, I want to disagree with you on one point, under certain circumstances. Although I have a deep respect for the medical profession, it has been my experience on occasion to cross-examine doctors who are not being entirely frank and who have even gone far beyond the bounds of good medical practice and opinion and have actually gone way off base. Now, I say that if you can trap a doctor like that and trap him properly, this should be done. Of course, you should have the proper tools to do it. Let me give you a specific example. A doctor was testifying, and this doctor was not testifying the truth. This particular doctor was testifying to several visits shortly after the accident which just did not take place. We had other proof that it did not take place, but we could not use this other proof. And it came up that he had a date written on the back of a letter, showing his visit and showing what he had done. But the date he had written happened to be approximately three months before the postmark of this letter on the reverse side. Now, of course, he had to be set up for this by such questions as: "When you made your notation, did you make it at the time you saw the patient?" Answer: "Yes." Question: "Is that your practice?" Answer: "Yes." And so forth. Now the "how" question was permitted to be asked, or at least it was asked. "Doctor, would you now explain how it is that you were able to make this notation on the back of the letter that was written three months later?" Now that was a trap—no question about it. He trapped himself – after we set him up.

Now I want to go to the next question. Here is where I agree with you a thousand per cent, Harley, a thousand per cent – that is on this question of "yes" and "no" answers by a doctor. If you let a doctor take off on an explanation, you are dead. Have you ever heard an uninitiated lawyer cross-examining a doctor: "Doctor, would you tell me about this question of pain; you say you found no objective symptoms?" "That's right. These were just subjective complaints." "Well, now how do you account for that?" For fifteen minutes he will tell you how he accounts for that, and you will be finished for good.

Now, Dr. Frankel, we have not done this before – it is entirely unrehearsed – but let me put some questions to you to see what I mean about the "yes" and "no" answer.

WILLIAM GEOGHAN: Doctor, you have testified many times before, have you not?

DOCTOR FRANKEL: Yes.

WILLIAM GEOGHAN: And you have testified on both sides of the counsel table for the plaintiff and the defendant – is that correct, Sir?

DOCTOR FRANKEL: Yes, Sir.

WILLIAM GEOGHAN: And having testified many times as a specialist in your field, certainly you have heard hundreds of lawyers over the years put questions to you. Isn't that correct, Sir?

DOCTOR FRANKEL: Yes, Sir.

WILLIAM GEOGHAN: You have heard lawyers put questions to you on direct examination and cross-examination. Is that correct, Sir?

DOCTOR FRANKEL: Yes, Sir.

WILLIAM GEOGHAN: Now, having heard many questions put to you by many lawyers over the years and having this vast experience as a witness, you would immediately recognize, would you not, Doctor, the questions that could be answered "yes" or "no", is that correct, Sir?

DOCTOR FRANKEL: Yes, Sir.

WILLIAM GEOGHAN: And if I put such questions to you, Doctor, would you please try to answer them "yes" or "no"?

Of course, he has to say "yes". Now, then put the questions that can be answered "yes" or "no". That is important. And if a doctor then takes off and makes a speech on you, I think he loses a little bit of his sincerity.

ALBERT AVERBACH: Bill, I have researched the question of whether or not you can pin a doctor witness or any witness down to a categorical "yes" or "no". I find no such authorities in New York, and I find very few such authorities in any other jurisdiction!

WILLIAM GEOGHAN: Well, let me say this, Al. Let me put this to you: What authority do you need in law? You do not need a case or an authority to permit a "yes" or "no" answer if the question is properly posed, and if it requires a "yes" or "no" answer.

ALBERT AVERBACH: You could start off a series of questions in this form, Bill, as we illustrated the method at recent Practicing Law Institute trial demonstrations: "Doctor, I am going to ask you some questions. Whenever possible, would you please answer by a "yes" or "no"? If you cannot, would you please indicate, and I will rephrase?" Once you have done that, you have come within the category of pinning him down to a "yes" or "no", and every time you pose a question, give it to him in such form that he can only answer "yes" or "no". One further observation! Suppose we take a doctor like say, Doctor Whitman. Before I cross-examine him I will have checked him in *Index Medicus*. *Index Medicus* is the book published now by the United States Government that gives you all of the writings of all of the doctors – you can doublecheck what they have written. You can go to one other book, and that is A. N.

Marquis & Company's *Directory of Medical Specialties.* In looking up Doctor Whitman, for instance, you see that he is a neuro-psychiatrist. He belongs to all of the societies; he has been board certificated. I will show you a very fast technique on cross-examination. Say we have an orthopedist who testifies to a herniated disc. Against him, we have a neuro-psychiatrist. My examination of the Marquis *Directory of Medical Specialties* shows that the neuro-psychiatrist does not do operative interventions. Now I believe that the most deadly cross-examination of a doctor is the so-called "periphery cross-examination." So you ask a doctor like Doctor Whitman, who is testifying against the man that did the laminectomy, "Doctor Whitman, how many laminectomies did you personally perform last year?" "None." "How many in the last five years?" "None." "How many in the last ten years?" "None." "How many fusions did you personally do?" "None" (You know the orthopedist does that) "How many in the last five years?" "None." "How many in the last ten years?" "None." "What do you do when you get a disc case that requires operative intervention?" "I send it to Doctor Frankel." "That is all" – then sit down.

LEO KARLIN: What is the other lawyer supposed to be doing while Bill Geoghan is pulling this "yes" or "no" business, or when you are asking a neurologist about surgery when he is never qualified for it . . . does he sit still?

ALBERT AVERBACH: The answer is "No."

LEO KARLIN: No, very frankly, I do not mean to talk out of turn, but when you call a doctor, you are calling him to advise a jury about a subject with relation to which he has superior knowledge; and to my mind I would like to see the other lawyer get up and tell him he only wants him to answer "yes" or "no" because then it is the lawyer who is the witness and the doctor either agrees or disagrees, and I think that can be made very clear.

ALBERT AVERBACH: I am talking about cross-examination, not direct. I do not want him to take off . . . I do not want him to make a speech. But on cross-examination I think you have a right to lead – that is the way you do cross-examinations.

WILLIAM GEOGHAN: Your observation is very good. Some of the good lawyers have objected to it, and sometimes the objection is sustained and sometimes it is overruled. If you like it, try it.

ALBERT AVERBACH: Here is a question from the audience – from a small-town lawyer who states that he is so far removed from medical experts in the city that it is often impossible to call the doctor over to testify. He wants to know how can deposition techniques be improved. Harley, you answer that, will you?

HARLEY MCNEAL: Well, I would say that there is no difference, to my way of thinking, of taking a deposition and actually questioning the witness in the courtroom. Just as much time should be devoted to the taking of a deposition as you expect to devote to your case in the courtroom. In fact, I feel a deposition is of much more importance as to the framing of the questions and the painting of the information because once you're finished with that deposition, you're dead in so far as opening it up again; whereas in the courtroom, if you forget something, you can still go back and ask the court and the counsel if they mind if you ask a few more questions.

In the deposition of a medical witness, you must know your subject. You must know the case. You must talk with your physician before his deposition is taken, and you must have an understanding of exactly what is going to be asked and the field which is going to be explored. At the same time, you must advise your physician — if you are taking it on direct — of the things that he can expect on cross-examination. Again, you should not lay him open to any trapping such as has been indicated here by the other side. You must advise him that there are things in the case about which he will be asked that he should be prepared to answer, and to be careful about questions that ask him information from medical texts. He should be prepared to answer those questions properly to the effect that in most cases he is not familiar with the text or the man who wrote it, or if he says he is familiar then he should ask for the book and make sure that which is asked of him is in context, and not taken out of context, with one sentence or two sentences being used to prove a point, whereas the other fourteen sentences disprove the point which is advanced.

WILLIAM GEOGHAN: Harley just made a statement about not trapping a doctor by taking something out of context from a medical book. I agree with that a thousand per cent. If you pull something out of context, the opposing counsel is going to ruin you; and all of the sincerity that you have built up is lost. I agree with you here, too, that sincerity is the big thing we have to sell, and we cannot sell that with doubt.

Getting back to the use of medical books, I think this technique is important. If you are going to cross-examine a doctor, and if you have about ten or twelve books that are going to contradict any of the things that that doctor said on direct examination, why not use them? I think the only reason we lawyers do not use medical books is that very often we are too lazy, or we are too busy, or we do not look at the books. We do not sit down with the doctors and ask what books to use. Now, if you are going to use them, make sure that the portions of the book that you are going to use are not contradictory to another part of the book. And

do not walk in with the fourteen books under your arm. Write out these excerpts that you anticipate he may testify to. Write them out on your yellow paid. Another technique where the doctor has written a book – you can read an excerpt from the doctor's own book off your yellow pad, and say, "Doctor do you agree with this?" The other lawyer knows it is a perfect mousetrap, and he is going to get up and say, "I object to it." Then you can do it the right way and say, "Oh, yes, Doctor, you wrote a book." Then read the same statement out of his book. It is very effective. I think that you have to dramatize these things to get your point across.

ALBERT AVERBACH: Let me say one more thing on books. I recall this about the late Doctor Thomas Cusack. When you come into the courtroom loaded with books, and started on *Brock,* he would say, "Young man, there is only one book that I recognize as an authority and that is the Bible." Well, what do you do with that type of witness? When you know that a doctor is not going to recognize the book as an authority, preface your remarks by saying: "Doctor, do you recognize Dr. Joe Blow who is Dean of Medicine at Harvard University Medical School and who has written such and such and who is on the faculty of so and so – do you recognize him as an authority, Doctor?" You do not care what his answer is. If he says "no", then you go to another one, and you give him the whole background. And if he does not recognize that authority, I think you have made your point to the jury.

LEO KARLIN: I am from Illinois where you cannot do that. I could not find out whether you can in Tennessee, although some in the audience indicate that you can. In Illinois you cannot use them until the doctor positively testifies that he relies on this book. Then if he relies on this book written by this authority, you can take some other parts to impeach him. I know in New York you can put the book in evidence, so to speak, by reading from it where you are giving testimony by a witness that is not there.

ALBERT AVERBACH: Let me suggest a technique that I have found more effective than bringing in a cartful of books. I suggest that you go through the books that you want and when you find a paragraph that you like, or that you think you can use in the courtroom, you mark it in one of these little loose-leaf books, and then, without the book in front of you, you put a question to a doctor like this: "Doctor, is it not an accepted medical fact that the duration of the period of unconsciousness does not determine the degree or severity of the concussion and post-concussion state?" This is a popular dictum that is not rigidly true; nor is the long-cherished idea true that there can be no concussion without unconsciousness. Clinical experience has disproved these concepts as

dicta which must be accepted without question. See Dr. Louise J. Gordy's paper published in 1955 *American Bar Association Section of Insurance Law Proceedings* 439. Now you haven't a book before you, but you are asking whether it is an accepted medical fact that certain things are true. And you usually can get an affirmative answer, supported with a quote from a book in a page in your own little notebook. I will leave my quote book here so you can see what I mean.

Now let us get on to another subject. We have some questions that we ought to take up in the time permitting. Doctor Boswell, here is one for you. Where the plaintiff is seeking damages for traumatic neurosis, or conversion hysteria, how far back can the defendant go in adducing her past history of behavior? Five years, ten years, or how long medically?

DOCTOR BOSWELL: I think you can go back as far as you can trace the genealogy.

ALBERT AVERBACH: Here is a question by Doctor Bob Patterson in the audience. What are the rights of the expert medical witness to object to answering what seems to be an improperly worded or misleadingly worded question? Can he properly address the court directly on the propriety of the question in case the lawyers involved do not perceive the apparent flaw in questioning or are insisting on an answer notwithstanding?

DOCTOR FRANKEL: What he had better do is simply tell the lawyer that he cannot understand the question, and would he mind rephrasing it. Do not address the judge, or do not try to try the case before the lawyer!

ALBERT AVERBACH: Now, let me point this out. In the Inter-professional Code that was jointly passed and adopted by the A. M. A. and the A. B. A., there is a phrase that I think the lawyers are neglecting, and that is that a *doctor should never be an advocate*. In cross-examination I think it is important to bring out possibly that the doctor aided in the development of the theory of defense or in the preparation of the hypothetical questions, particularly if the doctor becomes a witness, because he cannot be an advocate and a witness both. I throw that out for your consideration.

In the few remaining minutes, let me discuss a technique that I think might be useful to you. You have a case involving two fractured ribs, and I think everybody in the audience will concede that that is not a particularly exciting type of case. The testimony of the doctor is that this was a competent producing cause of exquisite pain . . . both on inhaling and exhaling, and it lasted two months. The client testifies that for two months she could not sleep; that she was living on aspirin tablets; and that every time she drew a breath it caused her aches and pains

and disturbed and hurt her. Use the word *hurt*. Now you have a doctor on the witness stand, and you ask him . . . this is the key to the thing . . . you ask him what the normal respiration rate is. In an adult it is 18 times per minute. Then you ask him to multiply 18 respirations per minute by 60 minutes in an hour — you get 1,080 respirations per hour; and with a piece of paper and a pencil handy, you ask him to multiply that by 24 hours in a day — you get 25,920 respirations per day. You ask him to multiply that by 60 days (or two months) — you get the imposing total of 1,555,200 painful breaths. You have already put into the record the hospital chart which shows that she was being charged a penny for each aspirin. She has testified that she was practically living on aspirin tablets, and in our state and in all those states that do not follow the benighted *Botta v. Brunner,* 26 N.J. 82, 138 A.2d 713 (1958), you can go to the blackboard and then say to the jury, "I ask you to evaluate this injury at merely one penny per painful breath — just the cost of an aspirin tablet. That gives you, my friends, a total of $15,552."

WILLIAM GEOGHAN: What happens when the judge charges the jury that there is not any formula — and this is a law of New York — by which you can reach damages for pain and suffering and so forth? There is a formula for out-of-pocket expenses. There is a formula for your loss of earnings and your lost time. But when it comes to pain and suffering, there is no formula. Do you not feel that you lose much of your sincerity when such a charge comes from the court, as it usually does?

ALBERT AVERBACH: I think that you have got to preface this kind of language in a charge in every state, including New York, so that when the judge charges, and in our state he charges after summation, he will say that he can give the jury "no yardstick by which you jurors can measure pain and suffering. However, there is a yardstick by which you can at least evaluate this injury. And this is one of them. But you are not bound by my suggestion because you are the sole judges of the amount."

This procedure which I say has been approved in New York at trial level can go one step further. In one of the states, Maryland, to be exact, it is not proper because they follow *Botta v. Brunner,* 26 N.J. 82, 138 A.2d 713 (1958), and they follow the Pennsylvania decisions which make it tantamount to misconduct for an attorney to suggest to the jury what the *ad damnum* clause is. In a case which went to the Third Circuit — *Bowers v. Pennsylvania R.R. Co.,* 182 F.Supp. 756 (D.C.Del.), *aff'd* 281 F.2d 953 (3d Cir. 1960) — a resourceful laywer in effect said this in his final address to the jury: "I may not and I

am not permitted to tell you what you should award for pain and suffering per hour. Under our law I cannot mention that. But this I can tell you – that in our record in this case there is proof that Mr. Bowers, when working an 8-hour day for the railroad, which is the defendant in this case, was paid $2.77 an hour; this is what he got for doing what he was skilled in doing, what he wanted to do, what he liked to do for his family. What, in your opinion, is 24 hours of pain worth when he is lying in a bed of pain without surcease; is it worth three times as much? Is it worth twice as much? I cannot say, but you may say." And this was approved in the *Bowers* case last year as affirmed by the Third Circuit.

FRANK FOWLER: I would like to ask Mr. McNeal if he has any comments.

HARLEY MCNEAL: Well, on Mr. Averbach's use of the cards and the mathematics I can only say this, that a law suit is neither the time nor the place to introduce that kind of mathematics; that a law suit, in my opinion, is to be tried upon the facts and the evidence. Any mathematical computation of what pain and suffering is worth is not evidence and, in my opinion, is improper.

FRANK FOWLER: We have reached the end of this section of the program. Despite the lack of formal presentation, I think it has been very interesting; it has certainly been interesting to me. I want to thank these distinguished gentlemen for thus instructing and entertaining us.

PHARMACEUTICALS AND PRODUCTS LIABILITY LAW

PANEL: CHARLES J. FRANKEL, M.D., LL.B., *Professor of Orthopedic Surgery, University of Virginia Medical School*
ALBERT AVERBACH, *of the New York Bar*
WILLIAM F. X. GEOGHAN, JR., *of the New York Bar*
HARLEY J. MCNEAL, *of the Cleveland, Ohio Bar*

MODERATOR: TAYLOR H. COX, *of the Knoxville Bar*

CO-ORDINATOR: RICHARD STAIR, *President, Knoxville Bar Association*

CO-ORDINATOR RICHARD STAIR: We want to welcome you to the Evening Session of the Twenty-second Annual Institute of the University of Tennessee College of Law and the Knoxville Bar Association. I want to take just a moment to give some credit where it is properly due for the fine program that we have had here today. First of all I want to compliment Dean Wicker, the Dean of the Law College, on his over-all responsibility for this program. Perhaps in a more fitting fashion we should give credit to the man who has done the actual hard work through the year in working out the details, correspondence, and program planning that goes into an Institute of this kind, and that is Professor Martin Feerick of the Law College Faculty.

I have been attending these Law Institutes for quite a few years, along with many of my fellow lawyers, and I believe that we may say with some sense of pride that this is the best Institute that we have ever had. And it certainly seems as though there is more favorable response and appreciation than any we have ever had.

Now for the Evening Session, after a fine day of it — I thought particularly the Afternoon Session was a very spirited program on Trial Tactics. We also had in the morning, "Whiplash Injuries" — injuries to the cervical spine; in the afternoon, the low back and lumbar spine; and this evening we have a subject that we know is increasingly in evidence in litigation; that is the subject of pharmaceuticals and products liability law.

I want to just review briefly for a moment the subjects under discussion tonight before I introduce the moderator. They are: establishing liability of manufacturers, distributors, retailers, pharmacists, and physicians; particular hazards in manufacturing, prescribing and dispensing new drugs, vaccines, serums, plasma, and the like. Other problems include the liability of the druggist for giving medical advice; for dispensing without a prescription, or where prescription has lapsed; for mislabeling prescriptions, and selected problems in negligence and

warranty. Also up for discussion will be the duty to warn in descriptive literature and labeling; warranties, express or implied; privity; effect of disclaimers; res ipsa loquitur; and statutory violations. We shall also discuss current developments in malpractice litigation against physicians based on complications and toxic reactions to drugs employed in diagnostic and therapeutic medicine; hazards in diagnostic injection procedures; allergies; hemotoxic and gastro-intestinal drug reactions; and legal problems in transfusions and serum hepatitis.

For our Moderator this evening I want to introduce to you Mr. Taylor H. Cox, a very fine attorney of this city. He is a lawyer of long experience, a member of the American College of Trial Lawyers, a member of the International Association of Insurance Counsel, former Circuit Judge for Knox County, former President of the Knoxville Bar Association, member of the Board of Governors of the Tennessee Bar Association, and a very fine lawyer — Mr. Taylor H. Cox, our Moderator.

TAYLOR H. COX, MODERATOR: I do not know when the attorneys in this area and the students of this Law College have ever had the opportunity of hearing a group of men standing any higher in our profession and in the medical profession than they have had the opportunity of hearing all during the day. The subject for this evening is, I think, one of the most important, at least beginning to be the most important. When you stop to think of the millions upon millions of dollars that are being spent in research and development in this country by the pharmaceutical houses and all of the wonder drugs that are being placed on the market by these manufacturers, it simply broadens the spectrum for litigation, for misunderstanding, and for more work for the attorneys in the future. The products liability angle is developing now into one of the most important segments of practice. On tonight's panel are men who have been introduced to you on two or three occasions today and I am not going to take the time from the program to again introduce them. The first speaker on the program is Doctor Charles J. Frankel from the University of Virginia Medical School who will talk to us on some phases of the subject under discussion; I could spend all evening putting into the record his qualifications — Doctor Frankel.

DOCTOR CHARLES J. FRANKEL: We have agreed that I would say a few words about malpractice, and then continue with a few words about drugs and instruments. Most of you know the legal definition of malpractice. It is simply practice below an acceptable standard. It infers negligence on the part of the physician, and we all agree that

he who is negligent, he who causes damage to another, ought to pay a penalty.

When we look at the malpractice problem, we realize that there are a great many more suits against physicians than there are real evidences of actual negligence. In California, for instance, one physician in four may expect a suit for malpractice. In New York and metropolitan Washington, D.C. one in four or five is sued for malpractice; in Virginia, one in about eighteen; in Tennessee, one in about twenty; and in South Carolina, which has the lowest rate of suits, one in about thirty-two. We know from the records that only about 20 per cent or 25 per cent of the suits that are brought have any real basis or any real groundwork that would enable the lawyer to carry his case through litigation. This means that fully 70 or 75 per cent are nuisance suits or are based on some mistake on the part of the lawyer who accepts the case.

We feel that it is necessary to educate lawyers into determining just what is a malpractice suit — what is a basis for it. We feel that it will have an efficacious effect on the relationships between the two professions if they try to understand each other, particularly along these lines. Most lawyers take cases of malpractice simply because the client comes to the office and has a complaint to make, and not having any adequate medical background, the lawyer will usually feel for the client and accept the case. If the case has no merit, and most of these cases are taken on a contingency basis, it means that the lawyer is simply going to spend a fair amount of time and get nowhere. If the lawyer is somewhat dishonest, he will take the case because of its nuisance value in the hope that he will get a three or four thousand dollar settlement from the insurance company which often feels that it is probably better to settle a case of that sort rather than go to court and take a chance on a higher verdict. I have heard of insurance companies who will settle for $3,000 despite the fact that they are absolutely certain that they can win the case. They feel that it will cost them a bit more than that to fight the case.

What is malpractice so far as the lawyer is concerned? It is a bad result? If it were a bad result, then we would have, of course, a fair number of suits because in the practice of medicine there has to be, and there always will be, a mortality rate. A certain number of patients are going to die from minor illnesses or minor operations, a certain number of patients are going to develop infections, and a certain number of patients are not going to get the results that they feel they ought to have. So long as that is to be expected, then we probably will continue to have suits unless the lawyers begin

to realize that a bad result per se is not evidence of malpractice. Mr. Belli, out in California, developed a plan where he thought that we ought to develop some form of insurance where both doctor and patient would pay a premium, and in the event an untoward result was had, this fund would pay the client or the patient a certain sum of money. Mr. Belli communicated with me and asked me what I thought about the plan, and I wrote back and told him that I thought that we ought to try it in law first because we had a 50 per cent mortality rate in most law cases since one side wins and one side loses — so we ought to insure the client who loses. If the lawyers would give this plan a good trial, then we can try it in the medical field. Well, he did not think that was a very good idea, and so that is as far as we have gone with that plan so far.

The only way that the lawyer can find out what this whole problem is about is to get himself some education, and he has to acquire that education from doctors. We started many years ago a program of inter-professional meetings between the bar and the medical groups in local communities, and we got to the point where the doctors and lawyers were meeting and discussing their problems. The lawyers found out that all doctors are not quacks, and we found out that all lawyers are not ambulance chasers. The fact still remains that there is much to be done in the field of education. Lawyers have to be taught that every operation carries with it a mortality rate. They have to understand the nature of an illness. They have to understand the nature of an operation. They have to be able to differentiate between negligence during an operation and the normal complication or an unexpected complication which may follow any and every operative procedure.

Let me illustrate. Simple tonsillectomy is one of the simplest procedures that the nose and throat people do. Now most of these patients do well, but occasionally a patient will vomit and aspirate and swallow some of the vomitus and aspirate some of that material into the lungs, and develop pneumonia or develop a collapse of the lung, and die following a procedure. Yet when you examine this procedure, you find it was done well, done by well-qualified personnel; and it was an accident which attended this procedure. It does not happen very often; but when it does happen, it is an unfortunate incident. All patients who have any operative procedures done on them should be forewarned that the operation carries with it an element of danger. When a patient asks me: "Doctor, is this operation serious?", even though it may be the closing of a small laceration, I usually tell him: "Well, on me every operation is dangerous, and

I feel the same way about an operation being done to the patient."

All operations, of course, carry complications, but there are many things that ought not to happen during an operation. If the lawyer will acquaint himself with some of the fundamentals of medicine, then he will be able to determine without too much difficulty, with some help, that there has been some actual negligence. Now does that mean that we want to sue everybody who is negligent? I believe that the fellow who is consistently negligent time after time ought to be sued. So far as allowing him to practice, the medical societies are the ones who are going to have to take action, and sometimes they have been slow.

What else can be done to solve this problem? Everybody makes mistakes. I know of no one in any field who is perfect. The party who makes the mistake should have to pay for it but should he suffer the public humiliation that often goes with the malpractice publicity? The magazines, *Readers' Digest,* the *Ladies' Home Journal, Life, Look,* have all had articles in which they have brought out the fact that doctors are susceptible to difficulty, and they have brought out perhaps too strongly the fact that doctors do make mistakes. Somewhere along the line someone is going to write an article and well-publicize the fact that lawyers also carry malpractice insurance. Very few people realize that. A story in a leading popular magazine, of course, could do irreparable harm to the law profession. As soon as people find out you have got this type of insurance, they will sue you. We know of some suits in Virginia against lawyers for malpractice, and I am sure that all of you are aware that there are suits elsewhere in the country. The fact is that the lawyers are just as vulnerable as the doctors.

What is being done around the country? In 1952 Charles Gregory, Professor of Labor Law at the University of Virginia, and I wrote up a plan in which we would use the arbitration groups to hear the problems relative to malpractice to take it out of the hands of the court, and do away with the attendant publicity. We sent that plan out to California, and about five years later they came up with a plan which was very similar but which differs in that they do not have the arbitrating group. They have a group of lawyers and doctors who hear the merits of the case; and by pre-agreement with many of the lawyers, they submit that if this case has merit then they will recommend settlement; if the case has no merit, the lawyer will not pursue it. This has worked fairly well. It has worked well enough so that in certain areas of California the doctors can again get malpractice insurance. They were dropped from the rolls of the large

companies, and they had to purchase insurance from Lloyd's of London for a terrific fee, and they were only covered for small sums.

Pima County, Arizona, has a board made up of thirty lawyers and thirty doctors usually from an area distant from the site of the alleged malpractice. They hear the merits of the case, and they make the same recommendations. Other medical societies have had what they call grievance groups made up of their own members, but they have been suspect as biased. Nobody is going to believe that a medical society group in the same town in which a doctor is situated is going to do very much. So the grievance committee arrangement has not worked.

Then some suggested the extension of the impartial medical testimony project. The impartial medical testimony project, as you know, was one that was started in New York, the so-called Peck plan devised by Justice Peck and by other members of the bar and by the medical groups. They select professors at the various medical schools, and it is very flattering to be told that just because you are a professor at the medical school you are completely impartial. The truth of the matter is that some professors are partial — with a defense-wise, or a plaintiff-wise, approach to all cases. They are not any holier than anybody else, and I think that you can find impartial people throughout the profession. You do not have to go to various schools for them. The halo simply does not fit. When the halo becomes too loose, it sometimes becomes a noose; and that is what has happened in some areas.

We think that this problem can be licked, but it requires understanding and cooperation by the members of the law and the medical groups. We only ask that you be tolerant. We only ask that you do the right thing. We are not asking you to forgive a man who is negligent. We are not asking you to let him off scot-free. We are only asking that in each case you examine the facts carefully. If the man has made a mistake, he must pay for his mistake; but he need not pay for it the rest of his life. Let the punishment fit the crime, and I think that if you project yourself into the position of the doctor and see how you would like to be treated in the event that you were guilty or found guilty of making a mistake, then perhaps we will get some Christian charity between and among the groups.

I just want to say a few words about some of the areas in which doctors get into trouble. We mentioned the use of drugs. One of the areas they get in trouble is the use of tetanus antitoxin. Sometimes they fail to give a patient tetanus shots after he has been cut or hurt; not to do so, in my mind, is negligence, and they ought to pay for it.

Another area in which doctors get into trouble is the use of local anesthesia. Every patient who has local anesthesia should be tested

for an allergy: "Have you ever had local anesthesia before? If so, did you have a reaction? Did you get sick?" If the answer is negative on the reaction, you can go ahead in most cases and give the anesthesia. But we have seen people who have come awfully close to dying simply because we neglected to ask them that simple question. That is negligence. This is something we have to be aware of, and this awareness extends to doctors who practice in Podunk or practice in Knoxville or in Richmond or in New York or in Baltimore or any other place. This is not knowledge that is exclusive to the big city doctors. This is the knowledge that is given to the average physician who graduates from a Class *A* medical school, and he should know this.

What about spinal anesthesia? Now spinal anesthesia is a very safe type of anesthesia, but it also carries with it some complications. The complications are small; but when it happens to one client or one patient, it is rather large. But it can happen, and you must expect it. It is a useful anesthesia, but to give it to a patient and tell him that he is going to be absolutely all right means that you are guaranteeing to him that there will be no ill effects. The doctor who does that is stupid because he ought to know better than to be a guarantor. No doctor is expected to be a guarantor, nor should he be one.

We have an interesting case, *Orthopedic Equipment Co v. Eutsler,* 276 F.2d 455 (4th Cir. 1960) which was decided about a year or two ago. This is the first case, I believe, in which instruments were brought in under the Federal Pure Food and Drug Act. This is the case of a young man who had a fractured femur – the thigh bone – and he wanted to have an operation done which would eliminate the long hospital stay. Accordingly, an intramedullary nail was used. Now intramedullary nails are these long rods that are inserted into the hollow portion of the bone. All intramedullary nails are stamped – they are stamped by width, diameter, and length. They are stamped 9, 10, 11 millimeters in diameter, and 32, 33, 34, 35, or 36 centimeters. The men who devised the technique of using an intramedullary nail insisted that the nail be snug. A loose nail would be useless. A nail that would be too large might split the bone and cause trouble. So, in order to arrive at the ideal measurements and the ideal situation for placing the nail, they devised a drill which was the same diameter as the nail so that if you were going to use an 11 millimeter nail you would use an 11 millimeter drill to insure a snug fit and you would get the results that you desired.

In the case we are discussing, this nail was measured. We used a 9 millimeter drill – it was the same size drill as the stamped size of

the nail. The drill was stamped 9 millimeters, and the nail was stamped 9 millimeters. When the surgeon attempted to drive the nail, it got stuck. They could not drive it in, and they could not extract it. They broke every one of the instruments designed for removing the nail. There they were with the nail sticking out of the wound six inches and a portion of it in the bone. Now, what to do? They got a hacksaw, and they sawed off the portion that was sticking out, and they closed the patient up and hoped that by the time the outside wound healed, a little bone atrophy would develop — that the bone would sort of shrink a little and then they would be able to lift the nail out. That happens in many cases, and that is good sound reasoning.

In about three weeks they got a new set of instruments for extracting, and they went after this thing, and again they broke every one of the instruments. We finally had to devise a new type of instrument to get this nail out, and that is what we did. We went down to the machine shop, and we invented a new instrument just for this purpose, and we got the nail out. Then we got the bright idea that we had better measure that nail. We found that all through the course of this nail it measured between 10 and 11 millimeters. This is a big difference for a precision instrument — a 10 per cent difference. We called the instrument company, and we told them that the nail was faulty. They sent their vice-president down, and he said, "Oh, well, we will give the boy $500 and call it quits." The boy later got a $75,000 verdict; and this made, I think, new law insofar as instruments are concerned. The defense said that the doctors should have measured the instrument. But to do so would have required special engineering tools, special gauges because this was not a completely round instrument. This was an instrument that had a funny shape — a clover-leaf shape. If we have to measure every instrument of that variety, that would add about an hour's operating time, and it simply is not feasible. What we did was rely on the manufacturer for the size of the nail. And so what might have been construed as malpractice, was not. The average lawyer would have looked at this case and said: "You are guilty of malpractice. You got a bad result." And we certainly got a bad result. This boy's leg is almost useless to him; he developed a serious infection. But you see, when they looked into the situation, and examined the background of the use of this nail, they found out that our resident staff was not negligent. When they compared the procedure that we used with the procedures done all over the country, they found out that it was done well and that we followed all of the techniques, all of the routine steps, advised by the originator of the method. So here is an example of a case that ordinarily might

have been labeled "malpractice" but actually was due to a fault in the manufacturing end of it.

I do not know how many other cases are blamed on doctors — bad results, and all that — but I do think that if we can get across to you the fact that doctors are human, that they can make mistakes, and that medicine is not a completely precise science, then you will be tolerant and we both can go forward together and accomplish a great deal more than we have in the past 50 or 100 years.

MODERATOR TAYLOR H. COX: Thank you, Doctor Frankel. In connection with malpractice discussion, we are going to hear now the plaintiffs' side on this subject by Al Averbach of the New York Bar.

ALBERT AVERBACH: Well, the plaintiffs' side of this problem is very much the same as was so beautifully expressed by this very charming doctor, lawyer, and talent, Doctor Frankel. Malpractice cases, as I view them — and this goes back 37 years into the days when I tried my first one — are not law suits for amateurs. These are not law suits that should be brought indiscriminately. These are law suits in which you must consider some very basic problems. Everyone who is a potential juror, whether a male or female, has a rapport with the doctor because everyone has had, on some occasion, to call a doctor to treat a member of the family. And you see some weird results in the courtroom in malpractice cases. A plaintiffs' lawyer has absolutely no right to start a malpractice action against a doctor unless he is backed up by a *written* report from a doctor, who is prepared to testify in a courtroom that there was a departure from standard practice and procedure. This is basic, and too many doctors are sued by lawyers who feel that once they start a lawsuit in a bad end-result case they are half-way home. They are not because they have to get over the hurdle at the trial level of convincing the judge that they have a jury question. That presents a great problem of proof.

Let me clarify what I mean. I tried a malpractice case that lasted 18 days against a doctor and his father, also a doctor, both owners of a small hospital in a small community. A little boy, eight years of age, with very sharp mentality and a high I.Q., went in for abdominal surgery one Saturday night. This was bridge night in this community, and the boy was left after coming out of surgery with no attending physician or nurse. No one but the young boy's father was in the room; the nurse on the floor was checking a woman in active labor. The child had not fully recovered from the anesthesia and went into "surgical shock." They lost the child's pulse. This bright boy is now a "vegetable"; this bright boy cannot see; this bright boy cannot speak; this bright boy has to be spoon-fed; this bright boy

has to be lifted up by his mother. He is a quadriplegic spastic. I had six women on this jury and six males. In New York state we have to get a five-sixths verdict. Would you believe that the six women would hold out for a defendants' verdict when the plaintiff had six medical expert witnesses showing departures from standard practice and procedure? The men voted for a plaintiff's verdict, but the women did not; there was a hung jury after eleven hours. So even though you have doctors who are willing to testify, you have the problem that you must face up to — that a jury feels that a doctor is a man of science, and he is doing the best he can.

Let us go one step further. I say it is malpractice for a lawyer to attempt a malpractice law suit against a hospital, doctor, or nurse without adequately trial-briefing his case before he draws his pleadings. Here is a trial brief that we drew in our office in a case that was settled this week. Let me show you the detail that you need basically in every case: Statement of facts, pages 1 to 11; medical brief, pages 11 to 19; and finally, brief on the law: *Point One*: the defendants owe to the plaintiff the duty and obligation to possess and to use a reasonable degree of learning and skill and to keep abreast of the times and methods and procedures. *Point Two*: the defendants, holding themselves out as having special knowledge and skill, owe to the plaintiff the duty and obligation to possess and exercise that degree of knowledge and skill ordinarily possessed and exercised by physicians and surgeons, having regard to the existing state of knowledge and medicine and surgery — not merely the average skill and care of the general practioner. *Point Three*: the defendants owe the duty and obligation to apprise the plaintiff of the surgical procedure to be undertaken with sufficient clarity, so that the plaintiff can intelligently understand and be well-informed before giving consent to the surgical procedure. *Point Four*: the defendants, while working together as a team, performed a surgical operation and procedure on the plaintiff and owed the duty and obligation to exercise reasonable diligence and care to observe the progress of the surgical procedure and to observe the conduct of the other physicians comprising the team. They cannot escape responsibility by relying upon the other members comprising the team to perform acts which could not properly in the exercise a reasonable skill be delegated. *Point Five*: the defendants owed the plaintiff a continuing duty following the operation and were liable for abandonment in the case. *Point Six*: the question of the defendants' negligence was a question for the jury to determine and not for the court. And then *Point Seven*: final requests to charge.

All this you need *before* you draw a pleading, and how dare you

men of law bring an action against a professional man which has serious consequences, until you know from your briefing that you have departures from standard practice and procedure? I have had men submit cases to me for evaluation – "cinch" liability they would say – the doctor was drunk! Let me tell you something. Every policy written in the United States, with the exception possibly of Lloyds' and their affiliates, has an absolute clause that provides an exclusion to the policy if the operation is done under the influence of intoxicating liquors or drugs – the insurance policy does not cover it.

Number Two: How many of you in this audience know that there can *never* be a settlement of a malpractice case until a doctor gives written consent to the settlement?

In 37 years I have gone to "conclusion" in only one malpractice case. This is because, before we sue, we investigate. We turn down nine out of every ten cases submitted to our office because we do not look at the end result; we look, rather, at what the departures from the standard procedures were, what it was that this doctor did not do that he should have done. This is the message I leave with the lawyers.

Let me tell you a couple of things that I think need to be expressed, and I am glad that we have a number of men in the audience tonight that represent the drug industry. I think that a great number of actions that are brought against doctors properly should be brought against the drug outfits for knowingly putting upon the market drugs that may have deletericus results. For the men in the audience who are interested in this type of work, here is something that is a *must* for you: *The Medical Letter.* It is written by doctors for doctors and for druggists and is published twice a month by Drug and Therapeutic Information, Inc., 136 E. 57 Street, New York 22, New York. Most of the knowledgeable lawyers suscribe to it. If there is a drug that has harmful effects, it calls it by name. Let me read one to you: "*Toxic effects of streptomyocin in combinations.* The occurrence of severe toxic respiratory and central-nervous-system depressive reactions in pediatric patients treated with pencillin-streptomyocin combinations has resulted in a recent requirement by the Food and Drug Administration that manufacturers of such combinations include the following caution in the package insert: *'Not for pediatric use.'* "

I know from my discussion with some of the men here that there is a case in litigation locally involving a certain drug, the name of which I will not presently disclose. In this very issue of *The Medical Letter* that I am looking at it says: "New emphasis on the hazard of this therapy now appears in an editorial in the JAMA issue by a doctor

(an eminent hematologist), who reports that of thirty patients with aplastic anemia he had seen in the past three years, eight had received significant amounts of this particular drug — most of them for minor infections. He says, 'The tragic thing about all these seriously ill cases, most of whom died . . . is that the drug need never have been given.' "

Doctors make mistakes; so do lawyers. We can have a title search and mislay it, and our client suffers because a new search has to be drawn, and we can be sued. Our malpractice policies cover such an occurrence.

Bear this in mind — doctors, when they make mistakes, are responsible in negligence the same as if they drove a car negligently. If you are satisfied that you have a departure from standard practice and procedure and you are going to sue a malpractice case, then outline your case to a jury by pointing out to them that although it is labeled in the calendar as a "malpractice" case, it is a "medical negligence" case.

Let me give you what I think are the significant factors in malpractice cases. First, abandonment — a doctor who undertakes to treat a sick patient owes an obligation to stay with it. He cannot relieve himself of his obligations. He cannot subordinate it while he goes fishing. If he does, in our state at least, you can prove an abandonment case *without expert medical testimony*. Point Two: admissions of liability. One of our important cases in New York involved a dentist who in abstracting a tooth broke a portion of the mandibular bone. He said, "I must have hit it too hard." Well, that was all that was needed in that plaintiff's case. No expert testimony was introduced. That was an admission against interest. Also, take spinal anesthesia which Dr. Frankel mentioned. I am not in complete agreement that it is a harmless procedure. I will say this, that if a patient says he does not want spinal anesthesia, the cases hold that for a doctor to give spinal anesthesia is an assault for which an action lies. Another area is "telephone diagnosis". This is being done time after time. The doctor is dead wrong making a diagnosis by telephone. They admit this is a hazardous procedure, and they know it because it is in their medical journals.

Those of you who, notwithstanding my words of caution, decide that you still want to take on these hard core cases, should by all means get the following books. Thorek's *Surgical Errors and Safeguards,* one of the finest books published. It is published by Lippincott Co. of Philadelphia. The Surgical Clinics of North America came out with an issue called *Surgical Errors and Pitfalls in Surgery*. When they found out that we were mentioning this as required reading in

meetings of plaintiffs' lawyers, that issue became a collector's item. I suggest that you get a copy of it. You will be surprised at some of the surgical errors that the doctors write about.

It is true that in certain states there has been medical literature saying that law suits have set back the progress of medicine in certain fields because of the high rates of malpractice insurance and the high verdict elements. However, we find that in these fields where there is hazard, a doctor holds the responsiblity of getting an intelligent consent after knowledge upon the part of the patient of the hazard. I speak only of one class of cases, but we have had several of these recently: cerebral angiography where the carotid artery is pierced by a needle in order to get an X-ray view of a possible tumor in the brain. That has caused, in many cases that we now have in the office, piercing of the optic nerves and hemiplegias. I think that this is a procedure that requires of the lawyer the reading of the literature on it, and the doctor that attempts it has some hazards that he knows about.

We tried a case recently involving something that frequently occurs. Even in very large hospitals, and I am speaking now of one of the real large teaching hospitals, errors are committed by the record room. We had a young lady who fractured a thumb while skating, and it was repaired by an orthopedic surgeon. Then later on, she came in with a complaint that she had pulled this injured thumb by pulling up her zipper and had no motion in it. So the doctor looked at it and decided that while they were going to do a tendon repair on it, he had better take care of a nodule that he felt there, and he was going to do a tendon synovitis repair. Now this could have been done under local anesthesia by infiltration method. By a strange coincidence her name was Jean Blank, living on Butler Drive. She entered the hospital as number 463,235. Somebody in the record room dug up a 35-year-old previous admission of a girl whose name was Jean Butler and, misled by my client's residence on Butler Drive crossed out the new unit number and inserted the unit number of the old case. The old case involved a girl that was brought in to that hospital with asthma. The girl that I represented wanted a general anesthesia that she designated, but the two anesthetists said: "No, you have a history of asthma so we are going to give you a 'brachial plexus block'." She said, "What is that?" They said, "Oh, we will just deaden the thumb by going through the first rib in the area of the clavicle." She said, "I do not want that." They said, "Well, you must have it because you are asthmatic." She said, "I am not asthmatic." Well, to make a long story short, they had trouble there. They pierced the lung. There was a

massive pneumothorax, a collapsed lung. They had no business being near the lung. Well, we sued that case against the hospital and the doctors, and, of course, that was one that was readily settled because to a jury this is one thing that they knew should not have happened.

Now these are the types of cases you have a right to sue. In the type of case that I mentioned where you have a child abandoned and surgical shock develops and you have a quadriplegic spastic, you have a right to sue. But do not look at the tail end of it and say that this is a terrible result, and we are going to sue everybody in the picture.

My very close friend and fellow lecturer, Mel Belli, who has been mentioned by Doctor Frankel, tries many of these cases, but he has never cross-examined a doctor about anything unless he has personally "scrubbed" for such an operation or has witnessed it or has seen it in the autopsy. Any of you who think you know enough about malpractice had better get your feet wet by viewing an operation, as we do time after time, or go into the morgue and see what is going on. Then you will know the medicine that you are required to know to effectively handle these cases.

I hope I have not scared you, but I am giving you the facts of life. These are *hard cases.* They should not be handled unless you know where you are going and why you are going, because your opponents know where they are going. Everytime we go into a case of this type in New York State, our opponents are the attorneys for the Medical Society. Their entire staff does nothing but try malpractice cases. In our state most of the Society members are insured in one company, and each of the members of this one law firm knows medicine. And you have to know medicine. When you hear Harley McNeal, who defends some of these cases, tell you about it, you will realize that this is not the forum for experimental work.

I know that I probably have exceeded my time, Mr. Moderator, but let me just say this. There are a great number of cases presented to lawyers involving staphylococcus aureus. We turn them all down. We do not think there is a chance to recover. We refuse to take them, for the simple reason that we do not feel that anyone knows what causes it. It is in the air, and you can have a staph case in a brand new hospital. We turn them down. I know that the literature says that some of these cases are being settled for modest amounts. But I do not think that a man who stands up in a courtroom who needs medical testimony constantly ought to try to get into a case where there is a possible $500 settlement – you owe a duty to represent people that need your expertise in medicine if you have a case that ought to be sued.

Thank you for listening to me so patiently. I thoroughly enjoyed the opportunity of coming here to Knoxville and spending this pleasant day with you.

MODERATOR TAYLOR COX: Thank you, Al, and now from the defense side of the courtroom is Harley J. McNeal of Cleveland, Ohio.

HARLEY J. MCNEAL: I will try to be quite brief about malpractice because there is still quite a bit of program material to cover, and I am sure that there will be other things that can be discussed which will be of equal importance. On the defense side of malpractice cases I think the real job of counsel representing the physician is to do his job thoroughly before trial. That means researching very carefully the problem involved as to whether or not the physician charged with malpractice has really exercised his best judgment in the handling of the case. It is the physician's individual best judgment which will be one of the criteria whereby the jury or the court will determine responsibility. It is necessary that we know whether the physician followed one or more of the approved methods then being followed by the physicians or surgeons practicing in that particular locality and whether, in following such an approved method, the physician did exercise his individual best judgment in the care of the case.

In order to arrive at those decisions, it is necessary that the lawyers on the defense side explore and become familiar with a number of the methods used in various operations, diagnostic procedures, and procedures necessary to properly advise patients whether or not post-operative care had been given in accordance with clinical signs, whether the physician has, and surgeon has, correctly recognized complications.

Insofar as determining whether or not the case involving post-operative complications is one for settlement or trial, hospital records and office records have to be examined carefully. I think probably the defense is most vulnerable when hospital records are involved. Because of the vast amount of demand or attention that is required on the particular surgeon or physician to take care of so many patients, there is a tendency on the part of the surgeon or the physician to fail to put in the record those things which will substantiate the claims of the surgeon when you talk with him after a malpractice action has been started. Therefore, we try to go over the hospital records very carefully and to ascertain whether or not sufficient orders have been listed; whether the physican or surgeon has kept the progress notes up-to-date; and whether in the nurses' notes there are accurate representations of the number of times the surgeon has visited the patient and has indicated therein whether or not some care has

been given the patient by either the operating surgeon or a physician in charge of the case.

Those records have to be examined most carefully because in the trial of such a case I think lawyers on the other side will examine those records, and the surgeon on trial, if you please, becomes fair game for cross-examination as to the lack of recording that he has done. Sometimes the nurses' notes give us a pretty clear story of what is developing insofar as complications are concerned, and the lack of care on the part of the surgeon to recognize these developing complications so as to take procedures which will counteract such developing complications. You might have a gastric surgery with a sewing of a duodenal stump with an individual who apparently was in good health and post-operatively begins to show signs of hemorrhaging, a continuous high pulse, perspiration, cold and clammy extremities, and a failure to observe as to hemorrhaging from the rectum, failure to observe a distending abdomen or complaints about distention; and those things are indicative of either a leakage from the stump or a blow-out which should be recognized, and so forth.

So we must look, on the defense, in surgical cases, to a great deal of hospital records to see whether it is probable that we will be able to convince that jury that sufficient care was given — that is, ordinary care such as would be exercised by surgeons practicing in that locality. As Doctor Frankel has pointed out, all surgery entails certain risks, but if any physician or any surgeon is foolish enough to guarantee a cure or guarantee recovery, then we have difficulty. It is very hard to convince juries that the physician or surgeon is without fault if he admits that he guaranteed his patient that he would be cured, that there would be recovery. In most of these cases the jurors are very prone to give the physician or the surgeon the benefit of the doubt, if there is a doubt. And I might say that it is very unusual for these malpractice cases to go to trial if there is a doubt, or if there is a probability that the surgeon or the physician has actually been negligent. We try to get independent examinations made of the particular kind of treatment or of the particular surgery which was done, and we try to get a man who is totally — I hate to use disinterested because all people are interested to some degree or other in the particular case at hand — but we try to get at least two surgeons or physicians practicing within the particular field to examine what was done, to look at the records, and then try to, as objectively as possible, give us the benefit of their opinion before we will venture into a courtroom and have twelve tried and true individuals ascertain whether the surgeon has properly taken care of the case. We hate to subject a physician or

surgeon to twelve people who are uninitiated in a very technical field and have them determine whether or not approved methods, best judgment, and ordinary care were used by an individual who has been trying, as best he could, probably, under the circumstances, to take care of an ill or surgery case. We are very careful and only go into court when we are at least 95 per cent sure that the other side is not going to be able to attack on any basis. So we try to make sure that our hospital records are clean records and are complete records.

In most of these cases, as I think all of you know, the plaintiff must produce an expert witness practicing in the same field as the defendant who will testify on behalf of the plaintiff that the defendant did not follow what would be characterized as ordinary care practiced by the physician or surgeon in the locality where this accident occurred. Most of the plaintiffs' cases, I think, fall down because they cannot, usually, get experts practicing in this same locality to testify in these cases. It is only in the exaggerated case that experts in the same locality will usually testify. But in cases of res ipsa loquitur it is not necessary that the plaintiff produce an expert. Those res ipsa cases usually are the sponge cases where there is an error made in sponge count, and a sponge is left in a body cavity, or where a needle has broken — there are cases both ways on needles — burn cases where X-ray was used and sufficient care was not given — things where these acts speak for themselves. In these cases, then, experts are not needed, or as Mr. Averbach pointed out, where the physician or surgeon himself had admitted that he was negligent. We try to settle these cases, unless we meet boxcar figures and it is just a question of having a jury determine where the equities lie and how much actual injury the individual really sustained as a result of the admitted negligence on the part of the physician or surgeon.

On defense we try to get and produce for the jury outstanding experts who are not only recognized for their ability but also for their ease in explaining these medical problems to jurors of the average type who have difficulty in following what should or should not be done in these cases. The abandoning cases are very difficult because jurors will sometimes penalize a surgeon or physician for deliberately abandoning a patient, and that is the one type of case that is the most difficult to explain away — why the doctor or the surgeon leaves town knowing the situation. Was he justified in abandoning or leaving his patient in the hands of an assistant or in the hands of an intern or resident merely because he wanted to take a trip out of town either for a vacation or to see a friend? Then you have the problem of being able to prove that the individual who was supposed to take care of

the case was capable and experienced; had he had enough background to take care of any emergency that might develop? In these cases we have to find out whether reasonable notice was given to the patient that the physician or surgeon was going to leave town or was going to be absent; and whether or not a choice was given the patient as to who was going to take the place of the physician or surgeon if he is going to be gone for some period of time.

Finally, and in concluding, because of the hour, we want to know what diagnostic procedures were followed by the physician or surgeon: whether or not sufficient diagnosis was had in order to justify either the medical or surgical care that was given. For example, in a gastric ulcer case, did the physician or surgeon give conservative care for a reasonable length of time which would justify an operation if in fact it was an operative case? In ulcer cases, I think the minimum that is recognized is three weeks of conservative treatment to ascertain whether or not the case is one for surgery or continued conservative care. Only where you have hemorrhaging, perforation or intractable pain, will we find that most surgeons will undertake surgery in ulcer cases because of the risks that are involved in abdominal surgery.

So really the task of defense is to properly evaluate these cases before trial. Once they have been properly evaluated, the trial of the case is relatively simple because we are given great cooperation by all of the physicians and surgeons because they are interested, and they do not want any plaintiff verdicts resulting in these cases if we have to try them. It is our job to do the best we can to see that we get defendants' verdicts in these cases. Thank you very much.

MODERATOR TAYLOR COX: Thank you, Harley. In connection with the establishing of liability of the manufacturer in connection with drugs and other pharmaceuticals, we have William F. X. Geoghan, Jr. of the New York Bar.

WILLIAM F. X. GEOGHAN, JR: When we arranged this program for this evening, we thought perhaps we might speak a little bit on this question of the liability of the manufacturer, the distributor, and the retailer of drugs. I might preface my remarks by saying, and I think we all recognize this to be true, that the comments that any of the attorneys here have made so far with respect to any of these particular problems might not necessarily be the law of Tennessee or perhaps the law of other jurisdictions that we come from individually. For instance, with respect to X-ray — I wish I were in a state where the rule of res ipsa applies. In New York we still have to go ahead and bring in the doctor and prove that there was a departure from the norm. And so with respect to many of these observations that we have made

this evening, I am sure that you will recognize that we are speaking perhaps of the law in our own jurisdiction, but at least we are pointing up some of the problems. I say that because, perhaps, the laws with respect to privity, with respect to the elements one must prove, whether the manufacturer is involved as distinguished from the retailer, might be different here in Tennessee than in New York.

In your pharmaceutical cases you most often have three possible defendants. If the particular drug has been one that is subject to prescription, certainly you must consider the physician, the druggist, possibly the distributor — or possibly there the druggist will bring in the distributor or the manufacturer, and the manufacturer also. In line with what has been said so far and what I said this afternoon, I do not think it would be right if you merely join all unless you are firmly convinced, and this applies certainly with respect to the physician, that there is at least a prima facie case and one of merit against the treating physician. For instance, if the case is one where the physician has properly prescribed the particular drug, and this you have ascertained after investigation, but it was merely a question of the druggist filling the prescription and deviating from what was prescribed, in other words, prescribing or selling something different, certainly in a case like that the physician who, having prescribed properly, has done everything he should have done, should not be made the subject of such a suit. Very often in our general tort litigation we may indulge in the luxury of joining many defendants, even where we know that some are completely blameless but perhaps for the purpose of proving our case we are using such defendants as witnesses and perhaps discontinuing at the proper time. I do not think we should do that where a physician is involved merely for the purpose of perhaps making it a little easier to prove our case. The first thing we have to decide is who are our proper party defendants and if the physician is not properly one, he is certainly not to be joined.

When one considers suing the manufacturer in a drug case, although the trend in recent years has been to extend the privity doctrine, still, up to the present time in New York, where the manufacturer is involved, one must still proceed in negligence so far as the plaintiff is concerned, the original injured party. With respect to a retailer bringing in a manufacturer on question of warranty, of course we have a different problem. But the law still is, at least in New York and I believe it is probably also the law of Tennessee, that your cause of action against the manufacturer must still be predicated in negligence with all the problems that that entails. Naturally, you must show some violation, some absence of care, some affirmative act, or failure to do

that which the manufacturer should have done. The defense is, of course, in showing what the procedures are, in showing that the manufacturer did act properly, in showing what is customary and what is usual in the particular manufacture of a particular product. All of these defenses are available to the manufacturer, and certainly one can see the difficulty in proving a case against the manufacturer in negligence.

Against the retailer, or we will call him the druggist, certainly in New York and I am sure that it must be the law in Tennessee, your action would be one in warranty. If you want to join an action in negligence, that is permissible in our jurisdiction. You can sue on both, but usually the main action, where the druggist is concerned, is one in warranty – the failure of the product to meet the standards which it has been warranted that it should meet; the failure to be suitable for the purposes intended. New York has gone this far on the privity doctrine, and for the benefit of the younger members of the bar, if there are any students who may be here who have not gotten to that particular course yet, I think we all know what we are talking about when we talk about privity: the contractual relationship between the party purchasing and the party selling. And to remove it to a third party we lose the particular element of privity in the relationship. This is still required in New York although in some of the restaurant cases, the food cases, where food is purchased in a group of friends or in a family, they have extended the warranty not merely to the person who picks up the tab but also to those who are in on the cut. Now, New York has not gone any further than that. So we still have some problems there.

With respect to the distributor, the same rule would apply, as I see it, as would apply to the manufacturer. Usually the distributor would be brought in by perhaps the druggist where the druggist is sued on warranty, and then go down the line of distributors, and then on to the manufacturer. Those are the few items that I was asked to comment on tonight. The hour is late and I know Harley has a few remarks to make on some other subjects that are set forth here in the program. Since this will be the last time that I will have the opportunity to speak with you, let me say that I have really enjoyed my short stay in Tennessee, and I hope to see you all again soon.

MODERATOR TAYLOR COX: Harley McNeal is going to discuss now some of the legal aspects in so far as the duties of the druggists are concerned, and I understand there are some druggists in the audience.

HARLEY J. MCNEAL: As I understand the law, the registered pharmacist or his assistant may fill prescriptions or sell drugs or poisons. Employees working under the pharmacist, properly supervised by the

pharmacist, may sell drugs or medicine, but it must be under proper supervision. Where medicines are sold for technical and non-medical purposes, they may usually be sold by non-pharmacists. There are certain domestic remedies which are not treated as the type of product which requires a sale by pharmacists or assistants, and those are the types of iodine or quinine. Proprietary medicine is sold on the reputation and the name of the manufacturer — those things may be sold without liability on the part of the pharmacist. Aspirin is not a proprietary medicine. Some states will relieve the pharmacist from responsibility in connection with the sales of medicines or proprietary or patent medicines where the strength or quality of the particular medicine is concerned. But the pharmacist or his assistant is responsible for the quality, strength, and chemical make-up of all drugs or chemicals or medicines sold or dispensed by him that are not consdered domestic remedies or patented or proprietary medicines. The question of whether vitamins are drugs or food — some states have held that vitamins are food and not drugs — depends upon whether or not the vitamins are sold as a medicine. In order to obtain narcotics, as probably all of you know, a pharmacist must present the wholesaler with an official written order. Poisons have to be labeled "Poison". Some states require that antidotes be put on labels, and some require that records of the sale of poisons be kept for five years. They must be sold only for lawful purposes, and in some instances it is the duty of the pharmacist to inquire of the purchaser as to the purpose of the poison — what it is to be used for. Of course, poisons cannot be sold to minors. Sulfanilamides must be sold by prescription in some states including Tennessee, I believe. They must have the name and address of the seller, serial number and date, and name of the doctor recommending or prescribing. And penicillin in some states must be sold by prescription.

In connection with drugs — that includes medicine recognized in an official compendium and any substance intended for use in the cure, mitigatim or prevention of disease — in determining whether these products are adulterated, most of the evidence can be garnered from the *United States Pharmacopoia* or the *National Formulary*. When you find that the product which has been sold differs in strength, quality, or purity, or falls below the standard as set up in the *United States Pharmacopoia* or the *National Formulary*, that constitutes an adulterated drug or product. A pharmacist sometimes can avoid liability by obtaining from a wholesaler or manufacturer a written guarantee which is signed by the wholesaler or the manufacturer indicating that the drug which has been dispensed to the pharmacist is not adulterated or misbranded and that the drug does comply with

the federal law. You all know that the Food, Drug and Cosmetic Law prevents false advertising, adulteration, and misbranding.

The pharmacist or assistant cannot sell or hold for sale any new drug unless an application with respect thereto has become effective under the federal law or has been filed with the particular state authorities. In connection with the new drug, the application which has to be filed must contain reports of the investigations to show that the drug is safe, a list of the ingredients, the composition, methods of manufacture, samples of the drug, and specimens of labeling. The application is deemed to be effective 60 days after filing, but it does not apply to new drugs which are used only for investigational use.

I understand that in Tennessee it is false advertising if a drug is represented to have any effect on certain diseases such as arteriosclerosis, cancer, diabetes, dropsy, and the like. It is important to know that advertisement does not embrace labeling.

In most states the sale of insecticides or fungicides is regulated. They must be properly labeled. It is unlawful to sell Paris green, lead arsenate, unless the sale is accompanied with a label stating the percentage of the arsenic contained therein. Hypnotics have to be dealt with particularly carefully, and hypnotics embrace any barbiturates. Some states regulate the sale of body-weight reducing drugs, in particular, dinitrophenol, amatol, luminol or varinol. We had a case involving dinitrophenol that happened approximately 20 years ago, where a lady only wanted to lose five pounds. She purchased a reducing compound which contained dinitrophenol, and in 9 months from a 135 pounds she went down to about 78 pounds and lost all her hair, her sight, and the nails on her hands and feet and her body constantly scaled off by reason of the excess concentration of dinitrophenol in this reducing compound. She got to the point where they could not even keep a sheet over her. That was a tough case to handle and we had quite a hassle between the pharmacist and the manufacturer of the drug over a question of whose insurance policy should cover it. But finally, and that was twenty years ago, we settled the case for $48,000. And it was not more than six weeks to two months later that the lady died. It was a very distressing case, and every time I see the word dinitrophenol, I am reminded of that particular case and that poor lady who just wanted to lose five pounds and believed, by reason of the advertising and the claims, that this was a fine reducing aid.

Drug manufacturers, I think, have to be licensed and the manufacturer of any drug has to be under the personal supervision of a pharmacist or other person of at least five years experience, and the

place of manufacture of drugs has to be registered with the Board of Pharmacy in the particular state. The federal agency that would be involved would be the Public Health Service and probably Part F of the Public Health Service Act which deals with viruses, serums, and toxins. It is unlawful to send from one state to another any virus or therapeutic serum for treatment or cure of disease or injuries unless such virus or serum has been prepared at a licensed establishment. The package must be marked with the proper name, the date of effectiveness, and the label cannot be altered.

In connection, further, with the duties of the pharmacist or assistant, he must not fill a prescription if he knows that the prescription, as given to him, is chemically wrong. He cannot substitute preparations without notifying the purchaser of the prescription of such substitution, and he must not fill a prescription if the dose given is obviously fatal. If a medicine is prepared by a manufacturer but sold under the pharmacist's name, the pharmacist is liable. This is true even if it is a proprietary medicine. It is a different situation if the medicine is sold in the original package except where the distributor or the pharmacist puts his name on the product when sold.

The manufacturer of a proprietary medicine is liable to the customer. I found one New York case, *Thomas v. Winchester,* 6 New York 397 (1852) where a bottle of extract of belladonna was mislabeled as extract of dandelion, a mild medicine. The product was sold to a druggist who in turn sold it to another druggist who sold to Thomas for his wife's use. The manufacturer was held liable because of the dangerous character of the product, and they did not discuss privity of contract. In Ohio we have probably one of the so-called landmarks in these drug cases. This happened to be *Rogers v. Toni Home Permanent Co.,* 167 Ohio St. 244, 147 N.E.2d 612 (1958), where the purchaser relied upon a television commercial. She had an allergic reaction to the use of the Toni Home-wave, and the Ohio Court held that that stated a cause of action against the manufacturer on the grounds of express warranty; but the Ohio Court held that she could not sue on an implied warranty because there was no privity of contract. The Ohio courts, and they have been followed by several other states, have said that where an individual relies upon commercials, either by radio or television, and purchases a product and then has a reaction these warranties by advertisement are sufficient to state a cause of action against the manufacturer. But in our *Rogers* case we are still wondering what express warranty was actually breached, for the case was settled without trial after the Ohio Court determined that the petition stated a cause of action.

Conversely, in a case decided one year later, our Supreme Court said that the plaintiff did not make out a case because there it was proved that the plaintiff had not relied upon any direct or express warranties and had not followed the directions given as to the use of the product. They stated that the warranty would be limited to the immediate purchaser and that implied warranty required privity of contract.

The concept, I think, has been established by the *Cutter* cases, *Gottsdanker v. Cutter Laboratories,* 182 Cal. App.2d 602, 6 Cal. Rptr. 320 (1960), that there is liability on the part of the drug manufacturer without fault where the drug manufacturer warrants really the unknown. One of the problems developed in the *Cutter* cases was whether or not there were any known methods which Cutter could have used to ascertain whether the virus in question was actually deleterious or adulterated. The court held that the manufacturer was liable and reached the conclusion that in that kind of drug the manufacturer does warrant the safety of the drug under the particular circumstances.

In some cases the dealer, as well as the manufacturer, can be held liable even where the product is sold in the container as received from the manufacturer. Some courts have gone so far as to say that the dealer or the retailer affirms anything that he sells, and that he is liable for products which are sold in sealed containers because it is one of the hazards of business. In a recent case, the *Allied Chemical* case, expert evidence of a medical possibility, taken with other evidence of a non-expert character, may be sufficient to support an inference of medical probability. Now that is Washington double-talk, but that is the way some of the courts have attacked these particular problems where the testimony has been advanced as only a possibility, a medical possibility which in some states is proper, as I understand it, whereas in other states you need testimony of probability — that goes beyond a "possibility" and beyond a "might" or "could" or "likely-to-happen" situation. But in the *Allied Chemical* case where there was testimony of medical possibility together with other evidence of a non-expert character of the product doing harm, the court held that that was sufficient to support an inference of medical probability; therefore, they are saying that there can be an inference upon an inference.

In closing, I would like to make some random observations which shall be brief because of my time allocation. I think most courts hold that the administering of blood plasma is constituted a service and not a sale, and therefore, no warranty as to the blood plasma will attach to the use of blood plasma. The concept of purchase and sale cannot be attached to healing materials — I think is what the courts

find; and they find that in connection with medicine, drugs, and blood so that the processor of blood plasma is free of warranty. One court has held, in an opinion written by Potter Stewart who is now Associate Justice in the United States Supreme Court, that blood plasma is not a filthy substance when it is used and serum hepatitis develops.

A disclaimer cannot disclaim an express warranty. A disclaimer is one which precludes an implied warranty, and a disclaimer has to be in strong and specific language in order to amount to a disclaimer.

In all of these cases, in investigation or in preparation in defense we have to ascertain whether or not there have been careful laboratory studies made. We have to find out what the period of incubation is; whether there are certain bacteria that might normally be found in the throat or intestines; whether or not the product or the results of the ingestion of the product has come from some other cause; whether the individual has had an impaired digestion or some stomach difficulty; whether there has been an impaired metabolism insofar as the individual is concerned, such as diabetes and the like. At this point I shall close, for the hour is very late. You have been very kind, and I appreciate your kindness in inviting me here; I certainly have had a wonderful time, and I have enjoyed your hospitality. God speed to you all.

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COMMENTS

THE DOCTRINE OF EQUITABLE SERVITUDES

With the growth of cities and the more crowded conditions of modern life, there developed the need to preserve the residential character of suburban real estate and to prevent the growth of large industrial plants in certain parts of the cities. It was because of this need that the courts of equity developed the doctrine of equitable servitudes: the doctrine of he who takes land with notice of a restriction upon it will not in equity and good conscience be permitted to act in violation of the terms of these restrictions.[1]

The doctrine of equitable servitudes is a relatively new doctrine, having its origin in the middle of the nineteenth century. And although much has been written about the doctrine of equitable servitudes, it remains a relatively unknown doctrine to many practicing lawyers today.

The purpose of this comment is to examine historical concepts and the development of Tennessee case law concerning equitable servitudes. This comment is merely an introduction to equitable servitudes and is not intended as a complete discussion of all the doctrine's ramifications.

I. Equitable Servitudes in General

A. *Origin of the Doctrine*

The doctrine of equitable servitudes arose out of the famous English case, *Tulk v. Moxhay*.[2] There the plaintiff, owner of a piece of vacant ground in Leicester Square and also of several of the houses forming the Square, sold the vacant piece to one Elms. The deed contained a covenant by Elms that he, his heirs, and assigns would maintain the said piece of ground in its then form, uncovered with any buildings. The piece of land passed by several mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor, but who had notice of the original covenant when he made his purchase. When the defendant manifested an intention to alter the character of the property and asserted a right to build thereon, the plaintiff, who still remained owner of several houses in the Square, obtained an injunction against his doing so. The defendant contended that as the covenant was not a covenant that ran with the land, it

1. Clark, Covenants and Interests Running with Land 170 (2d ed. 1947).
2. Tulk v. Moxhay, 2 Phil. 774, 41 Eng. Rep. 1143 (Eng. Ch. 1848).

could not be enforced against the transferee of Elms.[3] The Lord Chancellor, however, overruled the defendant's contention and in so doing laid down the principle that where an owner of land enters into a contract that he will use or abstain from using his land in a particular way or manner, equity will enforce the agreement against any purchaser or possessor with notice who attempts to use the land in violation of its terms, irrespective of whether the agreement creates a valid covenant running with the land at law or not.[4]

B. *Theories of Enforcement*

Although the doctrine of equitable servitudes has achieved widespread acceptance in this country, there have arisen two distinct theories of enforcement. Surprisingly, both of these theories originated from the language of Lord Cottenham in *Tulk v. Moxhay*.[5]

One theory is that such restrictions are enforced as contracts concerning lands. It is from the following language of the *Tulk* case that the contract theory arose:

> It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by the vendor and with notice of which he purchased.[6]

The other theory is that the restrictions are enforced substantially as servitudes or easements on the land. The following language of the *Tulk* case gave rise to this theory:

> That the question does not depend upon whether the covenant runs with the land is evident from this, that if it were a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.[7]

Under the contract theory, the contract containing the restriction is enforceable against both the promisor and those taking from him with notice.[8] The promisor, those who take from him, and also those

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3. It is interesting to note that this case would not have arisen in American courts, since the covenant would have run at law here. In England, however, the burden of a covenant would not run at law between owners in fee.
4. This rule is often referred to as "the doctrine of *Tulk v. Moxhay*."
5. 2 Phil. 774, 41 Eng. Rep. 1143 (Eng. Ch. 1848).
6. Tulk v. Moxhay, 2 Phil. 774, 775, 41 Eng. Rep. 1143, 1144 (Eng. Ch. 1848).
7. *Ibid.*
8. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 172 (2d ed. 1947).

in the neighborhood who may be considered third party beneficiaries of the contract, may enforce the obligation.[9] Under the theory that the restrictions are treated as servitudes upon the land, similar at least to easements and profits, the restrictions create an equitable property interest in the burdened land appurtenant to the benefited land.[10]

Although the two theories usually achieve the same results, much has been written arguing for the adoption of one theory rather than the other.[11] The contract theory is supported by many able writers and courts in this country; however, it is the servitude theory that has been adopted in a majority of the American cases.[12]

C. *Equitable Servitudes Distinguished from Covenants Running with the Land at Law*

The essential requirements of a covenant running with the land at law are: (1) a writing sufficient to satisfy the Statute of Frauds; (2) an intention of the parties that the covenant should run; (3) a promise of such kind that it may be held to touch and concern the land; and (4) privity of estate.[13] Of these requirements only two are clearly applicable to the running of equitable servitudes: (1) an intention of the parties that the covenant should so run; (2) a promise of such kind that it may be held to touch and concern the land.

The requirement that the benefit must touch and concern the land to which it is claimed to be attached was borrowed by equity courts from the doctrine of covenants running with the land at law. The great volume of litigation that has arisen in cases of covenants running with

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9. *Ibid.*

10. See 2 AMERICAN LAW OF PROPERTY 403 (1942), citing Werner v. Graham, 181 Cal. 174, 783 Pac. 945 (1919); Childs v. Boston and Maine. R.R., 213 Mass. 91, 99 N.E. 957 (1912); Flynn v. New York R. R., 218 N. Y. 140, 112 N.E. 913 (1916).

11. Writers supporting the *contract* theory include TIFFANY, REAL PROPERTY §861, pp. 485-490 (3d ed. 1939); Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174 (1904); Giddings, *Restrictions Upon the Use of Land*, 7 HARV. L. REV. 274 (1892); Stone, *The Equitable Rights and Liabilities of Strangers to the Contract*, 18 CAL. L. REV. 291 (1918), 19 CAL. L. REV. 177 (1919).
Writers supporting the *servitude* theory include: CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 172 (2d ed. 1947); Pound, *Progress of the Law* 33 HARV. L. REV. 813 (1920); Scott, *Nature of the Rights of the Cestui que Trust*, 17 CAL. L. REV. 269, 281, 285 (1917); G. L. Clark, *Equitable Servitudes*, 16 MICH. L. REV. 90 (1917); Keashey, *Restrictions upon the Use of Land*, 6 HARV. L. REV. 280 (1893); POMEROY, EQUITY JURISPRUDENCE §1295 (5th ed. 1941).

12. 2 AMERICAN LAW OF PROPERTY 403 (1952). For a complete discussion of the two theories and their development see the opinion of the Justice Cardozo in *Bristol v. Woodward*, 251 N. Y. 275, 167 N.E. 441 (1929) and also Reno, *Equitable Servitudes in Land*, 28 VA. L. REV. 951 (1942).

13. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 145 (2d ed. 1947).

the land at law in regard to the problem of whether the benefit or burden can be said to touch and concern its respective estate has not been present in respect to equitable servitudes.[14] The reason for this is that most equitable servitudes are building restrictions, and such restrictions can be said to benefit any land within a reasonable distance from the restricted land.[15]

About the only situation where there is a problem as to whether the benefit can be said to touch and concern the land is where the covenant is one not to engage in a particular type of business which would be in competition with the business carried on by the promisee.[16] Some cases have held that in this situation the restriction benefits not the land but the owner of the business operated thereon.[17] The majority of cases, however, have upheld the running of the benefit in this type of agreement, even though as a result competition in business is restricted and there is a tendency toward a monopoly.[18]

In addition to the requirement of "touching-and-concerning", another prerequisite for the running of equitable servitudes is that the parties to the agreement must intend the benefit to attach to the land. Satisfaction of the requirement of touching-and-concerning is not enough to create a running benefit because in many instances the parties intended the benefit to be entirely personal to the promisee.[19] What is important, however, is the mutual intent of both parties to the agreement and not merely the intent of the promisor.[20]

Where there is an absence of evidence as to the intent of the parties at the time of the agreement, a few cases have held that if the promisee owns any land in the neighborhood which will be benefited by the agreement, there arises a presumption that the parties contracted with the intention of attaching the benefit to such land.[21] The majority

14. Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1071 (1942).
15. *Ibid.,* p. 1070.
16. 2 AMERICAN LAW OF PROPERTY 413 (1952); Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1070 (1942).
17. Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885); Shade v. O'Keefe, 260 Mass. 180, 156 N.E. 867 (1927); Tardy v. Creasy, 81 Va. 553 (1886); Brewer v. Marshall, 19 N. J. Eq. 537 (1868).
18. See Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1071 (1942), citing Clem v. Valentine, 155 Md. 19, 141 Atl. 710 (1928); Hodges v. Sloan, 107 N. Y. 224, 17 N.E. 335 (1887); Watrous v. Allen, 57 Mich. 362, 24 N.W. 104 (1885); and Stines v. Dorman, 25 Ohio St. 580 (1874).
19. See Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1071, 1072 (1942), citing McLean v. F. W. Woolworth Co., 204 App. Div. 118, 198 N.Y. Supp. 467 (1926); and Clapp v. Wilder, 176 Mass. 332, 57 N.E. 692 (1900).
20. Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919).
21. 2 AMERICAN LAW OF PROPERTY 415 (1952) citing McMahon v. Williams, 79 Ala. 288 (1885); Watrous v. Allen, 57 Mich, 362, 24 N.W. 104 (1885); Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889); Ball v. Milliken, 31 R.I. 36, 76 Atl. 789 (1910).

of cases, however, hold that there is a presumption that the benefit is personal to the promisee, in absence of evidence to the contrary.[22]

The requirement of privity of estate so essential to the running of covenants at law is not applicable to the running of equitable servitudes. As to the other requirement of a covenant running with the land[23] at law — a writing sufficient to satisfy the Statute of Frauds — there is some controversy as to the applicability of the requirements to equitable servitudes.[24] Under the contract theory of enforcement of equitable servitudes it is generally held that the agreement is not within the Statute of Frauds as the court is merely granting specific performance of a contract and, therefore, no interest or easement in land within the meaning of these statutes is involved.[25] On the other hand, under the theory that the restrictions are treated as servitudes upon the land creating a property interest in the land it is generally held that the agreement is within the terms of the Statute of Frauds.[26] There is one situation where the courts will always allow enforcement of an equitable servitude where there is no writing sufficient to satisfy the Statute of Frauds, and this is true even if the servitude or easement theory is followed. This is the situation where the agreement consists of a promise or representation by the common grantor, made in the earlier sales of lots in the subdivision subject to express restrictions, that the remaining lots will be sold subject to similar restrictions. It is held that there arises an implied reciprocal servitude against the remaining land, regardless of the fact that there was no writing so as to satisfy the Statute of Frauds.[27] It should be noted that a few cases have considered the problem of whether an oral restriction is a contract performable within a year and, therefore, not within the Statute of Frauds on that ground.[28]

D. *The Running of the Burden*

In order for the burden of an equitable servitude to run with the land, a subsequent purchaser or possessor must take with notice of the restrictions.[29] Such notice, however, may be either actual or con-

22. *Ibid.*, p. 416, citing Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 Pac. 677 (1911); Clem v. Valentine, 155 Md. 19, 141 Atl. 710 (1928); Lowell Institute for Savings v. Lowell, 153 Mass. 530, 27 N.E. 518 (1891); Goothaker and Perkins v. Pleasant, 315 Mo. 1239, 288 S.W. 38 (1926); McNichols v. Townsend, 73 N.J. Eq. 276, 67 Atl. 938 (Ch. 1907).
23. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 172 (2d ed. 1947).
24. See Sims, *The Law of Real Covenants,* 30 CORN. L. Q. 1, 27-28, (1944), for summary of split of authority on the question of the applicability of the Statute of Frauds to restrictive covenants.
25. Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1067, 1091 (1942).
26. *Ibid.*, p. 1093.
27. *Ibid.*, p. 1092.
28. Long v. Cramer Packing Co., 155 Cal. 402, 101 Pac. 297 (1909).
29. Williams, *Restrictions on the Use of Land: Equitable Servitudes,* 28 TEX. L. REV. 194, 225 (1949).

structive.[30] Thus, this element of notice may be supplied by circumstances which would put a reasonable person on inquiry as to the existence of such a restriction.[31]

The majority view is that an equitable servitude is a recordable interest, and recordation will afford constructive notice to subsequent purchasers of the burdened land.[32] The rule is well settled, however, that a purchaser takes with notice from the record only of encumbrances in his direct chain of title. Thus, where one makes an agreement concerning property that he may later acquire in the neighborhood, this agreement, even if recorded, is not in the chain of title of any after-acquired property of the promisor.[33] Hence, there would be no notice of it from the record.

It has been stated that in the case of covenants running with the land at law, the purchaser of the burdened land is bound, regardless of his knowledge of the covenant; if it does not run, he is bound only if he takes the land with notice thereof.[34] There is one situation, however, where an equitable servitude may be enforced against a person even though he had no notice, either actual or constructive of the restriction. This is the case where a person gains title to restricted land by adverse possession.[35] Thus it may be said that the burden of equitable servitudes is enforced against those who take with notice or who are not purchasers for value.[36]

E. *The Running of the Benefit*

The benefit of a covenant running with the land attaches to the estate of the covenantee, and can run with the land only to one who succeeds to that estate.[37] The benefit of an equitable servitude, however, since it is usually described as being a property interest appurtenant to the benefited land, can be enforced by anyone who acquires an interest in the property without regard to privity of estate with the original promisee.[38] Thus, the benefit of an equitable servitude passes to an

30. SIMS, COVENANTS WHICH RUN WITH LAND OTHER THAN COVENANTS FOR TITLE 225 (1901); Williams, *Restrictions on Use of Land: Equitable Servitudes*, 28 TEX. L. REV. 194, 225 (1949).
31. See Sanborn v. McLean, 233 Mich. 227, 206 N. W. 496 (1925) (Notice provided by uniform character of residential development in surrounding area).
32. 7 THOMPSON, REAL PROPERTY 105 (Perm. ed. 1940).
33. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 183 (2d ed. 1947).
34. 3 TIFFANY, REAL PROPERTY 472-3, 492-4 (3d ed. 1939).
35. Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174, 177 (1904); 3 TIFFANY, REAL PROPERTY 490 (3d ed. 1939).
36. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 183 (2d ed. 1947).
37. 2 AMERICAN LAW OF PROPERTY 410 (1952).
38. Johnson v. Robertson, 157 Iowa 64, 135 N.W. 585 (1912) (lessee); Taite v. Gosling, 11 Ch. D. 273 (Eng. 1879) (lessee); Brower v. Jones, 23 Barb. 153 (N.Y. 1856) (life tenant).

assignee, not as an incident of succession to the covenantee's estate as in covenants running with the land, but as an appurtenant point of possession.

Whether a subsequent purchaser of such benefited land must purchase with knowledge of the benefit in order to be entitled to enforce it will depend on whether the contract theory or the equitable property theory is followed. Under the contract theory, there is strong support for the proposition that the purchaser must have knowledge of the restriction in order to enforce it.[39] The majority view, however, is that an equitable servitude creates an equitable incorporeal property interest; under this theory, knowledge by a subsequent purchaser of the benefited land of the existence of the benefit is immaterial.[40]

A problem arises where a prior purchaser of land from the promisee attempts enforcement of an agreement subsequently made by his grantor with an intention to benefit this land previously sold. Under such circumstances most courts have allowed the prior purchaser to enforce such restrictions but add a third requirement, in addition to the two previously discussed: that the land must have been acquired with the expectation and understanding that such prior purchaser would be entitled to the benefit of subsequent equitable servitudes created by his grantor in later sales of other land.[41]

Thus it is now well settled that where land has been developed according to a neighborhood plan of restriction, anyone purchasing in reliance on such restriction may sue anyone in the neighborhood taking with notice, who violates the restriction no matter when each purchased.[42]

Another problem that arises is whether the benefit of an equitable servitude may remain in gross while the burden runs. The English view is that the doctrine is limited to agreements which benefit land of the promisee so as to create a dominant tenement, and cannot be extended to benefits in gross.[43] The great majority of the American courts have followed the English view, although there is some authority to the contrary.[44]

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39. Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1076 (1942).
40. *Ibid.,* p. 1077.
41. See Reno, *Equitable Servitudes in Land,* 28 VA. L. REV. 1080 (1942), citing Roberts v. Scull, 58 N.J. Eq. 396, 43 Atl. 583 (Ch. 1899); Summes v. Beeler, 90 Md. 474, 45 Atl. 19 (1899); Mulligan v. Jordan, 50 N.J. Eq. 363, 24 Atl. 543 (Ch. 1892); Sharp. v. Ropes, 110 Mass. 381 (1872).
42. CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 173 (2d ed. 1947).
43. Formby v. Barker, [1903] 2 Ch. 539 (Eng. 1903).
44. See CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 181, 182, (2d ed. 1947).

F. *Enforcement*

Since the doctrine of equitable servitudes was a creation of the courts of equity, the normal method for the enforcement of equitable servitude is the injunction. This is true under either the contract theory or the equitable easement theory. When the covenant is of an affirmative character, there has been considerable reluctance to permit enforcement thereof by injunctive process. In England it finally became settled that only negative agreements were enforceable under the doctrine of equitable servitudes.[45] The policy of the English courts against the extension of the doctrine of equitable servitudes to affirmative agreements has had considerable influence upon the cases in this country, and some states have established the rule that only restrictive, as distinguished from affirmative, burdens can be enforced in equity against purchasers with notice.[46] On the other hand, the great weight of authority in this country favors the enforcement in equity against purchasers with notice of affirmative as well as negative agreements.[47]

G. *Defenses*

The most obvious defense to the enforcement of an equitable servitude is that the subsequent owner acquired the property for value and without notice. In such a case he takes the land free from the burden, but the burden of proof is upon him to show that he acquired it under such conditions as to defeat the equitable right against him.

As the doctrine of equitable servitudes is an equitable doctrine, the principle that one must come into court with clean hands is applicable.[48] The doctrine is also subject to other equitable defenses such as acquiescence,[49] laches,[50] estoppel,[51] waiver,[52] and abandonment.[53]

Another defense that has been greatly emphasized by courts in refusing to enforce equitable servitude is the doctrine of change of conditions.[54] This doctrine is that where there is a change in the

45. Haywood v. Brunswick Building Society, 8 Q.B.D. 403 (Eng. 1881); Hall v. Ewin, 37 Ch. D. 74 (Eng. 1887); Muller v. Grafford, [1901] 1 Ch. 54 (Eng. 1901).
46. Miller v. Clary, 210 N.Y. 127, 103 N.E. 1114 (1913).
47. Lloyd, *Enforcement of Affirmative Agreements Respecting the Use of Land*, 14 VA. L. REV. 419 (1928).
48. 2 AMERICAN LAW OF PROPERTY 441 (1952); see Laud v. Pendergast, 206 Mass. 122, 92 N.E. 40 (1910).
49. RESTATEMENT, PROPERTY §561 (1944); 3 TIFFANY, REAL PROPERTY 513-517 (3d ed. 1939).
50. RESTATEMENT, PROPERTY §562 (1944).
51. RESTATEMENT, PROPERTY §559 (1944).
52. 7 THOMPSON, REAL PROPERTY 130 (Perm. ed. 1940).
53. RESTATEMENT, PROPERTY §558 (1944).
54. See cases collected in ANNOT., 54 A.L.R. 812-837 (1928); 85 A.L.R. 985 (1933); 103 A.L.R. 734 (1936); See also CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 184 (2d ed. 1947) and note the material collected therein under note 60.

character of the surrounding neighborhood so as to defeat the purpose of the covenant and render its enforcement an inequitable burden on the owner, then equity will deny relief.[55] This arises mainly where the covenants restricted the use of lots to residential purposes and some time after the agreements the whole surrounding neighborhood has ceased to be used for such purposes and has been given over entirely to business, manufacturing, and the like. There seems to be no settled rule as to the changes necessary in order for the court to refuse to enforce the restrictions, but a change of condition affecting only the property owner asking the court to refuse to enforce the restriction, where such a result would injure other restricted property owners, has been held insufficient.[56]

Equitable servitudes are also subject to release or rescission by the persons entitled to enforce them, or may be subject to termination in accordance with the terms of the instrument creating the same.[57]

II. Equitable Servitudes in Tennessee

Compared with other jurisdictions, Tennessee has had only a small number of cases involving equitable servitudes. Let us now examine these cases so as to determine to what extent this doctrine has been recognized in Tennessee.

The case of *Hall v. Ashford*,[58] decided in 1916, was the first case in Tennessee dealing with equitable servitudes. In that case, one Snowden owned a body of land which was subdivided into lots that were sold to different purchasers to build residences and to be used for no other purpose. Plaintiff Hall purchased one of these lots, the deed containing a clause that the lots were not to be used for any other than residence purposes and that no building was to be erected on the property which cost less than $5,000. The clause also provided that every owner of a lot in the subdivision would have the right to enforce the restrictions. Defendant Ashford later purchased a lot near to and adjoining plaintiff's lot, the deed containing the same restrictions and limitations as were contained in plaintiff's deed. The defendant erected a building on his lot, the cost of which was only about $3,000. Plaintiff brought an action for damages in circuit court and the court dismissed the suit.

On appeal to the court of civil appeals, the court stated that "it

55. 2 American Law of Property 445 (1952).
56. See Abernathy v. Adone, 49 S.W.2d 476 (Tex. Civ. App. 1932).
57. See Williams, *Restrictions on the Use of Land: Equitable Servitudes*, 28 Tex Law Rev. 194, 221 (1949), citing Restatement, Property §554, *comment e* (1944).
58. 6 Tenn. Civ. App. 171 (1916).

has been repeatedly decided in other jurisdictions that leases and deeds to land containing reservations and limitations as to the character of the buildings to be erected and the use to be made of the land after it is sold and conveyed are valid and binding on the vendee in such cases and not only on the vendee but on any subsequent purchaser from him with notice of such limitations and restrictions." The court further stated:

> It seems that where the owner of lands divides them into town lots and makes a deed to the vendees thereof, and each of the deeds made by him to the respective purchaser embodies limitations and restrictions like those involved in the conveyance by the Snowdens to both plaintiffs and the defendants, any purchaser buying lots in such subdivisions has the right to enforce the limitations and restrictions as to all other purchasers of lots in the same subdivision, provided the deeds of such other purchasers contain the same limitations and restrictions and they purchased with knowledge, actual or constructive, of the limitations and restrictions in other deeds or leases.[59]

In affirming the lower court's decision that the plaintiff was not entitled to damages in a court of law, the court of civil appeals went on to say:

> The limitations and restrictions are treated by Professor Pomeroy and characterized by him as equitable easements, and the authorities that we have examined seem to proceed upon the idea that *the right of each purchaser under such limitations and restrictions in the lots of all other purchasers taking deeds with the same limitations and restrictions in them, are equitable rights and are termed equitable easements,* and in every case that we have examined it appears that the purchasers have universally gone into a Court of Equity to enforce such rights, and in no case to which our attention has been called or which we have been able to find, has there been an attempt to enforce such rights in a Court of law. (emphasis added.)[60]

An examination of the above language will show that, even though the court denied the plaintiff the relief he was seeking, it recognized the doctrine that is now commonly called the doctrine of equitable servitudes. Although unable to cite any prior Tennessee authority, the court seemed to go out of its way to state that plaintiff did have a remedy, but that such restrictions could only be enforced in a court of equity by way of an injunction. By continually referring to such restrictions as equitable easements, it is quite obvious that the court

59. Hall v. Ashford, 6 Tenn. Civ. App. 171, 175 (1916).
60. *Ibid.*, pp. 175, 176.

considered that such restrictions should be considered servitudes upon the land similar to easements and profits rather than enforceable as contracts concerning land. The Tennessee court, thus adopted the theory supported by a majority of courts in this country.

In *Laughlin v. Wagner*,[61] the owner of a tract of land opened a street through the property and laid out lots. One lot was sold to Yates, the deed containing a restriction that any houses erected on the Belvedere side were to be used for residence purposes only. Practically all the other lots in the subdivision had been sold with similar restrictive clauses. The defendant purchased the lot from Yates, the deed containing no restrictive clause whatever. In an action by the common grantor and the owner of one of the other lots, the chancery court granted an injunction to restrain the defendant from using his property for other than residential purposes. The Tennessee Supreme Court, in affirming this decision, stated:

> The restrictive clause in this deed being valid and not contrary to public policy and enforcible in equity by the original grantor and by property owners who purchased other property from him in the vicinity who hold their property largely under similar restrictive clauses, it remains to apply the rule to the situation shown to exist.[62]

Although nowhere in the decision was the term equitable servitude or equitable easement mentioned, it is quite obvious that what the court was enforcing by way of the injunction was actually an equitable servitude.

In *Emory v. Sweat*,[63] decided in 1927, Emory, the original owner of land who had the land laid out into a subdivision, and Henderson, who had purchased one of the lots, brought suit in chancery court to enforce a restriction on the lot owned by defendant. Defendant's lot was first conveyed by Emory to one Thornburg with several restrictions including a provision that no dwelling house costing less than $5,000 was to be erected on any of the lots in the subdivision. Thornburg conveyed the lot to one Jenkins with the same restrictions; Jenkins conveyed to defendant without the restrictions, although defendant had notice thereof. The court of appeals held that the original owner was entitled to the relief he was seeking and remanded the case to the chancery court for the enforcement of its decree that defendant be made to comply with the restrictions. What was significant, however,

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61. 146 Tenn. 647, 244 S.W. 475 (1922).
62. Laughlin v. Wagner, 146 Tenn. 647, 653, 244 S.W. 477 (1922).
63. 9 Tenn. App. 167 (1927).

was that the court held that Henderson, who had purchased one of the lots in the subdivision with the same restrictions as those imposed on defendant's lot, could not enforce the restrictions – that only the original owner could as the covenants were personal to him. The court, relying on two California cases, held that since the deeds to the other purchasers of lots in the subdivision did not provide that the restrictions were for the benefit of anyone other than the grantor, the purchasers of other lots acquired no interest in the restrictions, although their deeds contained like restrictions and they were verbally told that the restrictions were for the mutual benefit of those purchasing property in the subdivision.

The decision in the *Emory* case is not in accord with the overwhelming weight of authority which holds that, where the agreement is entered into pursuant to a general building plan for the subdivision, evidence of the existence of such a plan at the time the agreement is made will be sufficient evidence of an intent to attach the benefit to all the lots in the subdivision.[64] Also, the case will have no effect on the doctrine of equitable servitudes in the future, as a later Tennessee case refused to follow its decision.

The next case that arose in Tennessee concerning equitable servitudes was *Yates v. Chandler*.[65] There the court held that the owner of land is not bound by covenants restricting the use of the land, made by his remote grantor, when such covenants do not appear in the owner's chain of title and appear only in a deed of his grantor conveying other property. The court said:

> The decree of the Chancellor must be sustained on the ground, if upon no other, that the chain of title under which the defendant holds his land does not contain any reference to the alleged covenants relied on by the complainant, and that the defendant is therefore not chargeable with notice thereof. It is essential, if subsequent purchasers of land are to be bound by a covenant, that the covenant, or notice thereof, shall be recited in some grant of that land. There is no charge that when he acquired his title Chandler had either constructive or actual notice of the alleged covenant.[66]

Thus the *Yates* case puts Tennessee in accord with the majority view by holding that the notice required for the running of the burden of equitable servitudes can be either actual or constructive.[67] Constructive

64. 2 AMERICAN LAW OF PROPERTY 418 (1952).
65. 162 Tenn. 388, 38 S.W.2d 70 (1930).
66. Yates v. Chandler, 162 Tenn. 388, 38 S.W.2d 70 (1930).
67. *Supra,* Note 30.

notice can be afforded from the recording of the instrument, but only of the restrictions that appear in his direct chain of title.

In *Ridley v. Haiman*,[68] the Tennessee Supreme Court committed itself to such a vigorous enforcement of equitable servitudes that it has been called a landmark decision. Two contiguous tracts of land were divided into lots and a subdivision laid out. The deeds executed to purchasers of the lots were almost identical and provided that the lots were to be used only for residential purposes. One Landis purchased one of the lots; after he was forced into bankruptcy, the lot was sold to one Kenner, but the deed contained no restrictions. Kenner advertised his lot for sale as the "only unrestricted lot" and defendant Haiman purchased the lot, the deed containing no restrictions. Defendant proceeded with the erection of a filling station on the lot. Plaintiff, the owner of another lot in the subdivision, obtained an injunction in the chancery court against the violation of the restriction, but the court of appeals, relying on *Emory v. Sweat*[69] reversed the chancellor's decree. The Tennessee Supreme Court first looked into the question of whether the defendant had notice of the restriction. The court found that since the restrictions in the deed to Landis were a part of defendant's direct chain of title, he was thus charged with notice. The court, after saying it was not satisfied that defendant was without actual notice, went on to state that "when one buys into a high-class residence neighborhood where there are no business houses, such a situation, open to him, puts upon the purchaser a duty of inquiry. Certainly the purchaser cannot willfully close his ears and shut his eyes." Thus the Supreme Court decision on the question of notice is in accord with the decision in the *Yates* case.

In reversing the court of appeals decision which had dismissed the bill upon the ruling of *Emory* v. *Sweat*[70] that the purchasers of other lots in such a subdivision acquire no interest in the restrictions, and only the common grantor can enforce them, the court said:

> This ruling in *Emory v. Sweat* was not necessary to the decision of that case and was not approved by this court when the petition for certiorari filed therein was denied. In *Emory* v. *Sweat* the bill was brought by the common grantor, joined by a grantee of one lot, to enforce a building restriction against the grantee of another lot. It was held that this restriction could be enforced at the suit of the original grantor and it was enforced in that case.

68. 164 Tenn. 239, 47 S.W.2d 750 (1932).
69. 9 Tenn. App. 167 (1927).
70. *Ibid.*

> What was said about the rights of one grantee with respect to another grantee was not called for and was not a material factor in the decision of the case.[71]

The court pointed out that in *Laughlin v. Wagner*,[72] as in *Emory v. Sweat*,[73] the common grantor joined in a suit with certain of his grantees against another of his grantees to enforce the covenant and thus the liability of one grantee to suit by another grantee about such matter has not been directly adjudicated in Tennessee.

The court further pointed out that in the case before it the deed to Landis containing the restrictions did not state whether these restrictions were inserted for the benefit of the grantees of the other lots, or merely for the personal benefit of the original grantor. The court said that "the intention of the parties is to be gathered not alone from the written contract but when that instrument is indefinite, such intention is to be gathered from the circumstances of the case." The court then said:

> The general rule is that where the owner of a tract of land subdivides it and sells the different lots to separate grantees, and puts in each deed restrictions upon the use of the lots conveyed, in accordance with the general building, improvement or development plan, such restrictions may be enforced by any grantee against any other grantee.[74]

The *Ridley* case thus put Tennessee in accord with the majority view that the intention of the parties as to the running of the benefit is to be gathered not merely from the written contract but from all the surrounding circumstances; when the tract is laid out in a general plan of restriction, this shows that the parties intended the benefit to run to each purchaser of a lot.[75]

The Tennessee Supreme Court in *Harkett* v. *Steele*[76] reaffirmed the position of the court in the *Ridley* case on the question of the rights of all grantees in a subdivision to enforce the covenants against all other grantees when the land is laid out in a general plan of restriction and sold in lots. The *Hackett* case also dealt with the important problem of obtaining relief from the restrictions on the ground that there has been such a radical change of conditions in the neighborhood as to make enforcement inequitable. There a tract of land had been divided into lots and the lots sold with restrictions that they were to be used

71. 164 Tenn. 239, 248, 47 S.W.2d 750, 753 (1932).
72. 146 Tenn. 647, 244 S.W. 475 (1922).
73. 9 Tenn. App. 167 (1927).
74. 164 Tenn. 239, 250, 47 S.W.2d 750, 753 (1932).
75. *Supra*, Note 42.
76. 201 Tenn. 120, 297 S.W.2d 63 (1956).

only for residential purposes. The complainants, owners of some lots in the subdivision, filed a bill in the chancery court to have the restrictions cancelled. The defendants, who were also owners of lots in the subdivision, demurred to the complainant's bill seeking cancellation, and the chancellor sustained the demurrer on the ground the bill failed to state a cause of action. The Tennessee Supreme Court affirmed, stating:

> . . . appellant nowhere alleges there has been such a radical change in the neighborhood that the purposes of the restrictive covenants relating to the entire subdivision have become burdensome and are not being maintained for the benefit of the owners of the lots. The bill simply avers that there has been a radical change in Brainerd Road both with respect to the amount of business buildings on it as well as the fact that it has been rezoned "commercial" on both sides of the street including these four blocks; that the lots will be worth more for commercial than they are for residential; but the only averment with reference to the remainder of the other 500 lots is that the owner of these lots will not be adversely affected by the removal of the restrictions.[77]

Thus the test adopted by the *Hackett* case for the cancellation of provisions restricting the property to residential purposes is that the changes alleged and proved must be such "that the purposes of the restrictive covenants relating to the entire subdivision have become burdensome and are not being maintained for the benefit of the owners of the lot." The *Hackett* case seems to stand strongly in favor of restrictive covenants in deeds that result in equitable servitudes, for the test imposed, if strictly adhered to, would make it virtually impossible for the owner of the burdened land to avoid the restrictions.[78]

The case of *Hysinger* v. *Mullinax*,[79] decided in 1958, did much to cut the ground out from under the *Ridley* and *Hackett* cases and their rigorous support of equitable servitudes. There, the plaintiffs purchased their homes in "Country Club Estates" which had been laid off in lots all restricted solely and exclusively for residential purposes. Plaintiffs filed suit in the chancery court to enjoin the defendants, who also owned lots in the subdivision, from erecting a garage and used-car lot upon the property. The chancery court dismissed the bill on the ground that the change of conditions in the neighborhood made it inequitable to

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77. *Ibid.*, p. 132.

78. Roady, *Real Property — 1959 Tennessee Survey*, 12 VAND. L. REV. 1318, 1323 (1959). See also Roady, *Real Property — 1957 Tennessee Survey*, 10 VAND. L. REV. 1188, 1197 (1957).

79. 204 Tenn. 181, 319 S.W.2d 79 (1958). See Roady, *Real Property — 1959 Tennessee Survey*, 12 VAND. L. REV. 1318, 1321 (1959).

enforce the restrictions. Plaintiffs then filed suit in the circuit court for damages for breach of the restrictions and the trial judge dismissed the suit, relying on *Hall v. Ashford.*[80] The Tennessee Supreme Court, however, held that where a restrictive covenant is violated, the aggrieved party is not confined solely to a court of equity for relief, but is entitled where changed conditions have made it inequitable to enjoin violation of the covenants, to damages in a court of law. The court cited no prior Tennessee cases in arriving at this decision but quoted from Pomeroy's *Equity Jurisprudence*:

> If, therefore, the restrictive covenants in deeds of lots were made with evident reference to the continuance of the existing general conditions of the property and its surroundings, but in the lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, then equitable relief will not be granted, *and the plaintiff will be left to his remedy at law.*[81]

What the court seemed to have failed to realize, however, was that Pomeroy meant that the plaintiff would be left to his remedy at law, if he had any, and not necessarily that he did have such a remedy. If this had been a covenant running with the land at law, then the plaintiff would have had a remedy at law. In such a case, it is quite clear that a denial of equitable relief should in no way prejudice the plaintiff's right to receive damages in a court of law.

But in the case before the court, this was not a covenant running with the land at law but rather an equitable servitude. The doctrine of equitable servitudes arose so as to allow relief in a court of equity in a situation where there was no covenant running with the land at law and the plaintiff otherwise would be entitled to no relief. Equitable servitudes, being a creation of the courts of equity, have traditionally been enforced only in a court of equity. It seems that the court in the *Hysinger* case raised equitable servitudes in Tennessee to legal interests in land – not merely equitable easements, but true easements.[82]

The *Hysinger* case, by dictum, also cut the ground from under the *Hackett* case, which rigorously supported equitable servitudes, by imposing a test for the obtaining of relief from building restrictions that create equitable servitudes when there has been a change of conditions

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80. 6 Tenn. Civ. App. 171 (1916).

81. Hysinger v. Mullinax, 204 Tenn. 181, 187, 319 S.W.2d 79, 82 (1958) quoting from POMEROY, EQUITY JURISPRUDENCE, 855 (4th ed. 1918).

82. See Roady, *Real Property – 1959 Tennessee Survey,* 12 VAND. L. REV. 1318, 1322 (1959).

in the neighborhood that would make it virtually impossible for the owner of burdened land to avoid the performance of the promises.[83] Said the court in the *Hysinger* case:

> The existing circumstances . . . show without dispute that "Country Club Estates" had ceased to be desirable for residential purposes; that a number of lots upon which these restrictive covenants are imposed had been zoned commercially by the City of Cleveland, Tennessee. It thus conclusively appears that the Chancellor was eminently correct in holding that it would be inequitable to enforce these restrictive covenants.[84]

Although it might be argued that the *Hysinger* case can be distinguished from the *Hackett* case in that the former was dealing with a case of denying injunctive relief whereas the latter was a proceeding for cancellation of the restrictions, nevertheless, if the Tennessee courts will refuse to enforce by injunction such restrictions merely because the lots are no longer desirable for residential purposes, or merely because a municipality has zoned the area for a less restrictive use, then equitable servitudes are worth much less in Tennessee than in most states.

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83. *Ibid.*, p. 1323.
84. 319 S.W.2d 79 (Tenn. 1958).

MENTAL ILLNESS AND CONTRACT LAW

Modern developments in the study of mental health have focussed attention on mental illness in our society. Not only has the public in general become more aware of the problem, but many new methods of dealing with it have been employed with considerable success. The application of this newly acquired knowledge, however, has been confined largely to areas involving medical-sociological problems; the legal profession still relies for the most part on common law rules that were defined centuries ago. The law of contracts is no exception. Outside of the proof of insanity, the problem of insanity in contract law can be divided into two general situations: in one, a party to the contract is insane at the time the agreement is reached; in the other, the insanity does not occur until after the agreement.

I. Party Insane at Time of Agreement

A. Avoidance.

The general rule is that a contract can be set aside by a party who was insane at the time of the agreement.[1] In one of the earliest Tennessee cases, *Cole v. Cole*,[2] a woman suffering from a disease which affected her mind sued by her next friend to have her marriage set aside on the ground that she was of unsound mind at the time of the marriage. Justice Caruthers, in delivering the opinion of the court, stated: "Marriage, by our law, is a civil contract, and may be avoided, like any other contract, for want of sufficient mental capacity in the parties. If the mind is unsound at the time, it is incapable of consent, and that is an essential element in all contracts."[3] Here the plaintiff became permanently insane three years after her marriage, but for several years prior to that she had been subject to periods of temporary insanity. The court was dubious as to the proof that she was married during a period of temporary insanity, but the decision was for the defendant on the ground that, since the plaintiff was lucid on many occasions for three years after the marriage, she ratified the contract by remaining with her husband during those periods.

In spite of Justice Caruthers' statement that a contract may be avoided for want of sufficient mental capacity, there is some question as to whether a contract may be set aside merely because of mental incapacity, in the absence of any other equitable grounds. The English

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1. Corbin, Contracts §6, p. 12 (1950); Comment, *Mental Illness and Contracts*, 57 Mich. L. Rev. 1020, 1058 (1959).
2. 37 Tenn. 57 (1857).
3. *Ibid.*, at 59.

rule is that so long as the contract is fair, and the healthy party had no knowledge of the other party's incapacity, the contract cannot be avoided.[4] One authority indicates that this is also the prevailing American view:

> The general rule is that total incapacity to contract because of unsoundness of mind constitutes a ground for the rescission and cancellation of contracts executed by persons in that condition, especially where the other contracting party knew of such condition at the time the contract was entered into. The mere fact of insanity, however, even when clearly proved, does not seem to be enough to authorize a court of equity to cancel a contract or instrument executed by such person in the absence of some other equitable ground. For example, if the contract is made in good faith and is manifestly to the advantage of the person non compos mentis, a court of equity will not set it aside.[5]

A federal court applying Tennessee law referred to this statement in its opinion with approval.[6] Nevertheless, the rule in a majority of states is that a contract may be avoided on the ground of insanity, even in the absence of any other equitable ground, provided the healthy party can be restored to his status quo.[7] A number of decisions make it clear that this is the law in Tennessee. Thus in *Pritchett v. Plater & Co.*[8] the court said:

> The rule is stated to be that the contract of an insane person may be avoided so long as it is wholly executory, notwithstanding the fact that the other party entered into the same in good faith and in ignorance of his infirmity; but where the contract has been executed so that the insane person has received a benefit from it, and the parties cannot be restored to their former position, proof of the actual insanity at the time of making the contract, unaccompanied by any proof that the other knew or ought to have known of his condition, will not avoid the contract.[9]

In a fairly recent case, *McDade v. McDade,*[10] the Tennessee Court of Appeals upheld the avoidance of a contract because of the mental incompetency of one of the parties, even though the other parties were not returned to their original position. In that case several parties invested in a business which was to be operated by the person later ad-

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4. Brown, *Can the Insane Contract?*, 11 CAN. B. REV. 600 (1933); Cook, *Mental Deficiency and the Law of Contracts*, 21 COL. L. REV. 424 (1921).
5. 12 C.J.S., *Cancellation of Instruments* §26, p. 976 (1938).
6. Massachusetts Mut. Life Ins. Co. v. Hardwick, 118 F.Supp. 485 (E. D. Tenn. 1953).
7. Comment, *Mental Illness and Contracts*, 57 MICH. L. REV. 1020, 1083 (1959).
8. 144 Tenn. 406, 232 S.W. 961 (1920).
9. *Ibid.*, at 433.
10. 325 S.W.2d 575 (Tenn. 1958).

judged to have been incompetent at the time. The business lost money and the incompetent party was unable to repay the purchase price to the other parties, since he had no property other than his interest in the business. The court held that the other investors should receive their proportionate share in the proceeds from the sale of the business and stated:

> . . . the Chancellor properly allowed Everest to maintain the suit to set aside the contract without making tender of that portion of the purchase money which Everest had already expended. We see no prejudice to Neil McDade et al. from such action because upon a final accounting all of the matters between them and Everest will be fully adjusted.[11]

This case can be distinguished from the earlier Tennessee cases, however, because, although the defendants did not know of the plaintiff's incompetency at the time of the making of the contracts, the court expressly found that they had acquiesced to some of the incompetent's activities after they learned of his condition. The court apparently felt that because of this the defendants should share in the losses. Therefore it still seems to be the rule in Tennessee that a contract will not be set aside because of the mental incompetency of one of the parties to the prejudice of the other parties, unless there is some other equitable ground for so doing.

It should be pointed out in this respect that the existence of mental incapacity enables the court to more readily find equitable grounds for setting aside a contract. In a very early case the Tennessee Supreme Court made the following statement:

> It is a rule in equity, that although a contract made by a man of sound mind and fair understanding will not be set aside merely from its being a rash, improvident, or hard bargain; yet, if the same contract be made with a person of weak understanding, arising from the infirmity of extreme old age, or other cause, there does arise a natural inference that it was obtained by fraud, or circumvention, or undue influence.[12]

Thus, in determining whether a contract is fraudulent, a showing that the plaintiff was mentally incompetent at the time of the making, coupled with the fact that the defendant has gotten the better part of the bargain, will make a very strong case that fraud did exist. Moreover, the greater the incompetency, the less the amount of unfairness in the contract required by the court to find fraud. It has been held further

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11. *Ibid.*, at 610.
12. Walker v. McCoy, 40 Tenn. 104, 105 (1859).

that anyone who makes a contract with knowledge that the other party is of unsound mind is guilty of fraud as a matter of law, and the contract will be set aside, regardless of other equitable considerations.[13] Where a person has been adjudged insane, this is regarded as constructive notice to all the world, and no contract with such a person after the adjudication will be valid.[14]

Courts in Tennessee and elsewhere have often stated that a contract of an insane person made prior to an adjudication of his insanity and the appointment of a guardian is voidable, while a contract made after the adjudication is absolutely void.[15] In some states, statutes provide that contracts after such an adjudication are void.[16] Therefore the insane party would be able to avoid such a contract even against a bona fide purchaser.[17] The reason for this rule probably derives from the public policy concerning guardianship. Where no guardian has been appointed, the public policy of protecting the insane party from his own ill-advised acts tends to be offset by the policy in favor of protecting the interest of innocent purchasers. Once a guardian has been appointed, however, there is the additional policy of enabling the guardian to conduct the affairs of the insane person without interference.

There is some question as to whether this is still the law in Tennessee. In 1953, the legislature, in passing a law providing for the appointment of conservators for estates of incompetents, included a section which reads as follows:

> So long as there is a duly appointed conservator, the person whose property is in the charge of such conservator shall be limited in his or her contractual parties and contractual obligations to the same extent as a minor.[18]

Though the Tennessee courts have not yet interpreted this section, one writer believes it means that contracts made by such a person are only voidable, rather than void.[19] In one case, the Tennessee court, in holding that the section applied only to contracts and not to a will made by the incompetent, said in explaining the reason for the section that "it would

13. Pritchett v. Plater & Co., 144 Tenn. 406, 232 S.W. 961 (1920).
14. *Ibid.*
15. Pritchett v. Plater & Co., 144 Tenn. 406, 232 S.W. 961 (1920); Bryant v. Townsend, 188 Tenn. 630, 221 S.W.2d 949 (1949).
16. A compilation of these statutes will be found in Comment, *Mental Illness and Contracts,* 57 MICH. L. REV. 1020, at 1117-1118, (1959).
17. Gibson v. Westely, 115 Cal.App.2d 273, 251 P.2d 1003 (1953).
18. TENN. CODE ANN. §34-1006 (1955). All the sections dealing with appointment of a conservator were revoked in 1955 and replaced with new sections, but Code §34-1006 was included verbatim among these new sections. See TENN. CODE. ANN. §34-1014 (1961 Supp.)
19. Comment, *Mental Illness and Contracts,* 57 MICH. L. REV. 1020, 1118 (1959).

be anomalous and confusing if both the conservator and the person for whom he was appointed could bind the estate by contract."[20] As stated above, this seems to be one of the principal reasons why contracts by persons under guardianship have been held to be void rather than merely voidable.

B. Who Can Avoid

It is generally held that the sane party cannot avoid a contract because of the other party's insanity.[21] Thus the mentally ill party is given the option to either avoid the contract or to ratify it and require performance. This may work a hardship on the healthy party, who may find himself in the position of being bound to perform a contract with a party who may later have it set aside. However, the healthy party who was unaware of the infirmity at the time of the agreement is somewhat protected by the rule that he must be returned to his status quo before the contract will be avoided.

The contract can be avoided by the mentally ill party after his recovery, or, prior to that, by anyone representing his interests. Where he has been adjudicated incompetent, his guardian may assert the power of avoidance;[22] or, if there has been no adjudication, the suit may be brought by his next friend or guardian ad litem. The avoidance may also be asserted by persons having interests which descended from the mentally ill party at his death. This would include the heirs, executors, or administrators, but none of these parties, as such, could exercise this power before the death of the mentally ill person.[23]

An interesting problem arises in the case of an assignment. Suppose an insane person assigns his interest in a contract to a third party. Since normal contract rules would apply to the assignment, the mentally ill party could have the assignment avoided, but could the original party to the contract assert this same defense against the assignee? In the field of negotiable instruments this question has been generally answered in the negative. There the rule is that the maker of a note has no defense against the holder because the holder had the note indorsed to him by an insane person, even though the insane indorser could have the indorsement avoided.[24] However, this rule may result primarily from the desir-

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20. Tucker v. Jollay, 43 Tenn.App. 655, 657, 311 S.W.2d 234 (1957).
21. *E.g.*, Palmer v. Lititz Mutual Ins. Co., 113 F.Supp. 857 (W.D. S.C. 1953); McClure Realty & Investment Co. v. Eubanks, 151 Ga. 763, 108 S.E. 204 (1921); Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E.2d 226 (1947); Fannin v. Conn, 311 Ky. 670, 225 S.W.2d 102 (1949).
22. See TENN. CODE ANN. §34-1012 (1961 Supp.); TENN. CODE ANN. §34-402 (1955).
23. *E.g.*, Sellman v. Sellman, 63 Md. 520 (1885); Baldwin v. Golde, 34 N.Y.S. 587 (1895); McMillan v. Deering & Co., 139 Ind. 70, 38 N.E. 398 (1894).
24. TENN. CODE ANN. §47-122 (1955).

ability of maintaining the negotiability of an instrument and may not be applicable to assignments generally.

C. Loss of the Power of Avoidance

A person mentally incompetent at the time of making a contract may, after he regains competence, ratify the contract and thereby destroy his power of avoidance.[25] Ratification most clearly occurs when the incompetent, after he has regained his capacity, makes an express promise to adhere to the terms of the contract. This becomes in effect a new contract, although the consideration may be supplied by the earlier transaction.[26] Since it is a new contract, the ratification can be effected even where the original contract was void rather than voidable.[27] Normally a guardian cannot ratify a contract,[28] since this is a discretionary action and goes beyond his duty to conserve his ward's property.[29] In some states the court may ratify the contract, under statutory authority,[30] but such statutes are usually strictly construed.[31]

Of course, ratification is not necessarily accomplished by an express promise. Other types of conduct may amount to a ratification, even though the person ratifying did not know of his right to avoid or that his action would effect a ratification.[32] In *Cole v. Cole*,[33] discussed above, the Tennessee Supreme Court held that a woman, even though she was insane at the time of her marriage, later ratified the marriage by living with her husband during lucid intervals.

An incompetent person may also lose the right to avoid a contract because of a statute of limitations, although the statute will not begin to run so long as the person remains incompetent.[34] A court may also apply laches, or some other form of estoppel, against a person who has delayed too long in bringing his suit for avoidance; but, here again, the person will not be held accountable for his delay while he remained incompetent. In *Alston v. Boyd*[35] the defendant claimed that the incompetent's friends and relatives had been negligent in not having a guardian appointed and taking steps to avoid the disputed conveyance, but the court held that this negligence could not prejudice the rights of the incompetent.

25. 1 CORBIN, CONTRACTS §6 (1950).
26. 1 CORBIN, CONTRACTS §228 (1950).
27. Lawrence v. Morris, 167 App.Div. 186, 152 N.Y.S. 777 (1915).
28. Gingrich v. Rogers, 69 Neb. 527, 96 N.W. 156 (1903); Rannells v. Gerner, 80 Mo. 474 (1883); King v. Sipley, 166 Mich. 258, 131 N.W. 572 (1911).
29. TENN. CODE ANN. §§1008-1014 (1961 Supp.).
30. King v. Sipley, 166 Mich. 258, 131 N.W. 572 (1911).
31. Neal v. Holt, 69 S.W.2d 603 (Tex.Civ.App. 1934).
32. 1 WILLISTON, CONTRACTS §253 (rev. ed. 1936).
33. 37 Tenn. 57 (1857), discussed *supra* at p. 274.
34. TENN. CODE ANN. §28-107 (1955).
35. 25 Tenn. 504 (1846).

D. Necessities

In considering the fact that a contract by an incompetent may be avoided it should be kept in mind that at common law,[36] and by statute in Tennessee,[37] an insane person is always liable for necessities. Moreover, the word "necessities" has not been limited by the Tennessee courts to mean only food and clothing. Thus in *Cearley v. Mullins*[38] the court held that the plaintiff could recover for goods supplied to an insane person which were "required for his sustenance or comfort, and suitable to his means, condition and habits of life . . . ."[39] In *Key v. Harris*[40] the plaintiff was allowed to recover for personal services rendered over a period of years to her deceased sister, who had been an idiot.

In an interesting case, *Giles v. State ex rel. Giles*[41] a woman brought a habeas corpus proceeding to obtain her release from a state mental institution. The Tennessee Supreme Court overruled a judgment in her favor, ordered the petition dismissed and the complainant returned to the mental institution, and adjudged costs against the complainant. When it was objected that, since the complainant had been adjudicated insane, she could not be forced to pay the costs, the court replied that the services rendered by the court officers were "necessary to the conducting of the suit which she was permitted to maintain." The court then commented that "under the common law an insane person is liable for necessities furnished."[42] Although this is an unusual, and perhaps extreme case, it does illustrate the point that the Tennessee courts tend to apply a very liberal construction to the word "necessities."

II. Insanity Occurring After the Agreement

A. Mental Illness of a Promisor

Generally courts have approached the problem of the insanity of a promisor after the agreement and his resulting inability to perform as coming within the category of "impossibility of performance."[43] Although mental illness may affect the ability of the promisor to perform any contract, most contractual duties are considered delegable and therefore performance of these duties is not regarded as having been

36. 1 Williston, Contracts §255 (rev. ed. 1936).
37. Tenn. Code Ann. §47-1202 (1955).
38. 7 Tenn.Civ.App. 296 (1917).
39. *Ibid.*, at 300.
40. 116 Tenn. 161, 92 S.W. 234 (1905).
41. 191 Tenn. 538, 235 S.W.2d 24 (1950).
42. *Ibid.*, at 550.
43. See Comment, *Mental Illness and Contracts*, 57 Mich. L. Rev. 1020, 1092 (1959).

rendered impossible because of the mental illness.[44] It is only when the contract involves the personal service of the promisor, so that only he can properly perform, that supervening mental illness will discharge the obligations of the promisor, because of impossibility,[45] and of the promisee, because of failure of consideration.[46] Whether a contract is for personal service will depend on the intent of the parties and the circumstances of the agreement.[47]

There are actually two levels of mental illness which may affect the duties of parties to a contract. At one level, the illness may temporarily impair the promisor's ability to perform, so that he will be excused for his failure of performance, but the failure may be so trivial that the promisee is not justified in terminating the contract. On the other hand, the failure of performance may be so substantial or so lasting that the promisee is justified in ending the contract and seeking performance elsewhere.[48]

Thus, if a promisor is temporarily unable to perform his contract because of a mental disability, but recovers after a few days and renews performance, he will probably be excused from his temporary non-performance, but the promisee may not be allowed to terminate the contract because of this momentary lapse. Of course, in a given situation, performance during those few days might be essential to the contract, in which case the promisee would be justified in terminating it. Whether the promisee may terminate will depend on the type of performance required from the promisor, the nature and severity of his illness, and the duration of the illness, and the issue will normally be left to the jury.

Foreseeability of the supervening mental illness may be a question in determining whether the parties should be discharged from the contract. Usually a promisee cannot be expected to foresee future mental illness in the promisor, although he might if he were aware of the promisor's previous history of mental illness when he made the contract. He might also be able to anticipate, for instance, senility in an elderly person. A promisor who has a past record of mental illness may be able to foresee future re-occurrences, particularly in the case of organic disorders, but he will usually be reluctant to disclose his previous mental problems because of the stigma attached, and, in

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44. 2 RESTATEMENT, CONTRACTS §455, comment *a*, illus. 3 (1932); 6 CORBIN, CONTRACTS §1334 (1951); 6 WILLISTON, CONTRACTS §1940 (rev. ed. 1938).
45. 2 RESTATEMENT, CONTRACTS §459 (1932).
46. 1 RESTATEMENT, CONTRACTS §282 (1932).
47. 6 CORBIN, CONTRACTS §1334 (1951); 6 WILLISTON, CONTRACTS §1941 (rev. ed. 1938).
48. Comment, *Mental Illness and Contracts*, 57 MICH. L. REV. 1020, 1093 (1959).

many instances, he may think that he is completely recovered and have no reason to anticipate a relapse.[49]

B. *Mental Illness of the Promisee*

In some instances, mental illness on the part of the promisee will cause the promisor to want a discharge of his obligation because of the increased difficulty of performance. For example, a person who contracts to care for a relative might, after the relative becomes mentally ill, be justified in demanding either a rescission of the contract or an increase in remuneration. It is more difficult to understand why the promisee should be discharged because of his illness, but this has been done on several occasions. In one case it was held that there was an implied condition of continued supervision and control by the promisee which could not be fulfilled after his illness.[50] In another case the court based its decision on the doctrine of mutuality, reasoning that, since the promisor could have been discharged from a personal service contract because of his insanity, the promisee should be accorded the same rights.[51] However, this is rather dubious reasoning.

It has been suggested that in many instances the promisee could argue for discharge on the ground that his purpose in making the contract has been frustrated by his illness.[52] It might be argued in the case of the contract for the sale of land, for instance, that the promisee is no longer able to put into effect his plans for the use of the land because of his mental illness. This doctrine has had little development in the courts to date, but it probably has been a factor in decisions based on other grounds.

C. *Statutory Developments*

In many states, statutes have been enacted dealing with incomplete contracts where one of the parties has become mentally disabled after the making of the agreement.[53] Most of these statutes have very limited applications and solve few of the problems that arise in this situation.

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49. Cf. Shackleford v. Hamilton, 93 Ky. 80, 19 S.W. 5 (1892), where it was held in a breach of promise suit that the defendant had no duty to disclose previous syphilis to the plaintiff when he proposed to her, since he believed he was cured although in fact he was not.

50. Graves v. Cohen, 46 T.L.R. 121 (1929).

51. O'Byron's Estate, 2 Fay L.F. 16, 87 P.L.J. 121, 9 Som. 191 (1939).

52. Comment, *Mental Illness and Contracts,* 57 MICH. L. REV. 1020, 1100, 1101 (1959).

53. These statutes are compiled in Comment, *Mental Illness and Contracts,* 57 MICH. L. REV. 1020, 1109, n. 490 (1959).

Most of the statutes deal only with real property transactions, and only five states have statutes that cover purchase and sale.[54]

III. Proof of Contractual Incapacity

A. *Evidence of Insanity*

Whether a person is, or was at any time, mentally incompetent is a question of fact for the jury to decide.[55] The burden of proof is on the person alleging the incapacity, and there is a presumption of sanity until otherwise proven.[56] There are no set rules as to what constitutes proof of insanity, although there have been decisions as to what is admissible as evidence. In one case it was held that the fact that a person committed suicide is not conclusive evidence of insanity, but it was admissible as evidence to show the absence of a sound and disposing mind.[57] In another case, the court said that beliefs as to future rewards and punishments, or the principles of justice upon which they are to be administered, or other religious creeds, could not be regarded as evidence of insanity, since there is no test by which their truth can be ascertained.[58] Despite such holdings, there has not developed any set standard as to what is admissible or inadmissible as evidence of mental incompetency.

The use of expert testimony is of great value in this situation, particularly when there is an examination of the person whose competency is being questioned at or about the time he is claimed to have been incompetent. Even if the examination was prior to or after the time in question, the expert's opinion may still be of value if the person's condition at the time of the examination was such that it could give some clue as to his condition at the time in question. If, for instance, a psychiatrist examines the person before the trial and finds that he is suffering from a certain mental illness, his testimony as to that fact, along with lay testimony as to the person's condition in the past, might establish that the person was suffering from that condition at the time in question. The psychiatrist will probably be able to determine from his present condition the likelihood that he had been suffering from that condition for a period of time. The problem is more difficult when at the time of the examination the person is found to be normal, and the question to be decided is whether at

54. Ark. Stat. Ann. §57-628 (1947); Ill. Rev. Stat. c. 3, §275 (1957); N. J. Stat. Ann. §3A:22-3 (1953); Pa. Stat. Ann. Tit. 50, §3512 (1954); Wis. Stat. §§296.02-05 (1957).

55. Gass' Heirs v. Gass' Ex'rs, 22 Tenn. 278 (1842).

56. *Ibid.*

57. Pettitt's Ex'rs v. Pettitt, 23 Tenn. 191 (1843).

58. Gass' Heirs v. Gass' Ex'rs, 22 Tenn. 278 (1842).

some previous time he was suffering from some temporary incapacity. Even here, an expert's description of the symptoms of a particular mental disorder may serve to give significance to lay testimony, when this testimony indicates that the person was suffering from these symptoms at the time.

B. *Effect of Adjudication of Insanity*

It is a general rule in Tennessee that an adjudication of insanity is conclusive evidence of that fact in any dispute about the adjudicated party's condition subsequent to the adjudication.[59] It is also said that a jury's finding of insanity, prior to the entering of the judgment, is prima facie evidence.[60] This rule was seriously undermined in *Turner v. Bell,*[61] in which a woman was attempting to have a divorce, which she had obtained previously, set aside so that she could claim homestead and dower rights in the property of her deceased former husband. She claimed that, since she was adjudged insane prior to the divorce action, it was conclusively established that she did not have the requisite volition to maintain the action. The court upheld a decree for the defendant, stating the following:

> The fact that a person adjudged incompetent sues for divorce in his own name, when his adjudication of incompetency is disclosed to the court and no objection to his maintaining the action is raised, does not render the divorce granted under these circumstances void ab initio.
>
> The question of such person's possession of the requisite volition to seek a divorce is a fact to be found by the trial court just as is any other. The question of such person's possession of the capacity to take the required statutory oath is also a fact to be found by the trial court just as is any other.[62]

It has been suggested that the holding in this case is not contrary to the general rule that an adjudication is conclusive evidence of insanity, but that it has merely restricts the rule to contract actions.

> The Tennessee court has thus made a logical distinction between divorce and contract actions in relation to the nature of the continuing status until a declaration of competency in the manner prescribed by statute. That is, whether the adjudication is conclusive or merely prima facie evidence of subsequent incapacity will depend on whether it is a contract action or one for divorce. In divorce actions, the issue is the state of mind of the

59. Jackson v. Van Dresser, 788 Tenn. 384, 219 S.W.2d 896 (1949).
60. Prichett v. Thomas Plater & Co., 144 Tenn. 406, 232 S.W. 961 (1920); Brown v. Eckhardt, 23 Tenn.App. 217, 129 S.W.2d 1122 (1938).
61. 198 Tenn. 232, 279 S.W.2d 71 (1955), noted in 24 TENN. L. REV. 262 (1956).
62. *Ibid.*, at 253.

> party at the time of the trial – an issue which the instant court has properly left to the divorce trial court. In the contract field, on the other hand, the issue is the party's state of mind when entering the contract; this is a question which the trial court cannot so readily ascertain.[63]

This may be a questionable distinction, however, since it is doubtful whether the court which must decide whether a person who has been adjudicated insane was insane at the time of the making of a contract is any less able to ascertain the mental condition of that person than the court which tries the issue after the making. The more reasonable basis of the general rule is that the courts wish to enable the persons given the responsibility of handling the affairs of one adjudged insane to do so with as little interference as possible. And a rule that an adjudication is conclusive evidence of the fact, along with the rule that transactions by persons so adjudged are void rather than merely voidable,[64] tends to accomplish this goal.

There has been some confusion in Tennessee law as to how long an adjudication is effective as conclusive evidence of insanity. It has been said that it is so effective until a court subsequently decrees that sanity has been restored.[65] It has been held in at least one case, however, that it is conclusive until restoration or until a lucid interval is established.[66] This appears to be an anomalous rule, because if one is allowed to prove lucid interval it seems rather meaningless to say that the adjudication is conclusive. This problem was clarified to some extent by the legislature in 1959 when they passed the following:

> An adjudication of mental illness shall be prima facie and not conclusive evidence of mental illness where the disability has not been removed by appropriate proceedings, but the person originally under such disability has been released or discharged from an institution where persons are treated for mental illness, provided such person was committed to such an institution.[67]

IV. Conclusion

One obvious question that arises is whether the law of insanity in contracts, since it is almost totally based on long established common law rules, has become outmoded as a result of modern developments

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63. 24 Tenn. L. Rev. 262, 264 (1956).
64. See *supra* at p. 277.
65. Jackson v. Van Dresser, 788 Tenn. 384, 219 S.W.2d 896 (1949); Craddock v. Calcutt, 39 Tenn.App. 481, 285 S.W.2d 528 (1955).
66. Haynes v. Swann, 53 Tenn. 560 (1871).
67. Tenn. Code Ann. §33-314 (1961 Supp.).

in the study of the mind. By and large the answer is probably in the negative. The rules express policies which are as valid today as they were when the rules were created: the protection of mentally incompetent persons from their own ill-guarded acts as well as from persons who might take advantage of them, while at the same time protecting innocent persons who have dealings with these incompetents as much as possible. It is in determining when a person is mentally ill and what effect the illness has on his ability to conduct his affairs that modern knowledge is primarily applicable, and this remains basically a question of fact. It may be claimed that a jury composed of laymen is incapable of answering such questions, but the same observation can be made when a jury is called upon to determine the cause of a plane crash in a tort action, or to find the value of a piece of property in a condemnation proceeding. In answering these questions and many others, including the question of insanity, the jury must be aided by testimony from experts who understand better the issues and can supply the information needed to arrive at an accurate answer.

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THE TENNESSEE SAVING STATUTE

I. Introduction

Statutes of limitation are statutes of repose; they are beneficient in that they put an end to disputed claims, prevent litigation, quiet titles, and give rest and quiet. They apply generally to all causes of action within their terms. A rule of common law gave the plaintiff whose writ had abated through no default of his own a new writ, free from the bar of the statute, if the new writ were sued out within a reasonable time, usually a year and a day after the old writ failed. This was said to be by "journeys account"; that is, the new writ, to take the place of the old for the prosecution of the same cause, was considered a continuation of the old one if sued out within the time deemed necessary for the plaintiff to journey home from court and return equipped for new litigation.[1]

In almost every state, statutes have been enacted to carry into modern law a concept similar to the "journeys account," except that these statutes do not contemplate a revival or continuance of a former suit as at common law; they contemplate, rather, that a new and distinct suit may be brought.[2] As presently enacted, the Tennessee statute is as follows:

> If the action is commenced within the time limited by a rule or statute of limitations, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right to action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest.[3]

The Tennessee court has said of the saving statute:

> The statute has not merely letter but a spirit. That spirit is manifested in the history of the statute, which is the outgrowth of St. James 1, chapter 16, section 4, North Carolina Act 1715, chapter 27, section 6, and Tenn. Act 1819, chapter 28, section 3, liberalized by our Code of 1858, section 2755. It is that a plaintiff shall not be finally cast out by the force of any judgment or decree whatsoever, not concluding his right of action, without an opportunity to sue again within the brief period limited.[4]

Since saving statutes vary in scope and wording, no attempt will

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1. 3 L.R.A. (n.s.) 261 (1906).
2. 54 C. J. S., *Limitation of Actions* §287 (1948).
3. Tenn. Code Ann. §28-106 (1956).
4. Nashville, Cincinnati & St. L. Ry. v. Bolton, 134 Tenn. 447, 455, 184 S.W. 9 (1915).

be made in this comment to compare or contrast the holdings of the Tennessee courts with those of other jurisdictions. The question in the forefront of every inquiry as to whether a second action between the same parties for the same cause, following a first one that failed, is barred by the statute of limitation is: Is the case within the particular saving statute involved?[5]

II. Kinds of Actions

An action at law is commenced in Tennessee when the summons or warrant is issued,[6] provided a good faith effort to serve follows the issuance.[7] Suits in chancery are commenced upon the filing of the bill.[8] Other actions, such as workmen's compensation cases, which are tried according to chancery procedure, are also begun by filing a bill or petition. Actions in federal district courts are commenced by filing the complaint.[9]

Each of the following has been held to be such an action as will toll the applicable statute of limitations and fall within the saving statute: an action commenced in a federal court within the state;[10] a suit in equity;[11] a writ of error coram nobis;[12] an action in a justice of the peace court;[13] and a summary proceeding, based on affidavits, to procure a judgment where the docket book and original papers were destroyed by fire.[14] Although not inclusive, this list indicates the liberality of construction given the word "action" in the statute.

The statute is procedural, and is subject to liberal construction.[15] Therefore, it would seem that proceedings which are not technically "actions" would be regarded as such for the purpose of permitting a new action where the first proceeding was dismissed on a ground not concluding the right of action.[16] Although an action in a justice of the peace court is one of those listed as being within the saving statute, the plaintiff must take care not to limit his possible recovery in the new proceeding. For example, if, after the plaintiff recovers a judgment

5. 3 L.R.A. (n.s.) 261 (1906).
6. Tenn. Code Ann. §28-105 (1956).
7. Ridgeway Sprankle Co. v. Carter, 176 Tenn. 442, 143 S.W.2d 257 (1940); West v. Cincinnati, N. O. & T. P. Ry. Co., 108 F. Supp. 276 (E. D. Tenn. 1952).
8. Tenn. Code Ann. §21-102 (1955).
9. Federal Rules of Civil Procedure, Rule 3, 28 U.S.C.A. §723c.
10. Hooper v. Railway, 107 Tenn. 712, 65 S.W. 405 (1901).
11. Burns v. People's Tel. & Tel. Co., 161 Tenn. 382, 33 S.W.2d 76 (1930).
12. Nelson v. Hoss, 2 Shan. 503 (1877).
13. Moran v. Weinberger, 149 Tenn. 537, 260 S.W. 966 (1923).
14. Thomas v. Pointer, 82 Tenn. 343 (1884).
15. Nashville C. & St. L. R. Co. v. Bolton, 134 Tenn. 447, 184 S.W. 9 (1915); Galbraith v. Kirby, 21 Tenn. App. 303, 109 S.W.2d 1168 (1937).
16. Thomas v. Pointer, 82 Tenn. 343 (1884).

in the justice of the peace court, the defendant appeals to the circuit court and the plaintiff is granted a nonsuit therein, a new action commenced within one year after the nonsuit will be limited to damages recoverable under the monetary limitation of the justice of the peace court.[17] The rationale of such a holding is based on the extent of the notice given to the defendant. Thus, in *Moran v. Weinberger,*[18] the court stated:

> Upon notice to the defendant by suit commenced within one year the running of the statute of limitations is suspended; but it is suspended only to the extent of the notice thus directly given, or by law implied. The cause of action and the parties are fixed, the amount of the demand which the defendant may be called upon to meet being limited only by the jurisdiction invoked. But, if a jurisdiction is chosen which is limited, then it would seem to follow that the notice can be effective to stop the running of the statute only to the extent of the jurisdictional limit thus fixed.

The issue of whether an out-of-state action is within the saving provision was presented in *Sigler v. Youngblood Truck Lines,*[19] where an injury arose out of an accident in Kentucky. The plaintiff brought suit in a federal court in North Carolina, but was granted a voluntary nonsuit without prejudice in that action. More than a year after the accident the plaintiff filed his action in a United States district court in Tennessee, whereupon the defendant pleaded the Tennessee one-year statute of limitations on personal injury actions.[20] The court, concluding that the saving statute was not applicable, said:

> It is obvious that the words, *"If the action is commenced within the time limited by a rule or statute of limitation . . ."* contained in Sec. 28-106, have reference to actions commenced in Tennessee courts only. If the Legislature had intended to include actions commenced in foreign states, it could have easily said so, as was said by the Kentucky Legislature. The fact that this section is a part of the chapter containing Tennessee's general provisions of statutes of limitation buttresses this conclusion. The general rule is that the commencement of an action in one states does not toll the statute of limitations in another state, unless the applicable statute so provides.[21]

The holding that an action in another state is not within the saving statute is justifiable, since the effect of the first action under

17. Moran v. Weinberger, 149 Tenn. 537, 260 S.W. 966 (1923).
18. *Ibid*
19. 149 F. Supp. 61 (E. D. Tenn. 1957).
20. TENN. CODE ANN. §28-304 (1955).
21. 149 F. Supp. 61 at 66 (E. D. Tenn. 1957).

such a statute is said to constitute notice to the defendant of the plaintiff's cause of action, and he is warned thereby "to hold himself in readiness for this limited time (one year) to defend a new suit . . ."[22] It is submitted that an action commenced in another jurisdiction would not constitute notice under this rule.

An interesting line of cases was developed by the Tennessee courts involving the issue whether an action commenced in a court without jurisdiction is within the saving statute. In *Sweet v. Electric Light Co.*,[23] the plaintiff first instituted his personal injury action in the federal district court, but it was dismissed for want of jurisdiction. More than one year after the accident, but within one year after dismissal of the suit, a new action was commenced in a state court. There a demurrer was sustained and the action dismissed. This ruling was upheld on appeal on the ground that "an action commenced in a court having no jurisdiction to entertain it is no action in the sense of the statute." This decision was relied on by the defendant in *Jacobs & Davis. v. Pope*,[24] involving the question whether an action begun by an administrator was within the saving statute even though the letters of administration were later revoked. The court found that an action commenced by an administrator wrongly appointed could be reinstituted by his successor within one year after dismissal of the initial suit. The court decided further that the *Sweet* case was not in point but stated that "even if the case were applicable we would hesitate to follow it because of its unsoundness in our judgment."

Other expressions of dissatisfaction with the rule in the *Sweet* case have been made by the Tennessee courts in the course of several years.[25] In a somewhat similar case brought in a chancery court involving unliquidated damages to property, the supreme court reversed a decision of the trial judge to hear the case, but enjoined the defendant from relying on the statute of limitations in the event the case was thereafter seasonably brought in a proper law court.[26]

When the court was once again faced with the issue in *Burns v. People's Telephone & Telegraph Co.*,[27] it found ample authority for holding that the rule of *Sweet v. Electric Light Co.* should be limited

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22. Moran v. Weinberger, 149 Tenn. 537, 260 S.W. 966 (1923).
23. 97 Tenn. 252, 37 S.W. 385 (1896).
24. 8 Tenn. Civ. App. 452 (circa 1915).
25. La Follette Coal, Iron & Railway Co. v. Minton, 117 Tenn. 415, 101 S.W. 178 (1906); Davis v. Parks, 151 Tenn. 321, 270 S.W. 444 (1924).
26. Swift & Co. v. Memphis Cold Storage Warehouse Co., 128 Tenn. 82, 158 S.W. 480 (1913).
27. 161 Tenn. 382, 33 S.W.2d 76 (1930); 9 TENN. L. REV. 200 (1930).

to the narrow situation "in which a plaintiff was grossly negligent in choosing the forum of his first suit." This decision was followed by the court of appeals in *Williams v. Cravens*,[28] where it was said: "The bringing of that suit suspended the running of the statute of limitations. It matters not that the suit was improperly brought. The general rule is that the statute of limitations is suspended by the commencement of a suit even where it is dismissed for want of jurisdiction."

Thus it appears that under the liberal construction placed on the kinds of actions falling within the provisions of the saving statute, any action commenced in a court within Tennessee, whether or not the court is one of record, will constitute such an action as will toll the general statute of limitations.

III. Kinds of Time Limitations

The statutory language "within the time limited by a rule or statute of limitations"[29] is another restriction on the kinds of actions which will toll the applicable limitation period. The most frequent difficulties occur under limitations by contract provision and specific statutes of limitation. In general, any of the actions previously considered will toll the general statute of limitations, so long as the action is commenced during the period stated. The other limitations will be considered separately.

A. *Effect of Contractual Limitations*

The statute requiring that a new suit be brought within one year after the dismissal of the former suit does not operate to limit or abridge the general statute of limitation, and if the right of action is not barred by the general statute a new suit may be instituted at any time before the statute of limitations bars the right of action, regardless of whether it be one or more years after the dismissal of the original suit.[30]

Possibly the most frequently encountered contractual limitation is that found in insurance policies. According to the weight of authority, a contractual provision limiting the time within which suit must be brought is not affected by the operation of the saving statute.[31] An early case in Tennessee is in accord.[32]

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28. 31 Tenn. App. 246, 214 S.W.2d 57 (1948).
29. Tenn. Code Ann. §28-106 (1956).
30. Dushan v. Metropolitan Life Ins. Co., 14 Tenn. App. 422 (1931).
31. Annot., 23 A.L.R. 97 (1923).
32. Guthrie v. Connecticut Indemnity Association, 101 Tenn. 643, 49 S.W. 829 (1899).

B. Effect of Substantive Limitations

Another problem lies in the area where the statute creating a cause of action contains a limitation period, or where the general statute of limitations contains a specific provision concerning a particular action. An annotator has observed:

> . . . in most states wherein the question has arisen the view taken that, in general, a statute providing that a new action may be commenced after the expiration of the period of limitation regularly prescribed therefor, where a prior action brought within the period and terminating thereafter has failed otherwise than on the merits, does not apply where the action is founded wholly upon a statute which creates the right of action and specifies the time within which action may be commenced. In such cases the time prescribed in the statute limiting the right is ordinarily regarded as a limitation upon the right itself, so that when the time expires the right itself is extinguished except as to actions then pending.[33]

This is illustrated in *Automobile Sales Co. v. Johnson*,[34] where an action was commenced to recover gasoline taxes which had been paid under protest to the Tennessee Commissioner of Finance and Taxation. A similar suit had been begun privously in the chancery court, but was dismissed without prejudice. The tax statute[35] provided that any action to recover the tax paid must be filed within thirty days after payment of the tax. After reviewing the authorities in other jurisdictions concerning whether the state is bound by the words of a general procedural statute, the court concluded:

> Not only, as heretofore shown, is it held that general procedural statutes are not held to apply to a State unless expressly so provided, but the procedural statute, Code Section 8572 (presently T. C. A. 28-106) herein invoked has application to statutes of limitation of a general nature which relate to the remedy only, whereas we have here a statute which expressly provides a condition precedent, compliance with which is essential in order to confer jurisdiction.

It was pointed out that the tax statute under discussion did not provide for an extension of time, but expressly excluded such extension by the words "and not longer thereafter." Therefore the saving statute did not apply to the action, which was barred after the expiration of thirty days.

A more recent decision is *Brent v. The Town of Greeneville*.[36] There

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33. ANNOT., 120 A.L.R. 376, 379 (1939).
34. 174 Tenn. 38, 122 S.W.2d 453 (1938).
35. TENN. CODE §1792 (Williams 1934), presently TENN. CODE ANN. §67-2305 (1955).
36. 203 Tenn. 60, 309 S.W.2d 121 (1957).

an action was filed for a declaratory judgment as to the effect of an annexation ordinance passed by a municipality. In a prior suit, filed by the present defendants, a nonsuit was taken. The only question for determination in the instant case was whether the saving statute applied to permit another action by defendants after the nonsuit even though the thirty-day period allowed by the statute authorizing this type of ordinance had elapsed.[37] The supreme court, relying on *Automobile Sales Co. v. Johnson*,[38] held that the defendants did not have a right by virtue of the Tennessee saving statute to refile a suit one year from the date of the nonsuit, thus construing the limitation period as one limiting the statutory right, rather than as one operating only on the remedy.

With respect to actions brought under the Federal Employers' Liability Act, the language of that statute, "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued,"[39] was originally construed to be a condition precedent to the bringing of suit.[40] So in *Vaught v. Virginia & Southwestern R. R.*, the plaintiff brought suit in a state court within the period limited, but was granted a nonsuit. After the limitation had run, but within one year after the nonsuit, the plaintiff commenced another action under the F.E.L.A. The Tennessee court reasoned that the federal government did not intend that the limitation of the right to sue should be changed or altered by the statute of any particular state, and held that the time limitation was a condition which could not be altered by state procedural laws such as the saving statute.

In 1961, however, the Tennessee Court of Appeals had to consider further federal developments in *Breneman v. Cincinnati, New Orleans & Texas Pacific Railway Company*.[41] There an action was commenced on June 25, 1959, for injuries received on May 10, 1956, and it was alleged that within three years after the injury an action was brought in the federal court, but was terminated when the plaintiff took a voluntary nonsuit. The plaintiff contended that the new action could be brought under the saving provision. Concluding that the rule of earlier cases had been changed by two federal court decisions,[42] the court found that

37. TENN. CODE ANN. §§6-308, 6-319 (1956).
38. 174 Tenn. 38, 122 S.W.2d 453 (1938).
39. 45 U.S.C.A. §56.
40. Vaught v. Virginia & Southwestern R.R., 132 Tenn. 679, 179 S.W. 314 (1915); see also Harrisburg v. Rickards, 119 U.S. 199 (1886).
41. 346 S.W.2d 273 (Tenn. App. 1961).
42. Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959); Scarborough v. Atlantic Coast Line R. Co., 178 F. 2d 253 (4th Cir. 1949), *cert. den.* 339 U.S. 919 (1950).

the action was not barred by the statute of limitations contained in the act.

The cases relied on held that the defenses of estoppel and fraud tolled the statute of limitations in cases where the limitation upon the time to sue was an integral part of the act creating the right. The Tennessee court was also persuaded by the decisions of the Tennessee Supreme Court in workmen's compensation cases that although the limitation in the Workmen's Compensation Act could be considered substantive rather than remedial, fraudulent concealment of physical disability might in a proper case toll the limitation.[43] There is substantial Tennessee authority that the statute of limitations within the Workmen's Compensation Act affects the remedy rather than the right.[44] An action brought under the wrongful death statutes may also be reinstituted by virtue of the saving statute in Tennessee,[45] but it is held in most jurisdictions that since a wrongful death statute, or a survival statute allowing damages for death, creates a right of action which did not exist at common law or permits an action which abated at common law to survive, a provision therein limiting the time within which the action may be brought is technically not a statute of limitations, but is a condition of the right to maintain the action which must be strictly complied with, and that such a limitation is independent of the general statute of limitations.[46]

C. *Effect of Service on Statutory Agent*

A related area is the application of the saving statute to an action against one deemed to have appointed an agent to receive service by virtue of doing an act in the state. In *Oliver v. Altsheler*,[46] an automobile accident occurred in Grundy County, Tennessee, involving residents of Kentucky and Florida. An action commenced in Davidson County by service on the secretary of state was dismissed on a plea in abatement on the ground that the proper venue was Grundy County.[48] The statute providing for service on the secretary of state in an action against a nonresident contained the clause:

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43. Watson v. Procter and Gamble Defense Corp., 188 Tenn. 494, 221 S.W.2d 528 (1949); McBrayer v. Dixie Mercerizing Co., 176 Tenn. 560, 144 S.W.2d 764 (1940).

44. Rye v. Dupont Rayon Co., 163 Tenn. 95, 40 S.W.2d 1041 (1931); Norton v. Standard Coosa-Thatcher Co., 203 Tenn. 649, 315 S.W.2d 245 (1958).

45. Denny v. Webb, 199 Tenn. 39, 281 S.W.2d 698 (1955).

46. ANNOT. 132 A.L.R. 295 (1941).

47. 198 Tenn. 155, 278 S.W.2d 675 (1955).

48. Action of trial court affirmed in *Thomas v. Altsheler*, 191 Tenn. 640, 235 S.W.2d 806 (1951).

> The agency of the secretary of state to accept service of process shall continue for a period of one year from the date of any accident or injury and shall not be revoked by the death of such nonresident within such period of one year.[49]

Subsequently, more than one year after the accident, an action was commenced in Grundy County by service on the secretary of state. It was contended by the plaintiff that this action was within the coverage of the saving statute since the dismissal was not one concluding the right of action. The court held that the saving statute was not applicable, and that the trial court properly sustained a plea in abatement.

In reaching the conclusion in the *Oliver* case, the court relied on and quoted extensively from *Tabor v. Mason Dixon Lines, Inc.*,[50] another case involving the non-resident motorist statutes. There the summons was issued before the expiration of the one-year period, but service was made one week after the period had run. It was held that actual service must be made upon the statutory agent within the time allotted. Relating the non-resident motorist provisions to the application of statute providing that execution of the summons is the commencement of an action,[51] the court said:

> It seems to us that it was the intention of the Legislature enacting the Code Section presently under consideration (8671) that their intention was to make this an agreement statute for those nonresidents using our roads to agree that one in this state (The Secretary of the State of Tennessee) should be the agent of the nonresident using our roads. This is not a limitation statute but an appointing statute appointing this official as the agent of the nonresident. There being no ambiguity in this statute we do not think that the statute should be read in pari materia with the limitation statute or the saving statute Code 8571 above referred to.

III. Grounds for Dismissal or Reversal

A. Voluntary Nonsuit

The plaintiff in a trial at law in Tennessee has a statutory right to take a voluntary nonsuit[52] at any time before the jury has "begun to consider of their verdict,"[53] or before the case is finally submitted to the court in a case tried before the court without the intervention of a jury.[54] Exceptions may arise, however, as where the defendant pleads

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49. Tenn. Code (1932) §8671, as amended; presently Tenn. Code Ann. §20-224 (1955).
50. 196 Tenn. 198, 201, 264 S.W.2d 821 (1953).
51. Tenn. Code Ann. §28-105 (1955).
52. Tenn. Code Ann. §20-1311 (1955).
53. Darby v. Pidgeon Thomas Iron Co., 144 Tenn. 298, 300, 232 S.W. 75 (1921).
54. Huff v. Department of Highways & Public Works, 3 Tenn. App. 277 (1926).

a set-off, as to which the defendant is a plaintiff.[55] It is well settled that the saving statute under consideration operates to permit a new action after a voluntary nonsuit.[56] After taking a nonsuit in the original action, a plaintiff may reinstitute his action any number of times within one year after the first nonsuit;[57] subsequent nonsuits, however, do not give rise to successive periods of one year.[58]

The rule concerning taking nonsuits appears to be somewhat different in the chancery courts of the state. A complainant in equity does not request that a nonsuit be granted, but rather that the court dismiss the suit without prejudice. As a general rule, where a bill is dismissed for a reason not involving the merits of the controversy, the dismissal will be without prejudice.[59] Greater discretion than in the law court is allowed in cost cases where the court is compelled to permit the nonsuit. Accordingly, the chancellor has been upheld in his refusal to allow a dismissal without prejudice where all proof had been taken and the case was on the trial docket ready for trial in *Shelton v. Armstrong*.[60] There the court stated, "as a condition precedent to such dismissal the complainant must offer good and sufficient reasons to be weighed by the Chancellor in his sound discretion."[61] Since a dismissal without prejudice in chancery is closely analogous to the nonsuit in law courts, it appears that the saving statute is applicable after such a dismissal. The more complex rules governing dismissal of suits in federal courts will be examined in a later section.[62]

B. Dismissal Not Concluding the Cause of Action

Since the court is committed to a liberal construction of the saving statute,[63] it would seem to follow that a dismissal at law or a dismissal without prejudice in chancery will be construed to be one not concluding the cause of action, with the result that the statutory period of grace will apply. That this is the general practice seems apparent, although in an early case[64] the court said: ". . . in no case of which we are advised, when the failure of the action is due to the default, wrong, or laches of the plaintiff, has it been held sufficient to authorize the bringing of another

55. Riley and White v. Carter, 22 Tenn. 230 (1892).
56. Reed v. Cincinnati, N. O. & T. P. R. Co., 136 Tenn. 499, 190 S.W. 458, (1916) and cases cited in Annotation 28 to TENN. CODE ANN. §28-106 (1955).
57. Young v. Cumberland Groc. Co., 15 Tenn. App. 89 (1932).
58. Turner v. N. C. & St. L. Railway, 199 Tenn. 137, 285 S.W.2d 122 (1955).
59. GIBSON, SUITS IN CHANCERY §612 (5th ed. 1955).
60. 25 Tenn. App. 305, 156 S.W.2d 447 (1941).
61. Much the same rule was set down in the later case, *Lyle v. DeBord*, 185 Tenn. 380, 206 S.W.2d 392 (1947).
62. See *post.* at n 75.
63. See *ante* at n 15.
64. Anderson v. Bedford, 44 Tenn. 464 (1867).

suit, under the exceptions of the Statute, within one year after the termination of the first." The decision of the court in that case, that the second action was barred by the statute of limitations, is justified on the ground that champerty was shown on the part of the plaintiff.

The language of the court in the *Anderson* case was considerably limited, however, in later cases where it was pointed out that the case was decided under a statute which differed somewhat from the present provision.[65] Grounds for dismissal that were held not to conclude the plaintiff's cause of action include the following: failure to file a declaration;[66] failure to appear and prosecute;[67] loss of the files where the case remained on the docket four years;[68] and an attempt to prosecute the suit on a pauper's oath taken before a foreign notary public.[69] The courts have also allowed a second action to be commenced under the statute where the first action was dismissed because of want of jurisdiction in the original court;[70] abatement of the suit because of the death of the plaintiff;[71] failure of plaintiff to appear in federal court upon being called out;[72] choice of wrong venue;[73] and a dismissal for the unreasonable refusal of the plaintiff to undergo an operation in a workmen's compensation case.[74] In the last mentioned case the plaintiff was allowed to reinstitute his action within one year provided that he agreed to submit to the operation.

With reference to dismissals in federal courts, it should be noted that Rule 41 of the Federal Rules of Civil Procedure provides for both voluntary and involuntary dismissals. The federal rule limits the situations in which a plaintiff may have a voluntary dismissal without an order of the court to the filing of notice of dismissal before service of answer or motion for summary judgment, or the filing of a stipulation of dismissal signed by all parties to the action. Under the same Rule a notice of dismissal operates as an adjudication upon the merits when it is filed by a plaintiff who has once secured dismissal in any court of the United States, or of any state, of an action based on or including the same claim. This provision has no effect, however, upon a second dismissal in a state

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65. LaFollette Coal, Iron & Railway Co. v. Minton, 117 Tenn. 415, 101 S.W. 178 (1906).
66. *Ibid.*
67. Nash v. Davis, 3 Tenn. Civ. App. 634 (1913).
68. Cole v. Mayor and Aldermen of Nashville, 5 Tenn. 639 (1868).
69. Abraham v. Caldwell, 2 Shan. 71 (Tenn. 1876).
70. Smith v. McNeal 108 U.S. 426 (1883). See discussions *ante* at p. 290.
71. Reed v. Cincinnati Ry. Co., 136 Tenn. 499, 190 S.W. 458 (1916).
72. Southern Ry. v. Harris, 101 Tenn. 527, 47 S.W. 1096 (1898).
73. David v. Parks, 151 Tenn. 321, 270 S.W. 444 (1924).
74. Blevins v. Pearson Hardwood Flooring Co., 176 Tenn. 606, 144 S.W.2d 781 (1940).

court. Consequently the voluntary dismissal of a claim in a state court which had once been voluntarily dismissed in a United States District Court does not prevent a subsequent action in federal court.[75] Dismissal for failure to prosecute may be an adjudication on the merits unless the court order indicates otherwise, but a dismissal for lack of jurisdiction or improper venue is not.

Without inquiring further into the intricacies of federal procedure, the effect of these rules of procedure on the operation of the Tennessee saving statute should be noted. As was pointed out earlier, an action dismissed otherwise than on the merits in a state court may be reinstated in a federal court within one year.[76] The effect of Rule 41 on the application of the saving statute is illustrated by the case of *Eager v. Kain*,[77] where the plaintiff filed a personal injury action in a state court. At the close of the trial the plaintiff asked for and was granted a nonsuit although the court was about to sustain the defendant's motion for a directed verdict. The federal district judge found that "The case could not have been dismissed without terms and could have been dismissed with prejudice had it been brought in this court." Concluding that the plaintiff appeared to be "shopping for a favorable forum," the court decided that under these circumstances it was not compelled to hear the action where it would not have ordered the dismissal. The court therefore declined to entertain jurisdiction even though the period within the saving statute had not run.

The Tennessee Supreme Court was faced with the converse situation in *Adcox v. Southern Ry. Co.*[78] There the plaintiff instituted suit on the pauper's oath in the Hamilton County Circuit Court, but the case was removed to the United States District Court on a motion by the defendant. In the federal court the case was dismissed because the attorney for the plaintiff refused to give bond or file the pauper's oath as required by the federal rules at that time. Following dismissal, the plaintiff reinstituted her suit in the state court for an amount below the jurisdictional amount of the federal court. The issue in the second case was whether the dismissal for failure to properly file a pauper's oath or bond was an adjudication on the merits and *res judicata*. A plea of *res judicata*, followed by a replication, was sustained on a demurrer to the replication by the trial judge who stated that "the dismissal of plaintiff's case

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75. BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §915 (1950).
76. Privett v. W. Tennessee Power & Light Co., 19 F.Supp. 812 (W. D. Tenn. 1937), *aff.* in 103 F.2d 1021 (5th Cir. 1939).
77. 158 F. Supp. 222 (E.D. Tenn. 1957).
78. 182 Tenn. 6, 184 S.W.2d 37 (1944).

in the Federal Court was equivalent to a trial on its merits, and such dismissal was a bar to the prosecution of the present suit."

Referring to Rule 41,[79] the Tennessee Supreme Court concluded that it was evident that the rule of procedure should not be construed so as to impair the rights of litigants under the saving statute. Noting also that the statute under which the federal rules were adopted provided that "the rule shall not have the effect of abridging or modifying 'the substantive rights of any litigant'," the court held that the former suit was not *res judicata,* and that the case should be heard in the state court because "the right to bring a new suit within one year, following a judgment of dismissal without a trial on the merits, is a substantive right."

C. Arrest or Reversal of Judgment for Plaintiff

Nashville, C. & St. L. Ry. v. Bolton,[80] involved a decision in favor of the plaintiff which was reversed and remanded on appeal. After the remand to the trial court, the plaintiff was granted a voluntary nonsuit. Within one year after the nonsuit, but more than one year after the reversal, the plaintiff commenced a new action and was again awarded a verdict by the trial court. The issue was whether the new action could be brought only within one year from the date the case was reversed. The court decided that the case was to be handled *de novo* since a reversal with remand was not the conclusion of the case, but merely "a temporary check in the progress of the same suit." The statute is, of course, not applicable where the reversal is on the merits and without remand.

IV. Essential Characteristics of the Second Action

We have considered the various aspects of the statute permitting a new action after a non-conclusive dismissal or reversal. Our final inquiry concerns the essential similarities between the first and second suits. One federal court has set down the tests by which to determine the identity of two causes of action. They are:

> "Will the same evidence support both? Will the same measure of damages govern both? And will a judgment against one be a bar to the other? Causes of action may differ, concerning which some of these questions may be answered in the affirmative; but no two causes of action can be identical when all these questions must be answered in the negative."[81]

An early case in Tennessee states in connection with new actions that

79. See *ante* at p. 297.
80. 134 Tenn. 447, 184 S.W. 9 (1915).
81. Whalen v. Gordon, 95 Fed. 305 (8th Cir. 1899).

these are benefited only when the suits "are substantially for the same cause of action, and the parties in each suit are identical."[82] Thus, a case against an employer for wrongful death, and one for an award under the workmen's compensation laws are inconsistent and are not substantially the same.[83] The cause of action includes "all the facts which together constitute the plaintiff's right to maintain the action."[84]

In a more recent workmen's compensation case, the issue was whether a cause of action based on disability occasioned by an occupational disease was substantially the same as a subsequent one seeking compensation based on an accident. The court felt that in view of the general rule of liberality concerning pleadings in workmen's compensation cases, the second action should be heard since an amendment would have been permitted in the original action to bring in the claim of disability from accident. The court attempted to demonstrate "that the employer is not prejudiced or hurt or injured by reason of the amended or supplemental lawsuit which is an amendment to the original lawsuit."[85]

Another aspect of this area is the effect of amendments on a cause of action. An amendment which merely expends or amplifies what was alleged in support of the cause of action relates back to the commencement of the action and is not affected by the intervening lapse of time.[86] Here, too, it seems that the court will be liberal in permitting a new action or amendment in order to carry out the spirit of the saving statute.

V. Conclusion

In summary, it seems apparent that a clear understanding of the saving statute will be of value to an attorney who deems it proper to request a voluntary nonsuit, or who is the victim of an involuntary dismissal not on the merits. The statute was intended to aid those who are entitled to a hearing on the merits of their cases, but not as a tactic with which to harass defendants and to place a burden on the courts by unnecessary and prolonged delays.

Glenn C. Stophel

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82. Hughes v. Brown, 88 Tenn. 578, 13 S.W. 286 (1890).
83. Oman v. Delius, 162 Tenn. 192 34 S.W.2d 570 (1930).
84. *Ibid.*, at p. 200.
85. Norton v. Standard Coosa-Thatcher Co., 203 Tenn. 649, 315 S.W.2d 245 (1957); 12 Vand. L. Rev. 1256, 1286 (1958).
86. Norton v. Standard Coosa-Thatcher Co., 203 Tenn. 649, 315 S.W.2d 245 (1957).

CASE NOTES

AGENCY — TORTS — TRUCKING COMPANY'S LIABILITY TO UNAUTHORIZED RIDER

The defendant, under contract to haul a carnival's property from the fairgrounds to the railroad yards, subcontracted with a truck owner to do the hauling. The truck owner supplied both the truck and the driver, whom defendant paid for his services. Defendant gave explicit instructions to both the truck owner and the truck driver that no one be allowed to ride on the vehicles. Contrary to these instructions, the plaintiff, a carnival employee, boarded a loaded wagon towed by the truck with the knowledge, acquiescence, and implied permission of the driver. The plaintiff was injured when the driver negligently made a sudden turn, causing plaintiff to be thrown from the wagon. On appeal from a dismissal of the action in the trial court, *held,* where an employee-driver permits others to ride on the truck or trailer contrary to instructions from his employer, the status of the rider is not that of guest or invitee, but of trespasser with respect to the employer, *and* the employer is liable only for such injuries as are caused by the wanton or wilful acts of the driver. *Ball v. Whitaker,* 342 S.W.2d 67 (Tenn. 1960).

The court's finding in the principal case that the unauthorized rider was a trespasser as far as the master was concerned, and that the master was liable for only the wilful and wanton acts of his servant, is in harmony with the established law in Tennessee[1] and with the prevailing view elsewhere. The rule first appeared in Tennessee in railroad cases,[2] and has been extended to cases involving motor vehicles.[3]

The holding in the instant case involving a motor vehicle is closely related to the view that a landowner is liable to a trespasser only for wilful and wanton negligence.[4] But in many jurisdictions the effect of this rule has been changed by the re-defining of "wilful or wanton" to include a failure to use ordinary care after the trespasser's presence

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1. Home Stores v. Parker, 179 Tenn. 372, 166 S.W.2d 619 (1942); Reynolds v. Knowles, 185 Tenn. 337, 206 S.W.2d 375 (1947).
2. Illinois Central Railroad v. Meacham, 91 Tenn. 428, 19 S.W. 232 (1892); Sands v. Southern Ry. Co., 108 Tenn. 1, 64 S.W. 478 (1901).
3. Reynolds v. Knowles, 185 Tenn. 337, 206 S.W.2d 375 (1947); 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE §§3016, 3017, p. 309-320 (Perm. ed. 1948); ANDERSON, AN AUTOMOBILE ACCIDENT SUIT §560, p. 651 (1934); VARTANIAN, LAW OF AUTOMOBILES IN TENNESSEE §121, p. 412 (1938); Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 91 S.W. 199 (1905).
4. Haskins v. Grybko, 301 Mass. 322, 17 N.E.2d 146 (1938); Ellington v. Great Northern Ry. Co., 96 Minn. 176, 104 N.W. 827 (1905); PROSSER, LAW OF TORTS §76, p. 433 (2d ed. 1955).

has been discovered.[5] This is often referred to as the "discovered trespasser doctrine." Apparently, however, this discovered trespasser doctrine has not as yet been extended in Tennessee to cases involving a trespasser on a motor vehicle.[6] Consequently, in the principal case, even though the defendant's servant was quite aware of the plaintiff's presence, the plaintiff was held entitled to no more protection than any other trespasser.

Perhaps the real theory behind the rule advanced in the instant case, as one authority has propounded, is that the risk of injury to an unauthorized passenger from the negligent driving by the servant is one the master has not assumed and one which the servant cannot thrust upon him without his consent.[7]

Sometimes it is held that a master is not liable even for the wilful and wanton acts of his servant toward a trespasser. One reason given for this view is that the rider has voluntarily assumed the risk. In other cases the decision is based on the ground that the servant is acting outside the scope of his employment in driving with wilful or wanton negligence.[8] Modern cases, however, in most jurisdictions do allow recovery when the servant is guilty of wanton or wilful negligence,[9] though, not, as has been indicated, when the servant is guilty of only ordinary negligence. The Tennessee courts follow this prevailing view, allowing recovery in cases of wilful or wanton negligence.

It might be noted that in the somewhat related situation where a servant has allowed a third person to drive his master's vehicle, and the third person negligently injures another, the owner-master ordinarily is held liable.[10] The reason usually given for allowing recovery in such cases is that the servant was negligent in allowing an incompetent person to drive. Another ground relied on is that the servant was negligent in failing to properly supervise the substitute driver, once he has been allowed to drive.[11] A standard writer in this field says that if the master is to be held liable, it should be for the reason that "experience shows that drivers will let their friends drive the master's truck in spite of all that can be done to prevent it, and

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5. PROSSER, LAW OF TORTS §76, p. 435 (2d ed. 1955).
6. This extension of the "discovered trespasser doctrine" was refused in Home Stores v. Parker, 179 Tenn. 372, 166 S.W.2d 619 (1942).
7. MECHEM, AGENCY §386, p. 259 (4th ed. 1952).
8. Thomas v. Magnolia Petroleum Co., 177 Ark. 963, 7 S.W.2d 1 (1928); RESTATEMENT, LAW OF AGENCY §242, p. 534 (2d ed. 1958).
9. Higbee Company v. Jackson, 101 Ohio St. 75, 128 N.E. 6 (1920) is the landmark case allowing recovery where the servant has been wilfully and wantonly negligent.
10. Potter v. Golden Rule Grocery Co., 169 Tenn. 240, 84 S.W.2d 364 (1935).
11. RESTATEMENT, LAW OF AGENCY §241, p. 532 (2d ed. 1958).

that thus the risk of the substitute's careless driving becomes one of the normal risks of the business, to be borne by the master along with the others."[12]

It seems reasonable to assume that for a servant to allow a third person to drive his master's vehicle is a more serious deviation from the servant's authority and scope of employment than that which occurs when the servant merely allows a third person to ride in or on the master's vehicle. Consequently, if we look at the problem simply from the scope of employment angle, the holdings of the courts are puzzling in that a master is held liable for injuries to third persons caused by an unauthorized substitute driver, and not for injuries sustained by unauthorized riders. If, however, we look at the matter from the standpoint of what risks are normal to the business, or from the assumption of risk angle, these holdings are more understandable.

As indicated above, only a few jurisdictions have held a master liable for injuries to such unauthorized riders sustained by the ordinary negligence of the servant.[13] It is submitted that this view, though a minority one, is sound. A master should expect that his servant occasionally will allow third persons to ride, even contrary to specific orders given to him by the master, and if the servant continues on the master's business after allowing a person to enter the vehicle, he still is within the scope of his employment. It follows from this that the master should be liable for ordinary negligence of the servant which causes the rider to sustain injuries, for even if the rider is a trespasser as to the master, he is a discovered trespasser. As remarked by a leading authority in the field of agency, "in the case of the unauthorized passenger, the master has voluntarily assumed the risk of the harm that this particular servant using this very instrumentality may do to the car itself and to the persons and property of the public at large; it is surely a very trifling increase of risk to say that the master may be liable for the servant's negligent driving not only to other cars and people using the street — a veritable horde — but also to the passenger riding in the car without the master's permission."[14]

Where, however, there is a conspicious "No Riders" sign on the vehicle, perhaps the rider should be limited to recovery against the negligent driver himself, since the rider then knows that the driver is acting definitely outside the scope of his authority in permitting him to enter the vehicle. A difficulty results, however, from the fact

12. MECHEM, AGENCY §§385-387, pp. 258-260 (4th ed. 1952).
13. Pitman v. Merriman, 79 N.H. 492, 111 Atl. 751 (1920).
14. MECHEM, AGENCY §388, p. 261, 262 (4th ed. 1952).

that the driver still is driving the vehicle in the general scope of his employment. Even where there is a "no rider" sign, it is likely that most courts would allow the rider to recover against the employer in the event of wilful or wanton negligence.

Conceding that, as the plaintiff was a trespasser, the master would be liable to him only if the servant were wilfully and wantonly negligent, the plaintiff attempted, nevertheless, to establish liability on special grounds. One of these was that the contract between defendant trucking company and the carnival company which employed the plaintiff provided that defendant would be responsible for the safety of the carnival company's property and for any loss, damage, or injury which might be sustained by any one because of the manner in which the property was hauled. On this point, the court said that this was an indemnity agreement between the trucking company operator and the carnival and that plaintiff, an employee of the carnival, had no rights thereunder.

The other ground upon which plaintiff relied was a statutory provision requiring motor freight agents to carry liability insurance to pay for injuries or damage to persons by reason of negligent operation of the motor carrier while engaged in carrying property.[15] The court said that since the defendant hauled the carnival's property only within the city limits of Chattanooga and from the fairground to the railroad yards, another statute applied and therefore defendant was not required to have such insurance.[16] The court then rested the decision on the ground that since defendant's servant was guilty only of ordinary negligence, the master would be relieved from liability to one who was a trespasser on the vehicle.

S. M. W.

EVIDENCE — TESTIMONY AS TO POSITION OF VEHICLES AFTER COLLISION INSUFFICIENT

Plaintiff's husband was killed in a collision between the defendant's automobile in which the decedent was riding, apparently as a guest, and a truck operated by the co-defendants. Although the record revealed that two persons not parties to the litigation had witnessed the collision, the plaintiff elected to go to trial solely on the testimony of two other

15. TENN. CODE ANN. §65-1517 (1956).
16. TENN. CODE ANN. §65-1503 (1956), provides that the provisions of Chapter 65 shall not apply to any motor vehicle "while used exclusively for carrying . . . property between railroad depots and any points in any city, town, or suburb."

witnesses, neither of whom had witnessed the accident, but came upon the scene after it had occurred. The testimony of these two witnesses was in conflict as to the position of the truck. A directed verdict for the defendants was reversed by the court of appeals. On appeal to the supreme court, *held,* the testimony of witnesses as to the position of vehicles after a collision not seen by witnesses was insufficient to take the case to the jury. *McCollum v. Guest,* 343 S.W.2d 359 (1960).[1]

While it is unlikely that an automobile collision will occur without negligence or fault of either driver, it is clear that the mere happening of the accident does not imply negligence upon the part of either of the drivers of the automobiles.[2] The issue in the principal case is one of first impression in Tennessee: whether the testimony of two witnesses who saw the scene of an automobile accident after it occurred is sufficient to make out a *prima facie* case for the plaintiff.

In *Roberts v. Ray,*[3] evidence showed that the defendants' automobile ran down a hill unattended and collided with the plaintiff's automobile. The court held that this evidence raised a presumption of negligence, following an earlier Tennessee decision to the same effect.[4] While it is true that negligence has thus been held to be inferable from particular circumstances,[5] it has also been determined that in a situation where, aside from the accident, there are no circumstances pointing in that direction, negligence may not be inferred.[6] The only evidence in this case was the testimony as to the position of the vehicles immediately following the collision. As it was claimed that the plaintiff's husband was a guest in one of the vehicles, ordinarily the plaintiff should have a good cause of action against someone, but she must of course prove more than the mere fact that the collision causing her husband's death had occurred. So in *Tolar v. Yellow Cab Company,*[7] the court held that where the two drivers of colliding cars are not engaged in some common undertaking, independent acts of negligence must be shown in order to hold them liable; and if only one of them was negligent that also must be shown.[8]

In the instant decision the court points out that the position of

1. Rehearing denied March 10, 1960.
2. Granert v. Bauer, 17 Tenn. App. 370, 373, 67 S.W.2d 748 (1933); Nichols v. Smith, 21 Tenn. App. 478, 111 S.W.2d 911 (1937).
3. 322 S.W.2d 435 (Tenn. App., 1958).
4. Whitaker v. Bandy, 4 Tenn. App. 202 (1926).
5. Roberts v. Ray, 322 S.W.2d 435 (Tenn. App. 1958).
6. Wiser v. Parkway Baking Co., 289 Pa. 565, 137 A. 797, 798 (1927); Rosenthal v. Philadelphia Phonograph Co., 274 Pa. 236, 117 A. 790 (1922).
7. 179 Va. 38, 18 S.E.2d 250 (1942).
8. 3 VARTANIAN, LAW OF AUTOMOBILES IN TENNESSEE §242 (1947); see also Nohsey v. Slover, 14 Tenn. App. 42 (1931).

the vehicles after an accident is not necessarily an indication of the manner in which the accident occurred, quoting the Nebraska Supreme Court in *Anderson v. Interstate Transit Lines*[9] where it was stated:

> We are inclined to accept the views of the courts heretofore quoted as to the fact that mere position of the 'bus' and 'truck' after the accident, with the accompanying marks, as shown by the evidence, affords no just basis for a reasonable conclusion. In other words, these facts are insufficient to meet the burden of proof.

The court in the instant case cites one Tennessee case, *American Tobacco Co. v. Zoller*,[10] to the effect that "It is well known that cars sometimes take peculiar and unexpected courses after accidents." It follows that mere testimony as to the position of the vehicles should be insufficient to meet the burden of proof required.

In *Evansville Container Corp. v. McDonnell*,[11] evidence of tire tracks and skid marks, as well as of the condition of the automobiles subsequent to an accident was submitted. Such evidence may be weighed by a jury when supplemented by testimony of eyewitnesses. If such evidence has a tendency to contradict the testimony of eyewitnesses, the jury may accept the evidence of the physical facts as of superior probative value.

It has also been held that evidence regarding the place of the collision between two automobiles, the positions thereof after the accident, and the portions of the automobiles which came in contact with each other, may all be considered on the issue of due care by the operators of the automobiles.[12] It appears to be a general holding, however, that evidence only as to the position of the cars after the accident is not sufficient to make out a *prima facie* case.

In the instant case, the court relies on a well-known treatise[13] for a statement concerning the question in issue, and quotes as follows:

> It cannot be said, however, as a matter of law, where there is a collision of automobiles, that the accident did not happen as stated by either party solely from the respective positions of the automobiles after the accident; there being such a complexity of forces and resultants as to afford no idea where the two automobiles would go or what they would do.

While it is clear that liability may be asserted upon entirely circumstantial evidence, it thus appears that mere evidence of the position of the automobiles after the accident is not sufficient.

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9. 129 Neb. 612, 262 N.W. 445 (1935).
10. 6 Tenn. App. 390 (1927).
11. 132 F.2d 80 (6th Cir. 1942).
12. McAllister v. Chase, 65 R.I. 122, 13 A.2d 690 (1940).
13. BLASHFIELD, ENCY. OF AUTOMOBILE LAW 401, §6555 (1955).

In the instant case, the plaintiff's husband was killed directly as a consequence of the collision between the two vehicles. As a result of this decision she had no other recourse against the drivers of the two vehicles involved. While this may appear to be harsh, possibly the testimony of eyewitnesses who are not called would tend to place the blame on an insolvent or show that the decedent was in fact the driver and was driving negligently. In any event, it is well established that except in res ipsa loquitur cases, a plaintiff who is unable to produce some specific evidence of negligence will fail to recover, even though negligence was in fact present and caused the accident.

R. E. B. JR.

LANDLORD AND TENANT — LANDLORD'S DUTY TO REMOVE SNOW AND ICE ACCUMULATIONS

The defendant owned a multiple apartment building behind which were several garages for use by the tenants. The plaintiff rented one of the apartments and also used one of the garages. Following a severe ice and snow storm, the building superintendent who lived on the premises did not remove the snow and ice from any of the common walkways. During the four-day period after the storm the weather alternated between snow and freezing, resulting in the walkways becoming slick and dangerous. After having remained inside during these four days caring for her seriously ill husband, the plaintiff left her apartment by the normal exit used by the tenants. After taking only two or three steps on the walkway the plaintiff slipped and fell. In an action by the tenant against the landlord the jury returned a verdict in favor of the plaintiff. On appeal, *held* affirmed. "The general duty of the landlord to keep common passageways in good repair and in a safe condition includes the duty of removing natural accumulations of snow and ice within a reasonable time." *Grizzell v. Foxx*, 348 S.W.2d 815 (Tenn. App. 1960).[1]

In general a landlord who rents separate portions of his property to a number of tenants but retains control over the portion used in common by the tenants is under the duty of a general possessor of property to exercise reasonable care to keep the common premises in a reasonably safe condition for the contemplated use. That is the position taken in Tennessee,[2] but in a few jurisdictions the landlord's duty is only to

1. *Cert. den.* by Tennessee Supreme Court, July 26, 1961.
2. 32 AM. JUR., *Landlord and Tenant* §§688 *et. seq.* (1941); See ANNOT. 26 A.L.R.2d 468, 476 (1952); Woods v. Forrest Hill Cemetery, 183 Tenn. 413, 192 S.W.2d 987 (1946).

maintain the common portion in as good condition as it purported to be in at the inception of the tenancy under which the plaintiff was using the premises when injured.[3]

The instant case presents for the first time in Tennessee the question whether the duty to remove natural accumulations of snow and ice falls within the general duty owed by the landlord to the tenant.[4] The point has arisen in several other states, and at least three rules have been devised.[5]

Several courts have held that the landlord's duty with respect to the maintenance of parts of the premises retained in his control for the common use of his tenants does not entail any general common-law duty to remove natural accumulations of ice and snow.[6] This view is said to be based on the fact that snow and ice are temporary obstructions.[7] It should be noted that although under this view liability is not imposed as a part of the general duty owed by the landlord, where the accumulation of snow and ice is artificially caused by the negligence of the landlord in maintaining either the common passageway itself or some other part of the premises in a defective condition, the courts frequently find that liability exists.

Most of the courts not bound by precedent have held in recent years that the landlord's general duty includes the duty of removing natural accumulations of ice and snow from the common ways or structures.[8] The Tennessee court, in the principal case, aligns itself with that position. In doing so, the court pointed out that it could "see no reason to differentiate between the 'ice and snow' situation and other types of defects or dangerous conditions" which are covered by the general duty imposed on the landlord with respect to the common premises.

Another view is a compromise between the two positions already mentioned. Several New York cases, while stating that the landlord would not ordinarily be liable for injuries caused by natural accumulations of ice and snow in common areas or passageways retained in his control, nevertheless have recognized that there might be liability where the ice or snow in the common passageway presented an unreasonable

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3. 32 AM. JUR. *Landlord and Tenant* §696 (1941). Massachusetts is the major proponent of this rule. ANNOT. 26 A.L.R.2d 468, 476 n.1 (1952).
4. For a general discussion of the tort liability of landlord and tenant in Tennessee see Dehner, *Landlord and Tenant: Tort Liability in Tennessee*, 23 TENN. L. REV. 219 (1954).
5. These rules are not concerned with the duty undertaken under contract or which may arise when the landlord has voluntarily assumed the task of removing snow and ice or other obstructions upon prior occasions.
6. The duty of the landlord with respect to natural accumulation of snow and ice is extensively discussed in ANNOT., 26 A.L.R.2d 610 (1952).
7. Durkin v. Lewitz, 3 Ill.App.2d 481, 123 N.E.2d 151, 156 (1954).
8. ANNOT., 26 A.L.R.2d 610, 626 (1952).

risk to the user because its surface was formed into ridges or hummocks.[9] This view, it would seem, lessens the duty of care owed, in that liability is not incurred unless the natural accumulation of ice and snow has developed into an obstruction more dangerous than is ordinarily the case.

The courts imposing the duty on the landlord to remove the natural accumulations of ice and snow have agreed that the duty ordinarily encompasses the exercise of reasonable care. Therefore, the evidence presented must justify the conclusion that the landlord had notice of the dangerous condition and reasonable opportunity to correct it before the time when the plaintiff was injured.

Another aspect of the principal case dealt with the question whether the tenant who used the icy walk with knowledge of its dangerous condition was guilty of contributory negligence *per se*. The court noted that it was necessary for the plaintiff to leave the premises, that the common walkway which she used was the one normally used by the tenants and the one closest to the garage, and that all available exits were covered with ice and snow. Under these circumstances, the court observed that "To hold that the mere walking on a snow and ice covered walk is negligence *per se* would, in effect, make these plaintiffs captives in the apartment building." Consequently it was held that the issue of contributory negligence was one of fact to be decided by the jury.

G.C.S.

SALES — VALIDITY OF CONDITIONAL SALES CONTRACT NOT EXECUTED AT TIME OF SALE — BANKRUPTCY

A corporation purchased an asphalt plant in 1958, making a partial cash payment and executing a note for the balance of the purchase price. The note was secured by a conditional sales contract. Later in the same year, the corporation purchased a tractor from the same seller, again executing a conditional sales contract to secure the remaining indebtedness. The conditional seller assigned both 1958 contracts and notes to a bank with recourse. In 1959, the conditional buyer being unable to make the payment on the notes, the buyer and seller executed new notes and condtional sales contracts. These instruments also were assigned with recourse on the conditional seller. The proceeds from the second assignment were used to pay off the first assignee, who sent

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9. Harkin v. Crumbie, 20 Misc. 568, 46 N.Y.S. 453 (1897); Dwyer v. Woollard, 205 App.Div. 546, 199 N.Y.S. 840 (1923); Laufers-Weiler v. Borchardt, 88 N.Y.S. 985 (Sup.App. 1904); Van Slyke v. Fivey, 266 App.Div. 889, 42 N.Y.S.2d 625 (1943).

the 1958 contracts and notes to the conditional buyer. Less than one month after execution and assignment of the 1959 contracts, the conditional buyer was adjudged a bankrupt. Upon a demand of the assignee, the conditional seller repurchased the contracts, and received an assignment of the assignee's claims. The conditional seller then claimed as a secured creditor in bankruptcy proceedings. In a proceeding on a petition for review and reversal of the referee's order sustaining the trustee's objection to the allowances of petitioner's claim, *held,* the seller is entitled to priority as a secured creditor for the balance due under the 1958 notes secured by the 1958 conditional sales contract. In re *Cherokee Asphalt Company,* 192 F.Supp. 656 (E.D. Tenn. 1961).

The conditional sales contract is frequently used as a security device in commercial practice.[1] By the use of such contract, the seller of personal property retains title as security for payment of the purchase price of the chattel. The conditional buyer, on the other hand, is entitled to the possession and use of the personalty sold.

Tennessee decisions indicate that restrictions have been placed on the use of this device since conditional sales contracts are out of harmony with the policy which underlies the Tennessee registration laws.[2] For the same reason, unless the language of the contract of sale clearly makes out a conditional sale, any doubt whether the contract sued upon is a conditional sale will be resolved against such a holding.[3]

The title retained by the conditional seller is in the nature of a lien and is merely security for the payment of the purchase price.[4] The validity of a conditional sales contract does not depend upon registration in Tennessee,[5] although filing is necessary in several jurisdictions,[6] and under the Uniform Conditional Sales Act.[7]

The Tennessee statute governing conditional sales does, however, set forth the requirements for a valid conditional sales contract in this

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1. Martin, *Principal Security Devices in Tennessee,* 22 TENN. L. REV. 392 (1952).
2. Star Clothing Manufacturing Co. v. Nordeman, 118 Tenn. 384, 100 S.W. 93 (1907).
3. Matthews v. Archie, 196 Tenn. 417, 268 S.W.2d 334 (1954).
4. Home Indemnity Co. v. Bowers, 194 Tenn. 560, 253 S.W.2d 750 (1952); Ghormley v. Raulston, 34 Tenn. App. 109, 233 S.W.2d 57 (1950); Third National Bank of Nashville v. Keathley, 35 Tenn. App. 82, 242 S.W.2d 760 (1951).
5. McCombs v. Guild, Church & Co., 77 Tenn. 81 (1882); Shaw v. Webb, 131 Tenn. 173, 174 S.W. 273 (1915); Knoxville Outfitting Co. v. Knoxville Fireproof Storage Co., 160 Tenn. 203, 22 S.W.2d 354 (1929).
6. WILLISTON, SALES 743 (1948); Appendix D contains a synopsis of the statutory provisions in the several states.
7. 2 U. L. A.§6 (1922).

state.[8] Thus, in order to be valid as against subsequent purchasers or creditors, the contract must be in writing,[9] contain an adequate description of the property[10] and be in terms which indicate the intention of the parties that title remain in the seller.[11]

The instant case presents the issue of the validity of a conditional sales contract not executed at the time of the sale. Tennessee state courts have had few occasions to pass directly on this issue. In *Sanders v. Farmers Union Co.*,[12] implements were shipped to a company under a contract held to be a contract of sale, and later notes were given providing that the title was to be retained by the seller. The court in holding that the provision in regard to the retention of title was void, observed: "We think it well settled in this State that a retention of title must be made in writing at the time the sale is made to bring it within its condtional sales statute."[13]

In the principal case, it was conceded that the 1958 documents were valid retention of title instruments under the laws of Tennessee. It is clear that the creditor could have permitted an extension of time for payment without releasing the lien.[14] The court found that the creditor had no intention of releasing the lien when it permitted the debtor to execute the 1959 documents as a means of securing money to pay the assignee of the 1958 documents.

It was contended by the trustee in bankruptcy that the intention of the parties was not controlling on the issue of whether the lien was released by the execution of new contracts. It was argued that payment of the original notes completely abolished the claim; that the 1959 documents represented a completely new indebtedness which was unsecured since the title retention document was not executed at the time of the sale; that the claimant's rights were based solely on the 1959 instruments; and that the rights of the seller could rise no higher than those of the assignee. These arguments were dismissed on

8. TENN. CODE ANN 47-1301:
In all conditional sales of personal property, wherein the title to the property is retained by the vendor, as a security for the payment of purchase money, such retention of title shall be invalid unless evidenced by a written contract or memorandum, executed at the time of the sale.
9. *Ibid.*
10. Kenner & Co. v. Peters, 141 Tenn. 55, 206 S.W. 188; Moore v. Bridges, 161 Tenn. 422, 33 S.W.2d 89 (1930) (must describe property as well as the nature of property will permit); Burroughs Adding Machine Co. v. Robertson, 9 Fed.2d 619 (6th Cir. 1925) (description required is analogous to statute of frauds); Stoll v. Schneider, 158 Tenn. 341, 13 S.W.2d 325 (1929) (the rules generally applicable to chattel mortgages apply).
11. Matthews v. Archie, 196 Tenn. 417, 268 S.W.2d 334 (1954).
12. 5 Tenn. App. 560 (1927).
13. *Ibid.*, at p. 574.
14. Brasfield Hardware Co. v. Harris, 5 Tenn. App. 652 (1927).

the grounds that the secondary liability of the seller arising from the assignment with recourse, and the fact that the 1958 documents were never released or cancelled by the conditional seller, precluded such a construction of the transaction.

The court admitted that the 1959 documents, standing alone, would not be valid as conditional sales contracts because they were not executed at the time the equipment was sold. But, in considering the 1959 documents in relation to the 1958 documents, the court found that the seller was a secured creditor. The basis for the decision seems to be that since the creditor never intended to release his lien, but was attempting to aid the debtor, the equities of the transaction were in favor of the seller. With relation to other creditors, the court stated:

> We do not believe that the creditors who extended credit to the Bankrupt during the period from December 22, 1958 until December 21, 1959, or the date of bankruptcy, were prejudiced by reason of the 1959 instruments because they extended such credit with at least constructive knowledge that the original 1958 conditional sales contracts were outstanding.[15]

In conclusion, it appears that the court applied the maxim that equity looks at the substance of things rather than the form to reach the result which the court thought just in the instant case.

G. C. S.

TORTS — CONTRACTEE'S LIABILITY FOR INJURY TO INDEPENDENT CONTRACTOR

Plaintiff was employed as an independent contractor by an agent of defendant to erect a sign. During the course of the work the plaintiff found it necessary to go to the top of the sign to make certain alterations but did not have ladders for the purpose. He used a ladder which was present on the defendant's property. The ladder broke and the plaintiff was injured. There was no proof that defendant's agent furnished the ladder to the plaintiff or that he had superior knowledge of its defective condition. On appeal from a judgment in favor of the plaintiff, *held,* a contractee is not liable for injuries to an independent contractor from an appliance or instrumentality which he is not obliged to furnish and does not assume to furnish, though

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15. *In re* Cherokee Asphalt Paving Company, 192 F.Supp. 656, 659 (D. C. Tenn. 1961).

the appliance belongs to him and is used with his consent. *Monday v. Reed,* 341 S.W.2d 755 (Tenn.App. 1960).[1]

The precise issue presented to the court in the instant case was whether a contractee is liable to a contractor for an injury caused by a defective instrumentality owned by the contractee and used by the contractor in the course of the employment. In determining this question the court relied on the fact that there was no proof that the defendant or his agent had furnished the defective ladder to the plaintiff; that there was no contract between the plaintiff and defendant to furnish any appliances or equipment; and that there was no evidence that the defendant's agent had any superior knowledge of the defects in the ladder, which obviously was old and somewhat decayed.

It appears to be a general rule that:

> A contractee is not liable for injuries to an employee of an independent contractor arising from a defective or unsafe appliance or instrumentality where he was not obligated by contract or statute to furnish the appliance or instrumentality and did not in fact assume to furnish it, even though the appliance belonged to him and was used with or without his consent.[2]

This statement of the rule is in accord with that of the instant case and has been followed in another Tennessee case, *Davis v. Cam-Wyman Lumber Co.,*[3] where the court stated:

> Where the owner agrees with the contractor to furnish the appliances necessary for the performance of the contract, it is generally held that the owner is liable to any servant of the contractor for injury resulting from a failure of the owner in not providing proper appliances. Some of the cases place the liability of the owner upon the ground that he owes a nondelegable duty to the servants of the contractor assumed by him when he agreed to furnish the appliances, while other cases place the liability upon the ground that the owner, jointly with the contractor, commits the tort. But whatever the reason of the rule may be, we conceive it to be a just and fair one.
>
> We have found no case holding that the contractee is liable to the servant of the contractor for using an appliance belonging to the contractee which had been furnished the contractor, not as a fulfillment of any obligation of the contract, but merely for the accommodation of the contractor. In such a case, the duty of inspection and repair is upon the contractor. This is especially true, in the absence of any averment that the contractee knew of the defect, or upon the exercise of due care should have known it.[4]

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1. Certiorari denied by Tennessee Supreme Court, Dec. 9, 1960.
2. 57 C.J.S. *Master and Servant* §604, p. 376 (1948).
3. 126 Tenn. 578, 150 S.W.545 (1912).
4. *Ibid.,* p. 588.

One problem presented in the instant case was whether the plaintiff had produced any evidence that the defendants, through their agent, had furnished the ladder to the plaintiff. The court indicates that the most that could be inferred from the evidence would be that the agent knew of the plaintiff's use of the ladder. If the defendants' agent had been under a duty to furnish the ladder, then under the above quoted language from the *Davis* case the defendants would be obliged to use due care to discover the defect, and perhaps the user of the ladder could assume, without being guilty of contributory negligence as a matter of law, that this duty had been fulfilled, and that the ladder, though obviously old, was nevertheless safe.

The court in the principal case, however, points out that:

> If the employer permits the contractor to use his tools and appliances, in the absence of an agreement by the employer to do so, the latter is not required to keep them in repair. In such a case, the employer's only obligation in reference to tools and appliances supplied is to exercise due care not to let the contractor have an appliance which is a nuisance, apparently defective, or likely to cause injury to third persons.[5]

Apparently, in the principal case, the defendant did not actually furnish the ladder nor is there any definite allegation that it was used with the knowledge of the defendants or their agent. Certainly if the defendants did not know the defective ladder was being used by the plaintiff there is no basis whatsoever for liability.[6]

R. E. B., JR.

TORTS — LEGISLATIVE COMMITTEE — PRIVILEGED TESTIMONY

Defendants' agent testified before a legislative committee investigating trading stamp practices that the use of trading stamps increased retailing costs. Plaintiff, owner of a chain of supermarkets, alleged that the statements were false and maliciously made for the purpose of injuring the plaintiff. The trial court, at the conclusion of plaintiff's proof, directed a verdict for the defendants. The court of appeals reversed, apparently on the ground that such statements were only conditionally privileged. On appeal to the Tennessee Supreme Court, *held,* statements made in the course of legislative committee hearings are absolutely privileged. *Logan's Super Markets v. McCalla,* 343 S.W.2d 892 (Tenn. 1961).

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5. 27 AM. JUR., *Independent Contractors* §32 (1940).
6. See ANNOT. 44 A.L.R. 891 (1926), and cases cited therein.

The supreme court in the principal case drew an analogy between legislative and judicial proceedings, basing its decision upon the leading Tennessee case on judicial privilege.[1] The court there stated that only two facts need be proved to establish an absolute privilege: (1) that the statements were made in the course of judicial proceedings; and (2) that the statements were relevant or responsive to questions of the counsel.[2]

The court in the instant case extended the absolute privilege doctrine to include legislative proceedings. This is the first decision in Tennessee which recognizes an absolute privilege as to statements before a legislative committee. Likewise it seems to be the first judicial pronouncement involving the question of privilege with regard to the legislature itself. The judicial privilege case relied on as the basis for this extension was one involving defamatory statements, alleged to be malicious, made by a witness before chancery court.[3] The court there held that the statements were absolutely privileged and the existence of malice was irrelevant.

In according an absolute privilege to witnesses before a legislative committee, the court in the principal case stated:

> This rule of privilege is a compromise between two important rights, the one being the right of an individual to be free from attack by malicious words and the other the right public and private of a thorough investigation when necessary by some tribunal before which witnesses may speak without fear. The reason for the rule is applicable as much to a hearing before a committee of the legislature as to a court of justice.

The right of the public to have a thorough investigation, rather than the right of an individual to speak maliciously, gives rise to the absolute privilege.

An article on *The Constitutional Privileges of Legislators* takes the position of the Tennessee Court of Appeals in the principal case that a conditional privilege is sufficient to give legislators the protection necessary to enable them to perform their duties satisfactorily. Conditional privilege differs from an absolute privilege in that a showing of malice will destroy it while an absolute privilege protects the speaker from malicious statements. It is urged in this article that there is no necessity for according a legislator an absolute privilege; that the public interest in a critical and extensive debate on matters before

1. Cooley v. Galyon, 109 Tenn. 1, 70 S.W. 607 (1902).
2. Logan's Super Markets v. McCalla, 343 S.W.2d 892 (Tenn. 1961).
3. Cooley v. Galyon, 109 Tenn. 1, 70 S.W. 607 (1902).

the legislature can hardly be said to be benefited or advanced by malicious statements of a legislator; and that conditional privilege would protect freedom of debate in so far as it is beneficial to the public and still protect the individual from harm resulting from malicious statements.[4]

While it is true that no public interest is served by malicious statements in the course of a legislative proceeding, limiting legislators to a conditional privilege could well lead to encroachment upon the public interest which the privilege is designed to protect. As a practical matter the existence or non-existence of malice is a question for the jury. The possibility of being forced to refute a charge of malice before a jury might well cause legislators to restrict unduly their debate from fear of charges of malice as a result, the public would be deprived of its right to have all matters fully discussed before legislative action is taken.

The court observed that the principal case was not concerned directly with the privilege of the legislators themselves, but rather with other participants in legislative committee investigations. It is obvious however, that if such participants are allowed an absolute privilege, the legislators themselves have a similar privilege. In extending the scope of the privilege to non-legislator participants in hearings of legislative committees as well as to legislators themselves the decision is in accord with standard treatises on the subject. The public policies for and against an absolute privilege are identical whether legislators or other participants are involved. The public interest is the same. In view of the present trend toward the assignment of more and more work to the legislative committees this clear holding that the absolute privilege extends to all who participate in the hearings of these committees is timely and clearly in the public interest.

D. C. S., Jr.

TORTS — LIVERY STABLE KEEPER'S LIABILITY FOR INJURY TO EQUESTRIENNE

Plaintiff, a 38-year-old lady who had not ridden a horse in some years, went to defendant's riding academy accompanied by a friend, an experienced horseman. The friend informed defendant's employee that the plaintiff did not know how to ride and should have a horse

4. 9 MINN L. REV. 442 (1925).

suitable for a beginner. The employee thereupon gave her a mare which had no vicious habits and which often had been ridden by children and beginners. The plaintiff and her friend rode on the academy grounds for about one hour. Subsequently she decided to take riding lessons, and the defendant's employee was designated as her instructor. When the plaintiff arrived for her first lesson, she was furnished the same horse. The horse had a sore mouth at this time, a factor somewhat aggravated by the presence of a curb bit which, according to expert testimony for the plaintiff, was not the correct kind for use with a horse with a tender mouth or one carrying a beginner. Plaintiff and her instructor were riding back to the stables near the end of the lesson when the instructor suggested that she make a figure eight around a track. She did so, but as the mare returned to the place from which defendant's employee was watching, she reared up on her hind legs. The instructor said: "Well, kick her and make her go on around again. Show her who is boss." When the plaintiff made the figure eight again, the horse reared again and threw the rider. On appeal from a jury verdict in favor of the plaintiff, *held,* there was sufficient evidence for a jury to find defendant's employee guilty of negligence. *Fortune v. Holmes,* 348 S.W.2d 894 (Tenn. App. 1960).

Cases of this nature usually involve bailor-bailee relationships, but the action for injuries generally is based on negligence, as it was in the principal case. Some courts have approached the problem from the standpoint of a contractual obligation, asserting a breach of implied warranty that the horse is suitable.[1] The duty required of the owner or bailor from a tort approach is that he furnish a horse which is suitable for the purpose for which it is let.[2] If the hirer represents himself as a capable equestrian, the bailor can hardly be held liable for giving him a spirited animal; on the other hand, a beginner or a child would normally require a gentle horse. Factual situations vary widely, and the general rule that the owner of the livery stable is liable for injuries sustained because of the negligent letting of an animal known to be dangerous necessarily requires flexible application.

In an earlier Tennessee case, *McGregor v. Gill,*[3] a driver, hired to transport some people from a point where a steamboat was stranded, became so careless that he overturned the horse-drawn wagon, injuring one of the passengers. The owner of the livery stable escaped liability, since the driver was generally regarded as a safe driver. The court

1. ANNOT., 15 A.L.R.2d 1313, 1314 (1951).
2. ANNOT., 15 A.L.R.2d 1313, 1314 (1951).
3. 114 Tenn. 521, 85 S.W. 71 (1904).

in the principal case, however, found this decision not controlling, as it did not involve the furnishing of a horse to a beginning riding student. The *McGregor* case does establish that a livery stable keeper must exercise that degree of care which a prudent man could be expected to exercise, but as the court in the instant case points out: "The standard of reasonable care is flexibile, some occasions and circumstances requiring higher degrees of care than others."[4]

In the principal case the court emphasized that the plaintiff was a beginner, a fact which was known to the defendant's employee. The fact that she had ridden horses eight or nine years earlier apparently was of little significance. The decision is not based on any viciousness of the horse furnished, for on that point the court states: "It is true as insisted by attorneys for plaintiff-in-error that Queen was a horse of no vicious habits or propensities; that she had been ridden by children and beginners many times prior to plaintiff's accident without any unfortunate result."[5] In view of this, the court bases its decision on the testimony that the mare was tender-mouthed and was equipped with a curb rather than a snaffle bit, which plaintiff's expert said was more suitable for a beginner. In reference to an argument that curb bits were extensively used by women and children riders, the court pointed out that "the customary way of doing a thing may be a negligent way." The court also found that defendant's employer may have been negligent in instructing the plaintiff to kick the horse in the side and go around the track again after he saw the mare rear up with her, instead of having her dismount.

It thus appears that the proof of negligence may involve testimony as to the inadequacy of the horse, of its equipment, and of the instructions given to the rider. In the principal case, testimony as to all of these factors was utilized to show that the finding of negligence was not unreasonable.

D. F. P.

WILLS — CONSTRUCTION — MEANING OF "NEXT OF KIN"

In the last will and testament of deceased, certain of her real property was left to her husband's "next of kin." In an action involving construction of this will, certain nieces and nephews contended that

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4. Fortune v. Holmes, 348 S.W.2d 894, 899 (Tenn. App. 1960). One court has held that more than ordinary care would be required, but that decision seems to be limited to its factual content. See Hodge v. Montclair Riding Club, 130 N.J.L. 331, 32 A.2d 840 (1943).

5. Fortune v. Holmes, 348 S.W.2d 894, 898 (Tenn. App. 1960).

"next of kin" as used in the will meant "nearest of blood" relationship. The great nieces and nephews contended that the phrase should be construed to mean "heirs." In behalf of the Bry-Block Mercantile Co., which occupied certain of the property devised, it was contended that the term should be interpreted as meaning "next of kin" under the Tennessee statute of distribution. The chancellor held that since the will was obviously drawn by a lawyer, the expression "next of kin" should be given its technical construction — the nearest in blood to the testatrix. The court of appeals reversed and held that since the property being disposed of was exclusively real property the term was to be construed to mean "heirs." On appeal to the Tennessee Supreme Court, *held*, reversed. The phrase "next of kin" as used in the will devising realty meant "nearest in blood." *Farris v. Bry-Block Co.*, 346 S.W.2d 705 (Tenn. 1961).

Several cases in Tennessee have held that where the words "heirs" or "heirs at law" are used in a will with reference to personal property, they should be construed to mean "next of kin."[1] The court of appeals in the instant case held that although there have been no cases in Tennessee so holding, the converse of this should be true so that "next of kin" would be construed to mean "heirs" in a situation like the instant case where the property devised was realty. The supreme court, while not denying that in a proper case the words "next of kin" might be construed to mean "heirs," observed that this rule of construction that the meaning of the words "heirs" or "next of kin" is to be determined by the nature of the property whether real or personal, is not applicable "where the evident intention of the testator is otherwise." The court in support of this statement relied upon a previous Tennessee case which said that an intention actually expressed or to be gathered from the language used would prevail over technical meaning of a word.[2] Then the court went on to say that since the draftsman of this will must surely have known that the word "heir" is technically applied to real estate and that "next of kin" is ordinarily applied to those who take personal property, therefore if the intention of the testatrix had been to let the land go to the "heirs" it would have been so expressed in suitable language.

Thus what the court was actually saying was that when the term "next of kin" is used to devise real property it will not be interpreted to mean "heirs" where the evident intention of the testator is otherwise;

1. Paine v. Gupton, 30 Tenn. 402 (1850); Alexander v. Wallace, 76 Tenn. 569 (1892); Spofford v. Rose, 145 Tenn. 583, 237 S.W. 68 (1921); Spencer v. Stanton, 333 S.W.2d 225 (Tenn. App. 1959).
2. Alexander v. Wallace, 76 Tenn. 569 (1882).

since there was nothing to indicate an intent to let the land go to the "heirs", this shows that it was not the intent of the testatrix to devise the land to the "heirs." While this reasoning may seem illogical, the court's conclusion seems sound — that had the testatrix actually intended the property to go to the "heirs", this would have been indicated.

After deciding that the term "next of kin" should not be construed to mean "heirs" the court was faced with the problem of what construction to give to this term.

Before the enactment of the English Statute of Distribution in 1670, use of the term "next of kin" left no room for construction. It had a single, definite meaning: those removed by fewest steps from the propositus in the genealogical table.[3] With the passage of the statute the question arose as to whether the term "next of kin" acquired a new meaning: those who take personally through intestacy.[4]

There was a long period of dispute in England as to whether the term "next of kin" when used in a will without explanatory context meant (1) nearest blood relatives[5] or (2) blood relatives entitled to share under the statute of distribution. Finally, in 1843 the House of Lords settled the question by committing England to the rule that the term would be interpreted to mean those standing nearest in blood.[6]

As most of the jurisdictions in America have adopted a statute of distribution similar to the English statute,[7] the same problem of interpreting the term "next of kin" has arisen in this country. In the states that have adjudicated this question, the decisions have been almost equally divided with a very slight majority favoring the English interpretation.[8]

The court in the instant case in reaching its decision that the term "next of kin" in the will should be interpreted to mean nearest in blood relationship relied upon the earlier Tennessee case, *Frank v. Frank*.[9] Actually, however, the *Frank* case is not exactly in point. There the problem was whether a widow was included in the meaning of the phrase "next of kin." The court in the instant case stated the *Frank* case held that "where there is nothing in the context to show a different intent, the words 'next of kin' must be given their ordinary

3. ANNOT. 32 A.L.R.2d 296, 297 (1953).
4. *Ibid.*
5. According to the civil law degrees of consanguinity.
6. Withy v. Mangles, 10 Clark & F. 215, 8 Eng. Reprint 724 (1843).
7. For the Tennessee Statute of Distribution, see TENN. CODE ANN. §31.201 (1956).
8. ANNOT. 32 A.L.R.2d 296, 297 (1953). See also Godfrey v. Epple, 100 Ohio St. 447, 126 N.E. 886 (1919).
9. 180 Tenn. 114, 172 S.W.2d 804 (1942).

meaning of relatives in blood and that when used in a will the term has not acquired any meaning other than that of nearest in blood relationship." While the court in the *Frank* case did say this, it also stated "that the phrase 'next of kin' in the statute of distribution is there used in its strict legal sense, and means "next in blood." These statements, however, were made solely in support of the conclusion reached by the court in the *Frank* case that a spouse is not a "next of kin." Since this is the overwhelming weight of authority even in jurisdictions which hold that "next of kin" means those entitled to take under the statute of distribution as well as in those that hold the term means those nearest in blood relationship,[10] the *Frank* case actually is no authority for the proposition that "next of kin", when there is nothing to show a contrary intent, means nearest blood relatives rather than those entitled to take under the statute of distribution.

The court in the instant case referred to an A.L.R. annotation "which listed cases supporting each of the two views on interpretation of "next of kin." The court noted that most of the cases involving this problem were cases concerning personal property but the court did cite one case where the property involved was realty which followed the English view.[12]

What the court did not mention is that there is a much stronger case for applying the English view in a situation like the instant case, where the property involved is realty rather than personalty. It would seem difficult to contend that the testatrix meant for the real property to be disposed of under the statute of distribution as if it were personal property.

The writer has been unable to find any cases holding that "next of kin" was to be interpreted to mean those entitled to share under the statute of distribution where the property was real property. It is doubtful whether even the courts that follow this view as to personal property would do so where the property is real property. This conclusion is supported by the fact that the main argument of those who adhere to this view is that if "heirs" means those who succeed to real property by descent, then "next of kin" should designate those who take personalty.[13]

In conclusion it can be stated that the rule in Tennessee as shown by the instant case is that where realty is devised to the "next of kin"

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10. ANNOT. 32 A.L.R.2d 296, 315 (1953).
11. ANNOT. 32 A.L.R.2d 296 (1953).
12. Hammond v. Myers, 292 Ill. 270, 126 N.E. 537 (1920).
13. ANNOT. 32 A.L.R.2d 296, 304 (1953).

the term will be construed to mean those who take under the statute of distribution or even "heirs" where such an intent is expressed in the will. If no such intent is expressed, however, the term will be construed in its technical sense, that is, as meaning nearest in blood relationship. Also, there is nothing to indicate that Tennessee would not follow the same rule where the property devised is personalty.

Thus, the instant case serves as a useful guide to lawyers in Tennessee in drafting wills and also shows the truth of Lord Coke's statement: "wills and the construction of them do more perplex a man, than any other learning, and to make a certain construction of them, this excedit prudentum artem."[14]

J. H. H.

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14. Roberts v. Roberts, 2 Bulstr. 123, 80 Eng. Reprint 1002 (1613).

BOOK REVIEWS

PRODUCTS LIABILITY. By Louis R. Frumer and Melvin I. Friedman. New York: Matthew Bender & Co., 1960 (with 1961 Supplement). Two volumes. $45.00.

AMERICAN LAW OF PRODUCTS LIABILITY. By Robert D. Hursh. Rochester, N.Y.: Lawyers Co-operative Pub. Co., 1961. Four Volumes. $65.00.

And suddenly there were books on "Products Liability". This observation certainly is not intended to suggest that the captioned books were either spontaneously conceived or instantaneously delivered. It just so happens that their birthdates were reasonably close in point of time. One need only scan the contents of any volume in order to appreciate the great effort which has been put forth in order to bring these much needed treatises to the scene. For ease in reference in the following discussion, the two-volume work entitled *Products Liability,* will be referred to by the name of its co-author, Frumer, and the four volume work entitled *American Law of Products Liability* will be referred to by its author, Hursh.

To the practitioner, professor, or student who has grappled with the many problems inherent in products liability litigation, the books should represent invaluable aids. The complexities of such cases can be, and ofttimes are, overwhelming. In a bubbling introductory sentence, Frumer typifies this expanding field of law as follows: "Today's law of products liability mirrors the complex, highly industrial, Madison Avenue, 24-inch screen, 'hard sell', atomic age of the expert in which we live."

The two treatises are somewhat different in their approach to the subject. Generally speaking, Hursh restricts his consideration of a subject to issues which have been raised and ruled upon in specific appellate court decisions. The editorial comment is well documented and annotated by extensive citations. Many cases are "briefed", and there is a liberal cross-referencing to other Lawyers Co-operative Co. publications, namely, *American Jurisprudence, American Jurisprudence, Pleading and Practice, American Jurisprudence, Proof of Facts,* and *American Law Reports.* "The law" or "the court decision" is what Hursh undertakes to present in his treatise, and it would appear that something in excess of four thousand cases either are cited or considered in some detail. Failing to find "the law" on a given subject in this treatise would lead one reasonably to conclude that no appellate court has spoken.

With a realization that the attorney cannot adequately and properly advocate a products liability case without a clear understanding of "the law", still, there would appear to exist another facet of this problem which is of equal importance, and which is perhaps even more fundamental. I refer to the problem faced by the trial lawyer in deciding whether a particular "bundle of facts" can be moulded into a cause of action or a defense. In reaching this decision the lawyer

must not only evaluate the obvious facts; he also must have a sufficient knowledge of the product or the suspected product deficiency to guide his search for other facts which are material and germane. In certain instances in his treatise, Frumer transcends a presentation of "the law" as it relates to products liability and supplies other valuable information which the trial lawyer can use in the early preparation and evaluation of his "case to be". For example, twenty pages are devoted to a discussion of the scientific aspects of the exploding bottle case. In these twenty pages the trial lawyer can "educate" himself on such subjects as glass composition, causes of failure in glass vessels, and glass fracture analysis, and the like. The footnote references are excellent. Having been fortunate enough to participate in the trial of an exploding bottle case, this writer would be inclined to recommend the purchase of Frumer's treatise solely upon the strength of his excellent treatment of this subject. To single out one other feature of Frumer's treatise which is worthy of special mention, the writer would suggest a reading of his section on "expert evidence". This section presents a sound review of the applicable rules of law, as well as quotations of illustrative expert testimony.

Both works present detailed discussions of these ever-present and troublesome problems such as the necessity of privity in warranty cases, latent and concealed dangers, and conflicts of laws. These issues seem never to be solved, just litigated.

In the final analysis, I find myself drawn to Frumer's treatise for the reason that it more nearly approximates a "trial guide", and if ever there existed a field of law in which the practitioner needs guidance, the field of products liability law must be placed near the head of the class. I feel that Hursh's treatise loses some of its vitality by reason of its close similarity to the annotations found in American Law Reports; nevertheless, it is an impressive and exhaustive treatment of this twentieth century legal colossus. Both works provide for continuing supplementation to cover the growing stream of new decisions. An extensive 1961 Supplement already has been incorporated in the *Frumer* treatise.

Of the Knoxville Bar JACK B. DRAPER

TENNESSEE LAW REVIEW

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LEGAL EDUCATION IN TENNESSEE*

PANEL: WILLIAM WICKER, *Dean, University of Tennessee College of Law*
JOHN W. WADE, *Dean, Vanderbilt University Law School*

DEAN WILLIAM WICKER: A U.D.C. matron once said that what this country needs is an impartial United States history, written from the standpoint of the Confederate States of America. My part in this discussion of Legal Education in Tennessee will be an "impartial" treatment of the subject, written from the standpoint of the U-T College of Law. I shall try to state the basic facts objectively, but I want to make it clear that all inferences, conclusions, opinions, or beliefs expressed in this paper are to be attributed to me personally, and not to the Administration or Board of Trustees of the University of Tennessee.

Historically, perhaps the dawn of the modern era in legal education in Tennessee began in 1920 when the Tennessee Supreme Court, acting under rule-making powers specifically granted by Chapter 154 of the Public Acts of 1919,[1] promulgated a set of rules requiring, as an educational prerequisite to the taking of the Tennessee Bar Examination, the completion of one year of study in a law school or in the office of an attorney, plus a high school education or its equivalent. This standard continued to be the sole educational requirement until 1934, when two years of law school study or law office study were prescribed. On June 1, 1941, the pre-legal study requirements were increased to two years of college; and effective August 31, 1948, both the pre-legal and the legal educational requirements were increased, and credit for law office study was eliminated. The legal education requirement was increased to graduation from a law school accredited by the American Bar Association or one approved by the Tennessee Board of Law Examiners.

In March 1951, the Tennessee Supreme Court again revised bar admission standards by adopting the present rules. The prescribed period of pre-legal education was increased to three years of college study, and the period of law study was fixed at three academic years for the full-time ABA schools, and four years for the part-time evening law schools. The two full-time law schools presently operating in the State, Vanderbilt and U-T, meet the standards of the American Bar Association; the three evening law schools, the University of Memphis, the Southern Law University, and the Nashville Y.M.C.A. Law School, do not.

* Addresses, Midwinter 1962 Caribbean Cruise Meeting, Tennessee Bar Association.
1. TENN. CODE ANN. §29-103 (1956).

The most important question which I shall raise in this discussion is: Are we satisfied with the progress that has been made in increasing bar admission standards, and, if not, where do we go from here? We must, of course, avoid the example of the Boston spinster who, due to the necessity of living on a low income, had confined herself quite closely to her residence on Beacon Hill in Boston. Late in life she came into a substantial inheritance. Her friends were delighted and said: "Now you can travel." Her reply was, "Why should I travel when I am already here?"

As of the fall of 1961, there were 160 law schools in the United States. Of these, 134 were on the approved list of the American Bar Association and had a total enrollment of 41,499 or 92 per cent of the total law school enrollment. The 26 American law schools not on the ABA approved list had an enrollment of 3,513 students, or 8 per cent of the total law school enrollment. In contrast, as of the fall quarter of 1961, the three Tennessee law schools not on the ABA approved list had an enrollment of 333 students, or 47 per cent of the total enrollment of all law schools in Tennessee.

At the last convention of the Tennessee Bar Association, the Chairman of the Committee on Legal Education and Admissions to the Bar, Thomas Wardlaw Steele, summarized the Committee's Report and it was adopted without dissent. The principal change advocated by the Committee is a provision which requires, as a condition of approval of a law school by the Tennessee Board of Law Examiners, that the law school have three full-time teachers. This proposed provision is a needed and most important recommendation. All law schools approved by the American Bar Association are required to have at least that number of full-time teachers, and if a law school secures at least three full-time teachers it is a relatively safe prediction that within a few years it will comply with the other requirements for ABA approval.

This raises two question: (1) What are the advantages to the law school, to the students, and to the Bar Examiners, of American Bar Association approval? (2) What are the advantages and disadvantages of part-time teachers?

ABA approval is more than a badge of prestige. In 40 of the 50 American states, all law schools are ABA approved. Of the 10 American states with one or more law schools not so approved, only California, Georgia and Tennessee have as many as three unapproved schools. Credits earned in a school not so approved cannot be transferred to an ABA school. A graduate of an ABA school satisfies the legal requirements for taking the bar examination in any state in the Union. In 34 American states, if a school is not on the ABA approved list, its graduates cannot

take the bar examination.[2] Since the educational prerequisites for bar admissions in these 34 states are higher than those in Tennessee, a lawyer who is licensed to practice in any one of them may be admitted to the Tennessee Bar without taking the Tennessee Bar examination. There is, however, usually no reciprocal provision for admission without examination of a Tennessee lawyer, since the Tennessee Bar standards are not equivalent to those of the state in which the admission to practice is desired.

Each year approximately 10 per cent of the graduates of ABA schools are employed upon graduation by the United States Government and its numerous agencies. A degree from an ABA school and a law average in the top quartile of the class are the required qualifications for nearly all of the federal jobs with opportunities for legal experience and high starting salaries. The great majority of law firms employ as associates only graduates from ABA schools.

Constant evaluation and supervision are further advantages of ABA approval. All members of the Tennessee Bar owe a debt of gratitude to the members of the State Board of Law Examiners. They are doing a good job of preparing bar examination questions and grading papers, but they do not and cannot be expected to obtain information from each school relative to enrollment, records, faculty size and salaries, volumes in the library, and physical facilities. Nor do the Board members visit each school for the purpose of making an evaluation report on the quality of the educational program, the classroom performance of the faculty, and the morale of the students and the faculty. But the Section of Legal Education and Admissions to the Bar of the American Bar Association does perform those functions, and exercises that type of supervisory control over every school on its approved list. If unsatisfactory factors are found as a result of ABA visitations, the school is given every opportunity and ample time within which to correct the situation. If that is not done, the school loses its approved rating. It is an ABA policy to visit each ABA school every three years. Both the U.T. and the Vanderbilt law schools have had such visitations within the last two years.

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2. Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin. AM. BAR ASSN., SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES, FALL 1961 REVIEW OF LEGAL EDUCATION 27-32. In the great majority of the 34 states mentioned, the bar admission rules expressly require graduation from an ABA School. In the other states mentioned, the bar examiners construe the words "approved law schools" as used in the rules to mean approved by the American Bar Association.

The chief advantage of part-time teachers is economy. They are cheaper to obtain than full-time teachers. Then, too, some part-time faculty members are desirable in some courses, provided they are practicing specialists and are teaching their specialty. However, past experiences at nearly all of the best-known law schools have demonstrated that a sound educational program cannot be continued on a long-term basis, if the school has too high a concentration of part-time teachers.

A teacher's basic faculty duties should be his primary interest and responsibility. The main concern of a teacher who also has a law office is, or soon will become, his private practice. A law professor must not only keep his lectures up-to-date, but he must distinguish between the relative value to the student of the new knowledge as compared with the old. The average full-time teacher spends the major portion of his time preparing for classes by reading cases, treatises, and law review materials pertaining to his courses. He also spends four or five times as much time as a part-time teacher with individual students. There are only 24 hours in a day, and the time is lacking for a practitioner to compete on equal terms with a full-time teacher in a field that is not the practitioner's specialty.

One of the standards of the Association of American Law Schools requires a faculty of four full-time teachers in addition to a full-time dean. Both U-T and Vanderbilt are more than complying with this standard. Approximately 90 per cent of law instruction at both U-T and Vanderbilt is by full-time teachers. Most of the ABA schools, including U-T and Vanderbilt, will not permit a full-time teacher to be listed as a member of a law firm. Such a listing will militate against a teacher devoting the major portion of his time to preparation for classes, availability for consultation with students, and contacts with teaching colleagues.

Turning now to the history of ABA approved law schools in Tennessee, we find both the University of Tennessee College of Law and the Vanderbilt University Law School obtaining ABA approval in 1925, and Cumberland Law School, in 1949.

Cumberland University operated a law school in Lebanon, Tennessee, from 1844 to 1961. During the early part of that span of 117 years, this tradition-steeped law school was a leader in legal education. It is regrettable that during the last decade the number of Cumberland law students fell below a desirable minimum enrollment. Because of low enrollment and the high cost of operating a modern law school for a small student body, Cumberland was faced with the prospect of a withdrawal of full accreditation. In the Spring of 1961 Cumberland approached the University of Tennessee and suggested a consolidation of

the two law schools. This suggestion met with a favorable response, and considerable progress was made toward a mutually acceptable consolidation agreement. At one stage in the negotiations, the U-T Administration indicated a willingness to recommend acceptance by the Board of Trustees of all of the conditions Cumberland suggested, with the exception of Cumberland's suggested purchase price for the books in the law library, copies of all of which were already in the U-T Law Library. Cumberland then approached Vanderbilt and Memphis State University. Memphis State gave Cumberland a satisfactory response, in so far as the prospective purchase price for the books was concerned. At this stage in the negotiation, a meeting of a joint committee of the U-T Board of Trustees and the State Board of Education was called. This committee had previously been appointed for the purpose of making studies of the suggested needs in any field of higher education in Tennessee, and to recommend the specific college or university which is in the most advantageous position to supply those needs. This committee met and arranged for an impartial study of Legal Education in Tennessee by the Southern Regional Education Board, as a possible basis for a solution of the Cumberland problem. Unfortunately, the SREB study was never completed, for on the day the SREB delegates from out of state were to start visiting the institutions involved, Cumberland made known its decision to move to Howard College at Birmingham, Alabama. The U-T Administration never reached the point of making any recommendation on the question of a state-supported law school for the Memphis area, and the U-T Board of Trustees has never taken any action on that subject.

In some respects the move to Birmingham was advantageous to the Cumberland University Law School. The population of Tennessee is larger by 8 per cent than that of Alabama, and the population of Memphis is larger by 11 per cent than Birmingham, but prior to Cumberland's removal to Alabama, there was just one ABA law school along with two small unapproved law schools in that state. Then, too, Howard College committed itself to putting into the operation of the Cumberland Law School the financial assistance needed for a first-class school. A faculty salary schedule equal to or above the average salaries paid by fully accredited law schools in the Southeast was set up. The law library budget was more than doubled for the first year in the new location. Most of the members of the Cumberland law faculty went with the school to the new location, and their salaries were increased 25 per cent over last year.

It is your speaker's opinion that Tennessee has too many law schools, and there is a need for some measure of birth control over new Tennessee

law schools. In view of the fact that there is considerable sentiment for another state-supported law school, some of the basic facts upon which my opinion is based will be stated.

Tennessee has a total of 5 law schools. Of the 50 states, only 9 have that many.[3] As of the fall of 1960, there were 158 law schools in the United States with a student enrollment of 43,699. For the same school year, there were 81 medical schools with a student enrollment of 29,937. According to the statistics of the Department of Health, Education and Welfare, the enrollment in higher education has increased from 600,000 in 1920 to 3,500,000 today. This is an increased enrollment of over 500 per cent. Enrollment in law schools during the same period has increased from 25,000 to 43,000. This is an increased enrollment of only 172 per cent. In 1920, there were 42 law students for each 1,000 students in higher education, while in 1960 there were only 12 for each 1,000.

The Tennessee statistics corresponding to these nation-wide figures show a similar trend. The enrollment in Tennessee colleges and universities, including junior colleges, increased from 7,365 in 1920 to 63,200 in 1960. This is an increased enrollment of 858 per cent. The enrollment in Tennessee law schools during the same period increased from 424, with 4 law schools reporting, to 688, with 6 law schools reporting. This is an increased enrollment of only 162 per cent. In 1920, there were 59 law students for each 1,000 Tennessee students in higher education, while in 1960 there were 11 for each 1,000 students. Fewer law schools with larger enrollments should enable the tuition at each to cover a greater proportion of the expenses of legal education.

Almost every American state has one state-supported law school. But, if state-supported Negro law schools are excluded, there are only three states which have two state-supported law schools, namely, California, Indiana, and New Jersey, and there are none that have more. Compared with Tennessee's population of 3,567,089, California has a population of 15,717,204; Indiana has 4,662,498; and New Jersey has 6,066,782. If population trends are considered during the period 1950-1960, Tennessee had an 8.4 per cent increase in population, while California had a 48.5 per cent increase; New Jersey, a 25.5 per cent increase; and Indiana, an 18.5 per cent increase. The per student cost of modern legal education is relatively high and the student demand is relatively low. The total bar admissions in the United States in 1960 were 10,505, a decline from the previous year's 10,766, and, in relation to population, only 58 admittees for each million people in the country.

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3. California, Georgia, Illinois, Massachusetts, New York, Ohio, Pennsylvania, Tennessee and Texas.

Twelve years earlier, in 1949, there were 13,344 admittees, or 89 per million population.

Thus, population trends, student demands, and bar admissions do not warrant starting a new state-supported law school in Tennessee at this time.

There have been two American Bar Association reports on the law schools of Tennessee, one in 1938 and the other in 1949. These reports were published in the Tennessee Law Review.[4] Both reports discuss, as of their respective dates, each law school in Tennessee, and make findings of fact as to its history, financial structure, administration, physical equipment, library, curriculum, faculty, standards of teaching, and standards of scholarships. The appraisals, evaluations and findings of fact in both of these reports are favorable for both Vanderbilt and U-T, but the comments on the part-time law schools range from mildly adverse to out-right condemnation.

It would be worthwhile at this point to discuss the three existing part-time schools in Tennessee. The Nashville Y.M.C.A. Night Law School began operating in 1911, and was incorporated in 1927 as a non-profit educational institution. Apparently the only connections between this school and the Young Men's Christian Association are the rental from the Association for a very modest sum of four classrooms for two evenings a week, and the school uses the initials, Y.M.C.A., for business purposes. Also, the Y.M.C.A.'s Executive Secretary is a member of the school's Board of Trustees. The length of the course is four years, of 38 weeks each, with classes being held on Monday and Thursday nights from 7 to 10 p.m. The LL.B. degree is awarded on the basis of 912 hours of classroom work, including the examination periods. During the academic year 1960-61 this school conferred 18 LL.B. degrees. The tuition is $300 a school year. The enrollment in the fall of 1961 was 165, and the fall enrollment during the last 10 years averaged 84. The faculty includes some of the leading members of the Bench and Bar of the Nashville area. There are 16 part-time teachers and their average teaching experience is ten years. Ten of them are graduates of the Vanderbilt University School of Law. There are no full-time teachers. Graduates of the school include a criminal judge, a circuit judge, a United States Senator, and an Associate Justice of the Tennessee Supreme Court.

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4. Horack & Shafroth, *The Law Schools of Tennessee,* 15 TENN. L. REV. 311-395 (1938); Cheatham, *The Law Schools of Tennessee,* 21 TENN. L. REV. 283-304 (1950).

The Dean is J. G. Lackey, Jr. In a letter to your speaker, dated January 3, 1962, Dean Lackey, expressing his concern, stated:

> We do not feel that we are in competition with Vanderbilt Law School and the University of Tennessee Law School, and we certainly have no hostility toward either of the schools. I am a graduate of Vanderbilt Law School, and my son is presently a student at Vanderbilt. We feel that there are many worthy young men who desire to study law, but who cannot afford the expense of a full time law school or cannot attend day time classes. Our School offers these men an opportunity to study law, which otherwise they would not have. . . . Our library is small by comparison to the law libraries at Vanderbilt and the University of Tennessee, but we have the basic legal reference books. In addition, the students are entitled to use the very excellent State Supreme Court library which is only one block away. . . .

Dean Lackey then goes on to bestow merited praise on the calibre of his faculty and points out that his student body is drawn principally from among the full-time employees of governmental agencies and local insurance companies, banks, and the like. Dean Lackey also observes that he makes an effort to maintain high standards, and that the academic casualty rate among students during the first year is fairly high.

Dean Lackey's pride in his Law School and its faculty and students is reflected in the 1949 ABA Report which rated the Nashville Y.M.C.A. Law School as "probably the best part-time school in Tennessee," but the ABA Report goes on to list as grave weaknesses the following: an inadequate number of classroom hours, an antiquated curriculum, a poor library, ineffective teaching, and a high tuition rate for the amount and quality of work offered.

We will turn now to the Southern Law University which is located in Memphis and has been in continuous operation since 1932. Although it operates under its incorporated name of "Southern University," no school has been established except the law school. It owns and occupies a substantial air-conditioned building which was completed in 1951. The length of the course is four years. The school year is 38 weeks with "no more than six" classroom hours a week. Classes are held on Monday and Thursday nights, beginning at 6:30 p.m. and continuing for three hours. The LL.B. degree is awarded on the basis of work which is not in excess of 912 classroom hours, including examination periods. During the academic year 1960-61 this school conferred 25 LL.B. degrees. Tuition is $180 a school year. The faculty consists of six part-time teachers. Sam S. Margolin is the Dean. The textbook method of teaching is used in all courses. Enrollment in the fall of 1961 was 106; the average fall enrollment during the past ten years is 104.

The 1949 ABA Report stated: "The salaries paid the dean and the faculty are quite substantial. . . . The curriculum is old and out-moded. Some of the textbooks used . . . are completely inadequate."

Another night school, the University of Memphis Law School, was started in 1909. It was originally one of several affiliated schools, all of which have ceased to operate with the exception of the Law School. It was incorporated as a non-profit corporation but was denied that status by the Federal Government for tax purposes. The tuition charges are $200 a school year. The faculty consists of six part-time teachers. The enrollment for the fall of 1961 was 52; the average fall enrollment for the past 10 years is 51. During the academic year 1960-61 this school conferred 10 LL.B. degrees. The 1949 ABA Report on the school is in part as follows:

> The classes meet in cramped rooms in an office building. The library is about non-existent, consisting for the most part of collected case series around the walls of the room. . . . The students attend classes two evenings a week for three hours an evening, carrying two subjects at a time. The curriculum is an ancient one.

The most helpful way of improving the Tennessee Bar during the second half of the Twentieth Century is through modernization of legal education. One of America's leading educators, Elliott E. Cheatham, prepared the 1949 ABA Report on the Law Schools of Tennessee. In that report Dr. Cheatham said: "The part-time schools in the state give grave concern to everyone interested in the quality of the Bar of Tennessee and the welfare of the state. Though differing among themselves in tone and quality, they are all inadequate to the responsibilities they have assumed to prepare men for the bar."

The current bulletins of Tennessee's part-time schools indicate a stand-pat attitude which shows little improvement in their educational programs since the publication of the 1949 ABA Report. All three schools are still using the textbook method of instruction, and are operating entirely with part-time teachers and inadequate libraries. They are probably the only Tennessee schools of any type that do not have a single full-time teacher. A library is to a law student what a laboratory is to a student of chemistry. There is no possibility of a law school giving classroom instruction on every problem which a lawyer will have in practice. A properly trained lawyer is one who knows how to find in a law library the answers to his clients' problems.

Several generations ago the textbook method of instruction was the principal method used in the law schools of America, but that method was abandoned several decades ago and the casebook method was substituted by all state university law schools and by all other law schools

with a favorable nation-wide reputation. Typical questions put to students in a modern law school are: What were the basic facts of the case? What was the plaintiff's contention? What was the defendant's contention? What was the court's decision? Is the decision equitable? What are likely to be some of the consequences, if this case is followed as a precedent? How would you have presented the case, if the losing party had been your client? Textbooks are not suitable bases for classroom discussions of typical "what-should-the-court-hold" problems or the more exciting "what-should-the-lawyer-do" problems. According to the current bulletins of the Tennessee night law schools, textbooks are the exclusive method of instruction in the two Memphis schools and are used in 24 of the 29 courses offered by the Nashville Y.M.C.A. Law School.

The principal objection to the textbook method of instruction is that it tends to induce students to think of the law as a fixed body of dogma which can be learned in a parrot-like fashion. Textbooks further tend to develop in students a status-quo outlook which is wholly at variance with the progressive attitude that law must develop and change with the times.

Industry, legal aptitude, and character of a student are often more important than the standing and reputation of the school attended. To assume, however, that students in night law schools have desirable qualities that students in day law schools do not have is a completely unfounded assumption. The basic question is whether it is important to require that even a student of good reputation, who is sufficiently motivated and generously endowed in both mind and body, shall also have a first class legal education in order that he can better serve his clients and his profession.

Another erroneous assumption that is often made is that all students in night law school are self-supporting and all students in a day law school are supported by their parents. There are students of each kind in both types of schools. In the Fall Quarter of 1961, 46 per cent of the students in the U-T College of Law were working on part-time jobs to help defray their expenses. The U-T job-holding student usually takes a longer period of time to graduate, as he is seldom permitted to carry a full class load. Whether it is necessary for a student to work full-time or not, the fact that there is a night law school in his own city tends to induce him to get a full-time job and go to the night school. For the night law student the study of law is a part-time occupation; for the day law student, wage-earning is a part-time occupation. Thus one of the principal reasons for a day law school's reluctance to start a night division is the belief that it will inevitably result in a lowering

of the educational program by too many students transferring to the night division. This is not in the best interest of either the public or the legal profession.

Only forty-six of the 132 ABA law schools conduct night-school programs. Thirty-nine run both a full-time day and a part-time night school. Instructors who teach the same subject in both the morning and the night divisions state positively that the examination papers of night students are not as good as those of day students, notwithstanding the fact that night students are often more experienced and more determined to obtain a legal education.

Professional night schools operate under such a severe handicap that the medical profession eliminated all night medical schools about 50 years ago. Night schools do, however, have a place in legal education, provided they have adequate educational programs and good standards of scholarship. Generally speaking, the ABA night law schools are that type, and probably some of these night law schools are as good as some of the day schools. Obviously the only circumstances under which this can be true is where the teachers are of the same caliber and are as fully devoted to teaching as the full-time school teachers, and the students are held to exactly the same high standards as the full-time students. This can be done only with full-time teachers, with the part-time student's load reduced proportionately.

Tennessee has two ABA approved law schools, Vanderbilt and U-T, with a combined enrollment, as of the Fall of 1961, of 383 students.[5]

5. TEN-YEAR ENROLLMENT FOR TENNESSEE LAW SCHOOLS (1952-1961)

	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961
University of Tennessee	128	124	126	141	162	159	137	127	135	175
Vanderbilt University	128	120	141	131	152	160	190	174	180	208
Cumberland* University	83	65	40	52	69	49	49	64	67	(63)
Sub-totals	339	309	307	324	383	368	376	365	382	383
University of Memphis	—	—	—	62	56	49	46	48	41	52
McKenzie** Law School (Chatt.)	—	—	42	40	48	—	—	—		**
Southern Law University (Memphis)	—	—	132	89	—	92	89	103	104	116
Y.M.C.A. Law School (Nash.)	41	37	38	51	50	63	107	127	161	165
Sub-totals	41	37	212	242	154	204	242	278	306	333
Grand Totals	380	346	519	566	537	572	618	643	688	716

A blank for a particular year is an indication that the specific school failed to comply with the American Bar Association's request to furnish enrollment figures.

* Moved to Howard College, Birmingham, Alabama, August 1961.

** No longer in existence.

There are three law schools not so approved, the Nashville Y.M.C.A. Law School, the University of Memphis Law School, and the Southern University Law School, with a combined enrollment of 333. In other words, 44 per cent of the total number of students studying law in Tennessee are getting the kind of training which the leaders in the teaching profession and the great mass of the bar regard as inadequate, if we can take the ABA standards as representative of the sentiment of most lawyers in the country. Tennessee is at, or near, the bottom of the list of states, when judged from the standpoint of the percentage of law students in ABA schools. In the nation as a whole, 92 per cent of the law students are enrolled in ABA schools.

During the past two decades the Law School Admission Test has proved itself to be a reliable predictor of the students who will graduate in the top 15 per cent of their law school class. This test is now being given four times a year in Knoxville and Nashville, and twice a year in Memphis and Sewanee. Almost any student who is eligible to enter a Tennessee night law school and who makes a LSAT score which puts him in the top 10 per cent of those taking this test, can get a scholarship at an ABA approved law school.

The future of the legal profession rests in a very substantial part on the caliber of the students the law schools can attract. It is my opinion that the most reliable way for Tennessee lawyers to improve the Tennessee Bar is to donate scholarships to ABA schools, so that the gifted but financially needy student can attend a first-class law school. The Ladies' Auxiliary of the Knoxville Bar is now providing an annual law scholarship. At the last meeting of the Knoxville Bar Association a resolution was unanimously adopted to solicit every member for law scholarship funds, and a committee was set up for that purpose. I hope that other bar associations will adopt similar plans, with each contributor naming the school to receive his contribution. Lawyers are just as philanthropic and generous as physicians and dentists, but those two groups are currently doing more for their professional schools than lawyers are doing for law schools.

Men like Lincoln, who studied law at night but who had a very high intelligence quotient, will rise above the educational standards of the times and will be a professional success in any age. It should be remembered, however, that conditions change with the times, and as conditions change, educational standards must change. Securing a legal education is a much more formidable undertaking than it once was. What lawyers did a hundred years ago, what they do today, and what they ought to do in the 1970's and the 1980's present very different

problems and require different educational backgrounds. Lincoln, for example, never led a client through a corporate re-organization under Chapters 10 or 11 of the Bankruptcy Act, or through the delicate processes of a labor board election, a labor bargaining session, or a grievance and arbitration meeting. He was never opposed in a personal injury action by a NACCA attorney, or by an insurance lawyer better versed in the medical problems of the particular case than any physican of a generation ago. He never had to calculate the maximum marital deduction for an estate tax saving, nor was he ever faced with the necessity for an understanding of the limitations on the various methods of amortization of depreciation for income tax purposes. Lincoln achieved eminence in spite of a meager formal training, not because of it.

The man who is mentally gifted may succeed in spite of a substandard formal education. But rules must be made for the average man. A worthy student may occasionally be prevented, by appropriate educational standards, from becoming a member of the bar, but that is not our main concern. The Supreme Judicial Court of Massachusetts was on sound grounds when it stated: "The right of any person to engage in the practice of law is slight in comparison with the needs of protecting the public against the incompetent."[5a]

In concluding this portion of the discussion on the opportunities for a sound legal education in Tennessee, it would be well to note that the U-T Law College building has a capacity of 350 students and the new Vanderbilt Law School, a capacity of 450. Since both schools are presently operating at about half of their maximum enrollment capacity, it is my opinion that these two law schools are ready and able to take care of all adequately prepared Tennessee law students who will apply for daytime instruction during the foreseeable future.

We turn now to a discussion of the two leading law schools in Tennessee. My genial and able collaborator, Dean John Wade, is here for the specific purpose of giving you the Vanderbilt version of "Legal Education in Tennessee." I have no intention of trespassing on his province and shall devote the remaining time allotted to me to the school I know most about – the U-T College of Law.

The University of Tennessee College of Law is fully accredited by all agencies prescribing standards of legal education. A student may enter the Law College during fall, winter, spring, or summer quarters with full opportunity to pursue a complete program of law study. The tuition for citizens of Tennessee is $225; for non-residents the tuition is $525. A full-time student carries a class load of 12 to 15 hours a week. The LL.B. degree is awarded on the basis of 120 quarter hours –

5a. Bergeron, Petitioner, 220 Mass. 472, 477, 107 N.E. 1007 (1915).

that is nine quarters of study – a period of a little more than two years. This comprises approximately 1300 hours of classroom instruction. During the academic year 1960-61 the U-T College of Law conferred 39 LL.B. degrees. During the same year, 46 of the ABA schools throughout the nation graduated fewer law students than did the University of Tennessee. Every student who graduates with a University of Tennessee LL.B. degree complies with the legal education requirements for taking the bar in any state in the Union. Since 1900, when U-T became a charter member of the Association of American Law Schools, it has complied with all of the standards of that organization, the highest of any law accrediting agency. It has been on the ABA approved list of law schools since 1925. The requirements of these accrediting agencies are regarded by the U-T faculty as minimum standards, which should not only be met, but exceeded.

The general comment in the ABA's 1938 Report on the U-T College of Law follows:

> The school's record in the bar examination over the past five years shows it to have had better success than any of the other schools in the state . . . . With very difficult competition from many law schools of low standards, the University of Tennessee Law School has maintained a school of high grade, and is doing a good job of legal education in a field where it is much needed. With high admission requirements strictly enforced, good standards of scholarship, competent teaching personnel, and an excellent library, the school ranks well among the better law schools of the South.[6]

Some comments in the ABA 1949 Report on the U-T law school follow:

> In the past few years the College of Law has had a notable development under long-range planning and effective administration . . . . The curriculum has been re-organized so as to give greater depth to the legal education of students, and also to make them ready on graduation to deal with practical problems of the profession . . . . The faculty, chosen with an eye to broad and varied educational backgrounds, consists of nine full-time members and four part-time members . . . . The library is efficiently run by a librarian who has unusual training and experience in law and library work.[7]

The following commendation appears in the 1959 ABA accrediting appraisal report on the U-T College of Law:

> The school is housed in a new, completely adequate building of its own . . . . The classroom performance in all classes visited

6. Horack & Shafroth, *The Law Schools of Tennessee,* 15 TENN. L. REV. 311, 354 (1938).
7. Cheatham, *The Law Schools of Tennessee,* 21 TENN. L. REV. 283, 288-290 (1950).

> was good . . . . All the instructors indicated ability to arouse student discussion of the cases or legal problems presented . . . . The morale of the faculty is good . . . . The faculty is reasonably productive. All have ability for scholarly research and writings . . . . The school has a sound educational program . . . . The examination questions in general are the comprehensive essay type . . . . The Legal Aid Clinic and the accompanying Legal Clinic courses are perhaps the most distinctive feature of the school . . . . Appellate Moot Court is required of all students. The school participates in the national competition. Last year the Tennessee team won first prize for the best brief in the regional competition, and made a favorable showing in New York.[8]

Another honor bestowed upon the College of Law was the installation in 1951 of the Chapter of the Order of the Coif, a national honor society. Coif chapters are granted only for high scholastic attainment, and only about one-third of the law schools have been able to attain this coveted award.

The U-T law faculty is composed of teachers with a variety of educational backgrounds and experience in trial and appellate practice. And every one of the part-time teachers is a practicing specialist in his teaching field. The full-time teacher, on the average, possesses three degrees. Two have four degrees, three have three degrees, and two possess two degrees. The A.B. or equivalent degrees were earned at such universities as Columbia, Duke, U-T, Indiana, Harvard, and Chicago. One professor has a Master's degree from Columbia in Political Science. Three of the seven possess graduate degrees in law from Michigan and Harvard. LL.B. degrees were earned at Duke, Columbia, Indiana, Harvard, Chicago, U-T, and Yale. Five of the full-time teachers have taught at other law schools, including the Universities of Alabama, Indiana, Toledo, Wake Forest, Duke, Temple, Northeastern, Arkansas, Mercer, Oregon, and South Carolina.

The U-T law faculty is committed to the belief that the educational opportunities for every law student should be as good as the faculty can make them and that these opportunities do in fact compare favorably with those the same student would have had in other good law schools. To that end every member of the U-T staff is willing to discuss both in the classroom and in his office any problem relating to law school life that a student wants to discuss.

Over a period of years, successive law faculties worked to secure suitable quarters for the College of Law. Their efforts culminated in the building which in 1950 became the home of the College of Law. It was

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8. Unpublished Evaluation Report of Dean A. E. Papale of Loyola University of New Orleans, February 8-11, 1959.

planned with a view to utilization of new techniques of legal education, growth of student body, expansion of library materials, and increased opportunities for service to the State.

We have occupied this building for eleven years, and that is long enough to start acting modest about it. However, the more we use it the better we like it. Several committees from other universities which were planning new law buildings have told us that we got a better building for the money than any other university visited. Our building cost approximately $800,000, but the reproduction cost today would exceed that amount by 50%.

U-T's law building was planned during the high tide of enrollment which followed the end of World War II. It has a maximum capacity of 350 students. For the Fall Quarter of 1961, we had an enrollment of 175 students. Since the Fall of 1950, 770 first year law students have been enrolled in the U-T College of Law. Of that number, 310, or 40%, had a bachelor's degree before entering. A great majority of the remaining 60% received their undergraduate academic degrees prior to earning the LL.B. degree, under the three-three arrangement which the College of Law has with twenty Tennessee colleges. Under that arrangement, a student may earn both an academic degree and a professional degree within six years after high school graduation by taking three years of pre-law college work and three years of law work. Of the 770 first year students enrolled from 1950 to 1961, a total of 518, or 62%, completed their law studies and received the LL.B. degree. Of the students registered in the U-T College of Law for the Fall Quarter of 1961, 62% were married and 38% were single.

The U-T Law Library, like 95% of the rest of the law building, is air conditioned. It has a seating capacity of 150, and a stack capacity of 90,000 volumes, with 60,000 well selected and adequately cataloged law volumes on the shelves. The annual cost of new books is in excess of $15,000.

U-T's educational program is designed to train students in the art of relevancy, or the ability to ascertain what factors are significant in handling a legal problem and formulating a sound judgment about it. The means by which we seek to accomplish this objective will be discussed in its three phases:

(1) The obvious purpose of the College of Law is to impart information concerning legal rules, principles and standards. While the ever-increasing growth of the law makes it necessary to emphasize basic matters only, an effort is made to cover the more significant features of the major divisions of both substantive and procedural law. Some attention is given to historical developments and probable fu-

ture trends, as well as current applications. Since most of U-T's graduates will practice law in Tennessee, considerable emphasis is laid on Tennessee law. The faculty considers, however, that a study of law based on a comparison of precedents from many jurisdictions better qualifies a lawyer than does a program narrowly limited to the rules, principles, and standards of one jurisdiction. As a result, training in the Law College is adequate to prepare graduates for practice in any common law jurisdiction.

(2) The second objective is to develop powers of legal analysis and reasoning. All faculty members employ the case method of instruction. It is believed that discussions of actual cases often provide a law student with the most significant intellectual experience of his life. With some guidance from the instructor, students gradually learn to ascertain the significant facts in a legal dispute, to recognize the basic issues, and to infer the most appropriate rule of law in the face of arguments advanced by the instructor or elicited from members of the class in favor of some competing rule. The day-to-day classroom work involved in this effort to determine the fairest rules in given situations, in addition to developing a student's power of legal reasoning, does much to instill in him a sense of professional integrity and responsibility.

(3) While the greater part of a lawyer's skills in oral argument, legal writing, and counselling can be developed only in practice, the Law College recognizes the need of providing some training in these arts. The Legal Clinic provides a substantial amount of experience in the counselling of actual clients and the handling of live cases from the initial conference to the conclusion of any necessary litigation. Another means of developing skill in trial techniques and oral arguments is U-T's Moot Court Program. Also, an intensive course in Legal Research, or Legal Bibliography as it is called, is required of all students. For a selected group of students, training in research and writing is also provided by the Law Review.

The Law College curriculum is designed primarily to serve the basic needs of graduates who will practice law in Tennessee. For example, it has more course offerings in practice and procedure than the vast majority of other ABA schools. This is justified by the fact that Tennessee is in that small group of three or four states which have different sets of procedures for chancery courts, law courts, and federal courts. In general, however, the U-T curriculum is typical of state universities of a size comparable to our University.

U-T's Moot Court programs include both trial and appellate training. Although no academic credit is given, participation is required for graduation. Trial Moot Court is conducted by a judge of the Knox

County Circuit Court, who presides at the trial and criticizes the performance of students. The cases used are based upon the facts of actual cases tried in the Knox County courts.

All first year students participate in an appellate court program in which they do research, write briefs, and present oral arguments. Thereafter they may enter the appellate competition to argue on Law Day before judges of the Court of Appeals of Tennessee and the Tennessee Supreme Court. The highest prize of all is to be selected to represent the College of Law in the National Moot Court Competition, limited to ABA approved schools, and sponsored by the Association of the Bar of the City of New York. Winners and runners-up in the regional rounds advance to the final rounds in New York City. The regional rounds for this area are held in Atlanta, where ten student teams from the leading law schools of four states compete. In 1958 the U-T team was the regional runner-up, thereby earning entrance into the final rounds in New York. In November 1961, the U-T team was the regional winner. In addition, a member of the Tennessee team won a special award given by the American College of Trial Lawyers for the best individual argument. The briefs submitted in the national competition are judged separately from the oral argument. In 1958 the U-T brief was judged the best in the region, and in 1961 U-T's brief was rated third highest.

In the New York competition held on December 19, 20, and 21, 1961, the U-T team drew a bye in the first round. In the second round the U-T team opposed Notre Dame, which had won in the first round, and defeated Notre Dame, although the U-T team had to change sides and argue the respondent's side, which the U-T team had neither briefed nor argued in the regional competition in Atlanta. In the New York quarter-final round, the U-T team defeated Colorado, again arguing the respondent's side. In the semi-final round, Tennessee, again arguing the respondent's side, lost to Nebraska. In the final round Nebraska won the national award for the best oral argument, but New York University won the over-all competition on the strength of the combined oral argument and brief score. 129 ABA law schools participated in the 1961 National Moot Court competition. After the U-T team lost, there were only two of these teams left undefeated and those two were the finalists.

The U-T law building is the first law school building in America that has, from the planning stage, included in its design quarters for the operation of a legal clinic. Since the U-T Legal Clinic opened in 1947, more than 900 law students have participated in its program and have given legal services in 5,393 cases. The relationship between the Knoxville Bar and the Clinic has been harmonious and cooperative.

We are glad to assist in the Knoxville Bar Association's legal aid program.

The Clinic provides third year students with the kind of practical experience not obtainable in orthodox law school courses. It also performs an important community service by helping to provide, in an organized and efficient manner, legal assistance for clients who need but are not able financially to employ a lawyer. The preparation and office processing of cases from the first interview to the closing, furnishes an opportunity to teach office routines and interviewing skills. Much of the benefit that a student derives from the Clinic program comes from the day-by-day handling of cases and the contacts he has with his Clinic instructors. The supervisory relationship between the Clinic Director and the student is not that of instructor-student, but that of senior and junior partner of a law firm. Much of the work in preparing a student to meet his first client is done in the classroom. Checklists and actual interviews are discussed in the classroom to illustrate interviewing techniques.

Every Clinic student is also required to prepare a trial or an appellate brief for an attorney of his choice. The purpose of this requirement is twofold: first, to give the student writing experience on an actual problem presented by a pending case and, second, to give the student a contact with an attorney in his own community. This service has been received enthusiastically by lawyers in all parts of Tennessee for whom briefs have been prepared.

Several months ago the U-T College of Law received a grant of $23,500 from the National Council on Legal Clinics for the supplementation of the present Legal Clinic course, designated Clinic I, which centers predominately on the civil law fields. Emphasis is on interviewing, fact finding, fact evaluation, and professional responsibility. The objectives of the grant will be carried out in Clinic II by means of student experiences with indigent defendants in criminal cases. A trial attorney and additional secretarial help will be added to the Clinic staff. A permanent committee of the Knoxville Bar Association has assured its cooperation, as have the judges of the courts of Knox County.

Another feature of legal education at U-T is the *Tennessee Law Review* which is published quarterly by the faculty and the students of the College of Law. It is one of the better established journals among the seventy or more university law reviews, having been in continuous publication for nearly half a century. Except for the fall issue, which contains the proceedings of the annual convention of the Tennessee Bar Association, this publication follows the usual law review format. The

Review is financed by subscriptions and by subsidization from the Law College. With reference to subscriptions, there is an agreement between the Tennessee Bar Association and the Law Review which provides that the Review shall be sent to every member of the Bar Association and to all the judges in the state at a rate of $2.00 a year, payable by the Bar Association. The price to other subscribers is $5.00 a year.

Prior to 1936 the convention proceedings were published by the Bar Association as a once-a-year publication. In 1936, at the request of the Bar Association, the Law Review agreed to edit and publish the proceedings as its fall issue, and that arrangement has continued since that time. Every year since 1931, four issues of the Review have been mailed to every member of the Bar Association, and the Review has consistently advised prospective subscribers that the most economical method of obtaining the Review is to become a member of the Tennessee Bar Association. The fact that every member of the Association receives four issues of the Review each year has been an important factor in building up the membership of the Bar Association from a floating membership of four or five hundred to the present membership of upward of 2,000. For example, in 1934 the Tennessee Bar Association had only 451 members and the yearly dues were $4.00, making the total dues collected for the entire year $1,804.[9]

If some of the comments that Bar Association members have made are typical of the attitude of the membership generally, the Law Review does a good deal to provide answers to questions which members and prospective members sometimes ask: What does the Bar Association do? Should I join it? What is there in it for me?

Another aid to the bar and to our students seeking opportunities with law firms upon graduation is our Placement Coordinating Service which operates under the direct supervision of a faculty member. Graduating seniors and alumni are informed of opportunities, and interviews are arranged. Part-time employment is also secured for students. Our Placement Service Coordinator welcomes inquiries from law firms, corporations, banks, government agencies, and other organizations interested in law school graduates.

In concluding, I shall not attempt to summarize this long paper, other than to say that the Tennessee Bar Admission Standards are today much better than they were thirty years ago. Judged, however, by what a majority of the other states have done, we still have a long distance to go in the direction of raising bar admission requirements. It is my opinion

9. TENN. BAR ASSN., PROCEEDINGS OF 53rd ANNUAL SESSION 196 (1935).

that the next logical step is to require graduation from a law school with at least three full-time teachers as a prerequisite for taking the Tennessee Bar Examinations.

Before closing I want to call your attention to a quotation which I wholeheartedly indorse. This quotation is taken from a 1961 Report of an ABA Special Committee to Study Current Needs in the Field of Legal Education, and reads as follows:

> The best long-range method of insuring the availability of qualified lawyers in sufficient numbers to meet future needs is to improve the law schools. Schools that resist necessary improvements should be eliminated, for there is no place for substandard schools if our profession is to hold its rightful place in public esteem. Better law schools will draw better students, who will in turn improve the law schools and the profession.[10]

I will now turn the discussion over to Dean Wade who will discuss legal education at Vanderbilt Law School. Dean Wade will also present some observations concerning post-admission legal education.

DEAN JOHN W. WADE: It is a very real pleasure to be with you on this cruise and to take part in the mid-winter meeting of the Tennessee Bar Association under mid-summer conditions. I appreciated the introduction. It was certainly better than the last one I received. This was at an alumni meeting. The presiding officer explained that he had written to the Chancellor asking for someone to speak to the group and stating that they wanted someone not lower than a dean. According to him, the response came back, "There is no one lower than a dean." He added that he had gotten confused in the beginning and had started to say, "There's nothing worse than listening to a dean." Today you may be able to testify that there is something worse. That something is listening to two deans in succession.

I want to start by affirming my agreement with Dean Wicker's comments about accreditation requirements. Tennessee is now one of the few states in the Union which do not meet American Bar Association standards regarding approval of the law schools. These standards were established by able, qualified men who studied the matter carefully and who were acquainted with the needs of law schools and with the appropriate requirements for the purpose of practice in the law. The rules, particularly the one requiring at least three full-time teachers, have been in effect since 1921. It is now more than 40 years since that time and Tennessee should surely be ready to come into compliance in that period.

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10. AM. BAR ASSN., REPORT OF SPECIAL COMMITTEE TO STUDY CURRENT NEEDS IN THE FIELD OF LEGAL EDUCATION 7 (1961).

One other remark in this regard. The Association of American Law Schools has certain standards which are higher than those of the American Bar Association. At the last meeting of this Association last month, there was presented an amendment to require that at least half of all teaching be done by full-time teachers, in both day and evening divisions. The evening-division law schools met and conferred among themselves and presented a request that the proportion of required full-time teaching be increased. Their experience was such as to indicate that it is necessary that a large proportion of the teaching be by full-time teachers in order to insure that it is properly performed.

I.

Dean Wicker has talked about the several law schools in the state with the exception of Vanderbilt University, and I should like to say a few words about the Vanderbilt Law School before proceeding further. The Vanderbilt Law School is fully approved, fully accredited by all of the accrediting associations. It has been the subject of periodic investigations and the reports have uniformly been favorable.[11]

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11. Short quotations may be made from the three most recent inspection reports:

1938 Report. "The strictness with which admission and graduation requirements are enforced, its high scholarship standards, its competent faculty, and its well equipped library are proof that its excellent reputation through the South is well deserved. Among its graduates are many influential men in Tennessee and the South. Today approximately half its students are from outside the state. While the school is badly in need of a new building, its present quarters are much superior to those of any other in the state except the University of Tennessee." *The Law Schools of Tennessee: Report of the Survey Committee*, 15 TENN. L. REV. 311, at 394-95 (1938).

1949 Report. "The faculty now comprises seven full-time members and two part-time members. It is made up of men of varied background and unusually wide experience in practice, in government service, and in teaching. The members are strongly encouraged to widen still further their activities by graduate study, research and writing, experience in private practice and government service, and participation in the work of the organized bar and in post-admission education programs. The maximum teaching load of six or seven hours makes it possible for them to engage in these activities, and at the same time to keep their teaching fresh and vigorous. To an usual degree the faculty members have contributed to the law through research, but they continue to give their first attention to teaching . . . .

"In short, the Vanderbilt University School of Law is excellent in spirit and accomplishment and is preparing to improve still further its curriculum and methods." Cheatham, *The Law Schools of Tennessee, 1949*, 21 TENN. L. REV. 283, at 290, 292 (1950).

1960 Report. "One element of greatest strength in the subject school is its faculty. It is composed of twelve full-time members plus seven part-time lecturers. The diversity of background of the full-time faculty is shown by the fact that, in law and graduate degrees, twelve different institutions are represented. Ten have had teaching experience in other law schools, and seven have had substantial experience in practice. The school is fortunate in having on its faculty two distinguished legal scholars and great teachers who came to Vanderbilt after they had reached the age of retirement at Harvard and Columbia . . . .

The aspect of our School toward which we usually point first with pride is our faculty. We now have twelve full-time members and five part-time members. They are all good teachers; they like to teach. A majority of them have engaged in the active practice of the law. They are scholars, constantly engaged in important research and writing. They have published a number of legal treatises and an unusually large number of law review articles. In four of the law school courses, casebooks prepared by the instructor are used. Two members of the faculty have been presidents of the Association of American Law Schools. Only two other schools in the country can make that statement: one is on the Atlantic Seaboard and the other on the Pacific Seaboard. One of the members of the faculty is the editor of a leading casebook series in the country. Two years ago we had the editor of the other leading one, and thus had almost a monoply on casebook publishing. We have outstanding authorities in the fields of Evidence, Procedure, Conflict of Laws, Profession of Law and other courses. We have specialists in the fields of Taxation, Trade Regulation, Labor Law and other subjects. Our faculty members participate in an active fashion in professional organizations. In the American Bar Association, they have served in the secretariat, in offices in the sections, and on numerous committees. In the Tennessee Bar Association, they attend with regularity and have served regularly on committees. In the American Law Institute, one of the members of the faculty is a member of the Council. One of the members of our faculty is on the Commission on Uniform State Laws. One is on the Tennessee Judicial Council. There is, we think, an excellent balance in the faculty – a proper percentage of older men who are widely experienced and recognized authorities over the country as a whole, a proper percentage of men now in the prime of their lives and very active in their fields of interest, and a proper percentage of younger men in the early part of their teaching career and with vigor and energy and enthusiasm. We also have a proper percentage of part-time instructors to teach specialized courses; and we have been very

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"The spirit of the faculty members is excellent. They seem to be devoted to the school. They enjoy great autonomy and meet regularly . . . .

"The school publishes two periodicals. The Vanderbilt Law Review, largely because of its excellent and comprehensive symposia issues, has achieved an enviable reputation among legal periodicals. The Race Relations Reporter, subsidized by a foundation grant, is performing a unique function in the dissemination of information on this important subject . . . .

"*Summary*: Since World War II, under the capable leadership of three deans, the Vanderbilt University School of Law had made steady progress. In its present quarters it is handicapped. When it gets its new building, there is reason to believe it can achieve its ambition of becoming the outstanding law school of a relatively large region." Unpublished Report of Milton D. Green of New York University, April 24-25, 1961.

fortunate in the men who have done this work for us in that they have uniformly taken a considerable amount of time to prepare properly and thoroughly the courses which they present.

We are getting ready to point with pride toward our new building. Every report on the Law School in the past has indicated that our quarters were quite inadequate and declared that something needed to be done about this. We had, however, felt that the faculty was more important and placed our emphasis upon it until it was possible to maintain and expand the faculty and still to obtain the law building. The contract for our new building was let last March and it calls for completion of the building by next July. I am told by the contractors, however, that they expect to beat the contract date and to let us into the new building before the current semester ends. I have been hoping that it will be possible for the Tennessee Bar Association when it meets in Nashville in early June to have a meeting in the auditorium of the new law building. Our building will cost about $1,500,000. Not all of it has now been paid for, and we are still seeking to raise funds, but I am not trying to approach you for this purpose. The building will cover about 80,000 square feet and will be composed of three wings. The auditorium will be a separate wing by itself and will seat approximately 450. Most of the seats will have writing space, so that it will be possible for the audience to take notes. The auditorium will be of inestimable benefit to us in connection with institutes and other public meetings. The other two wings are joined. One of them contains the library — the reading room and mezzanine above for stacks, and two floors of stacks below the main room. It also contains two large classrooms, each seating 150. The third wing is U-shaped, joined onto the second wing so as to create an open court in the middle. This wing will contain two classrooms, a court room, a student lounge, and a unique room on the first floor. This is sometimes called the "Old Lawyer's Room" and sometimes the "Whittling Room." It will be furnished according to a model of a lawyer's office some 50 or 60 years ago. Messrs. Lewis Pope, Babe Murrah and Cecil Sims, and Chief Justice Prewitt are working on this project and we anticipate that it will be one of the favorite places for the alumni and other members of the Bar to visit. On the floor above in this wing are to be found the faculty offices, the administrative offices, and the offices of the *Reporter* and the *Law Review*. All of them will have immediate access to the library. The outer walls are of hand-molded brick, and the inner court is faced with white limestone. The building as a whole is to be air-conditioned. It has a nice architectural style which will be sufficiently traditional to give an impressive appearance, but sufficiently functional to make sure that

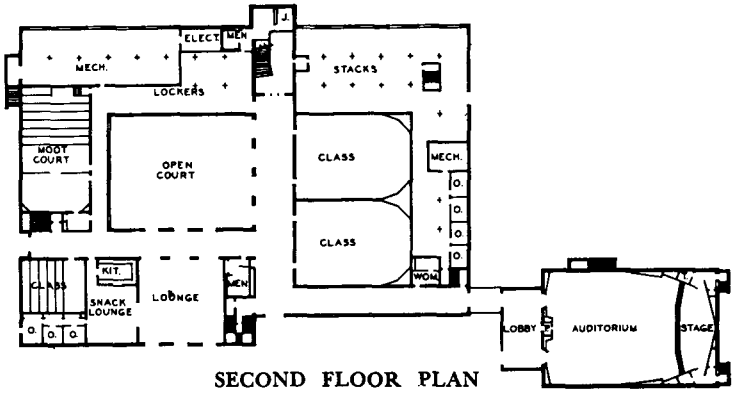
it is quite useable. It is located at the corner of Twenty-first Avenue and Broad.[12] Our dedication will take place sometime in the next school year, and we hope all of you can visit us on that pleasant occasion.

A third element of a law school is its library. Our library now has about 60,000 volumes and we expect to add considerably to this once we get into the new building and have room for the books. There are many volumes there which are not otherwise available to lawyers. I do not want to say more about it now, except to extend all of you a cordial invitation to come in to use it. It is available to all the lawyers of the region, and we are very pleased to have you make use of it.

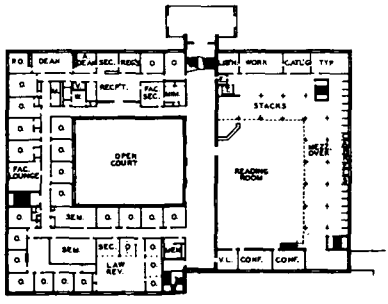
A word about our alumni. We now have about 2,200 active alumni on our mailing list. Some of them are with us on this trip and it is good to be with you again. There are numerous important and prominent men in our alumni, but it would take too long even to start listing names. Several years ago, a study of the Martindale-Hubbell Law

12. The floor plans of the building may be more meaningful to you than any description.

FIRST FLOOR PLAN



SECOND FLOOR PLAN



Directory disclosed that the percentage of the graduates of the Vanderbilt Law School who had obtained an "av" rating was the highest for any law school in the South.

Our student body this fall was composed of 208 students. The first-year class this year was larger than we have had for several years, being somewhat over a hundred, and we anticipate allowing the total enrollment to become larger in the new building. We can take care of 400 or more in the new building, but do not now plan to increase the size of the student body this far. The expected size, at least for the near future, is perhaps 250 or maybe 300. In our present first-year class, about half of the students are from Tennessee, but there are 24 states represented and the students attended 94 different schools. Our graduating class this year contains about 40. Most of you have seen our placement brochure, which contains pictures of the graduating seniors, together with data concerning them. For a number of years now we have had many more requests for men than we have had prospects to offer. We have consistently set high standards for admission to enrollment and expect to raise these standards even higher as the years go by.

I should say something now about our curriculum. In the days when most of us went to law school, the curriculum was comparatively simple. It is now quite complex. For example, we are now offering four courses in taxation, covering 14 semester hours. There are four hours of Income Taxation I, three hours of Income Taxation II (corporations and partnership), four hours of Estate Taxation and Planning and three hours of State and Local Taxation. We offer three separate courses in Labor Law, two separate courses in Trade Regulation, courses in Administrative Law, Jurisprudence and other fields in which there were no courses earlier. We offer seminars on such subjects as Constitutional Law Problems, Regional Economic Development, Selected Legal Problems, advanced problems in Procedure and in Criminal Law. Of course, we continue to offer the standard basic courses. Dean Wicker referred to Procedure. We offer five hours of Civil Procedure in the first year, three hours of Trial and Appellate Practice in the senior year, three hours of Tennessee Practice and Procedure and two hours of Trial Technique. We require 86 semester hours to graduate and offer now 120 hours, so that the student has plenty of opportunity for specialization and election during his last two years. We emphasize strongly the subject of professional responsibility. Our required course for the senior year entitled Profession of Law treats legal ethics in detail and inculcates in the students a sense of the lawyer's obligation to serve his profession by participating in professional organizations and his obligation to serve his community by providing real leadership. Evening sessions for the members of

the student body take up problems of current importance and we bring in speakers from all over the country to talk at these sessions. This year we have been laying our greatest emphasis upon the subject of Legal Writing. For a number of years we have been troubled by the fact that many students coming from the colleges were not able to express themselves adequately and clearly. We have installed in the first-year curriculum a two-hour course in Legal Writing. Every member of our faculty is participating in presenting it. The first-year class is divided among all of the members of the faculty and individual attention is being given to students. The work so far has proved extremely effective and I think there has been a considerable improvement in the powers of expression of our students as a result. Within the next year or two we plan to offer a program leading to a graduate degree. We offer now sufficient hours for this purpose, but want to increase the number of hours and to plan a master's degree in law set up to allow graduates of this and other schools to prepare themselves better for leadership in the practice of the law in the region. Dean Wicker has spoken about teaching methods and I shall not take time to go into this in any detail except to say that ours in general are similar.[13]

The Vanderbilt Law School engages in a number of activities other than the conducting of classes. First in importance is the *Vanderbilt Law Review*. It was founded in 1947 and during the 14 years of its existence has attained an enviable record. Its symposium issues particularly have been highly regarded over the country as a whole. I brought some quotations from the numerous remarks which have been made about the *Law Review* to read to you, but time suggests that I should pass over this.[14] One issue of each volume contains an annual survey

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13. They are described in some detail on pages 15 and 16 of our current catalogue, which is available for any interested member of the bar.

14. Out of many possible quotations I have selected a half dozen here:
"This is just a brief word to tell you how fine I think the April, 1953 issue of your Vanderbilt Law Review is . . . I really think that I have rarely seen another issue of any Law Review which has so many fine articles, and which maintains such consistently high quality. There is a great deal of useful learning in it on the subject of Conflict of Laws, and I find myself reading every article through from beginning to end. I haven't really found a weak spot anywhere. It is a very real accomplishment for your Review to be doing so well so shortly after it has been established. This is not the first good number of the Vanderbilt Law Review by any means. But it does seem to me to be easily the best, as I have indicated, one of the very best issues of any Law Review that I have ever seen." Dean of the Harvard Law School.
"This is really a contribution of major stature, and deserves a place on the library shelves ahead of all the formal treatises in this neglected field. We were overdue for a good going-over of the status of thinking in the area, and you have done the job up brown. This number will long be the indispensible handbook for teachers in Legislation." Faculty member of the University of Wisconsin Law School.

of Tennessee law. Most of you are familiar with it. Some of our symposium issues have later been published in book form. Our *Law Review* serves as an instructional device and many of our students participate in it. Perhaps we have emphasized our *Law Review* more than most schools have and we are very proud of its accomplishments.

We also publish the *Race Relations Law Reporter.* This of course is in a field which is charged with strong emotion. The *Reporter* attempts to set out the primary legal materials dealing with any field in which the subject of race affects the law. We have done this in an objective and impartial fashion and it is somewhat amazing that we are still able to say that we have received no letter of criticism regarding our work by anyone who has read the *Law Reporter.* Many people have told us that they found it of extreme value and assistance to them. It has been of value to people of a strong segregationalist viewpoint, a strong integrationalist viewpoint, and the people in between who were trying to find a means of solving problems.

Our moot-court system could be described at length. We have a series of appellate arguments, every first-year student being required to engage in an argument in his second semester and every second-year student except those on the *Law Review* being required to engage in the first semester. The arguments are administered by a student board of judges. They terminate in finals on Law Day in the spring with visiting judges. Our teams in the National Moot Court Competition have attained their share of success. They have on several occasions won the regional competition and gone to the national competition. On one occasion they reached the national semi-finals and had already beaten one of the four teams in that group. Normally we do not have our

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"I believe you have done an extraordinary job in getting together this symposium [Constitutional Law.] Among law review accomplishments I believe that yours is one of the most outstanding." Faculty member of the University of Minnesota Law School.

"After again running through your symposium . . . I am impressed with its solid achievement. I congratulate you and the Vanderbilt Law Review." Member of the U.S. Supreme Court.

"The treatment of the case was excellent from the standpoint of comprehension of the questions involved and clarity of construction. In fact, I don't know that I have read a better case note. Accept my congratulations." Former Chief Judge of the Tennessee Court of Appeals.

"I cannot praise this Vanderbilt issue too highly. Every symposium issue of Vanderbilt Law School has been excellent. But this one [Judicial Biography] is especially so." Taken from "Practicing Lawyer's Guide to Current Law Magazines," in *American Bar Journal,* 44 A.B.A.J. 377 (1958). On numerous other occasions this column has praised our Review. See, *e.g.,* 47 A.B.A.J. 429-30 (1961) ("I take my hat off and say 'bravo' to the Vanderbilt Law Review. . . . There is something fine about a great law review's publishing such a unique symposium"); 47 A.B.A.J. 1136-38 (1961) ("What a splendid symposium issue on Evidence!").

top students participating in the National Moot Court Competition, as the law review students are occupied with that work and the group of students immediately below them are normally serving on the moot court board of judges.

Our work with the Legal Aid Clinic is not as well and completely organized as that of the University of Tennessee. The Nashville Bar Association maintains a legal aid clinic at the Davidson County Court House one afternoon a week. Our students go down to participate in that work. They have an organization of their own and arrange for participation of the upperclassmen who are interested in this work.

Let me say a few words about the finances of the Law School. Since the War, we have had an endowment of $1,000,000. It has proved not adequate and we find it necessary to supplement it in other fashions. Our tuition this year is $600. It will be raised to $800 next year, but the actual cost to us per student is $1,600. This figure was obtained by taking the cost for operation of last year and dividing it by the number of students during the year. Incidentally, it may be of interest to you to know that the cost of educating a single student in our Medical School on this basis is more than ten times that amount. Our Law School has been very fortunate in obtaining foundation grants. The *Race Relations Law Reporter* has had three separate grants, the first from the Fund for the Republic and two subsequent ones from the Fund for the Advancement of Education. The Ford Foundation made a seven-year grant to the Law School of $340,000, most of this amount to be utilized for courses and activities concerned with professional responsibility. One part of this work involves the seminar on Regional Economic Development and the other a series of evening lectures on contemporary problems in which the students participate. You will recall that the Ford Foundation recently made substantial grants to five universities scattered throughout the country. Vanderbilt University was one of those and a $4,000,000 grant to Vanderbilt will be utilized in part to assist the Law School. Incidentally, the report on this grant which appeared in *Time* magazine indicated that a major reason for making the grant was to aid the University's "prestigious law school."[15] We have received a small grant for research purposes from the Rockefeller Foundation and we have recently received two small grants from the National Association of Legal Aid Clinics for projects which we are now engaged in performing.

Our goal is not just to produce lawyers, but to produce lawyers who will be leaders, who will provide constructive leadership in the com-

15. 76 TIME [No. 14] p. 42 (Oct. 3, 1960).

munities where they locate. In order to accomplish this purpose, we are seeking to provide leadership in the law school world ourselves. It is our objective to become the leading law school in the region.

II.

To this point in the two talks this morning, we have been discussing legal education for admission to the Bar. Now I should like to spend a few moments discussing with you post-admission education, or as we usually put it today, continuing legal education.

It is a well-worn cliché that a lawyer's education is never done. Law today is so complex that there are always new problems arising in fields with which the lawyer has not previously been familiar. Lawyers have realized this and have sought to continue their education by trying on their own to keep acquainted with new developments and to learn about unfamiliar fields. But this is a hard task to set and it requires a sterner self-discipline than most of us have been able to exercise with consistency. For this reason, various professional agencies have sought to help by presenting institutes and other types of programs which would organize the learning process and make it more stimulating and intelligible. Institutes and lectures were held on a number of occasions preceding World War II. After the War there was an organized program of preparing and publishing a series of monographs on developments during the war years for the benefit of those attorneys who had been in service and had not been able to keep up with these developments.

It was in 1947, however, that a systematic effort was started to establish continuing legal education on a nationwide basis. This was the date on which the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, composed of 18 members and a director, was established. Its function was to coordinate the activities of the various professional agencies. It published a number of pamphlets and other monographs on such topics as *Basic Problems of Evidence* (prepared by our own Professor Morgan), *Lifetime and Testamentary Estate Planning, Basic Accounting for Lawyers, The Federal Wage and Hour Law, The Modern Prudent Investor* and others. It offered assistance to the bar associations and the law schools and greatly stimulated the development of additional means of continuing legal education throughout the states of the country.

In 1958 at the instance of the Joint Committee the so-called Arden House Conference was held in New York with 110 persons attending, representing all of the states of the Union. From Tennessee, the representative was Erby Jenkins, who was at that time the president-elect of the

Tennessee Bar Association. This group met for three days of discussion and conference, and all who attended were in agreement that it was a very stimulating and fruitful meeting. At the end the conference prepared and adopted an excellent final statement. I should like to quote for you some paragraphs of this statement as they are so well expressed and so thought-provoking that I cannot improve upon the language in any respect. I hope you will listen carefully as I read.

> American Lawyers today are confronted with problems of vast and increasing complexity. No law school education can be expected to deal with all of these problems. A practicing lawyer has an obligation to continue his education throughout his professional life. This education not only must increase his professional competence but also better qualify him to meet his professional responsibilities to his clients and to the public.
>
> The organized bar has the primary obligation to make this continuing legal education available to the members of the profession. A generation ago the bar recognized its responsibility for the adequate education of law students. Today it recognizes a comparable responsibility for the continuing education of practicing lawyers. . . .
>
> Programs for continuing education thus far have placed a major emphasis on professional competence and have not always given to professional responsibility the attention it should have. In the future these programs must also emphasize the professional responsibilities of the lawyer. They must help the lawyer to fulfill a wide range of professional responsibilities: to the courts, to the administration of justice, to law reform, to the law-making process, to his profession, and to the public. . . .
>
> In the last analysis, the responsibility for this entire program in each state rests with the organized bar of the state. In most states it will be desirable for the state bar association to coordinate the activities of the organized bar, the law schools and other special groups concerned with the education of practicing lawyers. The autonomy of local groups and independent organizations should not be impaired, but their efforts should be encouraged and strengthened. . . .
>
> Law schools have an important contribution to make to the continuing education of the bar. This contribution should be made without either impairing the independence of the schools or diverting them from their primary responsibility for the education of law students.[16]

Since the time of the Arden House Conference the Joint Committee has continued to function effectively and well. As one of its members

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16. CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCY AND RESPONSIBILITY, REPORT ON THE ARDEN HOUSE CONFERENCE xiii-xvi (1959). Professor Elliott E. Cheatham, then of Columbia and now at Vanderbilt, was one of the five-man committee preparing this statement.

during the past two years, I can testify that they all work hard and devote a considerable amount of time to the activities of the Committee. It has continued to publish monographs of importance; it has continued to publish the *Practical Lawyer,* which most of you have seen and which now has an extremely large circulation. It has presented institutes of its own and it has offered its services to bar associations, to law schools and others in helping to plan and to present institutes.[17] In this connection it has classified institutes as being: (1) the how-to-do-it type, (2) the ones offering advanced instruction, (3) the ones offering instruction to specialists, and (4) the bridge-the-gap type. Its director, Mr. John E. Mulder, has been of very great assistance to persons who were preparing plans for institutes, including those in Tennessee. It is now engaged in preparing for presentation a four-course program which was suggested at the Arden House Conference. This would involve the following subjects: (1) "The Practice of Criminal Law"; (2) "Law Governing International Transactions"; (3) "Planning of Small Estates"; and (4) "The Trial of a Civil Action."[18] It has separated several functions of institutes and has emphasized not only professional competence, but also professional responsibility and public responsibility. It has constantly called attention to the need for a state coordinator and has assisted in the establishment of such a coordinator in several states.

During the period since the war, substantial progress has been made in most states in the field of continuing legal education. Some of the larger states, like California, have established and maintained very elaborate programs, but a number of the smaller states have also developed very worthwhile programs.[19]

In Tennessee we still need a state coordinator to assist in planning the programs and to organize them into a consistent whole. For several years now, however, the Tennessee Bar Association has had a Committee on Continuing Legal Education. Its efficiency has varied from year to year, but many of the committees have been of very real assistance to agencies which wanted to arrange for institutes or lectures. At present, the chairman of the Committee is Professor Paul H. Sanders of the Vanderbilt faculty. Within the state, we have developed and utilized

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17. See MULDER, SERVICES OFFERED BY THE JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION (Rev. ed. 1959). An earlier edition of this pamphlet is published in the ARDEN HOUSE REPORT at p. 247.

18. See Appendix H to the ARDEN HOUSE REPORT, pp. 291-305.

19. For a comprehensive survey of the general subject, see Rodgers, *Continuing Education of the Bar,* 28 TENN. L. REV. 445 (1961). And see Tweed, *Continuing Education of the Complete Lawyer,* 1960 WASH. U.L.Q. 317; Tweed, *Continuing Legal Education and the Law Schools,* 27 TENN. L. REV. 338 (1960); Jenkins, *Continuing Legal Education for Lawyers,* 27 TENN. L. REV. 347 (1960).

many different kinds and forms of continuing legal education. I thought it might be interesting to you for me to enumerate and describe the types of which I have knowledge.

For quite a number of years now both the University of Tennessee and Vanderbilt University have held annual fall institutes. It is usually the custom for both schools to set this for a date in connection with Homecoming. The law schools, of course, have no voice in determining when Homecoming will come and this has meant that once or twice our institutes have been in competition with each other because they came at the same time. Usually, however, it happens that the Homecoming is on a different date for the two institutions, so that we are not really in competition with each other. Our institutes have covered varying fields and have been of different kinds. Sometimes we have been concerned with current developments in the field of law, sometimes with a new development. Sometimes we have picked an unusual field of the law, sometimes we have been presenting basic subjects, and at other times we have taken subjects which involved specialized practice. We have used our own faculty members (for example, having them to talk about the way in which their own specialities impinge upon a central topic which has been selected). Sometimes we have brought in outside authorities, usually authorities recognized nationwide. At other times we have used local attorneys. We have arranged for panel discussions.

The subjects are varied too. I think we have both found that some aspect of tort litigation is most likely to bring a wide audience. Within this general field, there can be specialized subjects such as products liability, railroad and plane accidents, damages. Another subject which has been used with some frequency is taxation. This presents some problems of its own, however, since it is hard to tell whether to make the presentation simple so that the person who is not qualified as a tax specialist will understand it or to make it more complicated for the benefit of the tax specialist. In either case there will be a large group of the bar who will find that it does not meet their need. Other topics which have been used from time to time include such subjects as eminent domain, bankruptcy, labor law, automobile liability insurance. For a number of years now Vanderbilt has also presented a spring institute. The subjects for this institute are selected to appeal not just to lawyers alone, but also to a particular lay group. For example, this spring we are planning an institute on problems of banking law. In the past, we have had such subjects as labor arbitration, musical copyright law and financing of small businesses.

Since the beginning, both law schools have made no charge for

attending the fall institute. Vanderbilt has made a nominal charge for the spring institute. Perhaps some day in the future we may be able to plan to impose a minor charge on all institutes so as to make them self-supporting and to prevent them from being a drain on our regular law school funds.

Other professional agencies have promoted meetings similar to the law school institutes. Thus the section meetings of the state bar association are quite similar. Some city bar associations have sponsored institutes in particular fields. This is true, for example, of Chattanooga in recent years. Private groups, such as NACCA, have also sponsored institutes on occasion, as in Nashville recently.

Single talks or lectures have been made with some frequency before city and town bar associations. The faculty members of the Vanderbilt Law School are always ready to make a trip to any town in Tennessee to provide a lecture on a subject which may be desired, and I am sure the same is true of the faculty members of the University of Tennessee. In several cities, regular luncheon meetings are held and short talks are made. They are usually presented by members of the city bar association on subjects in which the speaker has recently done some intensive work or on which he feels particularly qualified. This program has been followed in both Memphis and Knoxville, I am informed.

Last summer the Tennessee Junior Bar Association promoted a bridge-the-gap program for the benefit of new lawyers who had just been admitted to the bar. There was a very satisfactory attendance and all who participated in it were pleased with the accomplishments. I understand that that Junior Bar Association intends to repeat the program this summer.

At Vanderbilt we have from time to time scheduled certain classes in the late afternoon or on Saturday morning so that it would be convenient for practicing lawyers to attend. Courses which have been selected for this purpose have included Federal Taxation, Federal Jurisdiction and Procedure, Trade Regulation and others. We at Vanderbilt plan to offer a graduate degree sometime soon and courses of this nature will be increased in number. Perhaps some attorneys will decide that they wish to take sufficient courses to earn the LL.M. degree. In the future with our air-conditioned building we may try to set certain summer courses up for practicing attorneys. Attorneys who take regular courses may take them for credit or not as they desire.

For our own school we have frequently during the regular session arranged for lectures or discussions by important visiting speakers. Sometimes these are in the morning, but quite frequently they are evening lectures. On such occasions we invite the members of the bar

to attend and participate, and a fair number of them have accepted the invitation. During the current school year, we have had a discussion of the Chicago jury study project by Professor Kalven of the University of Chicago, a debate on medical care for the aged between the general counsel for the U.S. Department of Health, Education and Welfare and the general counsel for the American Medical Association, and a treatment of the public responsibilities of the lawyer by Mr. Harrison Tweed, the retiring president of the American Law Institute. Other subjects include a discussion of joint city-county metropolitan government, the problem of adequate compensation for traffic victims, the railroad featherbedding issue, and Cuban constitutional law and the extent to which it has been affected by the Castro regime.

One other form of continuing legal education should be mentioned here. This is the scanning and reading of law reviews. All of you receive the *Tennessee Law Review*. Many of you, I hope, subscribe to the *Vanderbilt Law Review*. In both you will find very valuable discussions. Particular interest has been expressed by some lawyers in the annual survey of Tennessee law in one of the regular issues of the *Vanderbilt Law Review*. I would like to suggest that you subscribe to some three or four law reviews, and that you make a point of inspecting them carefully in order to keep up with current developments, both in this state and in the nation. Perhaps sometime soon we will be able to provide more and better texts and manuals on problems of Tennessee law.

III.

My time is now just about used up, but I should like to take a minute or two to say a few words to you about the relationship of each of you as an individual to legal education, and what you can do to aid in promoting it. My first suggestion to you is that you be interested in it. The American Bar Association has long had a strong interest in it. The last several presidents of the ABA have spoken of legal education as the "first responsibility" of the Association.[20] Legal giants of the past — such men as Elihu Root and Silas Strawn — have devoted considerable time and attention to legal education. You should therefore be concerned with it. You should be interested in the matter of admissions to the bar in Tennessee. Are the requirements sufficient? Should there be any changes? Do you know the requirements and practices regarding the state bar examination? Should the subjects on which the bar examination is given be changed? I would like to talk longer about this, but there is not time.

20. See, *e.g.*, Malone, *Our First Responsibility*, 45 A.B.A.J. 1023 (1959).

The adviser to the Section on Legal Education of the American Bar Association, Mr. John G. Hervey, has been quoted as saying that there is nothing wrong with legal education which sufficient money could not correct. I do not agree with him completely and this is not a pitch for contributions from you at this time. I am not getting ready to pass the hat to you, but I should like to suggest that you remember legal education when you allocate your contributions to charity. Remember that law schools cost much more than the tuition which they charge the students. As a law student you probably would not have been financially able to pay the full cost of your education if it had been charged to you. As an established lawyer now, you may decide that this is an appropriate time for you to repay a part of the "loan" which was made to you when you were a law student. As an attorney advising your client regarding a will, you should remember legal education. Most testators will be likely to think first of other recipients. Perhaps they need to be reminded that it was the law which made it possible for them to accumulate such assets as they will have in their estate when they die and that it is the law which makes it possible for them to decide where their property will go and what will be done about it on their death.

Last year the president of the American Bar Association appointed a special committee to study legal education and to assess its needs. This committee reported last summer at the St. Louis meeting of the Association.[21] Some of you will be surprised to learn what they listed as the first need. This was for more law students. Some of you may have had the impression that the bar is over-crowded and that young lawyers are finding trouble in obtaining proper locations. Exactly the converse is true. There is a shortage of lawyers at the present time and the American Bar Association is becoming extremely worried. In recent years the law school population has not increased. Thus in 1920 there were 42 law students out of 1,000 in higher education; in 1960 there were only 12 law students out of 1,000 in higher education. Admissions to the bar in 1949 numbered 89 per million of population; in 1956 there were only 57 per million of population. While the number of lawyers in proportion to the population has therefore actually decreased, the need for lawyers has increased substantially. There is an urgent need for law students of high quality. Any of you who have had occasion recently to seek to obtain a young law graduate in your office will have become aware of the extent to which they are in demand.

21. REPORT OF THE SPECIAL COMMITTEE TO STUDY CURRENT NEEDS IN THE FIELD OF LEGAL EDUCATION (1961).

The American Bar Association committee says that it should be a responsibility of all lawyers to encourage good high school students to enter the legal profession and it adds that the bar must take responsibility for the pre-legal counseling of students. It suggests that the National Law Day is a fine opportunity for speaking in the high schools in developing the interest of young men in the legal profession. Reference was made to the practice of the Junior Bar Association in Austin, Texas, of inviting high school students on some particular Saturday to attend court sessions and to learn about the way in which our courts are conducted.

A second great need of legal education, as indicated by the special committee, is more money for scholarship funds and loan funds. This is a very real need. Federal funds are not available to law students as they are to graduate students. Federal loan funds can be used for law students, but the priorities are such that there are usually none left for this purpose. Foundation funds are usually more frequently available for sciences and medical purposes. The committee reports a finding that in the past year the law schools had a total of about $2,000,000 available for scholarship purposes. Nine law schools had half of this amount, leaving 114 schools to divide the remainder. The cost of legal education is up. Tuition has increased and other expenses also. Law students are mature; their parents are not as ready to pay their expenses; they are often married and have families of their own. With increasing frequency they have found it necessary to work while attending law school. Here is a need which is really urgent and here is a place where your contribution can serve a three-fold purpose. It can help the individual student, it can help the law school involved, and it can help the legal profession at the same time. By making an investment in a good law student at this time, you will be making it possible for him to repay it when he becomes a well established lawyer and thus to continue the process.

What should you do about continuing legal education? Show an interest here, too. Attend legal institutes. Participate in them. Help the law schools and the bar association committees in planning them. Give suggestions as to suitable topics. Lend your active support. Read the law reviews. Make use of them. Subscribe to several of them. And finally, systematize your program of educating yourself. Assess what you have done in the immediate past and determine whether it is adequate or you should plan to do more.

One final word in conclusion. During recent years there has been a perceptible drawing together of the members of the law school world and

the attorneys practicing the law. This is all to the good. I hope that we can continue to associate together on intimate terms, to meet together frequently and to talk with each other intelligibly. We are both parts of the legal profession and we can each contribute to the other's well being. At least I hope that when the Tennessee Bar Association has another mid-winter Caribbean cruise, I'll be along to enjoy it with you.

THE BIBLE, THE CONSTITUTION AND PUBLIC EDUCATION*

Joseph W. Harrison**

I. American Religious Freedom in Perspective

In Philadelphia, in the year 1775, the Continental Congress began its operations by adopting a resolution which called for prayer at the opening of each session and which designated an Episcopalian minister to act as chaplain for the Congress. This proclamation, along with other state papers of the Continental Congress, not only made numerous references to religion, but expressed out and out adherence to Protestantism.[1] The Continental Congress actually legislated on such subjects as morality, sin, repentance, divine service, fasting, prayer mourning, public worship, funerals and true religion.[2]

But scarcely a decade later, the Constitutional Convention met for four months without the recitation of a single prayer, and with only one short reference to religion in the final draft of its Constitution.[3] This seems rather strange when one considers the actions of the Continental Congress, composed of many of the same men, and even more strange when one realizes that the Declaration of Independence makes at least four references to the Deity, but the United States Constitution, many times longer, makes none. This change in the concept of the proper relationship of religion and the state was so rapid and so well defined that it could be called more revolutionary than the Revolution itself.

In colonial times, the Church of England was officially established in several of the colonies, and taxes were commonly levied for its support. The year 1784 saw Thomas Jefferson and James Madison wage a battle against the establishment of the Church of England in Virginia, a state in which disestablishment was found more difficult to achieve than in

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* A case study of religious instruction in the public schools of Knoxville and Knox County, Tennessee. This study could not have reached completion had it not been for the close cooperation received from the administrators of the two school systems surveyed. In the county system, the author wishes to express sincere appreciation to Superintendent Mildred E. Doyle and to Dr. Rollin McKeehan; similar appreciation is due to Superintendent Thomas Johnston and to Curtis Gentry of the Knoxville City Schools. The author is also indebted to the principals and teachers who contributed their time and ideas. The author also gratefully acknowledges the assistance, both financial and academic, of the Anti-Defamation League of B'nai B'rith and Messrs. Morton J. Sobel and Sol Rabkin of that organization.

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1. Pfeffer, Church, State, and Freedom 107 (1953).
2. *Ibid.*
3. United States Constitution, Art. VI, clause 3, which reads, "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

other states. Early Virginia laws between 1659 and 1705 had made it a criminal offense for parents to refuse to have their children baptized, or for Quakers to establish themselves in Virginia, or for denial of the existence of God and the Trinity, or for positing more than one God, or for denial either of Christianity or of the divinity of the Scriptures. People who called themselves "Baptists" were severely persecuted in Virginia, where the Episcopal Church was established by law and supported by tithes on all inhabitants of the colony.[4] The control of Virginia by the Episcopal Church was so complete that James Madison was led to say that if that church had had the grip on the other colonies that it had on Virginia, there would have been no American revolution.[5]

The fight for religious freedom in the Virginia legislature was a long one, a hard one and a bitter one. Eventually, by 1784, all favoritism laws had been repealed and most of Jefferson's original draft of the "Act Establishing Religious Freedom" had been adopted. In the preface to the bill, Jefferson sets forth his arguments for religious liberty: First, compulsion makes people not Christians but hypocrites. Second, no man is competent to judge the religion of another. Third, religion does not need the support of a government to enable it to overcome error. Fourth, it was not God's plan to force man into obedience. Fifth, a religion of love, not a religion of force, should prevail.

The act, as drafted by Jefferson, is not lengthy but only its second section need be quoted here:

> We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, or shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[6]

This is in essence the thought of Thomas Jefferson on the subject of the church and its proper relation to the state. Jefferson's thought is even more concisely manifested in his belief that there should be a "wall of separation between church and state."

At the Constitutional Convention there was decided difference of opinion as to the necessity and desirability of incorporating a "bill of rights" which would protect and guarantee the fundamental rights and

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4. LILLARD, THE SOCIAL PHILOSOPHY OF THOMAS JEFFERSON 52 (1936). (Thesis submitted to The University of Tennessee.)
5. Patterson, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 180 (1953).
6. Gould, *op. cit.*, p. 206.

privileges of citizens. The prevailing view seemed to be that such provisions were unnecessary, particularly in the field of religion, not because the framers doubted the principle involved, but because they took it for granted. It seems not to have occurred to them that the United States government might establish a church for the entire nation.[7] Roger Sherman, for instance, thought no provisions were required since the prevailing liberality of the time was sufficient to safeguard against any infringement on religious liberty.[8] Alexander Hamilton said that since no power was granted to give it control over such subjects as religion, press, assembly and petition, it could therefore not establish laws limiting these areas.[9] Others felt that it might be dangerous to enumerate in the Constitution itself any of the rights and privileges of citizens for fear that the possible omission of some important rights might lead some to believe that those rights which were not included were not to be protected.

The men who hoped that these states would accept the Constitution soon saw, however, that it would be much easier to induce reluctant states into the union if such things as the affirmation of religious liberty were added to the document. The objective of these men was union, and there could be no union without explicit authorization of the differences prevalent in religious worship.[10] In 1791, the "Bill of Rights" was adopted, the first part of which stated that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.[11]

This amendment was a unique experiment, for it rested on the principle that government has no power to legislate in the field of religion, either by restricting the free exercise of religion or by providing for its support. Men who favored the amendment agreed with Tom Paine, when he said in his *Common Sense*: "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof; and I know of no other business which government hath to do therewith."[12]

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7. Pfeffer, *op. cit.*, p. 112.
8. Wright, RELIGIOUS LIBERTY UNDER THE CONSTITUTION OF THE UNITED STATES, 27 VIRGINIA L. REV. 76 (1940).
9. *Ibid.*, p. 75.
10. Pfeffer, *op. cit.*, p. 116.
11. UNITED STATES CONSTITUTION, Amendment I.
12. STOKES, CHURCH AND STATE IN THE UNITED STATES 318-319 (1950).

Only in recent times has there been any great agitation on the subject of separation of church and state and the vast majority of this agitation has been at the state level of government. National statutes respecting religion have always been few; those few usually have gone unchallenged. The first amendment did not involve state laws because its limitations, at least until recently, applied only to legislation by the United States Congress.[13]

A certain amount of preference is given in many states to those professing the Christian religion and more specifically to members of the more common Protestant faiths. The Sunday Observance laws (Blue laws) which many states have enacted have been upheld in the Supreme Court even though such laws seem to put some additional restraints upon such religious groups as the Jews and the Seventh-Day Adventists who observe the Sabbath on Saturday. The guarantee of religious freedom is generally thought to mean that no person shall be denied any civil right, privilege or position because of his religious opinions and yet courts have upheld the exclusion of atheists from jury duty and have also upheld their impeachment as witnesses on the grounds that their disbelief in the existence of a Supreme Being could impair the proper performance of their functions.[14]

II. Education, Religion and the United States Supreme Court

In colonial America virtually all schools were church schools. It was not until the second quarter of the nineteenth century, well after

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13. The single reference to religion in the body of the United States Constitution prohibits a religious test as a requirement for any office in the United States government. (See Note 3). This provision is directed only against the federal government but a similar prohibition has recently been laid against state action on these lines. Under the early constitutions of many of the states, Catholics and Jews were disfranchised or excluded from office. In Massachusetts and Maryland the office of governor was closed to all except Christians. New Hampshire, New Jersey, North Carolina and South Carolina went a step further: the governor had to be a Protestant. (Wright, *loc. cit.*, p. 78). It was not until 1895 that the following provision was deleted from the Constitution of South Carolina: "No person who denies the existence of a Supreme Being shall hold any office under this Constitution." But it was not until June, 1961, that the United States Supreme Court declared, in *Torcaso v. Watkins*, 367 U.S. 488 (1961), that a similar provision of the Maryland Constitution was invalid as an impairment of religious liberty: "No religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God. . . ." (*Maryland Constitution*, Declaration of Rights, Article 37). It is also noteworthy that the New Hampshire Constitution includes a provision which states that communities may "make adequate provision, at their own expense, for the support of and maintenance of public Protestant teachers of piety, religion, and morality." (*New Hampshire Constitution*, Part I. Section 6. But *Hale v. Everett*, 53 N.H. 9, an 1868 case, holds that a community may, under this provision, also support Catholic teachers.)

14. Wright, *loc. cit.*, p. 80.

the Constitution was established, that the free common school began its development. As the movement for free public education made headway, quarrels among various Protestant sects began to arise as to the type of religious and moral teaching that should be given to children in attendance at these schools. As the battle progressed, it became apparent that some compromise must be made if these schools were to flourish. Consequently, most Protestants agreed that the free public schools, since they were to be maintained by the state or the local community, would have to be "secular institutions divorced from distinctively religious teaching."[15] But certain religious practices, such as that of reading the Bible (which was seen by most Protestants as the only avenue to salvation), had been an intrinsic part of the American educational system throughout its history. Such practices were easily carried over into schools formerly denominational which had now become public. The argument that religious education in the common schools constitutes an establishment of religion by the state, though pertinent now, was not germane when the public schools were being formed. The first amendment unquestionably applied only to action by the national government and the fourteenth amendment, so crucial now in the problem of religion in the public schools, had not yet been written.

The fourteenth amendment was adopted in 1868 and today there is no question that freedom of religion is one of the basic freedoms which that amendment requires the states to observe, although this has been the case only in recent years.[16] Perhaps the first definitive step toward a broad interpretation of the fourteenth amendment came in 1897, in the case of *Allgeyer v. Louisiana*.[17] It was declared that the word "liberty", in the amendment, "is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties."[18] Little by little, the interpretation of the word "liberty" was broadened, with men like Justices Brandeis, Cardozo and the first Justice Harlan expressing especially strong views on the subject.

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15. BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 84 (2d ed. 1958).
16. The law has grown since 1891 when the historic conservatism of the judiciary was at its zenith and when the case of *In Re* King, 46 F. 905 (C.C.W.D. Tenn., 1891) reached the United States Circuit Court for the Western District of Tennessee. In that case it was held that, "the fourteenth amendment of the Constitution of the United States has not abrogated the Sunday laws of the States, and established religious freedom therein. The States may establish a Church or Creed, and maintain them, so far as the Federal Constitution is concerned. . . . As a matter of fact they left the States the most absolute power on the subject, and any of them might, if they chose, establish a creed and a church and maintain them."
17. 165 U.S. 578 (1897).
18. *Id*, at 589.

The fourteenth amendment was in force over half a century before it was used by the Supreme Court in guaranteeing to the citizens of the individual states the fundamental provisions of the Bill of Rights in regard to religious freedom. It was in 1923, in *Meyer v. Nebraska*[19] that liberalism first appeared in the court as far as religion was concerned.[20] While this case did not bear directly on the freedom of religion, it has great significance inasmuch as it may be considered a turning point in the history of American church-state relations. Among other things, the court noted the right of each person to "worship God according to the dictates of his own conscience":

> The problem for our determination is whether the statute construed and applied unreasonably infringes the liberty guaranteed . . . by the Fourteenth Amendment. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . .[21]

One of the most famous cases ever decided by the Supreme Court followed in 1925. This was *Gitlow v. New York*[22] which, again, was not concerned with religion, but is nevertheless essential to this study for it officially set down a principle of vast importance:

> For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the funda-

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19. 262 U.S. 390 (1923).

20. This case emanated from a Nebraska law enacted immediately after World War I in a period of intense nationalism. The statute provided that "no person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language" and that "languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade." The law was tested in the case of Meyer, who had been convicted of teaching the subject of reading in the German language in a parochial school to a child who had not passed the eighth grade. The Nebraska Supreme Court sustained the conviction, but, on appeal, the United States Supreme Court reversed the decision on the ground that the liberty of teachers and parents to educate children as they saw fit in private school was infringed by the state.

21. 262 U.S. 390 at 399 (1923).

22. 268 U.S. 652 (1925).

> mental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[23]

Since the *Gitlow* case was concerned with the freedom of speech, it was neither necessary, nor could it be reasonably expected, that the court would include religion as one of the "fundamental personal rights" protected from abridgment by the states. But yet another step had now been taken in the direction of protecting religious freedom. One writer, Charles Warren, sensed this when he wrote, just after the *Gitlow* case:

> One may well view with some apprehension the field of interference with State legislation to which a logical extension of the Gitlow case doctrine must inevitably lead the Court. For, if as now assumed, the right of freedom of speech contained in the First Amendment to the Federal Constitution is a part of a person's "liberty" protected against State legislation by the Fourteenth Amendment, then the right of free exercise of his religion contained in the First Amendment must be also a part of a person's "liberty", similarly protected against State action. And on this ground, the United States Supreme Court may be called upon to pass on State laws as to religion and religious sects — a subject which, of all others, ought to be purely the concern of the State and its own people, and in no wise subject to interference by the National Government.[24]

One may or may not share Warren's apprehension, but his prediction was quite accurate, for on December 6, 1937, the Supreme Court decided the case of *Palko v. State of Connecticut*.[25] The case concerned double jeopardy, not religion, but once again, an important principle was formulated. The due process clause of the fourteenth amendment applies to the individual states only those provisions of the Bill of Rights which "are of the very essence of a scheme of ordered liberty."[26] The provisions affected are those which involve principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." The court then noted that to date only the guarantees of the first amendment plus the right to counsel had been found to fit this test.[27] Religious freedom is guaranteed by the first amendment and presumably the court implied that it would be applied against state action if the question should arise.

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23. *Id;* quoted in PFEFFER, CHURCH, STATE, AND FREEDOM 129 (1953).
24. Warren, *The New 'Liberty' Under the Fourteenth Amendment,* 39 HARV. L. REV. 458 (1926).
25. 302 U.S. 319 (1937).
26. BARTHOLOMEW, SUMMARIES OF LEADING CASES ON THE CONSTITUTION 216 (1957).
27. *Ibid.*, p. 216.

The question did arise in the next year, 1938, in *Cantwell v. Connecticut*,[28] often considered the Magna Charta for religious liberty in this country. This was the first case specifically to use the fourteenth amendment to apply the provisions of the first amendment to the states in the matter of freedom of religion. The decision was not startling, however, for it had been well foreshadowed. The most important part of the decision said this:

> The fundamental concept of liberty embodied in the [fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.[29]

The trend in the direction of protection of individuals from state action abridging the freedom of religion was not as pronounced as the foregoing might imply, for the period before the Second World War saw many rulings which did not in the least follow this trend. An outstanding example is a 1934 case, *Hamilton v. Regents of the University of California*.[30] As members of a Methodist group opposed to war, the appellants claimed that they should be exempt from the required courses in military science. Since preparation for war was repugnant to the tenets of their church and to their consciences, they believed that they should not be forced to participate. The court disagreed, however, and noted that:

> Government, Federal and State, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes a reciprocal duty, according to his capacity, to support and defend government against all enemies.[31]

The *Hamilton* case was concerned with one of the two most basic aspects of the problem of religion and its connection with education: religious (or, in this instance, un-religious) instruction in public schools.

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28. 310 U.S. 296 (1940).
29. *Id,* at 303.
30. 293 U.S. 245 (1934).
31. *Id,* at 262. Justice Cardozo, in a concurring opinion, makes a significant point when he assumes that the fourteenth amendment extends the guarantee of religious liberty to the states, for this case was decided three years before *Palko*. But Cardozo emphasizes that Hamilton elected to attend the higher educational institution of the state and was commanded to follow the courses which the state believed vital to its welfare. On this basis, even with the first amendment read into the fourteenth, instruction in military science is not interference by the state with the free exercise of religion.

The other aspect of the problem is that of state aid to religious schools, as seen, for example, in the 1930 case of *Cochran v. Louisiana State Board of Education,*[32] in which it was held that the state could validly provide free textbooks to all school children including parochial school students, as long as the books were not religious in nature. To give books to children was considered a service to the child, not to his school. To spend tax money for this purpose, even though a private one, did not deny due process of law, although it should be noted for the sake of speculation that the fourteenth amendment had not, when this case was decided, been held to apply the first amendment to the states.[33]

This was no longer the situation, however, in 1947, when the Supreme Court decided *Everson v. Board of Education.*[34] Like *Cochran,* this case dealt with whether a New Jersey township could use public funds to provide free bus transportation for parochial school children. The decision, a five to four vote, held that such action was valid since, as in the *Cochran* case, the aid was not to religion, but to the children. The disagreement among the members of the court was not as to whether a state government could aid religion but as to whether in this instance religion was being aided by the state.

A. Released Time: The McCollum and Zorach Cases

Another issue which sparked considerable controversy a few years ago was that of released time from public schools for religious education, which first came to the United States Supreme Court in the 1948 case of *McCollum v. Board of Education.*[35] The city of Champaign, Illinois, had set up a program whereby children were released for one period a week from regular school duties to take classes in religious instruction, if written parental consent had first been secured. The classes were held in the school buildings, attendance records were kept and the administrative machinery of the school system was used to make the program effective. The court held this practice unconstitutional since the use of school property and the tax-supported school machinery gave aid to religions in spreading their faiths.[36]

Mr. Justice Black wrote the majority opinion both for this case and for the *Everson* case. In his *McCollum* opinion he quoted from his previous opinion, in which he had said:

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32. 281 U.S. 370 (1930).
33. CUSHMAN, CIVIL LIBERTIES IN THE UNITED STATES: A GUIDE TO CURRENT PROBLEMS AND EXPERIENCE 100 (1956).
34. 330 U.S. 1 (1947).
35. 333 U.S. 203 (1948).
36. Cushman, *op. cit.,* p. 103.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[37]

The State of New York instituted a plan similar to that of Champaign. The New York plan, which was upheld in 1952 in *Zorach v. Clauson*,[38] allowed students to be excused from school, with their parents' consent, for the purpose of going to nearby churches or other places where religious instruction was carried on. Those who did not attend the religious classes were kept in school to do other schoolwork. Whereas the *McCollum* vote had been eight to one, the *Zorach* decision was six to three, this time in favor of upholding the off-school premises plan. The court held that this did not constitute aid to religion and therefore did not violate the first and fourteenth amendments.[39]

According to the majority opinion, the state may cooperate with religious bodies, it may accommodate itself to their convenience and it may encourage (but not coerce) religious training. Writing of the government, Justice Douglas said that "it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary

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37. 333 U.S. 203, at 205-6 (1948).

38. 343 U.S. 306 (1952).

39. Justices Black, Frankfurter and Jackson dissented, with Frankfurter emphasizing that the plan depended entirely for its operation upon the compulsory attendance laws of the state. Justice Black maintained that the very facts which had led to the *McCollum* decision also appeared in *Zorach*. Justice Jackson's dissent had a more bitter tone. Among other things, he reminded his "evangelistic brethren" that "what should be rendered to God does not need to be decided and collected by Caesar." (343 U.S. 306, at 324, 325).

Justice Douglas, writing for the majority, disagreed:

> The First Amendment, however, does not say that in every and all respects, there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. (343 U.S. 306, at 312.)

for worship or instruction. No more than this is undertaken here."[40] A comparison of *McCollum* and *Zorach* would seem to indicate that the state may not finance religious groups nor may it offer religious instruction on public premises. On the other hand, the state need not be hostile to religion: "When the state encourages religious instruction or cooperation with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[41]

In the *McCollum* case, the Supreme Court of Illinois had ruled in favor of the school board, holding that there was no violation of the Constitution since the religious courses were entirely optional and no public school funds were used to finance the program. The highest court of Illinois emphasized the importance of cooperation between the state and various religious groups, not as a means of fostering certain religions, but in the interest generally of the welfare of society. Those responsible for the religious instruction in Champaign were concerned that their children should receive basic moral training, but Mrs. McCollum attacked the classes on the grounds that, though ostensibly optional, they actually resulted in compulsion on her son to participate, thereby denying him full use of his school time. In addition, Mrs. McCollum claimed that the classes resulted in a state establishment of religion.

The United States Supreme Court, through Justice Black, reversed the Illinois court and held that the Champaign system of released time violated the first and fourteenth amendments since the compulsory education laws of the state were used to assist and promote religious instruction as carried on by the different religious sects. "This," said Justice Black, "is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[42] Justice Black might have added that since the classes were held inside the public school buildings, tax money, whether or not actually appropriated for the purpose, was being used to aid in the financing of the program.[43]

Only Justice Reed dissented in the *McCollum* case. His ground was that the Champaign plan did not constitute an establishment of religion since it neither levied a tax to support religious teaching, nor did it coerce a student to take part in religious instruction or punish him for his beliefs. As to the incidental advantages that various faiths might

40. *Id*, at 314. But Justice Frankfurter countered this by pointing out that the school involved neither closed its doors nor suspended its operations. (*Id*, at 320, 321).
41. *Id*, at 314.
42. 333 U.S. 203, at 205 (1948).

receive under this released time plan, Justice Reed noted that the court had previously upheld various forms of indirect aid to churches, notably in the *Everson* and *Cochran* cases, and through such methods as tax exemption and assistance to sectarian hospitals.

Reed, however, was a minority of one. From the writings of Reed's associates in the *McCollum* case it seems fair to draw several conclusions pertinent to this study. First, the use of public school property for religious instruction of any kind is invalid. From this it follows that there must be a limit to the amount of cooperation between school authorities and religious groups in the promotion of moral and spiritual values. It appears that the use of the administrative machinery of the school system to provide pupils for these classes is beyond this limit, but the courts would probably uphold as within the limit of cooperation a program of intercultural education or comparative study of religion, as distinguished from sectarian religious instruction, at least at the upper levels of public instruction. A comparative study program, however, could not give preference to one sect over another and remain within the Constitution.

B. Bible Reading: The Doremus and Schempp Cases

In regard to a program not of released time but of Bible reading in the classroom, it would seem that, under the *McCollum* decision alone, the Supreme Court might find the use of the public school buildings sufficient for invalidation – if the court found Bible reading

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43. In a concurring opinion, Justice Frankfurter pointed out that the decision covered only the specific set of facts found in the Champaign program of released time. Judicial scrutiny is necessitated only when challenge is made to the role of the public schools in the execution of a particular released time program. A more important part of Frankfurter's opinion was devoted to the "obvious pressure" which is placed on the school children to take part in the religious instruction classes. For Frankfurter, the fact that there is power in the hands of the school authorities to compel attendance or to discriminate against those not attending is enough to make the program invalid; the fact that the power is not used is beside the point. Frankfurter's opinion also stressed the divisiveness which is fostered among the children, for pupils who belong to non-participating sects tend to become inculcated with feelings of separation, when the school should be in operation to instill habits of unity and "togetherness." In addition to this, many of the children, whether they participate or not, begin to have consciousness of religious differences; these differences, and the awareness of them, become increasingly sharpened at an unnecessarily early age. See Edward S. Corwin *The Supreme Court as National School Board,* LAW AND CONTEMPORARY PROBLEMS 8. (1949). Professor Corwin raises an interesting question when he asks if, in line with the reasoning in *McCollum,* the flag salute would be rendered invalid if Jehovah's Witnesses' children should complain that they were embarrassed as a result of their non-participation. Possible embarrassment was not an issue for the majority in *Zorach,* which might well be taken as an indication that embarrassment and social stigma are not important if the religious training occurs off the school grounds.

to be equivalent to religious instruction. Such has not yet been the case, for the Supreme Court of the United States has never squarely faced the issue of Bible reading in the public schools. The issue has faced the court, however, on two separate occasions, but on neither was the question clearly answered by the court. The first instance was in 1952, *Doremus v. Board of Education*.[44] In a six to three vote, with the majority opinion by Justice Jackson, the Supreme Court dismissed the appeal in this case on the ground that the appellants had no standing to bring the question before the Supreme Court.[45]

The case had emanated from the following New Jersey statute:

> At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled.
>
> No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools . . . .[46]

In addition to this law, the defendant school board had issued a directive which excused any student from the room during the reading "upon request." The plaintiffs asked the New Jersey Supreme Court to invalidate the statute on the grounds that it violated the first and fourteenth amendments.

This the court refused to do. Justice Case of that court pointed out that state decisions upholding Bible reading far outnumbered those which did not, that the District of Columbia Board of Education had a Bible reading program and also recitation of the Lord's Prayer, and

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44. 342 U.S. 429 (1952).

45. In this case there were two plaintiffs, one the parent of a public school student and the other a taxpayer. By the time the suit reached the Supreme Court the student had graduated from the school system. The majority held that the court could not decide the merits of an issue after the alleged injury had ceased. With regard to the taxpayer (the status of both appellants at the time the case reached the Supreme Court), Jackson's opinion held that the court would review such a claim only when, as in the *Everson* case, there was a "measurable appropriation" of public funds and a "direct dollars-and-cents injury."

46. N. J. STAT., R. S. 18: 14-77 and 18: 14-88; quoted in KONVITZ, BILL OF RIGHTS READER 103 (1954).

finally that Bible reading was carried out in several states where there were no statutes to authorize it.

The New Jersey court went on to say that, due to its wide acceptance, the Old Testament, and with it the Lord's Prayer, were not to be considered sectarian if read without comment. Justice Case also said that:

> . . . the Constitution itself assumes as an unquestioned fact the existence and authority of God and that preceding, contemporaneously with and after the adoption of the constitutional amendments all branches of the government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe; a course of conduct that has been accepted as not in conflict with the constitutional mandate. The American people are and always have been theistic . . . .The influence which that force contributed to our origins and the direction which it has given to our progress are beyond calculation. It may be of the highest importance to the nation that the people remain theistic, not that one or another sect or denomination may survive, but that belief in God shall abide. It was, we are led to believe, to that end that the statute was enacted; so that at the beginning of the day the children should pause to bow the head in humility before the Supreme Power. No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity.[47]

Thus the New Jersey Supreme Court believed that reading the Bible in public schools was not in violation of the United States Constitution. The last sentence quoted from the New Jersey opinion must have been written in portent of things to come, for without ritual or doctrinal teaching, and spending only a fleeting moment with this issue which seems now to have become eternal, the Supreme Court of the United States in effect strengthed the New Jersey decision.[48]

In the second case of Bible reading the Supreme Court found a different method to avoid a decision, temporarily if not indefinitely. On October 24, 1960, The United States Supreme Court remanded to the Federal District Court for the Eastern District of Pennsylvania the case known as *Schempp v. Abington,*[49] in which the lower court had declared a Pennsylvania law requiring Bible reading in the public schools violative of the religion clause of the United States Constitution.

The act involved stated that:

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47. Quoted in *Ibid.*, pp. 104-110.
48. According to Pfeffer, the Supreme Court could have, and probably should have, ruled on the merits of the case. Until the *Doremus* dismissal it had frequently been the policy of the court to review an appeal from a decision in a suit brought by a taxpayer in a state allowing such suits. In fact, this was the way in which two cases discussed above, *Cochran* and *Everson,* reached the highest court in the land. (Pfeffer, *op. cit.*, p. 169).
49. 177 F.Supp. 398 (E. D. Pa., 1959).

> At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge . . . .
>
> If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall . . . be discharged.[50]

In addition to the required verses there had for many years been in effect a directive from the superintendent of public schools in Abington which required daily recitation of the Lord's Prayer.[51] The version of the Bible used was not at issue in this case, for it appeared that the one used varied from time to time and from place to place, but it does seem that there was a certain amount of coercion, for nowhere in the law was there a provision for a student to absent himself from the reading or recitation.[52]

In this case, the first of its kind to be decided in the federal court system,[53] the plaintiffs sought from the court a declaration that the practice of Bible reading was both an establishment of religion and an interference with the freedom to practice religion. In connection with this they sought a permanent injunction against the operation of the statute. The contention of the defendant school board was that the freedom of religion and conscience does not preclude others from hearing the Bible in the public schools, especially when it is noted that the exercises were an important aid in the development of the minds and morals of the pupils, that the state has the right to use such practices to instill precepts of morality and that there was no compulsion on the part of the plaintiffs and their children to believe or otherwise to observe the teachings from the Bible.

Basing its decision on the *McCollum* opinion and on dicta found in the *Everson* and *Cantwell* cases, a special three-judge district court held that required Bible reading, along with recitation of the Lord's Prayer, were in violation of the provisions of the first amendment. The court did not hold that government and religion must be divorced absolutely and in every respect, but it did say that the state may restrict the freedom of religion only in order to prevent a grave and immediate danger to

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50. PENN. STAT. Public School Code of 1949, section 1516, as amended; PENN. STAT. ANN., Title 24, section 15-1516 (1950).
51. *Recent Decisions*, 5. VILL. L. REV. 487 (1960).
52. All of the Schempp family were Unitarians. Of the three children in the family, the eldest had complained of the reading and had asked to be excused, but her teacher refused; this issue was mooted, however, when the girl graduated before the litigation. Another of the children actually participated in the reading, while the third listened passively but did not ask to be excused.
53. No decision as to the issues was ever rendered by a federal court in the *Doremus* case.

interests which the state may lawfully protect. Thus it was implied, as in *Cantwell,* that an individual has an absolute right to believe anything he wishes, and this right may be abridged only when he attempts to implement his beliefs in a manner which would harm either himself or other members of society. Would it not be logical to affirm that the state may and should protect the morals of its citizens? The court accepted this notion but, recalling the *Everson* case, said that in so doing the state may not aid or prefer one religion over others.

This was the point of departure between the *Schempp* case and other decisions on Bible reading in various state courts. A majority of state court decisions on the subject hold that nothing sectarian may be taught in the public schools—but these decisions deny that the Bible is sectarian, for it is accepted by all Christians. In contradiction to this, the court in the *Schempp* case held that, due to the heterogeneity of our present population, it is no longer proper to use the term "sect" as meaning the several groups within Protestantism. The term now must include all "significant" religious factions which, although they believe in God, differ considerably from traditional Christianity. Thus, at least for this court, the Bible is a sectarian book, and its use denotes a preference for one religion over others thereby constituting an establishment of religion on the part of the state. "To characterize the Bible as a work of art, of literary or historical significance, and to refuse to admit its essential character as a religious document, would . . . be unrealistic."[54]

The court said that the practice of reading the Bible was in fact a religious service, and the exercises were frequently referred to by both students and teachers as "morning devotions."[55]

The basis for this ruling by the district court appears sound, for the practice was implemented by teachers employed by the state government, in buildings owned by the state. This seems to be more than mere accommodation of schedules of the state to religion, which is permitted under *Zorach.* This becomes especially true if one accepts the notion that the practice is not religion *qua* religion, but something which is sectarian.[56] Dissenting opinions in both *Everson* and *Zorach* lend weight to this. On the subject of state aid to religion, Justice Black in his *Zorach* dissent said: "In considering whether a state has entered this forbidden field the question is not whether it has entered to far but whether it has entered at all."[57]

Although the "wall of separation" does not prohibit incidental aid

54. 177 F.Supp. 398, at 404.
55. *Id,* at 404-406.
56. *Recent Decisions,* 45 VA. L. REV. 1381 (1959).
57. 343 U.S. 306, at 318.

or accommodation of the type discussed above, Justice Rutledge, dissenting in the *Everson* decision, said that the purpose of the first amendment "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[58]

The district court held in the *Schempp* case that since the Bible reading took place in an atmosphere of religious ceremony, and since it was required by state law, the state itself was engaging in the inculcation of religious doctrine, thereby aiding the groups which adhered to the teachings at the expense of those groups which did not. This constituted establishment, but more than that, the practice resulted in a denial of the freedom of religion. Had attendance at the Bible reading sessions not been mandatory, it is likely that the court would not have considered the practice a denial of religious freedom, but this could not alter the fact of establishment, which is unconstitutional in itself under the doctrine of the *McCollum* and *Zorach* decisions.[59]

In the hope that optional instead of compulsory attendance would make the entire Bible reading and prayer recitation program constitutional in the eyes of the Supreme Court, the legislature of Pennsylvania modified the Bible reading statute. The revision provides that pupils shall be excused while the Bible is being read if their parents so request,[60] but because the amendment was enacted after the district court decision but before the case could be heard by the Supreme Court, it was possible for the latter court to vacate the judgment and remand the case to the court of original jurisdiction "for such further proceedings as may be appropriate."[61] On two occasions, then, the Supreme Court of the United States has been faced with the issue of Bible reading; both times it has been able to avoid decision on the substance of the issue. While evasive action by the court is neither necessary nor praiseworthy except as an exercise of judicial self-restraint,[62] one reason for the action

58. 330 U.S. 1, at 32.

59. Whether or not any of the Schempp children seriously objected to the readings and attempted to be excused from them is moot, although the fact that one of them actually participated seems to lend support to the minority view in *Zorach* that the separation of students into religious groups is inherently coercive. Thus there is strong pressure on the children to participate against the dictates of their consciences. Such circumstances would prevail even if the law permitted absence from the reading for there still could be a psychological compulsion to remain.

60. PENN. PUB. ACTS, 1959 REG. SESS., Act No. 700.

61. 364 U.S. 298 (1960). On Feb. 5, 1962, the same three judge federal court held that the law as amended "does not mitigate the obligatory nature of the ceremony," for exercises are still required "to be held every school day in every school." Thus, the Pennsylvania law was held still to be unconstitutional. 30 U.S. L.W. 2380 (1962).

62. The importance of the principle of judicial self-restraint is not doubted — but neither is the importance of the substantive issue involved in the *Schempp* case.

is easy to see: the problem of Bible reading in the public schools is as thorny an issue as can be raised.

III. State Courts and Bible Reading

The boundless diversity of American religious practices is a matter of historical record. Recognition of an obligation to retain religious liberty for future generations prompted early American statesmen to incorporate into their legal documents specific provisions assuring an educational system of free common schools in which their children would be educated on an equal plane and where sectarian instruction and religious intolerance would never intrude.

One of the most important arguments used by advocates of Bible reading in the public schools is that state constitutions bar only sectarian instruction from the schools and that Bible reading and certain prayers are in fact non-sectarian. The constitutionality of statutes permitting or requiring Bible reading obviously hinges on a definition of the term "sectarian," which, when defined by any religious group, has a peculiar tendency to include anything to which that group is doctrinally opposed. It seems necessary, then, for the courts to make the definition of "sectarian" even though it is almost inevitable that they, too, will define the term in view of their own standards of judgment.[63]

There is no agreement as to a precise definition of "sect" or "sectarian," but it is generally agreed that any institution which qualifies as a "sect" or any form of instruction which is undeniably "sectarian" must remain outside the realm of politics and must not attempt to inculcate its doctrines into the public educational system. Unfortunately, this principle often becomes clouded in particular situations with the result being litigation and the necessity of judicial intervention with regard to the denial of religious freedom in the public schools.

Much of the litigation arising from alleged sectarianism in public schools emanates from the question of whether reading the Bible, in whole or in part, with or without comment, in the classroom, infringes upon the American notion of religious freedom and separation of church and state. Part of the conflict lies in the differences in the King James, the Revised Standard and the Douay translations of the Bible, and part lies in the rejection *in toto* of the New Testament by Judaism.

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63. For purposes of this study, sectarianism is equated with denominationalism — practices devoted to, peculiar to, or promotive of the interests of a particular denomination. Sectarian institutions are those "affiliated with a particular religious sect or denomination, or under the control of governing influence of such sect or denomination . . ." (56 C.J. 1272-73).

A. States in Which Bible Reading Has Been Upheld

Colorado. In 1927, the Colorado Supreme Court[64] upheld the validity of Bible reading in the public schools of that state. Attendance at the Bible reading sessions was optional and the King James Version was read without comment. The court held that when performed in this manner such exercises did not amount to sectarian instruction. Since attendance was not required, the court answered the question as to whether this constituted a stigma on the non-attender in these words: "The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them."[65]

Georgia. The City Commission of Rome had enacted that the Old or New Testament must be read in all city schools, without comment,

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Marked differences appear in attempts by various state courts at definition of the word "sect." For example, one court held that a sect is a class of people believing in a certain religious creed. Hale v. Everett, 53 N.H. 9, at 92 (1868). Another court said that a sect is "a body of persons distinguished by peculiarities of faith and practice from other bodies adhering to the same general system. Specifically, the adherents collectively of a particular creed . . . as the Presbyterian sect . . ." Stevenson v. Hanyon, 7 Pa. Dist. R. 585, at 590 (1898). What is meant by the term "general system?" If it means simply a belief in some form of Supreme Being, it is evident that Islam and Buddhism are sects in precisely the same way that Methodism and the Holiness groups of Christianity are sects. Perhaps "general system" has a more limited meaning — for example that Christianity is a "general system" totally different from Judaism. Perhaps the court intended an even more specific use for its terminology — that Protestantism is a "general system" different from Catholicism. See State v. Taylor, 122 Nebr. 454, at 458, 240 N.W. 573 (1932), which holds that the word "sectarian" applies to the Catholic Church without distinction between the original church and the many later denominations of Christianity.

A Georgia decision typifies the indefiniteness of the problem and its solution: ". . . A 'religious sect' is a body or number of persons, united in tenets, but constituting a distinct organization or party, holding sentiments or doctrines different from those of other sects of people." Bennett v. City of LaGrange, 153 Ga. 428, 112 S.E. 482 (1922).

The Wisconsin Supreme Court, in a decision which is discussed more fully later, held that the prohibition in the state constitution of sectarian instruction in public schools:

> manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; that is to say, instruction in religious doctrines which are believed by some religious sects and rejected by others. Hence, to teach the existence of a Supreme Being, of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma concerning which the religious sects are in conflict. State *ex rel.* Weiss v. District Board, 76 Wis. 177, at 193, 194, 44 N.W. 967 (1890).

64. 81 Col. 276, 255 Pac. 610 (1927).

65. In what was actually *obiter dictum*, since the particular question was not raised by the litigants, the court admitted that some sections of the King James Version of the Bible could be considered sectarian.

and further provided that a pupil could be excused from the reading sessions on the grounds of conscientious objection at the request of his parents or guardian.[66] The 1922 case of *Wilkerson v. City of Rome*,[67] arising from this legislation, brought the decision that such a law does not interfere with the freedom to worship, even though a prayer was said by the teacher, since the pupil did no more than listen; he did not actively participate. The relevant portions of the Constitution of Georgia are typical both of states which have upheld Bible reading and of those which have invalidated it, providing that:

> All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should in any case control or interfere with such right of conscience.
>
> No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution.[68]

The court held that the reading involved in this case was not of a sectarian nature. Church and state are not totally separate, nor was complete separation intended by the framers of the Georgia constitution. Furthermore, public funds were not expended for Bible reading, since the length of time involved in the reading was almost negligible. The theory to which the Georgia court adhered is a common one: that "sectarian" refers only to the Christian sects, since Jews, Moslems and atheists would regard all versions of the Bible as sectarian.

Iowa. The statute involved in the 1884 case of *Moore v. Monroe*[69] read that "The Bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian."[70] In the situation involved in this litigation there was Bible reading, hymn singing and prayer, but without comment and without compulsory attendance. The Iowa Supreme Court held that the religious liberty clause of the state constitution does not prevent the casual use of public buildings for worship, especially when attendance is voluntary.

Kansas. In Topeka, the Lord's Prayer and the Twenty-third Psalm were recited, but without comment. It was done primarily as a morning

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66. JOHNSON AND YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 44 (1948).
67. 152 Ga. 762 110 S.E. 895 (1922).
68. GA. CONST., Article I, Sections 12 and 14.
69. 64 Ia. 367, 20 N.W. 475 (1884).
70. CODE OF IOWA, 1931, §4258, as quoted in Johnson and Yost, *op. cit.*, p. 50.

exercised designed to quiet the pupils, but, on the other hand, a child could be excused (although one student was expelled from school for doing his regular school work during the devotions). The Kansas Supreme Court, in the 1904 case of *Billard v. Board of Education*,[71] held that this was neither religious worship nor sectarian instruction within the meaning of the state constitution. Nor was it a misuse of public funds; on the contrary, Bible reading is designed to encourage intellectual and moral improvement in the child and it is the duty of the schools to promote these values.[72]

Maine. The first litigation on the question of Bible reading in the public schools appeared in Maine in 1854, with the case of *Donahoe v. Richards*.[73] This case differs from those discussed previously in that the King James Version of the Bible had been adopted as a textbook, the use of which was compulsory for all pupils. Donahoe's daughter, a Catholic, had been expelled for her refusal (at her father's direction) to read this Protestant version of the Bible, as ordered by her teacher. The constitutionality of the Maine requirement hinged on the use of the Bible as a textbook, but the court held that the adoption of one version over another does not place a sanction of "purity" of the text or accuracy of its translation on that version. The state legislature, while prescribing that the Bible should be read, had placed the power of selection of a particular version in the hands of the local committees.[74] Of this the court said: "The power of selection is general and unlimited. It is vested in the committee of each town. It was neither expected nor intended that there should be entire uniformity in the course of instruction or in the books to be used in the several towns in the state."[75]

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71. 69 Kansas 53, 76 Pac. 422 (1904).

72. In 1905, the year after the Kansas decision, the Kentucky Supreme Court rendered a decision in a similar situation. The opinion of the court held that the King James Version of the Bible is not sectarian if it is not commented on, because it does not teach the dogmas of any sect as such, even though it might be accepted and used by some sects:

> "That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents that give it its character." Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S.W. 792 (1905).

73. 38 Me. 376 (1854). See HELMREICH, RELIGION AND THE MAINE SCHOOLS: AN HISTORICAL APPROACH 50-57 (1960).

74. Johnson and Yost, *op. cit.*, p. 41.

75. *Ibid.*, pp. 41-42.

The effect of the decision is that, under Maine law, it is not an infringement on individual religious freedom to require a student to take part in reading from a particular version of the Bible.[76]

Michigan. The State of Michigan enacted a statute, optional with local school boards or teachers, permitting daily readings from a book called *Readings from the Bible,* composed almost entirely of Biblical extracts emphasizing the moral precepts of the Ten Commandments. No comment could be made on these readings and a pupil could be excused if he so desired. The Michigan Supreme Court[77] held that this in no way violated the state constitution. As to the many problems involved in Bible reading, these were left to the discretion of the state Board of Education as an administrative matter.[78]

Nebraska. In the case of *State v. Scheve,*[79] in 1902, the Nebraska Supreme Court implicitly upheld the principle of Bible reading, but prohibited the particular practice in question. A teacher had received permission from her local school board to hold religious exercises during school hours. These exercises were to consist of readings from the Bible, hymn singing, and the offering of prayer according to the doctrines, beliefs and rites of certain churches. When objections were raised, the court agreed that this was sectarian instruction and therefore to be discontinued, but rendered only an *obiter dictum* statement as to Bible reading in general: "Certainly the Iliad may be read in the

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76. Another early case, Spiller v. Inhabitants of Woburn, 94 Mass. 127 (1866), resulted in a decision similar to that in Maine. In Woburn, the town committee had required that schools be opened with a prayer and readings from the Bible. One provision of the requirement was that the pupils should bow their heads during the prayer, but a child could be excused from this particular part of the devotion upon parental request. The provision as to individual omission of this part of the exercise had come about only as a result of objections from a student named Ella Spiller. Unfortunately, her father declined to request such an excuse and the girl was dismissed from the school.

The court held that a town committee can require Bible reading and prayer, but a student may not be required to conform to a religious rite or ceremony contrary to his beliefs and conscience, for this would be violative of a provision of the Constitution of Massachusetts which reads: "No subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments . . ."

However, the court held that in this situation bowing one's head is not a religious ceremony or rite, for the purpose was not to compel prayer but merely to prevent interruption. Furthermore, it was not compulsory since, if his parents wished, a student could even be excused from bowing his head.

77. Pfeiffer v. Board of Education of Detroit, 118 Mich. 560, 77 N.W. 250 (1898).

78. A similar holding is found in Kaplan v. Independent School District of Virginia, 171 Minn. 142, 214 N.W. 18 (1927). In this case, the Minnesota Supreme Court held that when the legislature has vested the administration of public education in school boards, the judiciary will not interfere with regulations unless it is clearly shown that abuses exist.

79. 65 Neb. 853 91 N.W. 846, 93 N.W. 169 (1902).

schools without inculcating a belief in the Olympic divinities, and the Koran may be read without preaching the Moslem faith. Why may not the Bible also be read without indoctrinating children . . .?"[80]

Ohio. The Ohio Supreme Court has left the problem of Bible reading to the discretion of school administrators, thus leaving the implication that reading the Bible in Ohio schools violates no provision of the state constitution. The court upheld a resolution of the Board of Education of Cincinnati which discontinued the daily reading of the King James Version of the Bible, and further prohibited any form of religious instruction or the reading of any books of a religious character. Part of the opinion, written by Justice Welch in the 1872 case of *Board of Education of Cincinnati v. Minor*,[81] has often been quoted in similar litigation since that case:

> Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.[82]

Texas. A school board resolution required the presence, but not the participation, of pupils for morning religious exercises which consisted of reading without comment verses from the King James Version of the Bible, recitation of the Lord's Prayer and the singing of hymns.[83] The Texas Supreme Court decided unanimously in *Church v Bullock*[84] that such practices do not make the school sectarian, even in view of a provision of the state constitution which reads: "No human authority ought . . . to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship."[85]

80. As quoted in BETH, THE AMERICAN THEORY OF CHURCH AND STATE 84 (1958). Similarly, the Charter of the City of New York prohibited the Board of Education from excluding the use of the Bible in any school. The highest New York court upheld the validity of this action, saying that Bible reading does not destroy the proper relation of church and state, as long as the readings are not commented upon. See Lewis v. Board of Education, 157 Misc. 520, 285 N.Y. Supp. 164 (1935).
81. 23 Oh. St. 211 (1872).
82. *Id,* as quoted in Johnson and Yost, *op. cit.*, p. 59.
83. Emerson and Haber, *op. cit.*, p. 1173.
84. 104 Tex. 1, 109 S.W. 115 (1908).
85. TEX. CONST., Article I, section 6. Although California law does not permit Bible reading in public schools, the Supreme Court of that state, in Evans v. Selma Union High School District, 193 Cal. 54, 222 Pac. 801 (1924), held that a school library may purchase copies of the Bible and such purchase does not imply acceptance by the state of the doctrines found in the Bible.

B. States in Which Bible Reading Has Been Held Unconstitutional

Illinois. An Illinois statute provided for the reading of the King James Version of the Bible with the pupils required not only to listen but also to stand devoutly. After the reading, there were comments and the students were asked questions about the reading. Included in the exercises were hymn singing and recitation of the Lord's Prayer. In 1910, in *State ex rel. Ring v. Board of Education,*[86] the Illinois Supreme Court held that this practice violated the religious freedom clause of the state constitution and also a provision of that constitution which prohibits the use of state funds in aid of sectarian purposes. Speaking of the Bible, the court said that whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction, and the version of the Bible used is irrelevant, for all versions are sectarian to the non-Christian.[87] The court pointed out that the public schools are supported by taxes levied on members of all faiths and on people of no faith at all. The decision in this case also noted that:

> The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to religious stigma and places him at a disadvantage in the school, which the law never contemplated.[88]

New Jersey. Litigation in New Jersey courts has produced two cases relevant to the problem of Bibles in the schools. The first of these,

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86. 245 Ill. 334, 92 N.E. 251 (1910).

87. SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF ILLINOIS, SUPREME COURT DECISIONS CONCERNING READING OF THE BIBLE AND RELIGIOUS EDUCATION IN THE PUBLIC SCHOOLS 13. (Reprint of opinion in 245 Ill. 334).

88. Five years after the Illinois case, a similar practice in Louisiana was invalidated, again with emphasis on the stigma involved when a student refrains from participation. A school board resolution required daily Bible reading without comment and made optional the recitation of the Lord's Prayer. In *Herold v. Parish Board of School Directors* 136 La.1034, 68.So. 116 (1915), the court held that the reading of the Christian Bible in any version is an invasion on the freedom of conscience of Jews and also violates a state constitutional prohibition against expenditures of public funds in aid of any church or sect. Regarding the provision in the resolution that students of minority faiths could be excused from the daily reading, the court said that:

> . . . excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself, it subjects him to a religious stigma . . .

It is interesting to compare this type of sociological decision with the later Colorado case discussed above where the question of stigma on the part of those excused was viewed in a totally different light. The Louisiana court also emphasized that the Bible is essentially a religious document and that:

Doremus v. Board of Education,[89] has been discussed earlier; since no state issues were involved it need not be re-discussed, except to emphasize the decision of the New Jersey Supreme Court that Bible reading *per se* does not constitute the kind of religious instruction prohibited by the United States Constitution.

The second New Jersey case, however, while not directly reversing the *Doremus* decision, considerably modified it. This case was *Tudor v. Boad of Education of Rutherford,*[90] in which the court held unconstitutional the distribution of the Holy Bible by the Gideons International, a Protestant organization, in the public schools of New Jersey. The Gideon Bible, which consisted of the New Testament, the Book of Psalms and the Book of Proverbs, was objectionable both to Jews and to Catholics. The Board of Education of Rutherford, New Jersey, had agreed to distribute copies of this Bible to pupils whose parents had given written permission and the Bibles were to be distributed at the close of the school day with only those pupils in the classroom who were actually to receive the books. The New Jersey Supreme Court held that this action violated both the state and federal constitutions since such distribution was preferential to Protestantism, thereby abolishing the neutrality which the state is required to maintain.[91]

The court differentiated between this situation and that occurring in the *Doremus* case by repeating that the Old Testament and the Lord's Prayer, without comment, do not constitute sectarian instruction or worship. The court also held that even though acceptance of the gift from the Gideons may be purely voluntary, it still constitutes sectarianism, and the state may not even "accommodate" religion if the facilities of the public school are actively used for the preference of one religion over others. As in the *Doremus* case, the United States Supreme Court declined to review the decision.[92]

South Dakota. The case of *State* ex rel. *Finger v. Weedman,*[93] in 1929, did not result in a direct ruling on the right to read the Bible in the public schools of South Dakota. Certain pupils had been dismissed

> To read the Bible [in the public schools] . . . requires that it be read reverently and worshipfully. As God is the author of the Book, He is necessarily worshipped in the reading of it. And the reading of it forms part of all religious services in the Christian and Jewish churches, which use the Word. It is as much a part of the religious worship of the churches of the land as is the offering of prayer to God. (68 So. 1161 at 121)

89. 5 N.J. 435, 75 Atl.2d 880 (1950); see *supra,* pp. 375-376.
90. 14 N.J. 31, 100 Atl.2d 857 (1953).
91. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY 74 (1957).
92. 348 U.S. 816 (1954); *cert. den.*
93. 55 S.D. 343, 226 N.W. 348 (1929).

from school for refusing to attend religious exercises, which included reading from the King James Version of the Bible and recitation of the Lord's Prayer. The court held that the Bible, as it was used in the schools involved in this litigation, was not for a secular purpose, but for "increasing, improving, and inculcating morality, patriotism, reverence, and the developing of religious and Christian character of the pupils." The only relief sought by the plaintiffs was the reinstatement of the pupils, and this the court granted. But the tenor of the case seemed adverse to Bible reading in public schools, for the court pointed out that serious problems may arise in selecting the version of the Bible to be read. The court also suggested that it should not be necessary to teach religion in the schools since churches exist to serve that function. As a result of this decision, the permissive Bible reading statute of South Dakota was deleted from the state code.

Washington. The Constitution of Washington states that "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."[94] The same constitution also provides that "all schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."[95] The 1930 case of *State ex rel. Clithero v. Showalter*[96] arose when the appellants sought a writ of mandamus to compel the state board of education to arrange for Bible reading and instruction in the public schools. On the basis of the sections of the constitution cited above and also because of its 1918 ruling on a similar issue, the Washington Supreme Court denied the writ. The case was appealed to the United States Supreme Court which dismissed the appeal, saying that no substantial federal question was involved.[97]

This case is unique in that it was the first attempt, through the courts, to require the teaching and reading of the Bible. The court held that, irrespective of the constitutionality of Bible reading, it could not grant a writ of mandamus controlling the discretion of an administrative board of officers in whom has been vested discretionary power. If one considers the decision thoroughly, however, there seems to be more than a suggestion that the board of education had no discretionary powers in this particular matter.

Wisconsin. The case of *State ex rel. Weiss v. District Board,*[98] in

94. WASH. CONST., Article I, section II.
95. *Ibid.*, Article IX, section 4.
96. 159 Wash. 519, 293 Pac. 1000 (1930).
97. 284 U.S. 573 (1939); app. dism.
98. 76 Wis. 177, 44 N.W. 967 (1890).

1890, emanated from circumstances in which the King James Version of the Bible was read daily, but without comment, and students could be excused from participation. The Wisconsin Supreme Court held that this practice, even though non-compulsory, violated a state statute which prohibited text books "which would have a tendency to inculcate sectarian ideas." This court, too, looked with sympathy on the individual who excused himself from the devotions for it said that when:

> . . . a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. . . . The practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage . . .[99]

The court also held that the practice interfered with freedom of worship. Moreover, it was held to constitute "sectarian instruction," prohibited by the Wisconsin Constitution, and also the use of public funds for religious instruction, likewise prohibited.

The court made clear that to prohibit Bible reading in schools is not to deny the value of Scripture; it is not disastrous to religion, nor is it harmful to the influence of religion in the minds and actions of men. "We most emphatically reject these views. The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle."[100] In this case, the Bible itself was held to be sectarian, but it should be noted that a later Wisconsin decision held that non-sectarian prayer by a minister at a public school graduation is not religious instruction, and is therefore constitutional.[101]

C. Summary of State Practices

Twelve state constitutions specifically prohibit sectarian instruction in public schools, but no state constitution makes any explicit prohibition of reading the Bible as such, and thus questions as to the legality of Bible reading have been left to the courts. It is especially interesting that the Constitution of Mississippi specifies that the rights of religious liberty do not exclude the Holy Bible from use in the public shcools of that state.[102]

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99. 76 Wis. 177, at 199.
100. *Id,* as quoted in Johnson and Yost, *op. cit.,* p. 70.
101. State *ex rel.* Conway v. District Board, 162 Wis. 482, 156 N.W. 477 (1916).
102. Butts, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 191 (1950).

As unilluminating as state constitutions are on this problem, they are not as confusing as the various state statutes. About one-half of the states have laws prohibiting sectarian instruction in public schools, but in most of these states Bible reading does not seem to be interpreted as sectarian instruction; indeed, twelve states have passed laws requiring that the Bible be read in the schools and in seven of these twelve there is also legislation prohibiting sectarian instruction. In addition to the twelve states requiring Bible reading, there are six in which permissive legislation has been passed, making Bible reading optional with local officials.[103] In approximately nineteen other states Bible reading has been rendered acceptable in the public schools through court decisions, rulings of the attorney general or the department of education, or simply by local custom.

In most states where Bible reading takes place, comments may not be made on the passages read, although, as we shall see later, this restriction cannot always be enforced. Ordinarily, the statutes do not prescribe the version of the Bible to be read, but almost invariably the one chosen in the King James Version, accepted neither by Catholics nor by Jews.

D. Bible Reading and the Supreme Court of Tennessee

It is in no way surprising that the highest court of a state in which the validity of a law prohibiting the teaching of evolution was upheld, should also uphold a law requiring the daily reading of the Bible in the public schools. This the Supreme Court of the State of Tennessee has done; the consistency and acceptability of such action in terms of the socio-religious complexion of the people of the state is beyond challenge. From a legal view, however, either or both of these decisions might be within the scope of challenge, since the Constitution of Tennessee says:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.
>
> That no political or religious test, other than an oath to support the Constitution of the United States and of this State,

103. *Ibid.*, p. 192.

> shall ever be required as a qualification to any office or public trust under this state.[104]

The issue arises in regard to a Tennessee statute which reads:

> It shall be the duty of the teacher . . . to read or cause to be read at the opening of the school every day a selection from the Bible, and the same selection shall not be read more than twice each month.[105]

Phillip M. Carden, resident of Nashville, taxpayer, and parent of public school children, believed that there was a basic and irreconcilable opposition between both the United States and Tennessee constitutions and the state statute which required reading of the Bible in the public schools.[106] Consequently Carden sought from the Chancery Court of Davidson County an injunction to restrain the Nashville school board from continuing Bible reading, on the grounds that this practice was both an establishment of religion and a violation of religious freedom.[107] In a fashion similar to that of the United States Supreme Court, the Supreme Court of Tennessee was hesitant to make a decision on the issue, saying that the complainants might not have sufficient interest to sue. But the court finally decided to hear the case since it felt that there was a "general public interest involved." One might wonder what qualifications would be necessary to bring suit if Carden did not have the qualifications, for it was probably implied in the *Doremus* decision that parents of children in school would have standing to sue.

From the decision in the case emerge the following fact of importance: the King James Version of the Bible was read in the classroom, the Lord's Prayer was recited and hymns were sung frequently. It was also charged originally that the teacher of one of the Carden children asked each Monday which of the pupils had attended Sunday School that week. Those who had failed to attend were required "to copy many verses from the Bible."[108] This particular issue was subsequently made moot by the stipulation that the Sunday School inquiries had ceased. It also appeared that teachers commonly asked of the students questions pertaining to the daily Bible reading. The complainants charged:

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104. TENN. CONST., Article I, Sections 3 and 4. But it may also be significant that the following provision is also a part of the Tennessee Constitution: "No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State." (Article 9, Section 2.) Undoubtedly, this provision is rendered invalid by *Torcaso v. Watkins*, 367 U.S. 488 (1961).

105. TENN. CODE ANN. §49-1307 (4).

106. As with the Schempp family, the Cardens were Unitarians.

107. Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

108. *Id*, at 668.

> that the said practices and each of them are contrary to their religious beliefs and principles; and that they have been and will continue to be aggrieved, offended and embarrassed by the said practices thus sanctioned and approved by the defendant Board of Education.[109]

The opinion in *Carden v. Bland* was written by Chief Justice A. B. Neil without dissent and was delivered on March 9, 1956. In a manner not unlike the decision in the famous *Scopes* trial of 1925,[110] the opinion in *Carden* seemed to read very much like the arguments of the State — in this case the Nashville school board. Although the court did not base its decision on *Scopes* it did adopt many of the arguments of the thirty-year-old evolution case, pointing out that to constitute a violation of rights, legislation must work an establishment of religion, provide for compulsory support, make attendance or worship compulsory or impose restrictions on the expression of belief. The present statute required only that the teacher read a selection from the Bible. If the anti-evolution statute in *Scopes* does not violate the Constitution, neither does the pro-Bible reading statute in *Carden*.

The opinion of the court in *Carden* began by emphasizing the principle that the public schools cannot conduct a program of religious education. To this the court added that the schools likewise cannot explain the meaning of the Bible.[111] Reading the Bible without comment, hymn singing and reading the Lord's Prayer do not violate the freedom of religion, nor do these practices make the school a place of worship. The doctrine of separation of church and state "should not be tortured into a meaning never intended by the founders of the Republic, making the school system a godless institution as a matter of law."[112] Instead, students should be taught not to forget God and that is all that this statute requires. For the court, this is neither establishment nor abridgment of religious freedom. The court freely admitted that the mandates of the Tennessee Constitution regarding religion are broader and much more specific than those of the United States Constitution, but at the same time the justices found it "difficult to view these simple ceremonies" as establishment or interference.[113]

Included in the *Carden* opinion were numerous quotations from U. S. Supreme Court decisions in the area of religion and education. The court found it possible to refer to *McCollum, Zorach* and *Everson,* and

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109. *Id,* at 669.
110. Scopes v. State, 154 Tenn. 105 289 S.W. 363 (1927), which upheld a statutory prohibition on the teaching of evolution in public schools.
111. 199 Tenn. 665.
112. *Id,* at 665.
113. *Id,* at 674.

also to a majority of the state decisions in the field, with a great deal of reliance on the New Jersey *Doremus* decision. But there was no mention in the review of state cases of any decision which had invalidated Bible reading. From *Zorach,* Justice Neil noted that the "government must be neutral when it comes to competition between sects."[114] This was followed by a seconding of the *Doremus* opinion that: "We consider that the Old Testament and the Lord's Prayer pronounced without comment, are not sectarian, and that the short exercise provided by the statute does not constitute sectarian instruction or sectarian worship."[115]

Undoubtedly the *Doremus* case is relevant in the Tennessee opinion, although there are important differences between the two statutes. The New Jersey statute permits reading only from the Old Testament while no such limitation occurs in Tennessee. The law in Tennessee makes no mention of comments on the reading while New Jersey specifically prohibits any interpretation; New Jersey requires "at least five verses" to be read each day, but no such mandate appears in the Tennessee law. These differences, however, do not seem to express variations in legislative intent, for both states felt that the Constitution does not imply that the state should be stripped of all religious sentiment; indeed, both legislatures saw fit to enact a statute which would permit children to begin the day by hearing "words from the wisdom of the ages and bow their heads in humility before the Supreme Power."[116]

Sectarian teachings were held unconstitutional in the *McCollum* case, where actual religious instructors were employed to teach various faiths, with tax supported institutions and the compulsory attendance machinery of the state used for sectarian instruction. The Tennessee Supreme Court differentiated *Carden* from the Illinois case on the basis that no teachings of any sect were involved, nor was the complainant ever injured or offended or compelled to approve or accept any creed or sectarian doctrine. He was not even obliged to listen when the Holy Bible was read.

But were the Carden children required to be present during the reading of the Bible and the recitation of the Lord's Prayer? This question cannot really be answered, since there was no allegation that Carden had made an attempt to have his children excused from the reading. The fact that the law fails to mention the possibility of absence from the room would seem to indicate that, under the statute, a teacher could refuse to excuse a pupil. Several of the state court decisions discussed earlier invalidated statutes only if attendance at the reading was com-

114. Quoted in *id,* at 674 from 343 U.S. 306.
115. Quoted in *id,* at 674 from 5 N.J. 435.
116. Brief of Appellees, p. 8.

pulsory. Laws not compelling attendance seem to be predicated on the theory that Bible reading might be a violation of religious freedom but that release from the reading rectifies any possible abridgment.

Again the sociological question may be raised, and the words of the United States Supreme Court on the problem of school segregation seem germane:

> The impact is greater when it has the sanction of the law; for the policy of separating . . . is usually interpreted as denoting the inferiority of the . . . group. A sense of inferiority affects the motivation of the child to learn.[117]

The release of one pupil from the reading of the Bible also seems to emphasize the fact that some form of religion – distasteful to that particular student – is being fostered in and by the public school. If this is true, it seems to conflict directly with dictum in the *Everson* case which holds that aid to any or all religions is invalid.[118] The *Carden* decision might, however, square with the *Everson* decision if one views the practice in Tennessee as directly beneficial to the pupil and only incidentally beneficial to the churches. The separation principle does seem to permit certain activities of a public nature from which churches derive indirect benefit, if these activities are in that nebulous domain known as the public interest. An attempt will be made in subsequent chapters to show that to label the Tennessee Bible reading practices "moral training for public welfare" may be too great an extension of the *Everson* doctrine.

The two most salient problems in the issue of Bible reading seem to intertwine themselves in the Tennessee case. The first of these problems is concerned with compulsory attendance during the reading, which would almost undoubtedly violate religious freedom; the second considers the question of whether or not the facts of the case amount to instruction in religion. Most state courts, and the Supreme Court of Tennessee is no exception, have not troubled to see if any general systems of faith are furthered by Bible reading, but only to see if any particular creed or church is aided. It would be difficult to find a school situation where Methodism was favored over Presbyterianism, but instances abound in Tennessee where Protestantism in general is favored over Unitarianism, Catholicism or Judaism. Although the Bible reading statute in Tennessee neither forbids nor permits comments or interpretation,[119] the state Supreme Court assumed that no interpretation took place and this alone was sufficient to distinguish the Tennessee practice from re-

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117. Brown v. Board of Education, 347 U. S. 494 (1954).
118. This dictum became the *ratio decidendi* in *McCollum*.
119. But the Tennessee Department of Education has a general directive forbidding comments on the matter read.

ligious instruction. It was held that the practice amounts only to an invocation of divine guidance which is not unconstitutional. In fact, according to the court, instruction pre-supposes interpretation and this is impossible since: "it is beyond the scope and authority of School Boards and teachers in the public schools to conduct a program of education in the Bible and undertake to explain the meaning of any chapter or verse in either the Old or the New Testament.[120]

Where the court found justification for this statement is difficult to say, unless it is derived from other state cases. It did not come from the law of Tennessee.[121] As for the Supreme Court in the Carden case, it can be said that the justices refused to view the Bible as a sectarian book. This is in harmony with the *Doremus* case, but not with the opinion of the federal district court in the *Schempp* decision, which, however, was handed down three years after *Carden*. Of the appellants the Tennessee Supreme Court said this: "In their commendable zeal in behalf of liberty of conscience, and of religious worship, they have overlooked the broader concept that religion *per se* is something which transcends all man-made creeds."[122]

It is submitted that the court overlooked something, too: most of the practices invalidated in *McCollum* were present in *Carden v. Bland*. Among these were the use of the school attendance machinery, the use of classrooms for religious instruction and close cooperation between churches and school officials. Moreover, in Tennessee, the Bible is read to the children and often interpreted,[123] by teachers employed by the state.

IV. The Nature of Religious Instruction in the Public Schools of Knoxville and Knox County

A. Bible Reading and Interpretation

The results of a survey[124] indicate that all but a few of the teachers in Knoxville and Knox County comply with that section of the Tennessee statutes which requires daily reading of verses from the Bible.

All of the principals interviewed answered in the affirmative to the question, "Does this school have daily readings of Bible verses at each grade level or in the homeroom?" Three elementary and eight high school teachers in county schools, however, admitted their failure to comply with this law, usually with the comment that they were unable

120. 199 Tenn. 665, at 721, 288 S.W.2d 718 (1956).
121. Although it was once in the law.
122. 199 Tenn. 665, at 677, 288 S.W.2d 718 (1956).
123. Interpretation was not at issue in the *Carden* case.

to find time to read the Bible daily. This is especially true at the high school level, where the Bible is customarily read in the homeroom section. Unfortunately, not enough city system teachers were interviewed to give conclusive evidence that their compliance with the statute is more pronounced that that of their colleagues in the county system, although there is some indication that such is the case. It is fairly clear, however, that the law is fulfilled more judiciously by elementary teachers than by teachers at the high school level.

The present statute requiring Bible reading in Tennessee public schools makes no mention of comments or interpretation of the verses read, although prohibition in this regard was a part of the Public Acts of 1915: "At least ten verses from the Holy Bible shall be read or caused to be read, without comment, at the opening of each and every public school, upon each and every school day, by the teacher in charge."[125]

This act was superseded in 1925, at which time the words "without comment" were deleted, with the remainder of the statute left basically intact. The Knox County School Board, in its statement of policy for 1960, filled the gap left by the revision of the law with the statement that "teachers shall see that daily Bible readings, without comment, shall be held each day."[126] Although this policy is binding on the Knox County public school personnel, the survey indicates that several county principals, about one-third of the elementary teachers and nearly one-half of the high school teachers are either unaware of this policy or consciously disregard it.

The Knoxville Board of Education has a similar policy for city schools: "Teachers are required to read the Bible daily to the class

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124. In order to learn the types and frequency of occurrence of religious instruction in the public schools of Knoxville and Knox County, it was felt necessary to interview directly principals and teachers of various schools in the area. Upon securing permission of the superintendents of the two school systems, interview schedules were submitted to selected principals and teachers during the months of April and May, 1960. In the county schools, fourteen elementary principals and seven high school principals were interviewed, while in the city the same questions were asked of four elementary school principals, one junior high school principal and the principals of two senior high schools. Thus, twenty-eight (or about one-fifth) of the principals in the city and county school systems were interviewed. In the elementary schools, answers to the questions were obtained from thirty-eight county teachers and eight city teachers. At the high school level a total of thirty-three teachers (twenty-six in the county and seven in the city) were interviewed. This survey, then, describes the in-school religious activities of approximately fifteen thousand of the more than fifty thousand public school students in the city and county. There is no reason to believe that the activities of the remainder of the pupils vary significantly.

125. TENN. PUB. ACTS, 1915, Chapter 102, Section 1.

126. POLICIES FOR THE OPERATION OF KNOX COUNTY SCHOOLS, 1960, Section 9, p. 18.

or in assembly ten verses without comment." [sic][127] As in the county schools there appears to be a sizeable number of teachers and principals who do not abide by the ruling of the board of education in regard to interpretation of Biblical verse reading.

On the assumption that the word "interpretation" might induce a negative attitude in the minds of those teachers who take pride in their open-mindedness and their non-sectarian approach to Bible reading, another question was included in the interview schedule asking whether the teacher defined words in the verses which might be difficult for the pupils to understand. It was further assumed that definition of certain words, e.g., "grace" or "baptism", would be tantamount to interpretation and just as likely to be in violation of the establishment clause of the first amendment. Moreover, both "definition" and "interpretation" would appear to be barred under the school board policies of "no comment."

Even the most cursory comparison of the completed interview schedules clearly shows much more "definition" than "interpretation", especially in county schools at the elementary level where 66 per cent (nearly two-thirds) of the teachers replied that they defined some of the words encountered in the Scripture reading. A social studies teacher in a county elementary school admitted that he incorporates certain "problem words" from the Bible reading into a vocabulary workbook on which the students are tested. Another county elementary teacher, however, pointed out that both definition and interpretation are against the law.

It is difficult to analyze the responses of the principals to this question. Less than one-third of all principals queried gave answers in the affirmative. It is quite possible that they are unaware of the practices of their teachers in this regard; it is also possible that most of the principals understand the prohibition against commentary of any sort and assume that their teachers abide by the ruling. One principal of a county school expressed doubt that practices regarding comments were consistent among the teachers of his school.

B. Who Reads and Chooses the Selections?

It was found that in most classes the Bible verses are sometimes read by the teacher and sometimes by students. In some cases a school-wide "intercom" system is used for the daily reading. In most cases where students read the verses, it is done on a voluntary basis, either

127. BOARD OF EDUCATION, KNOXVILLE, TENNESSEE, BY-LAWS AND REGULATIONS (Revised to July 1, 1948), rule number 41.

with one student as a permanent reader or with all those who desire to participate taking turns.

On the other hand, some teachers rotate the reading among the pupils on an assigned basis. Of such teachers, twenty-one were interviewed. In the city school system only one of the three teachers executing the reading on an assigned basis will not excuse students from participation. In the county, however, four of ten elementary teachers who assign the reading refuse to excuse students from the reading. On the high school level all teachers who responded, whether city or county, permit a student to excuse himself from participation, but one teacher in a city high school gave no answer to the question of whether a student could under any circumstances be permanently excused from taking his turn in the exercises. Several teachers, most of them in county elementary schools, commented that they would not require a student to participate in Bible reading if he should object, but the comment of one such teacher is not atypical: all of her pupils are eager to read the Bible.

The person making the choice of verses to be read varies, but the selection is usually made by the classroom teacher if she performs the reading, or by individual students if they do the reading. Five elementary teachers in the city system replied that the choice was made by school authorities, but none elaborated on this statement.

C. Who Supplies the Bibles?

One question asked of both teachers and principals dealt with the source from which copies of the Bible are obtained. The majority of responses indicated that the Bibles are furnished by the teacher or sometimes by the students themselves. Two elementary teachers, one high school teacher and one principal, all in the county, stated that the Bibles are furnished by the school and presumably furnished, therefore, by taxes. More interesting was the fact that nineteen people[128] said that the Bibles used were furnished by "interested religious groups." Of these, two interviewees noted that the supplier was Gideons International. One county high school teacher said that a homeroom group of a previous year had collectively purchased copies of the Bible.

D. The Version of the Bible and the Time Devoted to Bible Reading?

The King James Version of the Bible is in almost exclusive usage as compared with other versions of the Bible, although the Revised Standard Version is used occasionally. Usually the teacher or principal chooses

128. One city principal, four county principals, three county high school teachers, two city high school teachers, and two city and seven county elementary teachers.

the version to be used, although some teachers said that the choice was left to the student reading the selection.

There is a distinction between city and county schools and between high schools and elementary schools in the amount of time each day devoted to Bible reading. Omitting from consideration those who did not reply to this question, it is found that four of seven city principals (slightly over one-half) estimated that between five and fifteen minutes are spent by the teachers in their schools. But seventeen of twenty-one County principals (over 80 per cent) replied that more than five minutes are spent in their schools.

Replies from county elementary teachers corroborated the estimates of their principals, for over 75 per cent said that they spend between five and fifteen minutes in Bible reading. Of these, the majority spend less than ten minutes. The tide was reversed at the city elementary level, however, where all teachers interviewed answered that they spend less than five minutes each day on the Bible reading exercise.

On the high school level, 68 per cent of the county teachers indicated that less than five minutes is spent in their classes, while 60 per cent of the sample of city high school teachers spend about this amount of time. One plausible explanation for the large amount of time spent by county elementary teachers on Bible reading can be related to the fact that the rural county areas are considerably more "fundamentalist" than the urban areas. Consequently, more emphasis may be placed by the family on Bible reading and this stress might easily be transferred to the school. In general, less time is spent on Bible reading in the high schools; this is probably due to the crowded schedules of the homeroom meetings where Bible reading and many other chores must be done.

E. The Value of Bible Reading

May Bible reading accurately be classified as a "chore"? An attempt was made to ascertain the answer to this through a series of opinion questions directed to teachers and principals at all levels. Most of the interviewees felt that the Bible reading exercises should not be changed in any way. Included in this group were 70 per cent of the county principals, all of the city principals, 47 per cent of the county elementary teachers and five of the seven city elementary teachers who responded.

At the high school level a plurality of teachers, both city and county, replied that increased emphasis should be placed on Bible reading. It would seem from this that their basic attitudes are probably the same as those of their colleagues in the elementary schools but, as seen above, the time spent on Bible reading in the high schools is diminished, due probably to the pressure of other duties.

It may be significant to point out that of the 107 people interviewed, only seven advocated the abolition of Bible reading by law. Only six more felt that decreased emphasis should be given to the program. Teachers and principals evidently consider Bible reading anything but a chore, but one county high school principal said that students should not be "required by law to do something which is a moral obligation."

What do the students derive from Bible reading and related devotional exercises? The answers to this question manifest a difference both strange and unexpected between city and county teachers. City teachers appeared much more laudatory of the benefits of Bible reading than did county teachers, particularly on the high school level.[129] At both levels in the county system a clear majority of the teachers – and at the high school level a sweeping majority of 80 per cent – were rather conservative in their praise of the program.

Seven teachers felt that Bible reading should be abolished by law; the same number of teachers thought that the students did not gain enough from the reading to make it worth the time spent. Most teachers also thought that the pupils themselves were enthusiastic about Bible reading. No teacher interviewed felt that students generally disliked Bible reading, but at the city elementary and county high school levels a large portion of the students seem to hold an apathetic attitude. Greater interest appears in the students of county elementary and city high schools, where there also occurs a greater amount of commentary by the teachers and also somewhat more time spent each day in Bible reading.

F. Biblical Stories

The Bible reading statute does not seem to suggest that it might be permissible at any level to substitute Biblical stories for the required verse reading. However, several elementary teachers said that as general practice stories are read in substitution of direct reading of verses from the Bible. In the county schools, twenty-six of the thirty-eight elementary teachers interviewed use Biblical stories, although in some cases this is done in addition to Scripture reading. In the city schools, four teachers interviewed do use Biblical stories while four do not. Here, as in the county, the primary teachers are the most frequent users of Biblical stories. Among the principals queried, twelve in the county system said that Biblical stories were used in some classes and three denied that

129. Perhaps this can be related to the basic conservatism of rural people in most of their thought, although religion is one area in which the rural people of East Tennessee are anything but conservative from an emotional standpoint.

such readings were used, but in the city system all seven principals admitted the use of stories in some classes in their schools. This seems strange, for two of the seven were high school principals and one, a junior high school principal. It was also found that more often than not the classroom teacher chooses the story to be read, although in at least one county elementary school an "interested religious group" supplies Biblical stories, and in some cases the students themselves supply the reading material which in at least one school is a publication known as *The Upper Room.*

G. The Lord's Prayer and Other Classroom Religious Activities

Other sources are frequently used in an effort to instill spiritual values in the children. Over 40 per cent of the county principals interviewed were aware that additional sources are used in their schools, while four of the seven city principals also acknowledged such practices. The most frequent exercise used in conjunction with verse reading seems to be recitation of the Lord's Prayer. Twenty-one county high school teachers answered the question pertaining to the use of the Lord's Prayer and of these sixteen said that they used it along with their daily Bible reading. In the city, all four of the teachers who replied acknowledged use of the Lord's Prayer. In the elementary schools, thirty-five of thirty-eight teachers have recitation of this prayer, while in the city this is done by six of the eight teachers interviewed.

The Lord's Prayer is by no means the only source utilized to further the moral or religious education of Knoxville and Knox County public school pupils, as can be seen from the tabulation below. It is evident that a considerable amount of religion is taught to public school students at the elementary level. The tabulation does not indicate that these practices vary significantly between city and county; therefore no breakdown is shown between the two school systems:

	Times answered in the affirmative by 46 teachers
Recitation of prayers (other than the Lord's Prayer)	24
Religious plays	14
Religious notebooks or scrapbooks	3
Religious artwork (such as posters)	18
Biblical map drawing	2
Bible memory drills	10
Discussions of religious subjects	9
Religious movies	7
Chapel programs and religious assemblies	27

Although the sample is small it is large enough to give evidence that there are many religious practices carried out in local public schools; the size of the sample in no way governs the constitutionality of the practices.

In one county school, slower students at the junior high school level use a publication of the National Council of Churches of Christ for their devotional exercises; in another county school religious phonograph records are used for devotions at the elementary level. In a junior high school in the city, students sometimes give religious talks. One county elementary school teacher said that she offers a blessing before the students are dismissed for lunch each day.

H. Special Projects for Religious Holidays

These were not the only practices uncovered which are neither prohibited nor provided for by Tennessee statutes. In a majority of elementary schools, both city and county, students participate in special projects in observance of religious holidays. Of the county elementary teachers interviewed, twenty-seven replied that their students participate in various religious projects throughout the year, while only nine said that they had no such projects. The ratio was the same in city elementary schools. Six teachers had such projects while only two did not. In all cases these projects are limited to the traditional Christian holidays. Asked if students could be excused by parental request from these and other religious activities on the elementary level, seventeen county teachers said "yes" and six city teachers gave the same response. But five county teachers and one city teacher gave a negative response.

All school principals were asked the same questions. Fourteen county principals and three principals of city schools said that their students participated in special projects for religious holidays, again limited to the Christian holidays. In the county, five principals said that religious holidays were not given special observance through student projects while four city principals gave this reply. It was also ascertained from the principals that in fifteen county schools pupils present religious plays at assemblies; in only five county schools in the sample are there no religious plays. Of the city principals who answered this question, three said that their schools had religious plays and three gave the opposite reply, but it should be noted that several principals amplified their reasons for having no religious assemblies: they have no room large enough for assemblies. One county principal said that students could not be excused from participation in these activities, even by parental consent.

I. Distribution of Religious Information

Not all of the religious instruction given to pupils emanates from the school. Teachers and principals were asked if they were requested to distribute religious materials to their students. Only a few of those interviewed said that they were "frequently" asked to disseminate religious information but several more were asked to do so "occasionally." A subsequent question was in regard to the disposition of requests of this nature. Of the county principals who said that they received such requests, one said that he never complied, seven sometimes complied, and two always gave permission for distribution of religious information. In the city schools, three principals answered that they never gave permission and one replied that he occasionally acceded to the requests of religious groups in distribution of their materials.

At the elementary level the results were somewhat different. In the county, three teachers said "never"; two said "occasionally", and one said "always." Of the two interviewees in the city elementary schools, one occasionally gives permission and the other always does.

None of the teachers interviewed at the high school level indicated compliance with these requests. In the county, four high school teachers never give permission and six occasionally do. In the city high schools, one teacher answered that such permission was never granted while two teachers "occasionally" distribute the literature, which frequently is an appeal to enroll in a vacation Bible school or to join an organization such as Youth for Christ. The criteria used by teachers and principals in their decisions as to distribution of the material are varied, but all seem subject to value judgments. One teacher uses his "own judgment" in deciding whether or not to comply with the request; another teacher will cooperate if it is "beneficial to the welfare of the students;" still another claims to pass out religious information if it is "not controversial or sectarian in nature!"

J. Talks by Ministers

Ministers are frequently invited to public schools to give talks which are either inspirational or descriptive of their religion, or which, in a few instances, are sectarian. Seventeen county principals said that ministers periodically give talks to the students while only two of the principals interviewed said that ministers do not visit their schools. In the city, three principals have their students listen to talks by ministers, while four replied that ministers do not come to their schools. In most cases, according to the survey, the ministers are chosen by the school administration. Occasionally, members of the faculty make the choice

but in only a few schools are students asked to participate in the selection. The survey reveals that most schools invite only Protestant ministers, resultantly denying their pupils the opportunity of learning about other faiths. None of the teachers who responded had invited a representative of any faith save Protestantism to visit the class. Two principals, both in county schools, said that representatives of all three faiths had spoken at their schools, while one principal each in the county and the city replied that Protestant ministers and Catholic priests had spoken but Jewish rabbis had not.

Even more startling is the information that ministers sometimes give sectarian talks and that students in some schools may not be excused from attending religious talks or convocations. In the county, four principals admitted that ministers occasionally give talks which could be considered sectarian, while one city principal made the same admission. These schools represent only a small minority, but the mere fact of the existence of open sectarianism in Knoxville and Knox County public schools leads one to wonder whether other similar practices might also exist, though perhaps in a more subtle or clandestine manner. This admission by principals also casts doubt on any suggestion that educators are unaware of the strict meaning of "sectarian", for certainly a principal would not admit that sectarian practices exist in his school if he could possibly deny it. The five principals who affirmed that sectarian talks are given also seem to give at least tacit approval to the practice.[130]

K. Chapel Sessions

Most principals in the survey replied that chapel sessions were held in their school and a few said that spiritual convocations were held from time to time. In fourteen county schools attendance is required at chapel or convocation, while only three county principals replied that attendance is optional. In the city system, five principals said that attendance is mandatory and two replied that it is optional.[131]

L. Religious Organizations

A few schools have other methods to assist their pupils in spiritual development, although those uncovered by this survey were found to be purely voluntary in nature. By way of example, in two of the county schools studied, representatives of various religious groups frequently visit the school, attempting to foster Bible verse memorization among

130. One county principal, answering in the negative, commented that a minister had once presented a sectarian talk but that he had not been invited to return.

the pupils. The reward for "good scholarship" is usually an expense paid period at a vacation Bible camp. In nine of the twenty-one county schools and in one of the seven city schools where the principal was interviewed, an affirmative answer was obtained to the question, "Do other religious groups such as revivalists, choirs or Christian youth organizations appear at assemblies?" This is probably not voluntary as far as the students are concerned since attendance is required at assemblies in almost all schools. Again, however, the principals indicated no awareness of conflict between required attendance and the conscience of individual students.

Student religious organizations and clubs are encouraged by the principals of most junior and senior high schools, both county and city. In two county schools these groups may be officially supervised by ministers or other representatives of a particular denomination. In four county schools the meetings of the religious organizations are held on the school grounds in the customary activity period which occurs during the school day.[132]

M. The Bible Teaching Program

Since 1933 there has been an elective course in the Bible in some Knoxville and Knox County secondary schools. At the present time,

131. In at least one county school which has compulsory attendance for chapel sessions a student may not be excused from attendance unless he is legitimately absent from school. All other principals replied that parental request was sufficient for permission not to attend chapel devotions, but not all elementary teachers were as lenient in the matter of excusing pupils from various religious exercises. Three county teachers and one teacher in the city elementary system said that under no circumstances would they permit a child to absent himself from a religious talk unless he should be absent from school for a legally justifiable reason. It is possible that these teachers have not been faced with a parental request of this nature and if pressed would grant the excuse to a child whose parents so requested. There are very few children in local public schools who are not Protestant, and since the non-Protestant children of Knoxville live in a predominantly Protestant environment they very likely do not raise verbal objection to talks by Protestant ministers. To do so would bring forth the possibility of social stigma and derision from the teacher, the same problem which faced the Carden children of the Nashville Bible reading case.

132. Released time for religious instruction has not emerged as a problem in Tennessee, but the principals of three county schools and two city schools indicated that students and faculty may, if they wish, attend religious instruction during the school day but not on school property. One principal said that attendance records are maintained in such an event. In one county school surveyed, Jewish students are dismissed early on days of scheduled classes in Hebrew.

The principals were asked if there were students in their schools who objected to participating in the flag salute. Only one principal said that there were such pupils in his school and added that permission not to participate was readily granted. One county principal maintained that, although no objection had ever been raised, he would not be willing to give exemption from the salute. A similar situation exists in some rural areas of Knox County where a few parents, for religious reasons, forbid their children to participate in folk dances or to "dress" for physical education classes. As far as can be ascertained, school authorities cooperate with these parents.

under authority of the Tennessee State Board of Education, as much as one unit of credit may be earned in the Bible course in schools where it is a part of the curriculum. This unit may count toward the sixteen credits which are needed for graduation from the secondary schools of Tennessee and it is also recognized toward entrance into state colleges and universities in Tennessee.

The course in Bible presents problems of constitutionality somewhat different from those which face the religious practices discussed above. Consequently, the accredited secondary level course in the Bible is not the focus of this study but its main features should be included. The most important aspect of the course is its financing. The finance report for 1959-1960 of the Committee on Bible Teaching in the Public Schools indicates that most of the money for the program comes from various local churches and a smaller share is donated by local parent-teacher associations, civic clubs and private business firms.[133]

The teachers of the Bible are selected and paid by the Committee, which also directs the course of study. Some of the teachers are laymen, others are ministers. The function of the public school system is to place the course in the curriculum and provide a room for the class, which is held five days a week. The Bible teachers are members of the faculty of the school in which they teach and also frequently serve as advisors to school Bible clubs. In some schools they also prepare materials for chapel and classroom devotions.

Bible teachers must have state teaching certificates, even though they are employed by the committee. Apparently this committee encounters some trouble in finding qualified teachers, for a report of the administrative committee of the Committee on Bible Teaching in the Public Schools sent out a plea for church members to "please let us know of people who are known in the various denominations who could be recommended to teach in our program.[134]

The words "various denominations" seem to imply that only members of those denominations which contribute to the program are invited to participate in the teaching. Those concerned with the Bible course unanimously declare, however, that nothing denominational

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133. Of the nearly seventeen thousand dollars contributed by churches in 1959, a total of $5,591 was given by Baptist churches in the area, $4,021 by Methodist churches, $5,788 by Presbyterian churches and $900 by the First Christian Church. Slightly less than one thousand dollars was contributed by parent-teacher associations, civic clubs and business firms. (COMMITTEE ON BIBLE TEACHING IN THE PUBLIC SCHOOLS, FINANCE REPORT, 1960).

134. Dated April 26, 1960, and signed by the administrative committee chairman, Reverand Julian Spitzer, pastor of a Knoxville Presbyterian church.

creeps into the teaching. Teachers are required to be completely impartial and to state the positions of all disputants in any controversy concerned with the Bible.

Students furnish their own copies of the Bible, usually the King James Version, with other versions and source materials available in the school libraries. The course of study, approved by the public school administration, is based on an historical, philosophical and biographical approach to the content of the Bible. In some schools there is a comparative study of religion.

The Advocates of the Course. On the question of constitutionality of a course in the Bible, those affiliated with the program are not unanimous. The leading teacher of the course, a woman who has taught it for many years, believes that as long as the course is an accredited elective and taught on a "non-denominational" basis it is valid. The city superintendent of schools said that the constitutionality of the course is "debatable." The chairman of the Committee on Bible Teaching in the Public Schools, a layman, has a typical attitude. He feels that there is a possibility of unconstitutionality, but the crux of the issue for the chairman is whether or not the Bible course is substantially beneficial to the students. He maintains that it is a good program since it teaches children moral and spiritual values which they otherwise would not learn. Since it is worthwhile, it should be maintained, regardless of any possible invalidity. All supporters of the course claim that it is non-denominational, but the best refutation of this allegation was made, ironically, by a minister and active worker in the program who has said, "During twenty-five years of teaching the Bible in Knoxville city schools we have maintained consistently a non-sectarian approach. No church or denomination of Protestantism has ever had cause to question the approach.[135] Concealed in the phrase "denomination of Protestantism" is the sectarianism, and thus the unconstitutionality, of the program of Bible teaching in public schools.[136]

135. KNOXVILLE JOURNAL, April 26, 1958.

136. In the interview schedule for the present study, principals were asked if their school had an elective course in the Bible. Two city principals replied in the affirmative. In both cases the class meets daily in regular classrooms during school hours. At both schools the course is financed through the Committee on Bible Teaching; in one instance the class is taught by a layman and in the other by a minister. In both schools the approach is supposed to be one which combines the literary, biographical and historical elements of the Bible. One class is in a junior high school where twenty students receive Bible instruction, the other is in a senior high school where 150 students are enrolled in the course.

All secondary school principals were asked their opinion of the Bible study course. Not all principals gave an opinion, but those who answered felt that the course should be an elective course with credit. One city high school principal replied that the course should be elective but without credit.

Other Use of the Bible in Class. Those who teach Bible in Knoxville public schools teach nothing else and were not interviewed in the schedule appended to this report. The fact that a person does not teach a course in the Bible seemingly does not create a barrier to use of the Bible in regular schoolwork. Nine county high school teachers and two high school teachers in the city system said that they use the Bible for part of their course work.

Some of the uses to which the Bible is put would be mystifying in other localities, but an understanding of the socio-religious complexion of Knoxville clears up the problem. One teacher in a city high school uses *Genesis* in a biology course, adding that the study of the creation of man is based on the words of *Genesis* with students tested on their knowledge of relevant parts of that book of the Bible. As to the role of human evolution, this teacher holds that evolution is irrelevant, especially in view of Tennessee law on the subject. For the sake of speculation, it might be noted that this teacher is an ardent church worker who sometimes interprets the Bible verse reading, believes that books favorable to evolution should not be in the school library and feels that all religious activities in the school are very worthwhile and should be given more emphasis.

Other teachers use the Bible for other purposes. One foreign language instructor, for example, has students memorize various well known verses in translation. In another case, a county high school teacher occasionally refers to the Bible in teaching world history. Another science teacher, this one in a county school, uses *Genesis* only "for reference" in teaching of the creation of man. The basic approach for this teacher is "from an objective, scientific viewpoint."[137] One other science teacher who was interviewed presents both the scientific and the Biblical ideas, taking neither side in the issue. One history teacher finds it impossible to teach history without "frequent" reference to the Bible. Other teachers use the Bible in literature courses and a civics teacher uses it to teach about the "golden rule."

Perhaps the least expected answers to the interview schedule came from a county high school teacher who is also a Baptist minister. He has occasion to refer to the creation of man in his teaching and sometimes uses *Genesis,* but personally believes in an evolutionary process to explain the origin of man. Furthermore, this was one of the few interviewees who felt that a Bible course was unwise and probably in violation of the principle of separation of church and state. Although this teacher admitted interpreting Bible verses, he said that the reading is

137. Perhaps in violation of the Tennessee anti-evolution statute?

not worthwhile and should be abolished: "I feel that compulsory devotions are unwise. The majority of my students are church members and familiar with the Bible; it is occasionally discussed as its various teachings reflect on our studies and discussions in literature."

One non-minister countered this view with his statement on teaching about the creation of man. This teacher follows *Genesis,* but does not test his students "too much" on it. As far as evolution is concerned, it is nothing more than "nonsense." A paraphrase of this science teacher's concept of evolution is that originally there were man-like savages who underwent physical evolution, but who became extinct twenty-five thousand years ago. In the year 6006 B.C., God created modern man in a form physically similar to the creatures who had become extinct. Modern man, however, was endowed with a larger brain and a "spirit" in the year 6006 B.C. and has remained unchanged since that year. This the man believes and this he teaches.

A vast majority of the teachers and principals in this survey feel that religious activities in the public schools should either remain unchanged or be given more emphasis. One principal said that the study of religion and its role in society should be given greater emphasis in social studies classes, but this would be an academic approach to the subject and not on its face unconstitutional. Less than 10 percent of the interviewees had an inclination either to de-emphasize or to abolish religious activities in the schools. A county high school teacher who said that there should be increased emphasis on religion suggested that sources other than the Bible should also be used.

A total of only five of the teachers interviewed believed that the religious activities in their schools violate the United States Constitution in any particular. The vast majority of teachers included in the survey feel that religion in the public school is not only an end which is to be desired, but is also a constitutional end.

An elementary principal in a rural area of the county pointed out that her school was located in a "good community" where no problems of religion exist since almost everyone in the area is a Baptist. She pointed out, too, that some children were not afforded an opportunity at home to hear the Bible, thus the Bible must be read in the schools. A county elementary teacher who added an unsolicited "Definitely not!" to her opinion that school religious activities do not conflict with the Constitution also wrote the following note:

> I do not feel that any one denomination should be favored. However, in my 7 years of teaching, I have never known a teacher or school that tried to inject a particular doctrine. If I have any

> Jewish children, I have the old testament read. I feel that moral and ethical training is important. I favor daily Bible reading without comment.[138]

It is evident that there is an abundance of religious activity in the public schools of Knoxville and Knox County. Most teachers and principals see no problems, either social or constitutional, intrinsic to public school religious instruction. Only one teacher in the survey commented that the unwillingness of some students to participate created a problem in group religious activities. Only five teachers expressed the opinion that religious activities in public schools might create a constitutional problem.

It is unlikely that any of the practices described above will be eliminated voluntarily from the public schools. Should they be eliminated or modified? Or should they be retained in their present form, since a majority (indeed a large majority) of the people in the community seem to want religion taught in their public schools? The heart of the conflict may be seen in this statement by the principal of a rural Knox County elementary school:

> I have been a Christian for many years and I am convinced that too little spiritual emphasis is given in our schools. No matter how well educated academically our children become, if they have no spiritual or moral guidance they grow up not well educated but onesided.

This is an accurate representation of the majority view, but not all of the people agree with the majority. The focus of this study has involved an effort to indicate the methods by which the majority beliefs are incorporated into the program of the public schools.

V. The Constitutionality of Public School Religion

Daniel Webster said that the right of the state to punish immoral acts involves the duty of the state to teach morals. If the state wants to be certain that morals are properly taught, is there a more logical place to teach the moral code than in the schools, public as well as private? This question is rhetorical only if it is granted that not all children will learn morals at home or in church. The problem in Knoxville and in the rest of the "Bible belt" is that morals to most citizens are associated exclusively with the Holy Bible.

Since public schools are operated in the interests of all citizens by boards of education responsible to the entire local community, they

138. Remarks unedited.

must espouse no particular religious doctrines. By the same token, anti-religious views must also be prohibited from the public schools. We are committed irrevocably to the principle of separation of church and state, at least to an extent both possible and prudent. "We are," however, as the Supreme Court has said, "a religious people whose institutions presuppose a Supreme Being."[139] It would likely be disastrous for the public schools to disregard entirely the function of religion in American life. In the light of the Constitution and with a view toward the best interests of the entire community, what should be permitted and what prohibited in regard to the inculcation of spiritual values in the public schools?[140] Could the permissible amount of religious instruction increase as the proportion of children of the same faith increases? If the answer to the latter question should be in the affirmative, the amount of religious activity permissible for Knoxville and Knox County schools would be considerable.

Except for state laws establishing minimum standards and curricular requirements, most of the control of public schools in the United States is at the local level. How much autonomy and discretion do local school authorities have in the authorization of religious activities? If the decisions of the Supreme Court form any sort of guide, it would seem that local authorities have almost no autonomy in this matter, for nowhere in the opinions of the court is it suggested that the validity of a practice might hinge on the locality of the practice. Those religious activities which are invalid in one place are undoubtedly invalid everywhere.

Even if only one faith should be present in a community, it is not the function of the common school to provide training in religion. If the majority want religion in their schools, they must remember that the doctrine of interposition has long been dead, at least in the eyes of the Supreme Court. A local majority, then, may not force its wishes on the general public when the freedom of religion is at stake. The religious majority in Knoxville cannot adhere to the theory that *"L'état c'est nous."*

None of the practices found in the Knoxville schools has been directly ruled on by the Supreme Court of the United States. The only clues to the matter of their validity must come from dicta and from an under-

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139. Zorach v. Clauson, 343 U.S. 306, at 313.

140. Much has been written on the subject of moral and spiritual values in public schools. Since the present author is not an educationist, he prefers not to infringe on the highly specialized field of pedagogy. The aim of this chapter is to discuss various methods of moral education in their relation to the Constitution, not as to their educational value.

standing of the principles of separation of church and state. With the *caveat* that the Supreme Court does not reach its decisions through equations or formulae and thus cannot be predicted on any given question, let us hazard some opinions as to the constitutionality of the various religious activities reported above.

The Criteria

Perhaps the most important criterion as to the constitutionality of the practices comes from the *McCollum* decision, holding that all religious instruction on school property during school hours is in violation of the Constitution. All of the practices described above are held on school premises during the normal school days, with the pupils under the jurisdiction of school authorities. The only question remaining, then, is whether these practices constitute religious instruction. Many courts have barred only "sectarian" instruction; it is crucial to the present argument that, for constitutional purposes, the terms "religious" and "sectarian" are indistinguishable.[141] In the contemporary social milieu, a sect must mean more than a "Protestant denomination;" indeed, it must signify something more than "Christianity" and it is probable that it should include more than what is known as our "Judaic-Christian heritage."

There seems to be no reason to suggest that the motto, "In God We Trust," be removed from our currency, nor would the daily invocations in Congress seem to constitute an establishment of religion under the doctrines of any of the cases reviewed above. These, however, are examples essentially different from the case of a teacher announcing to her pupils that "Christ died for our sins."

Perhaps non-believers do not "trust in God" and perhaps they resent the presence of a chaplain to deliver prayer in Congress, but practices such as these have no unconstitutional overtones because they are not an aid to religion, they do not tend to establish a religion and they limit no one's freedom of conscience.

No case holds that state employees (a term which includes public school teachers) are forbidden to refer to the existence of a Supreme Being; it is not sectarian to posit and to talk about in the classroom the mere existence of a Supreme Being. Sectarianism occurs when one teaches, for example, that the Supreme Being is manifested through

141. This point may be disputed, but the Supreme Court of Washington, in invalidating Bible reading, pointed out that the state constitution forbids the use of public money for "religious worship, exercise, or instruction. . . ." The word "sectarian" was not used and the court held that the Bible, whether or not sectarian, was certainly religious. See BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 111 (1961).

Christ. It is submitted that many of the practices found in the schools surveyed in this study are unconstitutional beyond doubt, at least if we are to accept the doctrines of the modern Supreme Court. Other practices are marginal, that is, they are not unconstitutional in themselves, but they easily lead to sectarian inculcation. Of these latter, it would be in the best interests of the community to invoke strict regulations for some and to eliminate others completely.

Required Daily Bible Reading. The statute which requires daily Bible verse reading undoubtedly violates both the Tennessee Constitution and the United States Constitution, and should be repealed. Justice Black, writing for the majority in both *Everson* and *McCollum,* said that a state cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another." The Tennessee Bible reading statute clearly violates this doctrine, not because the moral precepts of Christianity are taught in the schools, but because the Christian religion is definitely given aid and preference by the state. Since the King James Version is almost universally used, only Protestant Christianity is given direct aid. There can be no doubt that this is sectarianism. Furthermore, with or without a provision for students to leave the room during the reading, this practice violates the freedom of religion since it exerts pressure on the children to participate.

As in the *Schempp* case, the Bible reading exercises in Knoxville are frequently referred to as "morning devotions." This is more than circumstantial evidence that the effect of the statute is to teach more than morality; devotions are always connected with religious values. Thus, if we are to accept the *Schempp* decision, Bible reading in Tennessee is a religious service.

Interpretation of Verses. The problem of interpretation of the readings may be dismissed summarily. The Tennessee Supreme Court, in the *Carden* case, said that teachers may not "undertake to explain the meaning of any chapter or verse in either the Old or the New Testament." As noted, the local school boards have policies which prohibit interpretation. Yet many teachers in the survey admitted that they sometimes give commentary on the reading. It is understandable that this should happen, for the language of the Bible is such that a child may not comprehend the meaning of a verse unless he is given further explanation. If the Bible is to be read as an attempt to teach moral values, the purpose is defeated unless the child understands the passages. This, in turn, means that the teacher must be permitted to explain those passages in which the moral lesson is obscured by the language. It should not, however, be necessary to discuss the sectarian

consequences of having each teacher give his own views on each passage. Interpretation is actually a moot issue, although it constitutes an even more flagrant establishment of religion. Bible verse reading alone is enough for the courts to invalidate the entire practice, for, again to quote Justice Black, "the question is not whether it [the state] has entered too far but whether it has entered at all."

Other Efforts to Instill Spiritual Values

The main focus of this study has been on the constitutionality of Bible reading in public schools. Primarily from curiosity, various "secondary effects" of Bible reading were also surveyed. In Tennessee, no legislation exists concerning other devotional or spiritual practices. On the other hand, there is no explicit state constitutional barrier to sectarian instruction in public schools.[142]

Bible Stories. The content of any Bible stories read in public schools is the determining factor in their constitutionality. A story of a Biblical character or event could be written and taught in a literary, historical or biographical manner. In such a case there would seem to be no objection to reading Bible stories. But if the stories are either written or discussed in a manner which is designed to instill religious values in the pupil, they fall unquestionably in the same category as Bible reading and are undoubtedly unconstitutional. From a constitutional standpoint, there is probably an important difference between reading stories about the life of Christ from an historical standpoint and reading stories about the miracles which Christ performed. Administrative problems are present, however, even when dealing with material which, on its face, is constitutional. How, for example, is the teacher to approach the question of the divinity of Christ? As an employee of the state, a public school teacher is not free to espouse any view on this question while on duty.[143] Biblical stories, then, may be valid under some circumstances. But even when valid, such stories pose administrative difficulties and from a practical standpoint the reading of such stories should probably be abolished.

Prayers. Under certain conditions, prayers may be in accord with the Constitution, but never may they be used *as prayers.*[144] Some

142. Article I, Section 3 of the *Tennessee Constitution* (see *supra,* p. 60) seems to bar sectarianism, and probably any form of religious teaching, by its prohibition against attempts by the state to "control or interfere with the rights of conscience."

143. Under the *Everson* and *McCollum* doctrines.

144. But Engel v. Vitale, 191 N.Y. Supp. 2d 453 (1959) holds that use of the following prayer is valid if it is not compulsory in any way: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

supplications have inherent literary value and these may be taught in public schools, but only as to their literary qualities. For a teacher to say grace before the noon meal is necessarily sectarian, as is recitation of the Lord's Prayer. If these prayers are deemed to be valuable as literature, there would seem to be no prohibition against their use in the classroom, but only in conjunction with the study of other literature. It would seem to be inadvisable, however, to require memorization of any prayer and the teacher should give equal emphasis to all important versions of these supplications.

Other In-class Religious Practices. It is doubtful that there should be any absolute constitutional prohibition relating to such activities as religious plays, religious poster making, Biblical map drawing or religious movies. Again, caution must be exercised and teachers should permit no trace of sectarian influences to enter the activity. If a pupil has an objection in conscience to participation in these activities, he should be in no way compelled or influenced to take part.

Other types of classroom activities found in Knoxville public schools should be totally eliminated. These include such exercises as religious notebooks, Bible memory drills, chapel programs and, at least at the elementary level, discussions on religious subjects. A significant number of teachers interviewed indicated that their students participate in these activities, all of which seem potentially geared to an inculcation of religious doctrine. This is especially true of Bible memory drills and chapel programs, both of which constitute an aid to religion and, when compulsory, violate the freedom of religion.

Students should achieve some understanding of the importance of religion, and some types of religious discussion might be permissible at the secondary level, but, again, problems arise too easily from this sort of activity. Religious groups entertaining at assemblies might be acceptable, as long as their purpose is to entertain, not to indoctrinate. The same holds true of hymns sung by school choirs and other groups.

Special Projects in Observance of Religious Holidays. The problem of special school observance of religious holidays through student projects is currently an area of great dispute. It is quite doubtful, especially since the recent Supreme Court decisions on Sunday observance laws,[145] that the court would invalidate special public school observance of religious holidays, even though, as in Knoxville, only the traditional

145. The cases were Braunfeld v. Brown, 366 U.S. 599 (1961), Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961), McGowan v. Maryland, 366 U.S. 420 (1961), and Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). All of these cases were decided May 29, 1961.

Christian holidays are observed. The Supreme Court noted that Sunday closing laws, although intended to compel observance of the Sabbath, have lost most of their religious significance. It remains a valid power of the state, however, to require periodically a cessation of commercial activity. Since Sunday has traditionally been a day of rest, the Supreme Court held that the state may prohibit servile labor on Sunday. By this reasoning, the court could easily uphold the practice, in general, of public school observance of religious holidays. They, too, have lost much of their religious significance and certain recognition of the essentially religious character of these holidays would seem to be within the Constitution. No student, however, should be compelled or induced to participate in any such activity, for this would definitely be an abridgment of religious freedom.

Dissemination of Religious Information. Under the New Jersey *Tudor* doctrine,[146] distribution in public schools of the Gideon Bible is sectarianism even though Bible reading itself is legal in that state. Acceptance of the Bible presented by the Gideons is purely voluntary, but the state, through the public schools, gives preference to Protestantism by assisting in the distribution. There seems to be no constitutional difference between that situation and the distribution of announcements of "revivals" or "vacation Bible schools." Dissemination of religious literature gives preference to one religion over others and should be abolished. Appearance on the school grounds of religionists who foster Bible verse memorization is also preferential to one religion.[147] This is considerably more than the "accommodation" by the state which is permitted under the *Zorach* doctrine.

Ministers in the Schools. There is no objection to the employment of ministers as regular members of public school faculties, but their task is at least as difficult as that of lay teachers. It is probably a natural tendency for children to ask of ministers questions concerning religion and the teacher-clergyman must take extreme care that his replies have no sectarian implications. Like other teachers, he should refer religious questions to the student's parents or minister.

Guest ministers in public schools pose another difficulty. Clergymen, like all citizens who have knowledge which may be beneficial to the pupils, should be encouraged to speak to student groups to share that

146. See *supra*. More to the point, a New Mexico case, Miller v. Cooper, 56 N.M. 355, 244 Pac.2d 520 (1952), holds that distribution of religious pamphlets by public schools violates the neutrality which the school is required to maintain.

146. See *supra*. More to the point, a New Mexico case, Miller v. Cooper, 56 N.M. is entertainment differ from those whose main purpose on the school grounds is concerned with proselytism.

knowledge. Again, this calls for special caution on the part of both the minister and the school. It is one thing to present an objective history of his faith, but quite another thing to sprinkle his remarks with derision of other churches. Visits by ministers to public schools should be considered an aid to religion only when the clergyman attempts to impart sectarian ideas to the students.

The Bible Teaching Program. The Bible course, as presently taught in Knoxville, is clearly in violation of the Constitution, under the *McCollum* decision. A course which treats the Bible, either as literature or as comparative religion, along with other works considered sacred by various religions, would present a different issue. But the Knoxville course, which considers only the Bible, is religious instruction on school property, using the tax-supported administrative machinery of the public school system.

It is of no significance that the funds are supplied by public subscription and that there is no direct cost to the public: the same was true in *McCollum*. Even the Tennessee Supreme Court may have hinted that a Bible course is invalid when it said, in the *Carden* case, that schools may not "conduct a program of education in the Bible. . . ."

Religious freedom may not be at issue in the instance of the Bible course, since the course is entirely elective. Establishment of religion, however, is definitely at issue because Christianity, and especially Protestant Christianity, is fostered under the auspices of the state.

Are There Any Solutions?

What, then, can be done by the public schools to further moral and spiritual excellence? The schools cannot ignore religion for it is an integral part of society and of a child's environment. Horace Mann suggested that the schools teach a "common core" of the major faiths – such things as belief in God, immortality of the soul and moral obligations imposed by God. A criticism of this plan has been advanced by the American Council on Education, saying:

> . . . we think it objectionable from the religious point of view. . . . The notion of a common core suggests a watering down of the several faiths to the point where common essentials appear. This might easily lead to a new sect – a public school sect – which would take its place alongside the existing faiths and compete with them.[148]

There is another approach: the objective, or comparative, teaching

148. AM. COUNCIL ON EDUCATION, COMMITTEE ON RELIGION AND EDUCATION, The Relation of Religion to Public Education, Series I, number 26, p. 15 (1947).

of religion. This does not violate the Constitution, but the difficulty inherent in this approach is that most teachers are not familiar enough with religions other than their own to make a complete and accurate presentation. It should not be difficult, however, to teach in history, literature, art and music courses, the historical religious foundations and assumptions of the American heritage.

It is not difficult, either, for people of different religions to agree on most questions of ethically desirable human action, but it is almost impossible for people of different faiths to agree on the sanctions for conduct. For example, the concept of the "brotherhood of man" is one accepted by most people. To the humanist, "brotherhood" is an expression of a purely human value, but the Christian practices "brotherhood' because the prior love of Christ demands it. Moral and spiritual values such as these can easily be taught in the public schools, but only if the question of the ultimate sanction for the teachings is left to the church or the parents in whom is vested the sole responsibility for the child's religious instruction.

CURRENT DEVELOPMENTS IN FEDERAL INCOME TAXATION*

By GEORGE D. WEBSTER**

The current developments in federal taxation continued at an unabated, dynamic pace during 1961 and early 1962. The new faces on the new frontier of federal taxation also added something to the current developments, or at least as portents for the future. These new people have started some private tax wars of their own against foreign tax havens, entertainment expenses, Section 1231 gains and other areas. In addition, there has been a stepped-up public relations campaign against expense accounts and other areas of abuse.

But regardless of the pious and well intentioned public statements about enforcement, there still remains the problem of the foot soldier of the Internal Revenue Service — the revenue agent. Much of the administration of the revenue law goes no higher, and among these, there are good ones and a few bad ones. There are mainly those who conscientiously do their duty and who in private enterprise would be paid substantially more. There are the ones who drink coffee all morning and get free lunches from the audited firms while waiting for retirement, and there is always the revenue agent in the large Metropolitan areas, where one suspects more corruption than the Service is willing to admit and one further suspects that the Service is not nearly as diligent and vigorous as it might be or should be in uncovering petty payoffs, corruptness and common garden-type dishonesty.[1] For instance, an investment banker in New York told me recently that his house (which we do not represent) took care of revenue agents by letting them participate in the so-called "hot issues." We cannot fully understand current cases, rulings and legislation developments without realizing that most tax business, as a practical matter, is done at the agent level.

This discussion is restricted to the federal income tax developments in 1961 and early 1962, and by virtue of space limitations must necessarily be quite selective.

INCOME PROBLEMS

The 15 year old *Wilcox*[2] holding that embezzlement does not give rise to taxable income was overruled this year in the *James*[3] case. James

* Based on a lecture delivered at Memphis in December, 1961, at the Tennessee Tax Institute.

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1. Commissioner Caplin has recently begun a vigorous drive to discipline errant revenue agents.
2. Commissioned v. Wilcox, 327 U.S. 404 (1946).
3. James v. United States, 366 U.S. 213 (1961).

embezzled large sums from his employer and an insurance company with which the employer was doing business. He did not report the sum for income tax purposes.

Most income derived from illegal sources is includible in gross income. In *Wilcox*, however, embezzled money was excepted from the general rule, the Court declaring that there was no tax liability if the taxpayer had no claim of right to the alleged income and if he had a "definite, unconditional obligation to repay." By overruling that case, the Court has adopted the sounder rule. For, if gain were taxable only when the recipient had a bona fide claim to it, most illegal gain would never be taxed.

The situation is still unclear as to the period between *Wilcox* and *James*. Three of the justices thought that a finding of wilfulness could be made only if as a matter of fact, the taxpayer did not rely on the *Wilcox* decision.

In the *Cowden*[4] case, the Tax Court on remand found that the obligation received by a seller had a market value and was taxable to that extent to the seller. You will recall that the Tax Court originally had held the seller taxable in the year of receipt of the obligations – not because the obligations were the equivalent of cash, but because the purchaser was willing to pay cash and therefore the seller should be taxed as if the transaction had taken that course. It was anticipated by most all practitioners that the Fifth Circuit would reverse the Tax Court on this point, which it did.

In *Estate of Cronheim*,[5] the Internal Revenue Service continued its attack on widows. The board of directors of a corporation passed a resolution which provided that a deceased officer's salary was to continue for the remainder of the company's fiscal year. Judge Forrester ruled that the payment constituted income for several reasons – (1) The board of directors had no knowledge of the widow's financial condition; (2) There was a pattern of salary continuation to other widows. The Tax Court stated that this decision made it unnecessary to decide whether the 1954 Code $5,000 limitation was applicable to this 1955 payment.

In this latter connection, reference should be made to the *Wilner*[6] case. There the Government was denied a motion for summary judgment, the District Judge concluding that the 1954 change did not render taxable all amounts in excess of $5,000. The Judge specifically noted his disagreement with a contrary *dictum* in the same Court.[7] As you

4. 1961 T.C.M. – 229, on remand from 289 F.2d 20 (5th Cir. 1961).
5. 1961 T.C.M. – 232, on petition for review to Court of Appeals, Eighth Circuit.
6. Wilner v. United States, 195 F.Supp. 786 (S.D.N.Y. 1961).
7. Rodner v. United States, 149 F.Supp. 233 (S.D.N.Y. 1957).

know, the 6th Circuit in the *Reed*[8] case specifically held this, but the Service has concluded that it will not follow *Reed.*[9]

In *Union Chemical Materials Corporation,*[10] there arose the question of the amount of deduction of a corporation where an employer exercises an unrestricted stock option. An employee received warrants to purchase stock in 1947. The Third Circuit had previously decided that the value of these warrants was includible in the employee's income in 1947.[11] In 1948, the employee sold the warrants for a much larger sum. The Court of Claims now allows a deduction to the corporation for 1948 for the larger amount. The Court stated:

> Hence, when Lawson Stone exercised his option and received $82,680 the corporation was worth that amount less to its stockholders than it would have been had it sold the shares on the open market.

The *Cavanagh*[12] and *Vandermade*[13] cases indicate the distinction between situations where the reimbursement of moving expenses constitutes income and those where it does not. In *Cavanagh,* the employee went to work for Lockheed for five weeks in Washington, D. C., as an attorney before being transferred to Burbank, California. It was known at the time he went to work in Washington that he would go to Burbank. The expenses of moving his family to Burbank were held not income since he was already an employee and the move therefore was for the convenience of the employer. This was so even though the short employment in Washington prior to going to Burbank was temporary and for the personal convenience of the employee. In *Vandermade,* it was concluded that the employee was in fact a new employee at the time he moved.

Business Expenses

In the *Patrick*[14] case, there was the often litigated question of the deductibility of legal fees incurred in connection with a divorce and property settlement. $19,200 out of $24,000 (both his and his wife's) were held deductible since their expenses were properly allocated to the rearrangement of the stock ownership of a family newspaper. The expenses were thus made in connection with the conservation of income producing property. This result was consistent with that already reach-

8. Reed v. United States, 277 F.2d 456 (6th Cir. 1960).
9. T.I.R. No. 252 (Sept. 12, 1960).
10. Union Chemical and Materials Corp. v. U.S., 296 F.2d 221 (Ct. Cls. 1961).
11. Commissioner v. Stone's Estate, 210 F.2d 33 (3rd Cir. 1954).
12. John E. Cavanagh, 36 T.C. No. 32 (1961).
13. Alan J. Vandermade, 36 T.C. No. 63 (1961).
14. Patrick v. United States, 288 F.2d 292 (4th Cir. 1961), certiorari granted.

ed in several other cases, probably the best known being the *Baer*[15] case in the 8th Circuit and the *Gilmore*[16] case in the Court of Claims. Reference should also be made to the *Fairbair*[17] case in which a similar result was reached and which is now pending in the 9th Circuit. *Patrick* and *Gilmore* are now both pending in the Supreme Court. The petition for certiorari in *Patrick* alleges a conflict with *Lykes.*[18] You will recall that *Lykes* denied a deduction for legal fees incurred by a taxpayer in contesting a gift tax deficiency.

Dr. Reuben Hoover[19] participated in a post-graduate medical seminar sponsored by Duke University. The seminar was given on a cruise to the Mediterranean. The Tax Court concluded that 12% of this amount was deductible ($232 out of $1,881). This percentage apparently was based on the conclusion that the course could have been given intensively in about 4½ days instead of 30. The Court said that what Dr. Hoover sought was primarily a vacation and not learning. This result was reached even though Dr. Hoover testified that he was impressed by Duke's medical faculty and also that he desired to escape midwestern provincialism in the field of medicine.

William Preston[20] was an Air Force colonel. The Tax Court held that he and his wife could not deduct amounts expended for club dues, food and drink, attending parties and nurses fees. Mostly associates were entertained and there was no showing as to the business necessity for such entertainment.

In *Robert Lee Henry*[21], the taxpayer, a tax accountant and lawyer, purchased a yacht on which he flew a red, white and blue pennant with the numerals "1040" on it. The yacht expenses were held nondeductible. The Tax Court stated that the taxpayer had failed to offer a single example of where the taxpayer's boating activities produced a single client. On the facts as found, the result was no doubt correct. But showing evidence of a client obtained through particular types of entertainment is difficult. It may be more difficult to make such a showing before the Tax Court since not all members of the Court have demonstrated evidence of ability to obtain substantial clients.[21a]

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15. Baer v. Commissioner, 196 F.2d 646 (8th Cir. 1952).
16. Gilmore v. U.S., 290 F.2d 942 (Ct. Cls. 1961), certiorari granted. Davis v. U.S., 287 F.2d 168 (Ct. Cls. 1961), certiorari granted.
17. Fairbairn v. U.S. — F.Supp. — (on appeal to 9th Cir.).
18. Lykes v. U.S., 343 U.S. 118 (1952).
19. Reuben B. Hoover, 35 T.C. No. 60 (1961).
20. William D. Preston, 1961 T.I.M. 250.
21. Robert Lee Henry, 36 T.C. No. 87 (1961).

21a. The Report of the Commissioner of Internal Revenue for the year ending June 30, 1961. p. 59, in which the statistics indicate the Tax Court as much less favorable forum than the U.S. District Court or U.S. Court of Claims.

Edgar Dilbeck,[22] a boilermaker, owned a house in Decatur, Alabama, and incurred certain travel expenses to New Johnsonville, Tennessee, where he worked for the TVA for a period of about 17 months. A jury held this was "indefinite" employment. The charge to the jury was that it was most important what a reasonably prudent man would have forseen at the time the employment was accepted.

As a procedural matter, it seems to me that this case is also significant since it demonstrates that the Justice Department now actively seeks a jury trial in many cases, whereas several years ago this was not the case.

Dr. Sapp,[23] a Rome, Georgia doctor, went to the Tax Court as to his second car. The first car was purely personal. The Tax Court allowed Dr. Sapp only a portion of this second car, since the second car took him to social functions and to the office as well as on official calls.

Rudolph[24] was paid the expenses of a trip to New York by Southland Insurance Company in Dallas for himself and wife as a bonus. His wife was a partner-in-fact in his insurance business. The amount was includible in income, and the Fifth Circuit held that the expenses were non-deductible since the New York trip was non-deductible. There was no doubt that this trip was optional to Rudolph, but if he had not taken the trip, it might have been as unfavorable for him as to the employer-company. There was a strong dissent by Judge Brown. The Supreme Court recently granted certiorari. In the Brief in Opposition[25] in *Rudolph*, the Government argued that the result rendered by the Fifth Circuit was correct for several reasons:

1) In three days in New York, the taxpayer attended only one business meeting;

2) The convention was at a luxury hotel in New York;

3) The attitude of Southland Insurance was set forth in a brochure, *Enjoy Yourself*, which set the theme for the meeting.

There are several aspects of this question. First, if the expenses here are to be taxed to the Rudolphs, then, by similar reasoning, the fair value of the taxpayer-paid travel by families of Government employees (accompanying some member of the Government) should also be taxed to the recipient or to the Government employee. Second, there should be a uniform tax policy as far as expenses are concerned. You and I

22. Dilbeck v. U.S. —— F.Supp. —— (N.D. Ala. 1961).
23. Clarence J. Sapp, 36 T.C. No. 83 (1961).
24. Rudolph v. U.S., 291 F.2d 841 (5th Cir. 1961), certiorari granted.
25. Brief in opposition to certiorari filed by Solicitor General in Rudolph v. U.S., *supra*.

know of cases that have come to our attention which seem to border on or constitute "fraud" as far as expenses are concerned, and yet, for some reason, the Service doesn't seem to care, and for some reason, political or otherwise, takes no action. Third, a decision in *Rudolph* may not affect all other similar situations since *Rudolph* could be merely a "fact" decision.

In REV. RUL. 61-115, the Service announced a change in position. Payments to a corporation under section 16 (b) of the Securities Exchange Act of 1934 are non-deductible. There was previously a case[26] allowing such a deduction, and the Service finally came around to acquiescing in it.

In *Louis Aronim*,[27] involving a deduction of $345, the issue was whether an NLRB examiner could deduct his University of Baltimore night law school expenses. Since this was not required by the NLRB, the Tax Court stated that this was acquiring a new skill and therefore, non-deductible. Of course, the fear here is that once the line is crossed into personal expenses, the way is opened for numerous personal expenses and that many tax dollars are accordingly lost.

MEDICAL EXPENSES

In 1954, *Robert Bilder*,[28] a lawyer in Newark, New Jersey, with a heart condition, was instructed by doctors to spend the winter in the South so as to lessen the chance of a fatal heart attack. He followed orders and moved with his wife and 3-year-old daughter to Florida near a hospital that could give him special treatment. In April, 1961, the Court of Appeals for the 3rd Circuit allowed expenses of $713.90 of living costs (the Florida apartment) for 1954 and 1955 in Florida. On June 9, 1961, Mr. Bilder died of a heart attack. To date, witness fees and transcripts have been in excess of $1,000.00 The lawyer is working free. The Supreme Court has granted certiorari and this means another $500.00 or so in expenses. Mrs. Bilder, as I understand it, is pursuing the matter because her husband felt so strongly about the principle involved.

No doubt the basis of the grant of certiorari was the conflict of *Bilder* with the decision in *Carasso*[30] in the Second Circuit. Carasso, who had the same lawyer as Bilder, deducted Bermuda living expenses where he had gone on advice of his doctor. The Second Circuit stated

26. L. M. Marks, 27 T.C. 464 (1956).
27. Louis Aronim, 1961 T.C.M. — 180.
28. Commissioner v. Bilder, 289 F.2d 291 (3rd Cir. 1961), certiorari granted.
29. N.Y. TIMES, November 21, 1961.
30. Carasso v. Commissioner, 292 F.2d 367 (2d Cir. 1961), certiorari granted.

specifically that they were following the dissent in *Bilder*, holding that amounts spent for lodging during a medical trip were not deductible.

In the *Wade*[31] case, it was held that the cost of an air-conditioning unit was not deductible as a medical expense for a taxpayer with hay-fever and asthma.

This result is to be compared with the new proposed Treasury Regulations under Section 213 which under some circumstances would allow an air conditioning unit as a medical expense.

In the *Glaze*[32] case, the tuition paid for attendance of a son at a military school, which provided no special treatment or training for mentally retarded children, was held not to be deductible. The Court stated that there was "no evidence that the boy's attendance had as its objective mental or physical therapy".

Charitable Contributions

In a news release (I.R. 400), the Service has restated its position as to the amount of a charitable contribution, where in return the donor receives some material benefit. For instance, if a taxpayer buys a ticket for $10.00 to some charity and in return has a chance to go to a $6.00 stage play, his charitable deduction is only $4.00.

In *Estate of Wardwell*,[33] Mrs. Wardwell paid an old people's home $7,500 as a room endowment. The Tax Court held (no charitable contribution) that the payment was made in consideration of her being granted residence in the home and the right to live there by paying less monthly charges than certain other residents. The case is now pending in the Eighth Circuit.

It is anticipated that there will be further developments this year in the area of charitable foundations. Senator Gore has indicated that he may hold hearings in respect to the use of foundations for personal benefit. This has been an area of abuse in the past, and eventually there will no doubt be legislation in this area.

Miscellaneous Accounting Problems

In *American Automobile Association*,[34] the Supreme Court held

31. Wade v. U.S. — F.Supp. — (Aug. 1961).
32. E. F. Glaze, 1961 T.C.M. 224 (1961).
33. 35 T.C. 443 (1960), on petition for review to 8th Circuit. There were strong dissents in this case because of the adverse affect of the decision on charitable homes. Cf. *DeJong*, 36 T.C. No. 89 (1961), where Judge Raum disallowed part of a "contribution" to a tax-exempt institution on the ground that the contributor received a consideration to the extent of the cost of schooling provided for the contributor's children who attended a school operated by the institution. See Sugarman, *Charitable Giving Developments in Tax Planning and Policy*, 39 Taxes 1027, 1030-1032 (1961). See also current problem set forth in Eaton, *Charitable Foundations Making Grants Abroad*, 17 Tax L. Rev. 41 (1961).
34. 367 U. S. 687 (1961).

that an automobile club could not accrue prepaid annual membership dues over the number of months covered by those dues. The Service's original position in this case was the "claim of right" doctrine. The Government shifted its argument to the "annual accounting concept" argument. There were four dissenting opinions and the matter was subsequently taken care of by legislation to make it possible to accord this treatment to dues of certain membership organizations.[35]

In *Consolidated Edison*,[36] there was involved the question of the deduction of the accrual of contested real property taxes. The contested portion of the taxes did not accrue in the year in which remittance was made in order to avoid seizure and sale of the property but in the year in which the contest was finally determined.

The area as to what is a change in method of accounting and what constitutes the correction of an error is still somewhat confused. There are study groups on this problem in the Service but so far, they have come up with no announced conclusions.

In *O. Liquidating*,[37] the taxpayer, in its group insurance program for employees, deducted premiums each year but netted out the premiums with the accrued dividends. Without requesting the approval of the Commission, the taxpayer in 1953 departed from its prior consistent method of treating insurance dividends and in that year accrued no dividends, deducting the full amount of its group insurance premiums. The Commissioner conceded that, under the accrual method of accounting, the dividend that was to be received in 1954 should not have been accrued in 1953. The Third Circuit held that the change in 1953 constituted a change in the taxpayer's "method of accounting".

This result is to be compared with *American Can*[38] where taxpayer had for years deducted vacation pay and property taxes in the year that these liabilities were paid rather than in the year they accrued. The Court held that the taxpayer could change without permission since this was merely a correction to come squarely within the accrual method of accounting. There were four dissents, one by Judge Opper. He quoted from *O. Liquidating* which follows the approach of the regulations that a change in a material item is a change in a method of accounting.

These cases are part of the larger problem of determining what is a "method of accounting". The Commissioner is playing fast and loose

35. P. L. 87-109 (July 26, 1961).
36. 366 U. S. 380 (1961).
37. 292 F.2d 225 (3rd Cir. 1961), certiorari denied, November 6, 1961.
38. American Can Co., 37 T. C. No. 26 (1961).

on this question. He wants a broad definition so that taxpayers will be required to ask permission to change a "method of accounting."[39] On the other hand, for Section 481 purposes, the Commissioner wants a narrow definition.

Loss Carryovers

Almost all the fun has been taken out of loss carryovers.

In *Thomas E. Snyder*[40] and *Urban Redevelopment Corporation*,[41] there was involved the acquisition of a loss corporation for the purpose of obtaining the net operating loss carryovers. In denying such loss carryovers, the Court of Appeals in *Urban Redevelopment*, stated:

> Rouse testified that his primary purpose in purchasing taxpayer's stock was not to avoid taxes but to acquire a going corporation . . . . This uncorroborated testimony of a highly interested witness is, in the light of the objective evidence simply unrealistic.

These two cases were followed in *Army Times Sales Company*.[42] In disregarding certain testimony as to the reason for the acquisition, Judge Kern stated:

> It does not seem plausible that Ryder, a successful publisher of several service publications having substantial domestic and foreign circulation, made the acquisition principally as a business venture and for the principal purpose of pumping life into the then insolvent corporation . . . .

Rev. Rul. 61-191 is another method used by the Service in attacking loss carryovers. There was defined in this ruling a "de facto dissolution." When a corporation terminates its regular business activities and becomes a mere corporate shell and has no valid business reason for continuing its existence, even though not formally dissolved, the Service states that there has been a dissolution.

Several of the cases have involved the identity of the business carried on.

In *Kolker Bros.*[43] the taxpayer incorporated to deal in foods and beverages, had operated an unprofitable retail grocery and liquor store. The taxpayer acquired a business primarily engaged in supplying meats to hotels and restaurants. After some months, it disposed of the unprofitable retail grocery and liquor business and then applied its loss

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39. Treas. Reg. §1. 446-1 (e) (2) (i). Cf. recent decision in Wright Contracting Company, 36 T. C. 65 No. 65 (1961).
40. Thomas E. Snyder Sons Co. v. Commissioner, 288 F.2d 36 (7th Cir. 1961), certiorari denied.
41. Urban Redevelopment Corp. v. Commissioner, 294 F.2d 328 (4th Cir. 1961).
42. 35 T. C. 688 No. 75 (1961).
43. 35 T. C. 299 No. 38 (1960)

against income from the hotel supply business. The Tax Court held that a single corporate taxpayer changed the essential character of its business but not the nature of its business.

This does not support the Commissioner's approach as exemplified in his proposed Regulations. In terms of the provisions of the Regulations relating to change of business, the maneuvers of the taxpayer in the *Kolker Bros.* case would run afoul of the Commissioner's position that the amalgamation of loss-producing assets with profit-producing assets which has the result of permitting the profits of one business to be offset by the losses of another, will not be allowed.

Regardless of the cases, it is apparent that the Commissioner will continue his attack on loss corporations by using a shotgun approach involving Sections 269, 382, and 482 and the so-called doctrine of *Libson Shops*[44] and so far he has been most successful.

Certain Corporate Problems

In *Coady,*[45] the Sixth Circuit invalidated the Treasury Regulations which preclude a Section 355 transaction where there is a division of a single integrated business into two or more businesses. In Rev. Rul. 61-198, the Service has now taken the position that it will not follow this decision even though there was no petition for certiorari filed.

In *Frelbro Corp.,*[46] the Tax Court decided that the deficits of two corporations were erased in consolidation. This was merely an application of the *Phipps*[47] case to the facts here – though there is some authority to the contrary.

In the *Turnbow*[47a] case, the Supreme Court held that where cash is paid in a "B" type corporate acquisition, it is not merely the "boot" (cash) that is taxed to the recipient shareholder, but also the value of the stock received in the exchange. Cash can still be used to some extent in a "C" type reorganization (exchange of assets solely for voting stock), although even here if liabilities are also assumed, the cash plus liabilities cannot exceed 20% of the consideration paid. Also, the use of cash in mergers seems unaffected by the *Turnbow* decision. There are, however, corporate acquisition situations where the "B" type reorganization may be required; thus, the mandate of the Supreme Court has a certain relevance to corporate tax planning.

Two Fifth Circuit decisions are important in the area of collapsible

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44. Libson Shops, Inc. v. Koehler, 353 U. S. 382 (1957).
45. Commissioner v. Coady, 289 F.2d 490 (6th Cir. 1960).
46. Frelbro Corp. 36 T. C. No. 86 (1961).
47. 336 U. S. 410 (1949).
47a. Turnbow, 286 F.2d 669, *aff'd* by Supreme Court, Dec. 18, 1961.

corporations. Conceding that the effect of its holding "is to leave the loophole two-thirds open", the Fifth Circuit in *Kelley*[48] has decided that ⅓ of a collapsible corporation's net income was a substantial part. The Fifth Circuit also held in *Kelley* that the "substantial part of net income" language used in the Code refers to the portion already realized at the time of a sale of stock by shareholders, rather than the portion to be realized. Apparently the Service in its ruling policy had used a 50% test in interpreting "substantial part of taxable income". This in effect avoided the issue.

Judge Wisdom in *Kelley* stated:

> [Section 341] seems a poor sort of tool for plugging loopholes. But the best workman can only work with the tools he has. If Congress wants a better job done, Congress should provide a tool that will not just plug the loophole "a substantial part of the way."

Shortly after the decision in *Kelley,* the Fifth Circuit decided *Heft*[49] which held that 17.07 per cent realized before sale was not substantial.

Depreciation

The Treasury Department has reviewed the average useful lives of textile machinery and equipment and come up with a new set of estimated average useful lives to replace those provided in Bulletin F.[50]

A study is now being made as to all industries. Stanley Surrey has requested that any industry group come by to see him. If they do not, then there is a danger that the lives used by the Treasury will be based on an historical basis rather than on a liberalized method of depreciation. It should also be noted that the textile change is based on "obsolescence" as much as anything else.

In *Westinghouse Broadcasting Co.*[51] the Tax Court held that a television network affiliation contract for a term of two years, automatically renewable an indefinite number of times unless either party gives written notice of intention not to renew, was held to have an undeterminable useful life. This case is now on petition for review to the Third Circuit.

In *Security National Bank of Trenton,*[52] a bank acquired certain improved property, for the ultimate purpose of demolition in order to make room for a parking lot. The taxpayer-bank claimed depreciation on the buildings which had been demolished. In disallowing the

48. J. B. Kelley v. Commissioner, 293 F.2d 904 (5th Cir. 1961).
49. Heft v. Commissioner, 294 F.2d 795 (5th Cir. 1961).
50. Technical Information Release No. 350 (Dec. 18, 1961).
51. 37 T. C. —— on petition for review to Court of Appeals, Third Circuit.
52. 20 T. C. M. 737 (1961).

deductions for depreciation, the Court held that the entire amount of the purchase price represented the cost of the land to the taxpayer and no part thereof could be subject to depreciation.

EXEMPT ORGANIZATIONS

REV. RUL. 61-177[53] held that a trade association may retain its tax exempt status despite the fact that its primary function is lobbying. This had been thought to be the correct rule all the time by all groups concerned except the Service.[54]

In *De La Salle Institute v. U.S.*,[55] it was held that schools and novitiates operated by the Christian Brothers were not "churches". The Christian Brothers are a teaching order but they are not priests. Accordingly, the income made from the sale of Christian Brothers wine was held to be unrelated business income and accordingly taxable. There was no appeal. The Christian Brothers have a bottling capacity of 6,000 cases per day.

The Service indicated its tougher approach on unrelated business income in the *Scripture Press* case.[56] The Court of Claims held there that an organization for the publication of religious books is not entitled to exemption.

There are a number of real estate investment trusts that have been established since the 1960 change in the tax law.[57] The Securities and Exchange Commission advises that approximately 35 filings (Form S-11) for full registration (in excess of $300,000) have been made since the 1960 change. The tax advantages of these trusts are well-known to tax practitioners. Probably the special treatment will at some time be accorded to corporations for the trust is a most awkward form of doing business.[57a] For instance, under many state laws, it is necessary that the holders of the shares of beneficial interest have almost no voting rights so that such holders will not be liable as partners. This permits an entrenched board of trustees to remain unanswerable to the shareholders.

PROCEDURE

In the recent case of *Welch v. Commissioner*,[58] the Fourth Circuit

53. Such a ruling had earlier been issued in Robert Dairy Co. v. Comm., 195 F.2d 948 (8th Cir. 1952).
54. WEBSTER, FEDERAL TAX ASPECTS OF ASSOCIATION ACTIVITIES (U. S. Chamber of Commerce, 1959).
55. 195 F.Supp. 891 (D.C. Cal. 1961).
56. Scripture Press Foundation v. U. S., 285 F.2d 800 (Ct. Cls. 1961); Certiorari denied.
57. See article by individual primarily responsible for passage of this legislation, Kilpatrick, *Taxation of Real Estate Investment Trusts and Their Shareholders*, 39 TAXES 1042 (1961).
57a. BUSINESS LAWYER, (July, 1961).
58. Welch v. Commissioner, — F.2d — (4th Cir. 1961).

reversed the Tax Court on the question of burden of proof. The taxpayer showed that the basis allowed by the Commissioner was erroneous, but did not show the correct basis. This was sufficient to take the burden of proof off of the taxpayer.

In *Louisville Builders Supply Co.*,[59] the Sixth Circuit determined that there was no discovery procedure in the Tax Court. This, of course, is another one of the several factors a taxpayer must consider in determining his forum. In addition, he should consider that in 1961, the Government prevailed in whole or in part in 48% and 52% of the tax cases, respectively, in the U.S. District Court and U.S. Court of Claims, but prevailed in whole or in part in 88% of the tax cases in the U.S. Tax Court.[59a]

LEGISLATION

The tax legislation passed by the first session of the 87th Congress was relatively insignificant, except for the very few affected.

As to pending legislation in the second session, there is always H.R. 10 relating to retirement plans for the self-employed. This proposed legislation has been around for many years. A new argument against it has now developed by virtue of the recent professional incorporation acts in the several states.

Senator Gore has introduced a bill (S. 1625) which would take away the special tax treatment accorded restricted stock options granted after April 14, 1961 (the date of introduction of the bill). Hearings before the Senate Finance Committee were held on this bill in July, 1961.[61] The theory of the repeal of this special treatment is correct; restricted stock options are unquestionably a means of giving additional compensation. In this respect, Senator Gore with great clarity has brushed aside the technical facade which has surrounded the restricted stock options. On the other hand, it may be unfair to repeal this provision and simultaneously leave other discriminatory provisions in the Code. There is the persuasive argument that restricted stock options primarily help the self-made man and the increasing rarity in our economic system — the man who really "works" a 70 to 80 hour week. Ordinarily, a five-day-a-week, eight-hours-a-day, car-pool-riding executive does not receive a restricted stock option. It is a policy question as to whether this competent, self-made, working man should not be given preferential tax treatment by treating part of his compensation as capital gains.

59. Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961).
59a. Annual Report of Commissioner of Internal Revenue for fiscal year ended June 30, 1961, p. 59.
60. P.L. 87-72; P.L. 87-109; P.L. 87-256; P.L. 87-293; P.L. 87-312; P.L. 87-397.
61. Hearings before Committee on Finance, United States Senate on S. 1625 (July 20 and 21, 1961).

Otherwise, the self-made man will not be able to compete on even or near-even terms with the second or third generation sons of the rich who do *nothing* to earn their money, and his influence on our political and economic system would be lessened.

Senator Gore has also been active in other federal tax areas. He has pointed out the obvious evils in the so-called "DuPont bill" (H.R. 8847) relating to distributions of stock pursuant to orders enforcing anti-trust laws.[62] The statement of Senator Gore in the Congressional Record of January 23, 1962 is an excellent analysis of a bill designed more to preserve monopolistic control than to give tax relief to the individual taxpayer. He has also pointed the way in the "tax haven" abuse area – the use of foreign subsidiaries which siphon off income from the U.S. tax base, and thus impose a greater tax burden on the rest of us.

Revenue Act of 1962

On April 20, 1961, Mr. Kennedy's Message to Congress set forth his tax proposals. In his Economic Message of January 22, 1962, he again stated his proposals for 1962, which were basically the same. It seems evident that at this session of Congress a tax bill will pass, somewhat changed and made somewhat sounder by both the House and Senate. Except for certain personalities in the Administration, it has been stated by responsible members of Congress that this bill would at least have passed the House in 1961.

The most obvious of the proposals which seem to have a good chance of passage are:

1. *Investment Credit.* This is a credit against tax. The Treasury has recently taken the position that this is only one-half of the proposal, coupling with it the increased depreciation allowances. The argument against the credit is that it gives favorable tax treatment to those engaged in a new construction, ignoring the company or industry unable to afford the new construction but needing "help." The investment credit may thus be a loophole itself.

2. *Entertainment Expenses.* This is a difficult area where there have been many abuses, as is well known. President Kennedy in referring to proposed changes in this area, stated:[63]

> I feel confident that these measures will be acclaimed by the American people. I am also confident that business firms, now forced to emulate the expense account forms of their competitors – will welcome the removal of this pressure.

62. Over the strong and virgorous objection of Senator Gore, this bill became law. See P.L. 87-403 (Feb. 2, 1962).
63. Message of President Kennedy dated April 20, 1961.

The proposals have been varied and have taken the form of daily limits (such as $32) disallowance of certain types of entertainment, disallowance of goodwill entertainment and disallowance of 50% nightclub (as contrasted with restaurant) entertainment.

There may be a formula that can be worked out, which is appropriate.[64] As Mortimer Caplin states, the "T&E problem . . . remains serious."[65] On the other hand, the present law has not been enforced. There are plenty of examples of expense account abuse. There is a strong argument that if the present laws were vigorously and honestly enforced, there would be no need for amendment of this provision. No law is better than the honesty and integrity of the enforcement officials. And again, the problem is more severe in the large Metropolitan areas, such as New York City, than in the smaller towns. For instance, a Twenty-One or Pavillon dinner in New York probably costs five times as much as a similar dinner in Jackson, Mississippi or in Midland, Texas, Yet, the dinner in New York may be just as ordinary and necessary as the dinner in Jackson. This is an area of much woozy and unrealistic thinking on the part of the Government as well as of some taxpayers. The expense account provision finally passed by the House in March, 1962, is in effect a statement of present law as to "directly related" expenses.

3. *Withholding on dividends and interest.* This has been an area of abuse and there seems to be some formula which can be practicable. Some groups have used the "widow" argument as to this proposal, but it still remains that the only way much income will be taxed will be by such a withholding system. ADP should also be of assistance in this area.

4. *Competitive Groups.* There are proposals in regard to savings and loan associations, mutual fire and casualty companies, and cooperatives. These are basically arguments between taxpayers and not between taxpayer and his Government. This is similar to the exempt organization area where so many of the problems arise because of complaints from non-exempt "competitors," or from similar groups. For instance, we recently obtained an exemption for a Christian Science organization, not because the client was necessarily entitled to it but because we pointed out to the Service that an exemption had previously been granted to similar Catholic and Jewish organizations.

5. *Tax deferral privileges in tax haven countries.* This proposal has gone through many drafts. Senator Gore, as stated, has had much

64. See Huffaker, *Even the Treasury Doesn't Like the T&E provisions of the Draft Bill,* 16 J. OF TAXATION 43 (1962).
65. Caplin, *The Travel and Entertainment Expense Problem,* 39 TAXES 947 (1961).

to do with spearheading this drive on "phony" foreign transactions which are difficult to reach under other sections of the Code.[66] The tax laws should not be used to enable U. S. industry to compete abroad. If wages are too high in the sporting goods industry, so as to permit competition with Japan, then the U. S. wage scale should be adjusted. Similarly, with tariffs — we should compete on the basic qualities of products. There should be no subsidy of American industry, through tariffs or taxes or some more direct means, except in those industries which are essential to national defense.

6. *Lobbying expenses.* There will probably be a provision in the Revenue Act of 1962 in respect to lobbying expenses. The Supreme Court has twice denied the deduction of such expense,[67] though the right to petition Congress or a State legislature or a city council may be just as important as the right to litigate. The entire requirement for deduction may not be obtained this year. It may be only the expenses of appearing before a Congressional Committee, but as it passed the House, it includes communication to individual Congressmen or legislators.[68]

Congressman Emanuel Celler of New York has well stated the importance of lobbying when discussing "Pressure Groups in Congress":[69]

> It is true that the cost of effective lobbying is ultimately borne by the people. It is also true that the pressures generated by a well-organized interest group can become irritating. But despite this cost and irritation, I believe that too much lobbying is not as dangerous to the quality of the resulting legislation as too little.

7. *Other.*

Other provisions have been suggested by the administration and many others have been proposed, though a complete tax reform bill has been postponed until a later year.

CONCLUSION

In any tax system which is fair and equitable, there must be uniform taxation of each dollar of income. This can be accomplished only by uniform enforcement and by uniform laws. At the present time we have neither, though most Americans are desirous of both. It is clear that only by some hygienic surgery both among the enforcement personnel in the

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66. *E.g.*, Sec. 482.

67. Cammarano v. U. S., 358 U. S. 498 (1959); Textile Mills Corp. v. Commissioner, 314 U. S. 326 (1941).

68. As agreed to by Ways and Means Committee on February 27, 1962, it includes almost all lobbying except appeals to the general public.

69. Celler, *Pressure Groups in Congress*, 319 ANNALS, THE AMERICAN ACADEMY OF POLITICAL SCIENCE 7 (Sept. 1958).

Internal Revenue Service and among the federal tax laws may we come closer to these two goals. Commissioner Caplin has indicated a vigorous campaign against errant revenue agents, and it has been indicated that a major tax reform program will be presented to the Congress late in 1962.[70] Both of these are desirable goals, and I have the feeling that the present Commissioner is continuing the effort to reinvigorate the Service begun under Commissioner Latham.

In any tax system, the words of Patrick Henry[71] uttered in another connection (claim of Government privileges as to discovery of documents) are relevant to help us keep in mind the relationship of a Government to its taxpayers, and the fact that the latter are always superior to the former:

> The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

If we as taxpayers must justify our tax positions or those of our clients to the Government, the Government must justify its uniform enforcement and uniform taxation — or lack of it — to the taxpayers.

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70. President's Economic Message, January 22, 1962.
71. 8 WIGMORE, EVIDENCE §2378a (3d ed. 1940).

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COMMENTS

PROFESSIONAL ASSOCIATIONS IN TENNESSEE

I. TAXATION ASPECTS

A. *Background*

A primary factor to be considered by an individual or partnership debating the advisability of incorporating is the impact of federal income and related taxes. It has been pointed out that only if the income from the business exceeds $20,000 for a one-owner organization, and $40,000 for two, or $90,000 for three owners can the corporate form be of tax advantage over a partnership with respect to the federal income tax.[1] Of course these figures are based on certain assumptions concerning the status of members of the fictitious firm; that is, that their income is to be derived almost entirely from the operation of this business, that each is married, and that the deductions are about normal for each individual. Other benefits arising from the corporate form of organization have been discussed also.[2] Although it is sometimes advantageous to be taxed as a corporation, often the owner of an enterprise would be better advised to form a partnership or individual proprietorship. Whether the individual has made a final choice as to taxability when he chooses the form of business under state law has been presented as the issue in many cases.

Morrissey v. Commissioner[3] involved an organization which under local law was formed as a trust to sell lots and construct a golf course. The Commissioner successfully contended that the trust should be classified as an association and taxed as a corporation. The Supreme Court said "Association implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. . . . While the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive." The Court pointed out that, in order to be taxable as a corporation, an association need only resemble a corporation; it need not be a corporation under state law. Particular characteristics of corporations were stated by the Court to be centralized management, continuity of life, transferability of interest, and limitation of personal liability.

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1. Sarner, *Choosing the Form of Organization*, 27 TENN. L. REV. 145, 149 (1960)
2. Jones, *Should Lawyers Incorporate*, 11 HASTINGS L. J. 150 (1959).
3. 296 U.S. 344 (1935).

The *Morrissey* case was followed in a later decision, *Pelton v. Commissioner*,[4] involving a medical clinic organized as a trust. The clinic was held taxable as a corporation despite the argument made on behalf of the clinic that the organization could not be a corporation because the corporate practice of medicine was not permitted under local state law. In these cases, it is to be noted that the taxpayer was attempting to be taxed as an entity other than a corporation. The tests of *Morrissey* were not met in *Mobile Bar Pilots Association v. Commissioner*,[5] and the organization of pilots was held not to be taxable as a corporation.

Next came the landmark decision which set the stage for the legislation to be discussed. In *U.S. v. Kintner*[6] the taxpayer was contending for the recognition of a medical clinic as an association, taxable as a corporation. A group of doctors in Montana organized an association called the Western Montana Clinic. The doctors, formerly partners under the same name, became associates, and the association adopted a pension plan. The Treasury Department sought to collect taxes from the members of the clinic as partners. The association successfully contested the Commissioner's position, and the circuit court held that the association was taxable as a corporation. It was also held that the pension plan which the association had adopted met the requirements of the Internal Revenue Code.[7] It is interesting to note that in the *Kintner* case the government contended that a corporation cannot engage in the practice of medicine, which was the taxpayer's position in the *Pelton* case. The circuit court in the *Kintner* case said with reference to the corporate characteristics of the association:

> The fact that some measure of control might have been secured by the partnership does not override the advantages resulting from continuity, centralized control and limitation of liability. The Government's contention, based upon the proposition that because, under local law, a corporation is not allowed to practice medicine, the group is not an association, would introduce an element of uncertainty which neither the courts nor the regulations have recognized.

Two years after the *Kintner* decision the Treasury Department stated its position that the case would not be followed by the Treasury.[8] Subsequently, in 1957, another ruling was issued in which it was stated that the fact that a medical clinic adopted a pension plan would not be considered determinative of whether the clinic was a partnership or

4. 82 F.2d 473 (7th Cir. 1936).
5. 97 F.2d 695 (5th Cir. 1938).
6. 216 F.2d 418 (9th Cir. 1954).
7. Sec. 401 of the 1939 Code.
8. Rev. Rul. 56-23, 1956-1 CB 598.

an association taxable as a corporation.[9] The latter ruling added that "the usual tests" would be applied to such a group to determine whether the clinic should be taxed as a corporation or as a partnership.

In *Galt v. U.S.*,[10] Dr. Galt, a member of the Southwest Clinic of Dallas, had filed a joint income tax return for himself and his wife. The association also filed a return and paid corporate taxes. The Revenue Department determined that for taxation purposes the association should be treated as a partnership, and the tax paid by the association was refunded. Dr. Galt paid the tax on his alleged share of the association profits and filed a claim for refund. No pension plan was involved in the case. Pointing out that under Texas law doctors were not permitted to incorporate, the court said:

> We think the association was entitled to be treated for tax purposes as though it was a corporation and the act of a state can neither raise nor lower the federal taxes that may be due by the association by whatever name it may be called under the laws of the particular state.

The court therefore held that the plaintiff was entitled to a refund of the tax paid as a partner in the clinic.

Following the *Galt* case, the Department of Justice filed notice of appeal, but withdrew it on November 25, 1959.[11] One month after the withdrawal of the appeal the Treasury Department issued its proposed regulations on the matter.[12] Soon after the proposed regulations were issued, at least one author expressed the view that the new regulations "reflect a desire of the officials of the Treasury Department and the Internal Revenue Service to correct certain inequities and attempt to introduce a degree of certainty and predictability in the important area of tax classification."[13] Final regulations were promulgated as TD 6503 and approved November 14, 1960.[14] A few changes were made in the proposed regulations, most of them dealing with the effect of state laws on the determination of the classification for tax purposes.[15]

The regulations first state that the tests or standards to be applied in determining the classification of an organization "are determined under the Internal Revenue Code." Under the heading "Effect of local

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9. Rev. Rul. 57-546, 1957-2 CB 886.
10. 175 F. Supp. 360 (N.D. Tex. 1959).
11. Ray, *Corporate Tax Treatment of Medical Clinics Organized as Associations*, 39 TAXES 73, 77 (1961).
12. 24 Fed. Reg. 10450, Dec. 23, 1959.
13. Saltz, *Associations*, 38 TAXES 187 (1960).
14. Sec. 301. 7701-1—11.
15. Ray, *Corporate Tax Treatment of Medical Clinics Organized as Associations*, 39 TAXES 73, 78-79 (1961).

law", the regulations indicate that in a situation such as that where a particular organization might be classified differently under various state laws, it would be uniformly classed as a trust, an association, or some other entity, "depending upon its nature under the classification standards of the Internal Revenue Code." Then the regulations go further into the concept of local law and its effect, as follows:

> Although it is the Internal Revenue Code rather than local law which establishes the tests or standards which will be applied in determining the classification in which an organization belongs, local law governs in determining whether the legal relationships which have been established in the formation of an organization are such that the standards are met. Thus, it is local law which must be applied in determining such matters as the legal relationships of the members of the organization among themselves and with the public at large, and the interests of the members of the organization in its assets.[16]

Since the conflict involves the taxability of associations, the regulations deal primarily with the definition of this organization. The Department defines "Associations" along the lines set forth in the *Morrissey* decision. The tests used in the regulations are: (a) characteristics of corporations; (b) continuity of life; (c) centralization of management; (d) limited liability; and (e) free transferability of interests. An examination of these tests reveals that the effect of local law on the determination of classification may be more pronounced than would appear from the above-quoted language.

The regulations point out that there are a number of major characteristics which ordinarily distinguish a corporation from other organizations such as (1) associates, (2) an objective to carry on business and divide the gains therefrom, (3) continuity of life, (4) centralization of management, (5) liability for corporate debts limited to corporate property, and (6) free transferability of interests. It is also stated that other factors may be found in some cases which may be significant, but "an organization will be treated as an association if the corporate characteristics are such that the organization more nearly resembles a corporation than a partnership or trust."[16] In an explanatory paragraph not contained in the proposed regulations of November 1959, a loose formula is set forth which is meant to aid in determining the weight to be given each of the various tests and the effect of characteristics common to both partnerships and corporations, as follows:

> (3) An unincorporated organization shall not be classified as an association unless such organization has more corporate characteristics than non-corporate characteristics. In determining whether

16. Sec. 301.7701-1 (c).

> an organization has more corporate characteristics than noncorporate characteristics, all characteristics common to both types of organizations shall not be considered. For example, if a limited partnership has centralized management and free transferability of interests but lacks continuity of life and limited liability, and if the limited partnership has no other characteristics which are significant in determining its classification, such limited partnership is not classified as an association. Although the limited partnership also has associates and an objective to carry on business and divide the gains therefrom, these characteristics are not considered because they are common to both corporations and partnerships.

It therefore appears that in making the determination only those corporate characteristics not common to the organization being considered and a corporation are to be counted.

Proceeding to the major factors which distinguish an association taxable as a corporation from a partnership, the regulations first consider "continuity of life." Whether an organization has this characteristic depends, of course, on whether dissolution will result from the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member. Dissolution is construed to be "an alteration of the identity of an organization by reason of a change in the relationship between its members as determined under local law. Thus, there may be a dissolution of the organization and no continuity of life although the business is continued by the remaining members." The reference to local law should be noted, since some 38 states have legislation similar to the Uniform Partnership Act[17] which provides for dissolution upon the death or bankruptcy of a partner.[18] In a state having such legislation an organization attempting to be taxed as an association cannot possess this characteristic. The regulations state:

> Accordingly, a general partnership subject to a statute corresponding to the Uniform Partnership Act and a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act both lack continuity of life.

The next test is "centralization of management." An organization has centralized management, under the regulations, if any person (or any group of persons which does not include all the members) has "continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed." The person or group, however, must have authority to make independent business decisions not subject to ratification by the members of the organization.

17. Ray, *Corporate Tax Treatment of Medical Clinics Organized as Associations*, 39 TAXES 73, 74 (1961).
18. UNIFORM PARTNERSHIP ACT §31 (4), (5).

Authority merely "to perform ministerial acts as an agent at the direction of a principal" is not centralized authority. An organization under the Uniform Partnership Act is again referred to in this section as an example of the type of organization which cannot qualify under this particular test, because of the mutual agency relationship between members of a general partnership.[19] This is said to be true even if the partners agree among themselves that the powers of management shall be exclusively in a selected few, since this agreement will be ineffective "as against an outsider who had no notice of it."

The regulations next list "limited liability." Organization has the characteristic of limited liability "if under local law there is no member who is personally liable for the debts of or claims against the organization." It is readily seen, therefore, that an organization formed under the Uniform Partnership Act could not claim this characteristic, since under that law all partners are liable jointly, or jointly and severally, for all obligations of the partnership.[20]

The final test contained in the regulations which must be considered in determining the taxability of an organization as an association is "free transferability of interests." This exists if each of the members of the organization has the power to substitute for himself in the "same" organization a person who is not a member of the organization without the consent of the other members. There is no transferability of interest under this section "if under local law a transfer of a member's interest results in the dissolution of the old organization and the formation of a new organization." The regulations recognize a "modified form of free transferability" in the situation where a member can transfer his interest to a person not a member only after having offered such interest to the other members of the association at its fair market value. This form of transferability, however, "will be accorded less significance than if such characteristic were present in an unmodified form." No mention is made of the effect of a further modification such as restricting the transfer of interests in the association to those of a particular group such as licensed attorneys or accountants.

An apparent inconsistency which must be clarified if reliance is to be placed on these tests is the one concerning the effect of local law on the determination of tax classification. As has been pointed out, the regulations refer several times to the "local law" concerning various relationships. It would appear that this reliance on the state law is adverse to the holdings of the courts, in the *Kintner* and *Galt* cases, that state

19. UNIFORM PARTNERSHIP ACT §9.
20. UNIFORM PARTNERSHIP ACT §§13-15.

law can have no effect on the determination. The current regulations on this point are a complete reversal of the regulations promulgated under the 1939 Code which provided that "local law is of no importance" in the classification of taxables.[21] Other apparent inconsistencies have been pointed out by practitioners in the tax field.[22]

Attempts have been made since 1951 in Congress to correct the inequities of the tax structure as applied to self employed individuals, but never with complete success. In the 87th Congress, the Keogh-Utt Bill, otherwise known as H.R. 10, was passed by an overwhelming majority in the House of Representatives.[23] The sponsor of the bill, Congressman Keogh, describes it as a bill which "would treat self-employed individuals as employees for the purpose of extending to them some of the tax benefits that present law provides in the case of qualified retirement plans established by employers for their employees."[24] When asked on the floor of Congress whether the bill took in lawyers, the sponsor indicated that although he did not wish the bill to be labeled as a "lawyer's bill" or as "any other professional man's bill," the bill is "designed to aid those who by law cannot or by choice do not operate as corporations."[25] Although the bill is opposed by the Treasury Department[26] there is some indication that it will remain alive for the coming session of Congress.[27]

B. State Statutory Provisions

As has been pointed out, between the *Kintner* decision in 1954 and the promulgation of the final regulations in 1960, the advisability of using the *Kintner* Articles of Association[28] as a pattern for attempted tax-saving became somewhat dubious. Professional practitioners and other self-employed individuals began considering the feasibility of state legislation which might partially solve the labyrinth brought on by the delay of the Internal Revenue Service in clarifying the matter. One hypothesized that perhaps if a few states attempt to rectify the situation by permitting professionals to incorporate, then, as happened in the joint tax return cases concerning community property states, the federal government would choose to act so as to uniformly cure the injustice.[29]

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21. Reg. 118, Sec. 39.3797-1 (1953).
22. Ray, *Corporate Tax Treatment of Medical Clinics Organized as Associations*, 39 TAXES 73, 85-87 (1961).
23. 107 CONG. REC. 8820 (June 5, 1961).
24. *Ibid.* at p. 8813.
25. *Ibid.* at p. 8814.
26. 6 AMERICAN BAR NEWS 1 (August 15, 1961).
27. 8 P-H TAX IDEAS REPORT No. 18, p. 2.
28. Jones, *The Professional Corporation*, 27 FORD. L. REV. 353 (1958).
29. Jones, *The Professional Corporation*, 27 FORD. L. REV. 353, 371, (1958).

That author urged that professional men should "first consider the professional corporation, and, having filled it out with appropriate powers and attributes, disciplined it with proper limitations, and reduced it to legislation compatible with the corporation laws and constitutions of the several states, then let them support its creation by the state legislatures."[30] Another writer called his proposal a "Professional Incorporation Law," a so-called unique type of corporation which would retain the personal liability of each member.[31]

These pleas did not fall on deaf ears. During 1961, fourteen states enacted legislation which was directed at least partly to solving the problem. These include Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Minnesota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas and Wisconsin.[32] States handled the solution in various ways. Some passed entirely new legislation setting up the framework for a new business organization.[33] The Colorado Supreme Court amended its rules governing admission to the Colorado Bar to permit law corporations without waiting for enabling legislation. Others chose to amend the partnership law of the state. This was the method selected by the Tennessee legislature.[34] The Tennessee legislation amends the section of the modified Uniform Partnership Act, entitled "Partnership defined — Associations subject to chapter." The amendment excluded from the provisions of the Partnership Act an association of three or more "persons licensed to practice a profession and/or engage in an occupation and/or trade for compensation or profit under the laws of the state of Tennessee" when the association is created by written articles of association which provide for certain characteristics. The articles must provide (1) for continuity of life, (2) for centralized management, (3) that the members are not personally liable for association liabilities, and (4) for transferability of interests to qualified nonmembers of the association after the shares have been offered to other members at their fair value.

The association is also subject to filing requirements contained in the amendment to regulations governing corporations concerning the filing of amendments to the articles of association, the blue sky laws and minimum starting capital requirement. The association further is "sub-

30. *Ibid.* at p. 372.
31. Wormser, *A Plea for Professional Incorporation Laws*, 46 A.B. A.J. 755 (1960).
32. The statutes include all professions except as follows: Arkansas — only physicians and dentists; Minnesota — only physicians; Oklahoma — all except dentists; South Dakota — only physicians. See 79 C.C.H. CORPORATION LAW GUIDE, Number 79, *New Professional Corporation Laws Explained* (1962).
33. Ohio, Pennsylvania, Florida and Wisconsin.
34. TENN. PUB. ACTS of 1961, Chapter 181, TENN. CODE ANN. 61-105 (1961 Supp.).

ject to the laws of the state of Tennessee regulating the practice of the profession, or engaging in the occupation or trade involved." It is also provided that the association so formed "shall be deemed and treated at law as a corporation, and not a partnership."

Any statement concerning the effect of the Tennessee or other state legislation on the matter of federal taxation would be purely conjectural. It would seem, however, that the elements of the association are tailored closely to those set forth in the Treasury Department regulations. In the event corporate taxation status was achieved by use of the statutory provision, benefits accruing to the members of the association might include, under the proper circumstances:

1. Election, under Subchapter S, either to be taxed as a partnership or a corporation.
2. If the election is to be taxed as a corporation, surplus could be accumulated within limits upon which to draw for capital improvements instead of having to spend each member's own personal capital.
3. The possibility of creating a qualified pension or profit sharing plan, or both, for both employees and associates.
4. Contributions would be deductible up to the limits prescribed.[35]

II. Ethical Barriers and Related Matters

It has been stated that "statutes, cases, and canons of ethics uniformly state that 'a corporation cannot practice law.' Less uniformly, similar principles today apply to the professions of medicine, accountancy, and architecture."[36] The corporation or pseudo-corporate association formed for the practice of law faces certain ethical hurdles in the race for tax relief.

The Committee on Professional Ethics of the American Bar Association has recently handed down an opinion to the effect that the Canons do not necessarily prohibit lawyers from practicing law in a form that would be classified as a corporation for federal income tax purposes.[37] The opinion points out, however, that there are "grave doubts" as to the wisdom and feasibility of professional associations or professional corporations. In all, the opinion considers six of the Canons.[38] The Com-

35. See White and Peterson, *Advantages for Attorneys*, 35 CALIF. ST. BAR J. 167 (1960); Stutsman, *How to Organize Professional Men for Corporate Tax Status Under Kintner*, 11 JOURNAL OF TAXATION, 336 (1959) and 12 JOURNAL OF TAXATION 174 (1960).

36. Jones, *The Professional Corporation*, 27 FORD. L. REV. 353 (1958).

37. 30 U.S. LAW WEEK 2252 (Dec. 5, 1961); Opinion 303 (1961).

38. A.B.A. CANONS 31, 33, 34, 35, 37 and 47.

mittee concluded, after a thorough discussion of the corporate-like characteristics of professional associations:

> The question initially presented in this Opinion – Can lawyers carry on the practice of law as a professional association or professional corporation, which has the characteristics of limited liability, centralized management, continuity of life, and transferability of interests, without being in violation of one or more of the Canons of Ethics – is answered in the affirmative provided appropriate safeguards are observed. It is the substance of the arrangement and not the form which will be controlling in determining whether the ethical restraints imposed on the legal profession have been violated.

Under the Tennessee form of association, the ethical problems do not seem unsurmountable. By providing that the shares or units of ownership are transferable to *qualified* nonmembers of the association, the statute clearly is intended to mean that shares are transferable only to members in good standing of the same profession as the members of the association. This, therefore, removes the danger of "fee-splitting." It seems that the personal responsibility of the attorney is not affected by the provision concerning limited liability for debts of the association; each practitioner remains personally liable for his own misfeasance or negligence.

In Tennessee, another problem facing the attorney is the applicability of the Code provision "nor shall any association or corporation engage in the practice of the law or do law business."[39] A similar provision prohibits the practice of public accounting by a corporation.[40] The legislature which passed the recent enactment did not make clear any intent to repeal the existing legislation as to the practice of law. This omission might, therefore, be construed to indicate one of two intents: (1) that the old statute was repealed by implication by the subsequent inconsistent legislation; or (2) that only those professions not specifically prohibited by the older statutes from practice as an association were covered by the new legislation. It would seem that the former construction is nearer the intent of the legislature in the light of the background as earlier stated. The court is not, however, generally inclined to find a repeal by implication unless the inconsistency is complete.

If called upon to construe the applicability of the professional association statute to attorneys, the court would likely be interested in developments in sister states. In Florida, the highest court of that state in

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39. TENN. CODE ANN. 29-303 (1956).
40. TENN. CODE ANN. 62-141 (1956).

October, 1961 was requested to amend the Integration Rule and Code of Ethics so as to permit the practice of law under Florida's "Professional Service Corporation Act."[41] The court, after noting the taxation background of the legislation, construed it "as a frank and forthright effort to adapt certain business and professional relationships to the requirements of the Internal Revenue Service" so that the members of the professions and business covered by the act would be placed on equal footing with other taxpayers. The court went on to say:

> If any means can be devised which reserves to the client and the public generally, all of the traditional obligations and responsibilities of the lawyer and at the same time enables the legal profession to obtain a benefit not otherwise available to it, we can find no objection to the proposal.

It was also noted that the individual practitioner, "whether a stockholder in a corporation or otherwise," would continue to be bound by all of the Rules and Canons of Professional Ethics as before. Any misprision of a member would subject the guilty stockholder to liability, and the association as well if the default occurred in the course of association business.

On the other hand, the Ohio Secretary of State has ruled that lawyer's corporations are unconstitutional even though Chapter 1785 of the Revised Code includes lawyers among the professional persons allowed to incorporate. As a result, there is now pending in the Ohio Supreme Court a mandamus action to test the constitutionality of this act as it refers to Ohio attorneys.[42]

III. Conclusion

In view of the favorable opinion of the American Bar Association Committee on Ethics and that of the Florida court, the association type of organization adopted in Tennessee would appear to be ethically acceptable for attorneys and surely for the other "learned" professions, especially those professions which are not forbidden by restrictive legislation from incorporating. The fact that the state provides for a professional association does not, however, insure its taxability as a corporation.

Glenn C. Stophel

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41. In the Matter of: The Florida Bar, Case No. 31,073, July Term, 1961, reported in full in 35 Fla. Bar J. 1067 (1961).
42. 8 P-H Tax Ideas Report, No. 23, p. 2 (Dec. 1, 1961).

THE LOANED SERVANT DOCTRINE

The doctrine of loaned servants is simply that a servant may be loaned by his master to another so that an act done by the servant becomes that of the one to whom he is loaned, and for the time the general master is not responsible for his acts.[1] The purpose of this comment is, first, to present a basic discussion of the loaned servant doctrine in general, with an analysis of the tests applied and the elements considered in determining whether a servant is loaned; and second, to analyze the doctrine of loaned servants in Tennessee. In view of the fact that it is difficult to formulate concrete rules since each case stands, to a certain extent, on its own particular facts,[2] it will be necessary to examine in detail the decisions in this area in order to determine the law in Tennessee on the doctrine of loaned servants.

I. The Loaned Servant Doctrine in General

It is well settled that a servant may be loaned by his master for some special purpose so as to become, as to that service, the servant of the person to whom he is loaned.[3] In such a situation the original master is relieved of the usual liabilities of a master.[4] Although the doctrine of loaned servants is well established, the problem is to determine when, and under what circumstances, a servant becomes a loaned servant.

The courts have developed several tests to determine when a servant is loaned. One of the criteria is commonly known as the "control test."[5] Under this test the master of the servant is the person who has the power to control and direct the servant in the performance of the work.[6] This rule has been subject to criticism, on the ground the word "control" is susceptive of two interpretations: broad control — control in the sense of hiring, training, and firing; and spot control — control exercised by the employer on the spot, the man who says when and where to go and how far.[7]

1. Rourke v. Whitemap Colliery Company, 2 Common Pleas Div. 208 (Eng. 1877).
2. Standard Oil Company v. Ogden and Moffett Co., 242 F.2d 287 (6th Cir. 1957). See Christiansen v. Mehlhorn, 146 Wash. 340, 262 Pac. 633 (1928).
3. Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); Denton v. Yazoo and Mississippi Valley Railroad Co., 284 U.S. 305 (1931); Standard Oil Company v. Ogden and Moffett Co., 242 F.2d 287 (6th Cir. 1957).
4. Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); Linstead v. Chesapeake & Ohio R. R., 276 U.S. 28 (1928); Denton v. Yazoo and Mississippi Valley Railroad Co., 284 U.S. 305 (1931).
5. For a discussion of this test see: Smith, *Scope of the Business: The Borrowed Servant Problem,* 28 Mich. L. Rev. 1222, 1228 (1940); Stevens, *The Test of the Employment Relation,* 38 Mich. L. Rev. 188 (1939).
6. See Annot., 55 A.L.R. 1263, 1264 (1928).
7. For a criticism of this test see: Smith, *Scope of the Business: The Borrowed Servant Problem,* 28 Mich. L. Rev. 1222, 1232, 1233 (1940).

Another test that has developed is the "whose business" test: whose business was being done by the servant.[8] This test did not develop all at once but for years ran hand in hand with the issue of control.[9] Thus some courts have applied the combination test of "whose work was being performed and who had the power to control."[10] Some courts, however, placed such emphasis on the "whose business" test that it grew into an ultimate test itself, apart from the question of control.[11] Thus the primary tests that have developed are (1) who has the right to control; (2) whose business or work was being performed and who has the right to control, and (3) whose business or work was being performed.[12]

In addition to these principal tests, the courts have looked to such elements as (1) the length of time that the servant is borrowed; [13] (2) the payment of the servant's salary;[14] (3) the power to discharge the servant or substitute another one in his place;[15] and (4) whether the servant has the skill of a specialist.[16] While applying one of the general tests discussed earlier, the courts may look to all, some, or none of the above elements.[17]

Some courts confuse the tests for determining whether a person is an employee or an independent contractor with the criteria for determining whether a servant has been loaned. Actually these issues are closely connected and in some jurisdictions the test may be identical. However, these should be recognized as two distinct problems and dealt with as such.

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8. See Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1233 (1940).
9. Byrne v. Kansas City H. S. & M. R. R. 61 F. 605, 607 (6th Cir. 1894): "The result is determined by the answer to the further questions, whose work was the servant doing? and under whose control was he doing it?" Standard Oil Co. v. Anderson, 212 U.S. 215, 221, 222 (1909): "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."
10. The leading case applying this test is Standard Oil Co. v. Anderson, 212 U.S. 215 (1909).
11. See Jones v. Getty Oil Co., 92 F.2d 255 (10th Cir. 1937), and Braxton v. Mendelson, 233 N. Y. 122, 135 N.E. 198 (1922).
12. Another test that has been proposed is the "scope of the business" test although the author admits there is "but the faintest shadow of judicial support for this suggested test." See Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1248 (1940).
13. Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 393 (1910); RESTATEMENT, AGENCY §220 (a) (f) (1953).
14. See Annot., 152 A.L.R. 816, 820 (1944); and Comment, *The Borrowed Servant Doctrine*, 9 LOYOLA L. REV. 225, 226 (1959).
15. Lowell v. Harris, 24 Cal. App.2d 70, 74 P.2d 551 (1938). See Annot., 152 A.L.R. 816, 821 (1944).
16. Lee v. Glens Falls Hospital, 265 App.Div. 607, 42 N.Y.S.2d 169 (1943).
17. See Keitz v. National Paving and Contracting Co., 214 Md. 479, 134 A.2d 296 (1957).

There are two types of cases in which the doctrine of loaned servants is applied. The first is a suit based upon common law negligence. The second type of situation in which the doctrine can be applied is a case arising under a workmen's compensation act. While the loaned servant doctrine was developed many years before workmen's compensation acts were passed, it is now fairly well settled that the doctrine applies to cases arising under the workmen's compensation act as well as to those at common law.[18] This statement, however, is subject to qualification by the wording of the workmen's compensation act in effect in the particular jurisdiction.[19] It is interesting to note that the English Workmen's Compensation Act, in order to avoid the application of the loaned servant doctrine, provides that the general employer shall continue to be the employer, even though his servant be loaned.[20]

One thing that all courts agree upon is that in order for a person who is a general servant of one master to become a special or loaned servant of another, the servant must so agree.[21] It has been held that this agreement may be either actual or implied.[22]

Generally, the question as to whether a servant has been loaned is a question of fact.[23] If reasonable minds could not differ on the conclusion to be drawn from the facts, however, the question becomes one of law for the courts to decide.[24]

II. The Loaned Servant Doctrine in Tennessee

Apparently the first Tennessee decision recognizing the doctrine of loaned servants was the 1890 case of *Powell v. Virginia Construction Company*.[25] There the defendant, a corporation engaged in the business of railway construction, had a contract for the construction of a certain road. The defendant sublet a portion of the track-laying to a firm of contractors known as Meredith & Horton. The plaintiff, while the general servant of defendant, and while acting as a brakeman, was

18. Scribner's Case, 231 Mass. 132, 120 N.E. 350 (1918); Wardrep v. Houston, 168 Tenn. 170, 76 S.W.2d 328 (1934).
19. See Annot., 152 A.L.R. 816, 861 (1944).
20. See St., 6 Edw. VIII, Chapter 58, Section 13.
21. Sanford v. Keef, 140 Tenn. 368, 204 S.W. 1154 (1918). See also Annot., 152 A.L.R. 816, 821 (1944).
22. Sanford v. Keef, 140 Tenn. 368, 204 S.W. 1154 (1918).
23. Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937); Ramsey v. New York Cent. R. R., 269 N. Y. 219, 199 N.E. 65 (1935); Gaston v. Sharpe, 179 Tenn. 609; 16 S.W.2d 784 (1943).
24. See Note, 9 Vand. L. Rev. 574, 576 citing Hudson v. Lazarus, 217 F.2d 344 (D. C. Cir. 1954); Angeo v. Standard Oil Co., 66 F.2d 929 (9th Cir. 1933); Lee Moor Contracting Co. v. Blanton, 49 Ariz. 130, 65 P.2d 35 (1937); Ryder v. Plumley, 138 Fla. 378, 189 So. 422 (1939); Balues v. Lexington Shoe Co., 93 N.H. 428, 43 A.2d 144 (1945); Cook v. Knox, 273 P.2d 865 (Okla. 1954).
25. 88 Tenn. 692, 13 S.W. 691 (1890).

injured in making a coupling, and sustained the loss of an arm. The negligence which caused the injury was that of Meredith, one of the subcontractors. The Supreme Court, in affirming a decision in favor of the defendant, stated:

> After careful consideration, we think the weight of opinion, as well as of reason, is that the fact that one is the general servant of one employer will not, as matter of law, prevent him from becoming the particular servant of another. The question as to who originally employed the servant, or who pays him, is not always a conclusive test as to who was his master in and about a particular work upon which he was engaged.

The court, although unable to cite any previous Tennessee decisions, went on to say:

> The better test would seem to be, was he, in regard to the particular matter in which he was employed, doing the work of a general master, or was he engaged in doing the work of another, over whom the general master had no control?

It is obvious that the test the court applied in the *Powell* case was "whose work was being done and who had the right to control." The "control" the court was speaking of was the control in the narrow sense, or spot control. The court refused to follow certain cases that supported the broad control concept stating that "they are not in harmony with the view we have reached as they seem to rest the question upon the power of employment and discharge and the duty of paying."

The next case decided in Tennessee dealing with the doctrine of loaned servants was *Sanford v. Keef*.[26] In that case Sanford purchased a cotton gin from a certain company and was to erect the gin himself. The contract provided that the seller would furnish a man from the factory to help with the erection but the purchaser was to pay five dollars per day plus expenses for such services. Keef, a skilled man regularly in the employ of the gin company, was furnished as erector. While Keef was engaged in the work of installation, the engineer, provided by Sanford, negligently started the engine and thus inflicted upon Keef serious injuries. From a judgment rendered in favor of Keef on the ground he was not a servant loaned to Sanford, Sanford appealed to the Tennessee Supreme Court. The court, citing *Powell v. Virginia Construction Company*,[27] stated that "the true test is whether in the particular service which he is engaged in performing at the time he continues liable to the direction and control of the general master or

26. 140 Tenn. 368, 204 S.W. 1154 (1918).
27. 88 Tenn. 692, 13 S.W. 691 (1890).

becomes subject to that of the person to whom he is lent or hired," and quoted from the *Powell* case as follows:

> In determining whether in respect of a particular act a loaned servant is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act done is done in the business of which the person is in control as proprietor, so that he can at any time stop or continue it and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result.

It appears that the court in the *Sanford* case applied the same test as did the *Powell* case, that is, "whose work was being done and who had the right to control." It seems, however, that the *Sanford* decision placed more emphasis on the element of control than did the *Powell* case and also that the court was speaking of control in a broader sense:

> The power was Sanford's to stop the work in event he changed his mind as to the work ability of the plans, to change the plans, or to discharge Keef if in his opinion Keef was incapable or insubordinate. This demonstrates where lay the supremacy of authority, over the work and all engaged in it, which is the ultimate test in such a case.

The court in *Sanford v. Keef*[28] in reversing the lower court decision and remanding the case for a new trial spelled out another principle that has universally been recognized as a constituent part of the doctrine of loaned servants, stating: "The servant must assent to or acquiesce in the transfer from the one employer to the other. This need not be written or even verbal; it need not be express, but may be implied. It may and very often does rest in the implication of circumstances."

The next case was *Chamberlain v. Lee*,[29] where the defendants were the owners of an office building. The signal system on the elevator went out of order, and the defendants employed a firm of electrical contractors to remedy this trouble. The plaintiff was sent by the firm to make the repairs and upon reaching the building communicated with the janitor, who at the time had control of the building, about the nature of the repairs to be made. The janitor left instructions with the elevator boy to run the elevator up and down as the plaintiff requested. The plaintiff told the elevator boy to hold the cage at the second floor and then went down in the basement to the bottom of the elevator shaft to pursue his investigation. When he was directly under the counterweights, the elevator boy, thinking he heard the plaintiff call to him to do

28. 140 Tenn. 368, 204 S.W. 1154 (1918).
29. 148 Tenn. 637, 257 S.W. 415 (1923).

so, started the cage upward, seriously injuring the plaintiff. The defendant contended that at the time of the accident the elevator boy acquired the position of a servant loaned to the firm of contractors. The Tennessee Supreme Court, however, rejected this argument and affirmed a judgment for the plaintiff stating:

> This does not make out a case of lending a servant. The servant was put under the control of plaintiff for one purpose alone. That is, to move the car up and down as plaintiff desired while the particular job was being done. The elevator car was put under the control of the plaintiff for the time, but it was put under his control along with its attendant, who remained in the service of the defendants. There is nothing to show that plaintiff could have discharged this boy and put another boy to running the elevator at this time. Plaintiff certainly had no right to use this elevator boy for any purpose in connection with the work other than running the elevator up and down. The plaintiff could not have required the elevator boy to remain on duty for a longer period than his regular hours under his contract with defendants.
>
> In order to escape responsibility for the negligence of his servant on the theory that the servant has been loaned, the original master must resign full control of the servant for the time being. It is not sufficient that the servant is partially under the control of a third person. The control of this servant was but partially transferred by defendants, with no right on the part of the plaintiff to discharge the elevator boy, or to use his services generally in connection with the job.

The court stated that *Sanford v. Keef*[30] and *Powell v. Virginia Construction Co.*[31] were not in point as the "general employes here only authorized the servant to do a particular thing for the independent contractor, and the general employer . . . did not give up his authority over the servant . . . While so acting the boy was in the service of the defendants who were co-operating with the contractors in making the repairs."

It is interesting to note that the opinion in the *Chamberlain* case, unlike those in the *Powell* and *Sanford* cases, does not refer to the element of "whose work was being done." The test relied on in the *Chamberlain* case was the "who has the right to control test" and the word control was used as meaning broad control.

The decision in the *Chamberlain* case was reinforced by *Dedman v. Dedman*.[32] There the plaintiff was injured while riding in the defendant's automobile which was negligently driven by defendant's chauffeur.

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30. 140 Tenn. 368, 204 S.W. 1159 (1918).
31. 88 Tenn. 692, 13 S.W. 691 (1890).
32. 155 Tenn. 241, 291 S.W. 449 (1926).

When plaintiff brought suit, defendant contended that she had loaned her automobile to the plaintiff and that although the chauffeur was in defendant's general employ he had been loaned to the plaintiff for the trip. The court quoted from the *Chamberlain* case to the effect that in order to escape responsibility for negligence of a servant on the theory the servant has been loaned, the original master must resign full control of the servant for the time being. Accordingly, it was held that the trial judge acted properly in leaving it to the jury to decide whether the defendant had given up entire control over her chauffeur or had only partially transferred control over him on this occasion.

In *Hot Blast Coal Co. v. Williax*,[33] the plaintiff was employed by Billiter & Oliver Bros., a partnership engaged in paving a state highway. Billiter & Oliver Bros. hired several trucks and drivers from the defendants, and while the plaintiff was working on the road, he was injured by one of the drivers of a truck hired from defendants. The court affirmed a judgment for the plaintiff on the ground that the driver of the truck was not a servant who had been loaned to Billiter & Oliver Bros. It was pointed out that the defendant retained the right to fix the compensation of the drivers, to discharge them, to require them to help the machinist in the repairs of the trucks, and to recall the trucks and drivers at will. The company also gave the drivers instructions about the way they should drive the trucks, warn pedestrians and others upon the road. Consequently the court held that under the test laid down in the *Chamberlain* and *Dedman* cases the servant was not a loaned servant, quoting from *Corpus Juris* as follows:

> To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary co-operation where the work furnished is part of a larger operation. A servant of one employer does not become the servant of another merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to the details of the work and the manner of doing it.[34]

In none of these cases was there any mention of "whose work was being done" and the test used was "who had the right to control." All three cases use the word *control* not in a narrow sense, as in the *Powell* case, but in a very broad sense, and it is not at all surprising, under the test that was used, that all of these decisions held that the servant had not been loaned.

33. 10 Tenn. App. 226 (1929).
34. 39 C. J. *Master and Servant* §1462 (d), p. 1275 (1925).

The case of *Wardrep v. Houston*[35] established the principle in Tennessee that the doctrine of loaned servants applies to cases arising under the Workmen's Compensation Act as to those at common law.[36] In the *Wardrep* case the defendant obtained a hauling contract in connection with the paving of a highway. The defendant hired from Wardrep three trucks along with drivers. The plaintiff, one of the truck drivers, was very seriously injured while operating one of the trucks hired from Wardrep. He brought suit against the defendant and recovered. The Tennessee Supreme Court affirmed the judgment for compensation on the ground that the defendant was the employer since the servant had been loaned to him by Wardrep.

In the *Wardrep* case the court did not state what test it was applying in determining whether the servant was loaned. It did, however, cite the *Powell* and *Sanford* cases with approval and found that the *Chamberlain, Dedman* and *Hot Blast Coal Co.* cases had no application. It is interesting to note that nowhere in this decision did the court mention the element of "whose work was being done," as did the *Powell* and *Sanford* decisions. Apparently the sole test used by the court was "who had the right to control," with "control" meaning narrow or spot control rather than broad control, for the court seemed to rest its decision on a statement to the effect that it was the defendants, not Wardrep, who were in control of the hauling, the work in which plaintiff was engaged when he was injured.

In *Shelton v. City of Greeneville*,[37] another workmen's compensation case involving the loaned servant doctrine, the plaintiff, who was employed and paid by the Tennessee Emergency Relief Administration, received injuries which resulted in the loss of an eye, while extending one of the streets in the City of Greeneville. Plaintiff contended that at the time of the injury he occupied the position of a servant loaned to the City of Greeneville and thus the city was liable as his employer. The agreement between the city and the T.E.R.A. was to the effect that the city was to furnish about fifteen per cent of the cost of the work and to provide a foreman to direct the details of the street construction. The court, relying on the case of *Sanford v. Keef*,[38] held that the plaintiff was not a servant loaned to the city. It was pointed out that T.E.R.A. was in control of the job, since it could have stopped

35. 168 Tenn. 170, 76 S.W.2d 328 (1934).
36. Wilmoth v. Phoenix Utility Co., 168 Tenn. 95, 75 S.W.2d 48 (1934), a case decided the same year as the *Wardrep* case, also recognized the applicability of the loaned servant doctrine to workmen's compensation cases.
37. 169 Tenn. 366, 87 S.W.2d 1016 (1935).
38. 140 Tenn. 368, 204 S.W. 1154 (1918).

the undertaking at any time and the project was to be conducted "under the rules and regulations of the Emergency Relief Administration."

In *Owens v. St. Louis Spring Co.*,[39] another workmen's compensation case, the St. Louis Spring Co. entered into a contract with the Greenville Welding Works for the sale and installation of a machine to be used for making and repairing springs for automobiles. Owens was directed by the St. Louis Spring Company to go to the place where the machine was to be installed and look after the job. The installation of the machine was completed in three weeks but Owens remained demonstrating to the workers how to operate the machine and while doing so received an injury which resulted in the loss of one of his eyes. Owens filed suit against the St. Louis Spring Company under the Workmen's Compensation Act. The defendant contended that Owens was a loaned servant in the employ of the Greenville Welding Works at the time of the injury, since the Greenville Welding Works paid his salary and expenses. The court in deciding the case stated:

> It is frequently a matter of difficulty to determine whether an employee, in a particular instance, should be regarded as a loaned employee in the services of a special employer or whether he should be regarded as remaining in the services of his general employer. A test running through our cases, although not always in terms noted, is indicated by the question: "In whose work was the employee engaged at the time?"

The court then went on to find that Owens was not engaged in the work of the Greenville Company at the time of the injury and thus was not a loaned servant. It is obvious that the ultimate test used in this case was "whose work was being done." This is the first Tennessee case to use that test as the ultimate one, without reference to the element of control.

The test laid down in the *Owens* case of "whose work was being done" was reaffirmed in *Tennessee Coach Co. v. Reece.*[40] There the defendant's bus while loaded with passengers, broke down and the driver of the bus went to the City Garage to obtain a mechanic. The plaintiff Reece was sent to work on the bus. The driver of the bus directed a bystander named Wilson to work the starter of the bus for the plaintiff while he was fixing the engine. Wilson, without directions from the plaintiff, pushed the starter button and the engine backfired burning the plaintiff.

Plaintiff brought suit against the owner of the bus and one of the contentions of the defendant was that the plaintiff occupied the status

39. 175 Tenn. 543, 136 S.W.2d 498 (1939).
40. 178 Tenn. 126, 156 S.W.2d 404 (1941).

of a loaned servant, and since Wilson was his fellow servant the defendant was not liable. The court held that the plaintiff was not a loaned servant, relying on the *Owens* decision and the test laid down in that case: "In whose work was the employee engaged at the time." The court stated that the arrangement for Reece's services was made at the City Garage; that the transaction of the bus driver was with a man in the City Garage office and that Reece's order to do the work came from a man in that office. City Garage was employed to do the work, and it was the job of that concern. Consequently the plaintiff was not regarded as the servant of the bus operator.

In *Gaston v. Sharpe*,[41] the City of Memphis rented a machine called a dragline from defendant Sharpe along with an operator to run the machine. The plaintiff was injured by the negligent operation of the machine by the man in charge and the question arose whether at the time of the accident the operator was a loaned servant so as to relieve the defendant Sharpe from the negligence of the operator. The salary of the operator was paid by Sharpe but it was the duty of the operator to use the machine as directed by those supervising the work. The court of appeals, relying on *Chamberlain v. Lee*,[42] held that the operator was not a loaned servant, as Sharpe had not surrendered full control of him. The Tennessee Supreme Court, however, reversed the court of appeals decision stating:

> On its face, as stated in the opinion, *Chamberlain v. Lee* was a case in which the general employer of the servant and the defendant were merely co-operating in a particular undertaking and the decision, holding it was not a case of loaned servant, was partly rested on the co-operative feature of the effort.

The court then looked at the test laid down in *Owens v. St. Louis Spring Co.*[43] — in whose work was the employee engaged at the time, or, rather, whose work was being done — and stated:

> Neither the test stated in *Chamberlain v. Lee* nor that stated in *Owens v. St. Louis Spring Co.*, has proved entirely adequate. Instead of being tests they are rather to be considered as factors in reaching a conclusion as to where the responsibility lies for the servant's act. This is true because a servant at a particular time may remain under the control of a special employer for others. Likewise it sometimes happens that a particular work in which the servant is engaged may be properly considered as the work or business of both the general employer and the special employer.
>
> The question is difficult. It is considered at some length in Re-

41. 179 Tenn. 609, 168 S.W.2d 784 (1942).
42. 148 Tenn. 637, 257 S.W. 415 (1923).
43. 175 Tenn. 543, 136 S.W.2d 498 (1939).

> statement of Agency, Section 227. We take the following from Restatement as a satisfactory rule. "Since the question of liability is always raised because of some specific act alone, the important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other. It is not conclusive that in practice he would be likely to obey the directions of the general employer in case of conflict of orders. The question is as to whether it is understood between him and his employers that he is to remain in the allegiance of the first as to a specific act, or is to be employed in the business of and subject to the direction of the temporary employer as to the details of such act. This is a question of fact in each case."

Then the court, in holding that the operator was a loaned servant, applied this rule as follows:

> There is no conflict in the evidence as to where the authority lay to direct the specific act which caused the injury to the plaintiff in the case before us. All the testimony is that the operator of this machine was to use it on the job as directed by the supervisor as foreman on the work. That is to say the operator was to swing the boom, drop the hammer, slacken the cables, and do the other things according to signals given him by the foreman or supervisor. The latter directed that slack be let out in one of the ropes. The operator of the machine negligently misinterpreted this order or negligently attempted to execute it. It was in pursuance of an order of the foreman or supervisor, which that party was entitled to give, that the operator did the thing that injured the plaintiff. In performance of this specific act, the operator was not employed in the business of and subject to the direction of defendant Sharpe.

It seems that actually the test used by the *Gaston* case was "whose work was being done and who had the right to control." The court, however, seemed to have placed more emphasis on the element of control and the court used control in the narrow sense as meaning spot control. Actually the test used by the *Gaston* case is quite similar to the test used in *Powell v. Construction Co.*[44] which was cited with approval. In *McDonald v. Dunn Const. Co.*,[45] a workmen's compensation case, *Gaston v. Sharpe*[46] was cited with approval.[47] In *Chapman v. Evans*,[48] however, neither the majority nor the dissent, which cited many loaned-servant decisions, mentioned the *Gaston* case.

44. 88 Tenn. 692, 13 S.W. 695 (1890).
45. 182 Tenn. 213, 185 S.W.2d 517 (1944).
46. 179 Tenn. 609, 168 S.W.2d 784 (1942).
47. The *Gaston* case was also cited with approval in Southern Bell Telephone and Telegraph Co. v. Yates, 34 Tenn. App. 98, 232 S.W.2d 796 (1950) and American Fidelity and Casualty Co. v. Pennsylvania Casualty Co., 97 Fed. Supp. 965 (E.D. Tenn. 1950) although these cases were not as such "loaned servant" cases.
48. 37 Tenn. App. 166, 261 S.W.2d 132 (1953).

Kempkau v. Cathey[49] was a workman's compensation case. There the defendant was engaged in the business of selling and delivering building supplies. Cathey was employed as a truck-driver for the defendant. One Harris, a general foreman of the defendant desired to move some furniture belonging to a domestic servant and arranged with Cathey to undertake the work for him. After Cathey had delivered the furniture and was on his way to return the truck to the company, the truck went out of control, causing injuries to Cathey from which he later died. The trial court awarded a judgment under the Workmen's Compensation Act against the defendant but the Supreme Court reversed on the ground that Cathey was a servant loaned to an independent contractor. The court did not disclose what test it was applying but seemed to rely heavily on the *Powell* case. The *Wardrep* and *Owens* cases were also discussed but the court did not mention *Gaston v. Sharpe*.[50]

III. Conclusion

The Tennessee courts have at different times relied on each of the three tests for determining when a servant is loaned: 1) the "control test"; 2) the "whose business test"; and 3) the "test of whose business was being done and who had the right to control". Also in Tennessee, as in other jurisdictions, the element of control has been subject to two applications: broad control and spot control.

In Tennessee, in view of the *Gaston* decision, probably the most important element is that of control, with control being interpreted in the narrow sense or as spot control. It is interesting to note that actually the test laid down in the *Gaston* case was basically a return to the test adopted by the *Powell* decision, the first Tennessee case recognizing the loaned servant doctrine. It should be kept in mind, however, that while several cases subsequent to the *Gaston* decision have cited that case with approval, several others have either failed or refused to even mention that decision.

In the future it is hoped that the Tennessee courts will follow the *Gaston* decision and view as the most important element the element of spot control, that is, the control exercised by the employer on the spot, the man who says when and where to go and how far. Not only is this test more realistic but it enables the court to reach a just result without too much difficulty.

John H. Harris

49. 198 Tenn. 17, 277 S.W.2d 392 (1954).
50. 179 Tenn. 609, 168 S.W.2d 784 (1942).

CASE NOTES

BAILMENTS—BAILOR'S DUTY TO WARN OF KNOWN DEFECTS IN CHATTEL TO BE REPAIRED BY BAILEE

Plaintiff contracted with defendant to repair the engine of defendant's air compressor, damaged when the water froze in the cooling system and ruptured the water jacket. The president of the defendant corporation informed the plaintiff that an employee of the corporation would "take everything that was necessary off the block to get it welded." The employee removed an oil filter, oil pump, magneto and governor from the face of the compressor engine. The removal of the oil filter and pump left an opening in the side of the compressor engine near the water jacket from which a line led to the crankcase some eighteen inches away. The crankcase was filled with oil and possibly gasoline and ether. The defendant's employee did not drain the crankcase or plug the opening left by the removal of the accessories from the engine. He then informed the plaintiff that the water jacket was ready for welding and delivered it to the plaintiff's shop, not mentioning the open line to the crankcase. Plaintiff, who had never before worked on an air compressor, did not know that the opening in the outside of the engine led to the crankcase or that the crankcase was filled with combustible liquids and gases. Following the custom of the welding trade, he made no examination of the compressor engine but began his weld. In the course of welding it was necessary to bring an electric torch almost directly above the opening leading to the crankcase. The contents of the crankcase were ignited, causing an explosion with resulting injuries to the welder and two others standing nearby. On appeal from a judgment on a jury verdict in favor of the plaintiff, *held,* affirmed. The defendant had an obligation to warn the plaintiff of any defects or conditions of which it had actual or constructive knowledge and which were potentially dangerous to the plaintiff in carrying out the welding operation. To support liability for negligence, "it is not essential that the precise manner in which an injury ultimately results be foreseeable, but only that there was substantial liability that the negligence charged would result in 'harm in the abstract' ". The issues of contributory negligence and assumption of risk were properly submitted to the jury under these circumstances. *Southeastern Steel & Tank Maintenance Co. v. Luttrell,* 348 S.W.2d 905 (Tenn. App. 1961).[1]

In imposing on the defendant a duty to warn of the dangerous condition arising from affirmative acts of its employee, the court relied

1. *Cert. den.* by Tennessee Supreme Court, July 26, 1961.

on standard authorities[2] which state that such a duty is present where the bailment is for work to be performed on the chattel. No Tennessee case was cited for this proposition, but the prevailing rule has been stated as follows:

> The general rule as to the duty of a bailor who delivers a chattel to another for work to be preformed upon it requires him to disclose to the bailee any condition of the chattel known to him, and unknown to the bailee, from which danger to the latter, his property, or his servants might reasonably be anticipated during the work upon the chattel in the manner known to be intended, and if he fails to give such warning, he is liable for injuries resulting therefrom without negligence on the part of the bailee.[3]

This rule is similar to the one concerning bailments for use, as when automobiles and trucks are rented. That point was considered in *Vaughn v. Millington Motor Co.*,[4] involving the rental of a truck with defective brakes and horn for use on a farm. The court there stated with reference to cars and trucks that "if the bailor knows or by reasonable diligence could know of defects in devices intended to control them, an obligation rests upon him not to let the machine without correcting the defect, or without notifying the bailee and contracting with him to make the machine safe before using it in public." Where the bailment is for public use, the duty does not rest simply upon the contract of bailment but "arises from the obligation which the law imposes upon every man to refrain from acts of omission or commission which he may reasonably expect would result in injury to third persons."

There is a related case[5] from another jurisdiction where a filling station operator was allowed to recover against the owner of an automobile when, at the owner's request, he attempted to replace a fan belt which had come off. His hand was drawn between the belt and the generator pulley with resulting injuries because, unknown to him, the generator was running. In that case, however, the relationship was one of independent contractor-contractee rather than bailor-bailee since the element of delivery of possession was absent. It is doubtful also whether the owner of the automobile who asked assistance actually knew of the danger involved under these circumstances, but perhaps, as in the present case, he should have realized that risk which arose from facts of which he apparently was aware.

In the instant case the court found that the jury could reasonably

2. 8 C.J.S., *Bailment* §25, p. 261 (1938); 6 AM. JUR., *Bailment* §199, p. 312 (1938).
3. Annot. 122 A.L.R. 1023 (1939).
4. 160 Tenn. 197, 22 S.W.2d 226 (1929).
5. Blum v. Shrock, 104 Ind. App. 247, 10 N.E.2d 752 (1937).

conclude that the defendant "had knowledge, either actual or constructive, of a condition that was potentially dangerous to the plaintiff." The duty placed on the bailor, therefore, is one of reasonable diligence to realize and warn of any dangerous condition or defect in a chattel bailed for the purpose of having work performed on it, at least where there is a superior knowledge of the condition which makes the chattel dangerous. The possession of such superior knowledge gives rise to the duty to warn, which was not complied with in this case, even though the bailor may not actually have realized the danger.

G.C.S.

CRIMINAL LAW — THREATS AND EXTORTION

Defendant threatened to injure another, Wright, in order to compel the latter to sign a statement that he had engaged in an illicit love affair with defendant's wife. Defendant had asked Wright to come to his home and, while Wright was there, had inquired into Wright's relationship with his wife. Defendant then forced Wright, at gunpoint, to sign a written statement which defendant had prepared before Wright's arrival, admitting the illicit love affair. After Wright signed and was preparing to leave, defendant struck him on the back of the head, causing a serious wound. Defendant was indicted and convicted under the Tennessee Threats and Extortion Statute.[1] Upon appeal, *held,* affirmed. The statute was violated even though defendant did not attempt to extort money, property, or pecuniary advantage, and even though the statement signed was true. *Furlotte v. State,* 350 S.W.2d 72 (Tenn. 1961).

The "Threats and Extortion Statute" had been interpreted in very few cases in Tennessee prior to the instant case. Under the Tennessee statute, the threat may be written, printed, or verbal;[2] and it is generally held under similar statutes in other jurisdictions that the threat need not be in any particular form.[3] It may be expressed in general,

1. TENN. CODE ANN. §39-4301 (1956), which provides: "If any person, either verbally or by written or printed communication, maliciously threaten to accuse another of a crime, offense, or immoral act, or to do any injury to the person, reputation, or property of another, with intent thereby to extort any money, property, or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall on conviction be punished. . . ."
2. TENN. CODE ANN. §39-4301 (1956).
3. Baker v. State, 47 Ga. App. 205, 170 S.E. 209 (1933); Moore v. People, 69 Ill. App. 398 (1896).

vague terms so long as the language conveys with sufficient clarity a meaning which can be understood.[4]

In *State v. Morgan*,[5] the question was whether a threat, made at gunpoint, that one would "suffer the consequences" if he did not leave the vicinity was a violation of the statute. The court in that case said: "The statute is a highly penal one, and . . . was not intended to apply to every idle threat, but such as are evidence of serious purpose to do the injury threatened, and that, some serious injury. . . ."[6] It was there held that the defendant's act was equivalent to saying that defendant would kill the person threatened, or do him great bodily harm if he did not comply with defendant's order. In the instant case, although defendant did not actually say anything, his act of pointing a pistol at Wright was sufficient to constitute a threat. This is in accord with many decisions which hold that a threat may be made by innuendo or suggestion.[7]

The threat may be a threat to accuse another of a crime, an offense, or an immoral act. In Tennessee,[8] and in most jurisdictions,[9] it makes no difference whether the threatened charge is or is not true in fact. In the principal case, although the defendant did not threaten to accuse Wright of a crime, an offense, or an immoral act, he did compel him to sign, at gunpoint, a statement which amounted to an admission that he had committed a crime.

A question has arisen in many jurisdictions as to what acts are necessary to constitute a threat under the statute. It is sometimes said that the threat must induce fear in the person so threatened;[10] other cases have held that the threat should be calculated to intimidate or put fear in an ordinarily prudent man, and that it makes no difference whether the person so threatened was actually intimidated, so long as a reasonable prudent man would have been.[11] Still other courts have held that the person threatened need only be apprehensive of some harm, injury, or detriment to his person or property.[12] In Tennessee it has been held that a serious and malicious threat intended to compel

4. People v. Percin, 330 Mich. 94, 47 N.W.2d 29 (1951).
5. 50 Tenn. 262 (1866).
6. *Ibid.*
7. State v. Brunswick, 69 Ohio. App. 407, 44 N.E.2d 116 (1941).
8. State v. Needam, 147 Tenn. 50, 245 S.W. 527 (1922).
9. People v. Goldstein, 84 Cal. App.2d 581, 191 P.2d 102 (1948); State v. Morrissey Co., 11 N.J.Super 298, 78 A.2d 329 (1951); Commonwealth v. Bernstein, 308 Pa. 394, 162 A. 297 (1911).
10. State v. Brownlee, 84 Iowa 473, 51 N.W. 25 (1892).
11. State v. McGee, 80 Conn. 614, 69 A. 1059 (1908).
12. People v. Rudolph, 277 App. Div. 195, 98 N.Y.S.2d 446 (1950), reversed on other grounds, 303 N.Y. 73, 100 N.E.2d 142 (1951).

a party to do an act against his will is within the statutory prohibition.[13]

It was said in *State v. Stockford*[14] that "any words calculated and intended to cause an ordinary person to fear an injury to his person, business, or property are sufficient to constitute a punishable threat," under a statute similar to the one involved in the principal case. It then follows that a threat to do great bodily harm to another is a sufficient threat to render the statute applicable.

In the principal case it is clear that the purpose of the threat was to compel Wright to do an act against his will, and was not to extort money, property, or to gain a pecuniary advantage. It has been held under similar statutes that the offense of using threats with the intention or purpose of compelling another person, against his will, to do or abstain from doing any act is separate and distinct from the offense covering threats with intent to extort money or pecuniary advantages,[15] and that the statute will be given effect in either instance for such offenses.[16] This same distinction was recognized in *State v. Morgan.*[17]

Where the mere making of threats with intent to compel a person to act against his will is a statutory offense, intent to extort is not essential and malice may be inferred, according to many authorities.[18]

A threat to compel a person to do a minor act of no great injury or serious importance would not be punishable under this act,[19] but in the principal case defendant induced another, through fear, to sign a statement against his will admitting a violation of the law for which he could have prosecuted. It is clear from the foregoing that the decision reached by the Tennessee court in the instant case is correct. The threat was designed to compel another to do, not a minor act, but one which could result in very serious consequences, and such a threat is clearly within the purview of this statute.

S.M.W.

MEDICAL MALPRACTICE — STANDARD OF CARE

Defendant, Dr. Raskind, performed a disc surgery operation on plaintiff to correct a left lateral herniation of the fourth and fifth lumbar

13. State v. Morgan, 50 Tenn. 262 (1866).
14. 77 Conn. 227, 58 A. 769 (1904).
15. State v. Wilbourn, 219 Iowa 120, 257 N.W. 571 (1934).
16. State v. McGee, 80 Conn. 614, 69 A. 1059 (1908); State v. Brown, 203 Minn. 505, 282 N.W. 131 (1938); People v. Kaplan, 240 App. Div. 72, 269 N.Y.S. 161 (1934), *Aff'd* 264 N.Y. 675, 191 N.E. 621 (1934).
17. 50 Tenn. 262 (1866).
18. State v. Young, 26 Iowa 122 (1868); State v. Brunswick, 69 Ohio App. 407, 91 N.E.2d 553 (1949).
19. State v. Morgan, 50 Tenn. 262 (1866).

discs and to relieve radiating sciatic pain in his left hip and leg. Immediately following Dr. Raskind's operation, another operation was performed by an orthopedic surgeon for the purpose of fusing the plaintiff's fourth and fifth vertebra. After these operations, the plaintiff experienced new intense sciatic pain with coldness and paralysis in his right leg. Defendant told the plaintiff that his symptoms were a natural after-effect of the disc surgery and that there was nothing to worry about. When the plaintiff's symptoms continued, a permanent sympathetic nerve block was performed by the defendant's assistant, pursuant to directions by defendant. Later the condition in the plaintiff's right leg was diagnosed as circulatory trouble by other doctors and treatment for that was administered. When the plaintiff sought the aid of a neurosurgeon, an exploratory operation was performed and there was found on the right side of the fifth lumbar interspace an extruded piece of material from the disc; this the neurosurgeon removed. After this the plaintiff's pain ceased, but the trouble in his right foot, known as "foot drop," remained because the muscles had atrophied. Plaintiff brought a malpractice action, alleging that it was the duty of the defendant to make a thorough examination of the vertebral interspace exposed during the disc surgery, and to make an adequate removal of the disc material to avoid later nerve root damage. The trial court granted defendant's motion for a directed verdict. On appeal to the court of appeals, *held,* affirmed. Defendant, at most, was guilty of an erroneous diagnosis of the cause of the plaintiff's trouble but since this same diagnosis was concurred in by numerous other physicians and surgeons, the defendant was not negligent. *Redwood v. Raskind,* 350 S.W.2d 414 (Tenn. App. 1961).[1]

There is no legal duty imposed upon a physician to treat an ill or injured person.[2] Thus a physician may refuse to treat a person and cannot be held liable for his omission to act. However, once the physician undertakes to treat a person or when a physician-patient relationship is established, the physician is liable for negligence toward the patient.[3]

Of course, a physician does not guarantee the cure of his patients,[4] but he is guilty of negligence if he does not exercise such reasonable and ordinary care, skill, and diligence as physicians in the same community,

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1. Certiorari denied by Tennessee Supreme Court, Oct. 1961.
2. McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549, 553 (1959).
3. Jenkins, *Medical Malpractice,* 26 TENN. L. REV. 514 (1959).
4. Butler v. Molinski, 198 Tenn. 124, 277 S.W.2d 448 (1955); McPeak v. Vanderbilt Univ. Hosp. 33 Tenn. App. 76, 229 S.W.2d 150 (1950). See Jenkins, *Medical Malpractice,* 26 TENN. L. REV. 514 (1959), where it is pointed out that the earliest systems of law held that the physician did guarantee the cure of his patients.

in the same general line of practice, ordinarily exercise in like cases.[5] He is not liable for following one of several methods of treatment[6] where there is a difference of opinion among physicians as to the best practice.[7] Thus if there is a difference of opinion among physicians with reference to the treatment to be given in a particular case, a physician will not be held liable for malpractice if he follows the course of treatment advocated by a considerable number of physicians of good standing in his community.[8]

The court in the instant case cited the following test for determining when a physician or surgeon is guilty of malpractice:

> The test in Tennessee is whether or not a physician or surgeon, to be held liable for malpractice, is lacking in the reasonable degree of learning, skill and experience which ordinarily is possessed others of his profession, and he must exercise reasonable and ordinary care and diligence to exert his best judgment as to treatment to be afforded in any given case.[9]

The court then went on to hold that since a number of other physicians and surgeons concurred in the erroneous diagnosis the defendant was not negligent.

The court discussed only briefly the plaintiff's allegation that the defendant was negligent in failing to make a thorough examination of the vertebral interspace to make an adequate removal of the disc material. The court did point out that the evidence clearly showed that the extruded material from the disc found by the neurosurgeon could not possibly have gotten there as a result of the operation performed by the defendant. This does not, however, consider the allegation that the defendant was negligent in failing to discover and remove this extruded material. Perhaps the court was satisfied that since the orthopedic surgeon who later operated on the plaintiff to fuse the fourth and fifth vertebrae did not discover the extruded material, the defendant exercised the reasonable degree of skill and experience ordinarily exercised by others in his profession.

The instant case is a good illustration of how the standard of care imposed upon the physician in a malpractice action differs from the standard of care imposed in the ordinary negligence case. Generally, in negligence actions, evidence of customary practice, while significant,

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5. Blankenship v. Baptist Mem. Hosp. 26 Tenn. App. 131, 168 S.W.2d 491 (1942); Glover v. Burke, 23 Tenn. App. 350, 133 S.W.2d 611 (1938); Floyd v. Walls, 26 Tenn. App. 151, 168 S.W.2d 602 (1941).
6. Casenburg v. Lewis, 163 Tenn. 163, 168, 40 S.W.2d 1038, 1040 (1931).
7. Blankenship v. Baptist Mem. Hosp., 26 Tenn. App. 131, 168 S.W.2d 491 (1942); Casenburg v. Lewis, 163 Tenn. 163, 40 S.W.2d 1038 (1931).
8. Blankenship v. Baptist Mem. Hosp., 26 Tenn. App. 131, 168 S.W.2d 491 (1942).
9. Redwood v. Raskind, 350 S.W.2d 414, 417 (Tenn. App. 1961).

is not conclusive on the question of care to be exercised.[10] In malpractice actions, however, customary practice is almost exclusively the measure of due care.[11] Thus it has been said that not only is the physician or surgeon held to the standard of practice generally accepted by his branch of the profession but is also protected by this standard since compliance is generally taken as conclusive evidence of due care.[12]

In a malpractice action, while the courts normally look almost exclusively to the customary practice of those engaged in the same general line of practice in the area, this is not true if a physician engaged in general practice holds himself out as a specialist in a certain area. In that case he will not only be held to the standard of those engaged in the same line of practice but will be held to the standard of a specialist.[13] This does not mean, however, that every time a general practitioner engages in treatment normally done by a specialist he holds himself out as a specialist. In *Sinz v. Owens*[14] the trial court charged that if a physician undertakes to perform services in a special branch of medicine and at the same time there are other members of the profession in that locality who specialize and limit their practice to that particular branch of medicine, the physician must possess the degree of learning and skill ordinarily possessed by specialists in that area. The appellate court found the charge erroneous and said that such a duty would devolve upon the physician only if he found, or should have realized, that the services of a specialist were required. If not, he could be held only to the skill and learning of a general practitioner.

In the instant case there was no indication whether the treatment involved was such as to require the skill of a specialist, and there was no indication whether the defendant was a specialist. Thus the question of the standard of care required of a physician doing work normally done by a specialist was not raised, but in view of an earlier Tennessee decision[15] Tennessee would probably follow the *Sinz* decision. Under the *Sinz* decision actually the standard of care in the case of a general practitioner doing work often done by a specialist reduces itself to the test of customary practice. Thus if it were the customary practice for general practitioners to refer that type of case to a specialist, then and then only would a general practitioner who undertook to perform the treatment himself be held to the standard of the specialist.

10. See, *e.g.*, Bryan, Inc. v. Hubbard, 32 Tenn. App. 648, 225 S.W.2d 282 (1949).
11. McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549, 606 (1959).
12. *Ibid.*, p. 560.
13. See cases cited in McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549, 566 (1949).
14. 33 Cal.2d 749, 205 Pac.2d 3 (1949).
15. Glover v. Burke, 23 Tenn. App. 350, 133 S.W.2d 611 (1938).

It seems clear that the standard of care applied to the defendant-doctor in a malpractice action is more favorable to the defendant than is the standard of care imposed in the ordinary negligence case.[16] In the malpractice case the standard of care is controlled almost exclusively by customary practice in the community, and the defendant is not liable if he follows a course of treatment advocated by a considerable number of other physicians engaged in the same general line of practice. Consequently the defendant in the instant case was not guilty of malpractice.[17]

J.H.H.

NEGLIGENCE — KEYS LEFT IN IGNITION — COLLISION WITH ESCAPING THIEF

The defendant left his car unattended beside a busy highway, failing to lock the ignition and remove the key. The vehicle was stolen and about four hours later collided with the plaintiff's car at a stop light. At the time of the collision the thief was intoxicated and driving at high speeds in an attempt to elude a highway patrolman who was chasing him for speeding. An action was brought against the defendant for negligence in leaving his car unattended without locking the ignition. Upon appeal from the trial court's holding in sustaining the demurrer, *held,* that the question of whether the actions of the thief were within the risk created by the defendant's careless conduct in leaving the vehicle while the keys were in the ignition was an issue of fact to be determined by a jury. *Justus v. Wood,* 348 S.W.2d 332; Second Petition to Rehear overruled, 349 S.W.2d 793 (Tenn. 1961).

The reasoning upon which the decision in the instant case is predicated is found in the following excerpt from the opinion:

> The court is of the opinion that the circumstances surrounding the negligent act of Wood, including the nature of the locality in which the negligence occurred, and the other averments of

16. McCoid, *The Care Required of Medical Practitioners,* 12 VAND. L. REV. 549, 607 (1959).

17. Plaintiff in the instant case also alleged that the defendant had fraudulently concealed the situation so as to toll the statute of limitations. The Tennessee rule is that, where a confidential relationship exists as between physician and patient, proof of failure to speak where there is a duty to speak produces the same result as a false representation. Hall v. De Saussure, 41 Tenn. App. 572, 297 S.W.2d 81 (1956), petition to rehear denied, 201 Tenn. 164, 297 S.W.2d 90; noted in 25 TENN. L. REV. 284 (1958). The court held, however, that this was a moot issue, for if there was no negligence on the part of the defendant, there was no malpractice on his part to be concealed.

> this declaration are such that different minds might draw different conclusions as to whether the intervening negligent act of the thief following the stealing of the car was a matter that was or should have been within the range of reasonable anticipation of defendant Wood. That is a jury question.[1]

The decision in the principal case aligns Tennessee with a minority of states which, at least where violation of statute is involved, hold that a defendant who leaves his ignition unlocked may be found liable for the negligent conduct of a thief.[2]

A survey of the general law on the point would be repetitious,[3] but a review of earlier Tennessee cases may prove useful. The first of these is *Morris v. Bolling*,[4] where a taxicab driver had left the key in the ignition of his cab and an intoxicated passenger in the front seat drove the cab away while the driver was delivering some packages. A collision with the plaintiff's parked car ensued several blocks from the site of the theft. The court found the taxicab company liable, affirming the trial court's decision, where the issue of foreseeability had been a jury question.

This case has been cited as authority for the minority view,[5] but it was not mentioned in a later Tennessee case to be discussed presently.[6] Although there was a city ordinance involved in *Morris v. Bolling* which prohibited the leaving of a key in the ignition,[7] the court did not refer to it and did not seem to rely on the ordinance as the basis for the driver's liability. As a consequence, the case is ordinarily cited as standing simply for the proposition that liability for the careless driving of the thief may result from failure to lock the ignition of a vehicle parked on a public street.[8]

The Tennessee courts were again confronted with this general problem in *Teague v. Pritchard*.[9] This opinion is described in the *Justus* case as "very scholarly,"[10] and it does refer to numerous decisions in other states.[11] It does not, however, refer to the earlier Tennessee taxi-

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1. Justus v. Wood, 348 S.W.2d 332, 335 (Tenn. 1961).
2. Annot., 51 A.L.R.2d 633, 665 (1957).
3. 24 TENN. L. REV. 395 (1956).
4. 31 Tenn. App. 577, 218 S.W.2d 754 (1948).
5. Annot., 51 A.L.R.2d 633, 657 (1957).
6. Teague v. Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (1954).
7. Justus v. Wood, 348 S.W.2d 332, 333 (Tenn. 1961). But see 349 S.W.2d 793, 794: "It is true that the case of Morris v. Bolling . . . does not have in it a statute or city ordinance . . . ." Perhaps there was an ordinance in existence, as stated in the original opinion, but this ordinance was not mentioned in the Morris opinion.
8. Annot., 51 A.L.R.2d 633, 647 (1957).
9. 38 Tenn. App. 686, 279 S.W.2d 706 (1954).
10. Justus v. Wood, 348 S.W.2d 332, 334 (Tenn. 1961).
11. Teague v. Pritchard, 38 Tenn. App. 686, 691, 279 S.W.2d 706, 709 (1954).

cab case. Perhaps that was not regarded as a theft case. The *Teague* decision remarks that in other states "the cases all seem to hold that the negligence of the thief is the efficient intervening proximate cause of the plaintiff's injury."[12] While this statement is not entirely accurate,[13] a large majority of courts did so hold at the time of the *Teague* decision.[14]

It is evident that the *Teague* case stands definitely for this prevailing view that the thief is a sufficient intervening force to break the causal relationship.[15] Shortly after that decision the Tennessee legislature enacted the following statute:

> No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.[16]

Much has been made of the omission of a provision calling for a removal of the keys after locking the ignition, since this clause is found in most other statutes of this nature.[17] As pointed out in the principal case, this was deleted from the original draft before enactment.[18] The best explanation of such an action would seem to be that the legislature deemed the additional wording to be surplusage, as the term "locked" would hardly apply if the keys were not removed.

The principal case considered for the first time the effect of the statute on the problem. Although the earlier case of *Morris v. Bolling* seems to rely more on general negligence principles than on a similar municipal ordinance,[19] the court in the instant case emphasized that the ordinance was present in the *Morris* case, suggesting that the statute was a principal factor in the instant decision.[20] This conclusion is fortified by the fact that similar decisions from other jurisdictions relied on in the instant opinion were based on statutes.[21] One portion of the court's answer to the petition to rehear, however, suggests that the same result might be based on common law principles. Thus the court observed:

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12. Teague v. Pritchard, 38 Tenn. App. 686, 691, 279 S.W.2d 706, 709 (1954).
13. Annot., 51 A.L.R.2d 633, 657 (1957).
14. Annot., 51 A.L.R.2d 633, 655 (1957).
15. Teague v. Pritchard, 38 Tenn. App. 686, 693, 279 S.W.2d 706, 709 (1954).
16. TENN. PUB. ACTS, 1955, Ch. 329 §62; now codified as TENN. CODE ANN. §59-863 (1956).
17. 24 TENN. L. REV. 395, 396, Note 17 (1956).
18. Justus v. Wood, 348 S.W.2d 332, 336 (Tenn. 1961).
19. 31 Tenn. App. 577, 218 S.W.2d 754 (1948).
20. Justus v. Wood, 348 S.W.2d 332, 333 (Tenn. 1961).
21. Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948). Ney v. Yellow Cab Company, 2 Ill.2d 74, 117 N.E.2d 74 (1954). Ross v. Hartman, 78 U.S. App. D.C. 217, 139 F.2d 14 (1943).

> The leaving of the key in the ignition of this automobile while parked upon a heavily traveled street amounted in fact to an open invitation to a thief to enter it and drive away. It made the process of so stealing the automobile without detection as easy as it could possibly have been made.
>
> Is it not, therefore, at least a jury question as to whether the owner of this automobile should have anticipated that a thief, observing the key in the ignition, would step in and drive away without having to commit any act which might arouse the suspicion of others who might be there on the street at the time?[22]

It is submitted that this reasoning would be equally applicable to a situation where there is no statute, assuming that the car is left in an area where the risk of theft is appreciable.

The opinion in the principal case makes it clear that on the trial of the case the jury might find either foreseeability or the lack of it. The jury is directed in that connection to consider all the circumstances, including specifically the fact that there was a lapse of four hours between the theft and the subsequent collision.[23] With reference to the last mentioned point, there is authority for the proposition that after considerable time has elapsed, at least enough for the thief to complete his escape from the scene of the crime, the car owner should be absolved from liability.[24] The Tennessee court, however, evidently considers that the basic issue is foreseeability and that this is a question of fact rather than of law, to be determined with reference to all the surroundings in the case.[25] The opinion does seem to intimate that for liability to fall upon the owner the thief must be in flight at the time of the accident:

> But it does not appear whether he was in flight or well away from the scene of the theft. This would be a question of evidence should there be a trial of the case.[26]

Doubtless the risk of accident is greater during the period of flight, when the criminal may be reckless because of panic. Perhaps the most significant factor in cases of this type, though, should be the nature of the locality in which the car is parked. The court expressly refers to this factor in the passage first quoted.[27] It may be that one who leaves his ignition unlocked beside a tavern or outside a large city high school at dismissal time creates a risk of theft and subsequent irresponsible driving which extends even beyond the period of the original get-away.

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22. Justus v. Wood, 348 S.W.2d 332, 338 (Tenn. 1961).
23. Justus v. Wood, 348 S.W.2d 332, 334 (Tenn. 1961).
24. Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948).
25. Justus v. Wood, 348 S.W.2d 332, 334 (Tenn. 1961).
26. Justus v. Wood, 348 S.W.2d 332, 334 (Tenn. 1961).
27. Justus v. Wood, 348 S.W.2d 332, 335 (Tenn. 1961).

If in the instant case the thief had already taken the car home and was returning it when the trooper began pursuing him for drunken driving, perhaps the accident still should have been regarded as within the risk created by the defendant. Subsequent opinions will indicate more specifically how far juries will be permitted to go in finding foreseeability of the risk, but the present opinion suggests that the court wishes the jury to consider all factors having any substantial bearing on the situation.

D.F.P.

NEGLIGENCE — UNNOTICED CHILD RUN OVER WHEN PARKED AUTOMOBILE WAS DRIVEN AWAY

Defendant parked his car on a graveled strip at the foot of a stone walk leading from the porch of plaintiff's residence to the street. Although the car was parked partially in the yard, this was a customary parking place for plaintiff's family and others in the neighborhood. The defendant noticed young children playing in a playground some 80 to 90 feet from the vehicle, but did not notice the deceased, a 13-month-old boy, and his mother sitting on the porch. He got out of the car and crossed the street to enter the house of a friend. While he was there, the child's mother left the porch to get some toys in the house. After the defendant left his friend's house, about five minutes after his entry, he crossed the street again, got in his vehicle and drove away. As he was leaving the parking place he felt a bump under the right rear wheel, but assumed it was a loose stone from the walk. The mother heard a child's cry, looked out to see an unidentified child pointing at the departing vehicle, and thereupon ran outside only to discover that her son had been run over. The administrator of the child's estate sued the defendant for negligence on the ground that since he was aware of children playing nearby, some of them of tender years comparable to the age of the deceased,[1] a duty arose to make sure that no child was in such a position as to be in danger when the car was driven away. The supreme court, reversing the decisions of the trial court and the

1. Williams v. Jordan, 346 S.W.2d 583, at 583, 584 (Tenn. 1961). "His [the deceased's] parents and 6 of the other children, the oldest of which was 8 years old, resided at . . . . [T]he record reflects that about 90 feet to the north from this graveled parking area there is some sort of playground with swings where the other children in this and other families in the area were playing at the time of this accident."

court of appeals, held that there was insufficient evidence to submit the case to a jury. *Williams v. Jordan,* 346 S.W.2d 583 (Tenn. '1961).

In reaching its holding in the principal case, the court stated:

> There is accordingly, in our opinion, no basis on which this case should have been submitted to the jury, unless under the circumstances of this case the operator of this motor vehicle in the exercise of ordinary care should have looked under and all around the automobile before getting in and taking off. It seems that merely to state the question is to give the answer that ordinary care would make no such requirement.[2]

The court evidently considered that the distance between the defendant and the children seen in the playground was too great to bring them within dangerous proximity to the defendant's vehicle, for the opinion further states:

> The mere fact that children were playing in the yard is insufficient in law, . . . as shown by a proper analysis of the facts in all of the cases. In the present case the record does not show anything other than that the other children were playing on swings, etc., 84 to 90 feet . . . northwest of defendant's vehicle, which makes the distance about one fourth of the length of the average city block; that they were taking no interest in the vehicle; that the infant was under the care of its mother and sitting on the top step of high front steps. If he had seen them, he had a right to assume the mother would not go off and leave the child.[3]

This instant case presented the Tennessee court with its first opportunity to determine liability under this or a similar set of facts.[4] It was necessary to resort to decisions in other jurisdictions for authority on the point. Another significant aspect of the case is that two judges dissented from the majority opinion,[5] a factor suggesting that the decision may be confined to its precise facts.

With reference to this general problem, it is stated in Blashfield's *Cyclopedia of Automobile Law and Practice* that "If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his car, negligence cannot be predicated on the mere fact that he started his

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2. Williams v. Jordan, 346 S.W.2d 583, 585 (Tenn. 1961).
3. Williams v. Jordan, 346 S.W.2d 583, 587 (Tenn. 1961). Since the facts disclose that the defendant did not see the mother with the child, the last sentence is merely dicta. Judge Swepston is supported, however, by 60 C.J.S. *Motor Vehicles* §396, p. 972, footnote 87 (1949), citing Comer v. Travelers Ins. Co., 213 La. 176, 34 So.2d 511 (1948). See also Brown v. Liberty Mutual Ins. Co., 234 La. 860, 101 So.2d 696 (1958), discussed *infra.*
4. Williams v. Jordan, 346 S.W.2d 583, 585 (Tenn. 1961).
5. Williams v. Jordan, 346 S.W.2d 583, 585 (Tenn. 1961).

machine, injuring the child."[6] It is further stated that "ordinarily a driver is not required to search for children on the running board on the far side of the vehicle, or hidden underneath or in front of it, whom he cannot see before starting."[7] A similar statement is made in *Corpus Juris Secundum*.[8]

A somewhat more flexible approach is taken in *American Jurisprudence* in the following statement:

> One who parks his motor vehicle in the midst of or in close proximity to playing children of tender years, and then runs over one of them, after taking no more precautions in starting his vehicle in motion than he would take where there is no reason to anticipate the presence of the children in dangerous proximity to his vehicle, can hardly be heard to say that as a matter of law he was free from actionable negligence. The questions whether under the circumstances his conduct measured up to that of an ordinarily prudent driver and whether a lack of due care on his part caused the accident are ordinarily questions of fact for a jury to decide.[9]

In the principal case the court was quite aware of the increased duty placed upon the driver when children are in the vicinity, but concludes that the children seen were not sufficiently close to the car to give rise to a duty to look beneath the car.[10]

In *Williams v. Cohn*,[11] an Iowa case relied on by the court, a driver delivering groceries re-entered his truck after taking the packages inside. Although he had seen three children with their mother on the porch beside the driveway as he drove up, he saw no one when he came out of the house, nor did he see any child before he ran over the deceased, an eighteen-month-old boy. An eyewitness testified that she observed the two older children follow their mother into the house and the baby go around the truck, being under the fender in front of the right front wheel when the delivery man and his helper left the house and got back in the truck and started it up.[12] The court held that the driver was under no duty to look under the fender for the child instead of merely approaching from the rear of the vehicle and mounting into

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6. 2A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE §1509, p. 443 (1951).
7. 2A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE §1509, p.443 (1951).
8. 60 C.J.S. *Motor Vehicles* §396, p.972 (1949).
9. 5A AM. JUR., *Automobiles and Highway Traffic* §437 (1956).
10. Williams v. Jordan, 346 S.W.2d 583, at 588, 589 (Tenn. 1961).
11. 201 Iowa 1121, 206 N.W. 823 (1926).
12. Williams v. Cohn, 201 Iowa 1121, 206 N.W. 823, 824 (1926). The principal case contains a slight error on p. 585 in the statement: "As he backed up he ran over the child." An examination of the facts in *Williams v. Cohn* will disclose that the truck moved forward instead of backward.

the cab. Of this decision, the Tennessee court in the instant case says: "The opinion points out clearly the difference between the mere fact that a child or children are in the vicinity and the *important fact* that they are in a *position of close proximity* to the truck or are otherwise in a *situation of danger* that requires the operator of a vehicle to exercise care commensurate with that potential danger."[13]

In *Brown v. Liberty Mutual Insurance Company*,[14] another case cited by the court, the defendant was relieved from liability when he ran over plaintiff's 18-month-old child on the ground that the parents were present with their three children and the driver was entitled to rely on their surveillance of the baby. While in the principal case the defendant was not aware of the presence of the parent,[15] he would have seen the parent if he had seen the small child.

In *Owens v. Holmes*,[16] another case cited by the majority, a mail carrier, although cognizant of the fact that the plaintiff, a 3-year-old girl, often came to the mailbox to meet him, did not see anyone there on the day of the accident. After depositing the mail in the box, he proceeded on his way, and by some unexplainable circumstance the plaintiff was hit by the vehicle. There also the court found no liability, but this case does not seem closely in point since the defendant saw no children at all in the area.[17]

The dissenting opinion cites numerous cases, all of which are distinguished from the facts in the present case by Judge Swepston. One of these cases, *Stein v. Palisi*,[18] involved a taxicab which drove past some children, including the 19-month-old plaintiff, playing beside a narrow private access road. The driver noticed these children. After he discharged passengers about two houses away, he turned around and came back down the narrow road at high speed. In the meantime two of the children went inside a house, leaving the plaintiff near the roadside by himself. The child was run over, and it was held that the evidence was sufficient to allow a jury to find that the driver of the cab was under a duty to watch out for the children playing by the roadside only moments before. The majority distinguishes this case from the present one as "an obvious case of *fast and reckless driving*."[19]

In *Tupman's Adm'r v. Schmidt*[20] a truck driver was delivering

13. Williams v. Jordan, 346 S.W.2d 583, 585 (Tenn. 1961).
14. 234 La. 860, 101 So.2d 696 (1958).
15. Williams v. Jordan, 346 S.W.2d 583, 584 (Tenn. 1961).
16. 199 Or. 332, 261 P.2d 383 (1953).
17. Owens v. Holmes, 199 Or. 332, 335, 261 P.2d 383, 385 (1953).
18. 308 N.Y. 293, 125 N.E.2d 575 (1955).
19. Williams v. Jordan, 346 S.W.2d 583, 587 (Tenn. 1961).
20. 200 Ky. 88, 254 S.W. 199 (1923).

groceries to a store, and the deceased tried to hitch his wagon to the tailgate of the truck. The driver closed the tailgate as he prepared to leave, placed the boy and his wagon on the sidewalk, and told him to stay there because he was going to back up. Cold weather forced the driver to crank the engine several times, and before backing he stepped to the sidewalk to look for the child but did not see him. He got in the cab, backed up, and killed the child who was again trying to hitch his wagon. It was held that the driver's negligence was a question for the jury. This case was distinguished on the grounds that the driver had seen the child in a situation of danger, placed him in a safe place, but then noticed that he had departed from that point of safety.[21]

In *Coca-Cola Bottling Co. of Black Hills v. Hubbard*[22] the driver for a soft-drink concern drove up to the sidewalk in front of the store to make a delivery. He noticed three to six children, all of tender years, playing in front of the store and apparently quite near the truck. When he came out of the store, he loaded the empty bottles on the truck, got in the cab, and drove off. He had gone forward only about 15 feet when he hit the deceased, a two-year-old child. As the court in the principal case points out,[23] this is a situation involving children quite close to a vehicle.

As both the majority and the dissenting opinions in the principal case bring out, the basic test is ordinary prudence, and the difficulty arises in the application of this test to particular facts. A convenient guidepost to be used, according to this decision, is the distance between the children noticed by the driver and the vehicle. To those who object that this matter of distances should be left to the jury, it may be argued that, from the result of the instant case in the trial court, juries need some kind of aid in determining what is meant by the presence of children in the "vicinity." Much also seems to depend on the ages of the children observed, and the presence or absence of a person likely to provide supervision. From a purely practical point of view, most of us probably would have behaved as did the defendant. In view, however, of the dissenting opinion in this case, it is evident that each case is likely to depend on its precise facts, and each must be carefully compared with earlier more or less relevant decisions.

D.F.P.

21. Williams v. Jordan, 346 S.W.2d 583, 587 (Tenn. 1961). A more recent Kentucky decision in accord is Cunningham v. Sublett's Adm'r., 306 Ky. 701, 208 S.W.2d 509 (1948). Likewise in Lovel v. Squirt Bottling Co. of Waconia, 234 Minn. 333, 48 N.W.2d 525 (1951), the driver admitted that three small children, including the injured girl, were playing around his truck.
22. 203 F.2d 859 (8th Cir. 1953).
23. Williams v. Jordan, 346 S.W.2d 583, 588 (Tenn. 1961).

WORKMEN'S COMPENSATION — GRADUAL INJURIES

Plaintiff was employed by defendant in the job of "rough trimming" shoes which required that he use his left arm and hand continually in operating a machine. While operating this machine, the employee experienced stiffness, soreness, and pain in his left arm and hand for some time, but thought that this condition would subside as his muscles became accustomed to the operation. However, in early 1959, the pain had become continuous and did not subside as it previously had when he was not operating the machine. He went to the employer's first aid station where he was advised to soak his arm in hot water. He did this for several weeks, but when the pain did not subside, in March, 1959, he consulted a physician. The physician referred him to a specialist, who diagnosed the condition as atrophy, and recommended that he not use his hand and have an operation. The atrophy had been caused by an injury to his ulnar nerve, which was injured by repeated movement of the nerve when it "jumped out of its normal groove" and moved across the end of the elbow bones, each such movement of the ulnar nerve in effect being a separate traumatic injury to the nerve. The atrophy resulted in the effective loss of use of the plaintiff's left hand and arm. He brought action on October 3, 1959, against his employer, seeking recovery for accidental injury under the Workmen's Compensation Law[1] and the trial court allowed recovery. Upon appeal, *held,* affirmed. When an employee experiences gradual injuries to a nerve, culminating in substantial permanent disability of an appendage, such injuries being not common to all persons doing like or similar work, then this resultant personal injury, though gradual, is an accidental injury caused by accidental means, and therefore is a compensable personal injury. *Reed v. Brown Shoe Co.,* 350 S.W.2d 67 (Tenn. 1961).

The principal case basically involves two questions. First, is an injury caused gradually by repeated, intentional acts of the injured employee, and finally resulting in a definite, noticeable, injury to that person a personal injury by accident, and therefore compensable under the Workmen's Compensation Law?[2] The second issue facing the court concerns the statutory notice to the employer.

In answer to the first question, the court in the instant case held that such an injury was by accident and was compensable. In *Roehl v. Graw,*[3] the court said: ". . . we consider the language 'accidental injuries' and 'injury by accident' as having in effect the same meaning;

1. TENN. CODE ANN. §50-901 *et. seq.* (1956).
2. TENN. CODE ANN. §50-902 (d) (1956).
3. 161 Tenn. 461, 32 S.W.2d 1049 (1930).

that is, an unintended and undesigned, or unexpected result, arising from some act or acts done." The acts which caused the injury might have been done intentionally by the employee, and yet the injury caused from them is still compensable since the injury itself was not intentional. The above statement leads to the inference that an injury is compensable even if several acts, repeated over a period of time, eventually result in the injury. Atrophy, which is a wasting or diminution in size of a part of the body, or a wasting of muscles that surround a joint,[4] has been held to be a compensable injury. It can be caused, as in the principal case, by constant pressure on a nerve, or by immediate injury to a nerve, or by a gradual injury to the nerve over a period of time.[5]

Larson defines the phrase "by accident" as "an unlooked-for mishap or an untoward event which is not expected or designed."[6] The basic requisite of an accident is unexpectedness, but most jurisdictions, including Tennessee, usually require that the injury must be traceable, within reasonable limits, to a definite time, place, and occasion or cause. Yet, recovery has been allowed in most jurisdictions for conditions which have developed, not instantaneously, but gradually over periods of time, resulting in a definite injury.[7] This same result has been found in Tennessee.[8] In *Shaw v. Musgrave*[9] the Tennessee Supreme Court said, in holding that an injury, an infection in that case, resulting from continued impacts of a hand saw on the chest of an employee who used the saw for a period of time, was a compensable injury by accident: "It is not necessary that the happening of the accident be a single occurence identified in space or time."

Generally the component parts of the accident concept are considered to be: 1, unexpectedness of cause and of result; and 2, definite time of cause and result. When there is a gradual injury, there are several theories under which these gradual injuries are treated as compensable. The time-definiteness can be thought of as applying to either cause or result. Some courts hold that if the cause of the injury is sudden, at a definite time, then the requirement that an injury, to be accidental, must have occurred at a definite time is fulfilled, even if the results occur thereafter.[10] Other jurisdictions, including Tennessee, have held that even if the cause were not definite in time, the injury is compensable

4. Johnson v. Vernon Parish Lumber Company, 151 La. 664, 92 So. 219 (1922).
5. SCHNEIDER, WORKMEN'S COMPENSATION TEXT §1309, p. 498 (1945).
6. LARSON, WORKMEN'S COMPENSATION LAW §37:00, p. 511 (1952).
7. Lovell v. Williams Brothers, Inc., 50 S.W.2d 710 (Mo.App. 1932); Lumbermen's Mutual Casualty Company v. Layfield, 60 Ga. App. 901, 5 S.E.2d 611 (1939).
8. Sears-Roebuck Company v. Starnes, 160 Tenn. 504, 56 S.W.2d 128 (1930); Benjamin F. Shaw Company v. Musgrave, 189 Tenn. 1, 222 S.W.2d 22 (1949).
9. 189 Tenn. 1, 222 S.W.2d 22 (1949).
10. Seward v. Sunset Trading and Land Company, 3 Cal. I.A.C. 49.

if the result did occur at a definite time.[11] In still other cases the courts, in order to allow recovery for injuries occurring gradually, have treated each impact or inhalation as a separate injury causing the final result.[12] The court, in the instant case, approved this doctrine. A number of jurisdictions have done away with the requirement that the injury be attributable to a cause or result which occurred at a definite time by eliminating the requirement altogether when considering the question of "accidental injury."[13]

Larson, in his work on workmen's compensation, maintains that where the statute's coverage formula speaks of "injury by accident," as does the Tennessee statute, rather than "an accident," the necessity for definite time rests on questionable ground.[14] Apparently this view is premised upon the idea that "an accident" means one definite act or event, whereas "injury by accident" does not.

From the foregoing it is clear that the injury received by the employee in the instant case was the result of an accident, and an unlooked-for mishap. The injury was caused by accidental means, an effect which was not the natural result of the means which produced it. Although the means which caused the injury operated over a period of time to eventually result in a definite injury, the injury still could be considered as an accident, under modern decisions, which allow compensation for gradual injuries.

The second problem arising in the principal case is concerned with the statutory requirement that an injured employee give written notice of his injury to the employer or his agent, immediately upon occurrence of the injury, or as soon thereafter as is reasonable and practicable.[15] If this notice is not given within one year after the accident resulting in injury, the claim for workmen's compensation by the employee is barred.[16]

In computing the time allowed for notice, there is a definite problem in the gradual injury cases as to when the accident causing injury actually occurred. It has been held that the date of accident is the date on which disability manifests itself.[17] In *De Maria v. Curtiss Wright Cor-*

11. Sears-Roebuck Company v. Starnes, 160 Tenn. 504, 56 S.W.2d 128 (1936).
12. Shaw v. Musgrave, 189 Tenn. 1, 222 S.W.2d 22 (1949); Fable v. Knefely, 176 Md. 474, 6 A.2d 48 (1939); Atlas Coal Corporation v. Scales, 198 Okla. 658, 185 P.2d 177 (1947).
13. Victory Sparkler and Specialty Company v. Francks, 147 Md. 368, 128 A. 635 (1925), where an employee experienced phosphorus poisoning from working in a fireworks plant; court stressed that under the phrase "accidental injury" there need not be "an accident."
14. LARSON, WORKMEN'S COMPENSATION LAW §39:00, p. 568 (1952).
15. TENN. CODE ANN. §50-1001 (1956).
16. TENN. CODE ANN. §50-1003 (1956).
17. Ptak v. General Electric Company, 13 N.J.Super 394, 80 A.2d 337 (1951).

poration,[18] where the date of accident for gradual loss of use of the hands of an employee was in issue, it was held that the date on which this development finally prevented the employee from performing his work was the date of the accident for notice purposes.

The problem of fixing the date of gradual injury is then solved in a manner similar to that utilized in determining the time of injury in occupational disease cases.[19] As to that type of case, in *Norton v. Coosa-Thatcher Company*[20] the court said: "The date of a compensable injury in workmen's compensation cases dates from the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause which could, by the exercise of reasonable care and diligence, have been discovered or was apparent to the employee, and such time is when the limitation statute starts to run in occupational disease cases." This doctrine has been applied to include gradual injury cases with respect to the notice problem.

It has been held, in gradual injury cases, that the court will consider the employee's ignorance of the serious nature of the injury, or of an injury which is not sufficient to justify a complaint, in determining whether the employee was reasonable in failing to give written notice when the pain occurred first and disability later.[21]

In the instant case, the employee brought action against the employer within one year after the effects of injury culminated in a disability. The nature of the pain, negligible at first and increasing in intensity later, indicates that the employee did notify the employer within a reasonable time of the injury. The principles applied in deciding the case are those followed in most jurisdictions and by the textwriters in the field of workmen's compensation. The decision seems to be the most equitable under the circumstances, since it is difficult to conceive that such a disability as the employee sustained here was not due to accident or injury.

S.M.W.

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18. 23 N.J.M. 374, 44 A.2d 688 (1945).
19. Greener v. E. I. du Pont de Nemours & Company, 188 Tenn. 303, 219 S.W.2d 185 (1948).
20. 203 Tenn. 655, 315 S.W.2d 245 (1958).
21. Marshall Construction Co. v. Russell, 163 Tenn. 410, 43 S.W.2d 208 (1931); Ware v. Ill. Cent. Ry. Co., 153 Tenn. 144, 281 S.W. 927 (1925); Edwards v. Harvey, 194 Tenn. 603, 253 S.W.2d 766 (1952).

BOOK REVIEWS

THE SUPREME COURT REVIEW, 1960. Edited by Philip B. Kurland. Chicago: The University of Chicago Press, 1961. Pp. i-ix, 326. $6.00.

The title page lists The Law School, The University of Chicago. The preface by the editor speaks of bringing another "law review into existence." It would thus appear that the University of Chicago conceives of this as an annual law review in a single volume, concerned in presenting "sustained, disinterested, and competent criticism of the professional qualities of the Court's opinions."

It is clear that this objective has been achieved at the highest level. The volume consists of seven essays or articles on problems raised by particular recent cases. Though the various contributions will appeal to individual readers differently, depending upon their particular interests, each article is broad, incisive, analytical, and provocative.

The article entitled *The Metaphysics of the Law of Obscenity* by Harry Kalven, Jr., Professor of Law, The University of Chicago, is significant not only because it reviews and analyzes the cases on obscenity, but because it analyzes the target evils of obscenity regulation. In addition, it points up the fact that such regulations cannot be dealt with insulated from major doctrines of free speech and press, nor from other major questions of constitutional law. It maintains a high level from any criterion.

Personal Rights, Property Rights, and the Fourth Amendment by Edward L. Barrett, Professor of Law, The University of California, Berkeley, is likewise of general and broad interest. The author examines the implications of the decisions concerning illegal search and seizure and illegal arrest, and suggests that the emphasis of the court has been misplaced in protecting against illegally seized evidence more than against invasions of personal liberty. He points out that the rules lead to earlier and easier arrests, and hence more frequent and significant invasions of personal freedom. His conclusion is biting: "But neither history nor policy can justify a doctrine which accords special protections to the privacy of lawbreakers which are not enjoyed by citizens generally."

Legislative Facts in Constitutional Litigation by Kenneth L. Karst, Professor of Law, The Ohio State University, is the third article of general interest and concern. It would seem to be the one most helpful to practitioners who are not specialists in a particular area.

It deals with the truism that in deciding cases in "making" constitutional as well as other kinds of law, the judges decide upon the basis of facts proved or assumed. His simple thesis is that the significant facts should be illuminated if the best possible prediction of the effects of a decision are to be made. It is clear that the author is not concerned with the facts of the particular case, but rather with the type of facts that an intelligent legislature would face in deciding what legislative acts to pass. It should consider such questions as: How much will the rule or regulation advance the governmental objective? How much will it aid the public welfare if successful? How successful will it likely be? What other less stringent rules or regulations might advance the objective comparably? On the other hand, additional questions must be faced,

such as: How much will the freedom entitled to constitutional protection be restricted? Is this rule or regulation more restrictive of liberty than some other which might achieve the same objective?

Since the weighing of social interests is essential to law making, the court should have the benefit of such material. Lawyers traditionally appear to fail in this area more than any other. The Brandeis brief educated lawyers to some extent by the use of expert opinion, and a finding of legislative facts by the lower courts furnishes aid to the Supreme Court in making choices of community policy. The author makes a convincing case for the use of such materials.

The remaining four articles deal with specific problems, and are of less general interest, though the breath of their appeal may differ. *The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining,* by Bernard D. Meltzer, Professor of Law, The University of Chicago, deals with the problem of an injunction against a union from striking in support of a demand that the railroad should not abolish pre-existing jobs without the union's consent. The author examines the case and its immediate background, the opinion, the federal legislation pertaining to the problem, and various issues that were raised, including the impact of state regulations applicable to the projected plan, and the reshaping of the Norris-La Guardia Act. He points out the difficulty in so far as the court said that it would not enjoin the strike, but would not enforce the agreement obtained by the strike. He feels that the analysis of the court was inadequate. The article is impressive, but the reviewer's lack of specialized familiarity with the area makes adequate evaluation difficult.

Federalism and the Admiralty: The Devil's Own Mess, by David P. Currie, law clerk at the United States Court of Appeals for the Second Circuit, is an admirable treatment of the doubts and confusion involved in the question of to what extent Federal law only, and to what extent state law, may apply to various aspects of admiralty law. The problem is of course of increasing concern to all lawyers, and particularly to lawyers in Tennessee. The maze is further complicated by a failure to weigh the concerns of the states and the impact of the state rules upon the commerce and maritime concerns, as well as by a failure of the courts to assume a more creative role in formulating a more cohesive maritime law. The author writes clearly and incisively.

Federal Taxation and the Supreme Court, by Charles L. B. Lowndes, Professor of Law, Duke University, is a briefer and to some extent simpler paper. He supports convincingly his thesis: "It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court." He shows why making the Supreme Court the final arbiter in tax matters is wasteful and unsatisfactory. The court has to deal with judicial trivia, the decisions do not serve the function of stare decisis, and the opinions are ambiguous. The author would have these questions submitted to a Court of Tax Appeals. The paper is scholarly and complete. The social implications in this area are less dramatic and of less general interest, but the tax lawyer will find the analysis intriguing.

The final paper, *The Park, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance,* by Edward H. Levi, Dean and Professor

of Law at The Law School of The University of Chicago, is a remarkably complete treatment of the history, recent cases, and confusions involved in the price maintenance field, particularly, of course, under the anti-trust laws. The facts, the precedents, the opinions, the confusions, the assumptions, and the theories are examined and analyzed fully and completely. Even one who is not familiar with the materials can agree with the conclusion that in such an area the construction of a theory by the court is most important, and that the structure has not been accomplished. Attorneys dealing with the area will want to read this article.

This new Review hopes to be of assistance to the courts. It seems clear that if the judges will study this material that they will receive much help. The Review hopes to provide a medium of exchange between political scientists and lawyers. If the two groups will read and communicate, the medium will be provided. The Review hopes to help the intelligent layman to understand the Court as an institution. If he can, as the editor says, "struggle with the technicalities of language" he will understand much, and have more appreciation of the "variety and difficulty of the problems confronting the Court, and the limited tools available to it for their resolution."

It is hard to see how the level of this first annual volume can be maintained. The second volume will be available shortly. The reviewer looks forward to its appearance. The bench and bar should not overlook this Review, if the amazingly high level is even approximated.

The University of Tennessee ELVIN E. OVERTON

TENNESSEE LAW REVIEW

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LAW DAY U. S. A. — 1962*

By WILLIAM WICKER**

One purpose of Law Day U.S.A., with its emphasis on Liberty under the Law, is to pay tribute to our faith in the rule of law and its supremacy in the lives of free men. In that connection, the legal profession has been subjected to much misquoted criticism. A prime example of such a criticism is a quotation, completely removed from its context and taken from Shakespeare's play, *Henry VI,* in which a character in addressing a motley group of vagabonds said, "Let's kill all the lawyers." And Jack Cade answered, "That I mean to do." According to the plot of that famous play, Jack Cade was a new, arrogant, tyrannical dictator. He was, however, unquestionably correct in thinking that if a new tyrannical dictator has any expectation of continuing to wield absolute and unlimited power over his subjects, the first thing he should do is kill all the lawyers. Shakespeare knew that a dictator cannot set up an absolute and complete totalitarian form of government unless he first gets rid of law and lawyers. A completely totalitarian government is necessarily based on threats, force, and violence.

Law and lawyers are very real foes of threats, force, and violence, and the absolutism practiced by tyrannical dictators. A system of law and lawyers presupposes a life measured by reason, a legal order measured by rationality and a system of trial and appellate courts conducted according to the rules, principles and standards of due process. Law is a civilizing agency which takes the place of fighting in the streets. Law represents the triumph of reason and education over caprice, violence and force. The Communists did not kill all the Russian lawyers, but they created conditions under which lawyers could not be of any service to the Russian public, and were compelled to seek bureaucratic positions or perform common labor. Competent observers of the present Russian system have stated that less than 4% of the Russian people are members of the Communist party, and that about 20% of that 4% rules the party and the government. Cuba is a closer and a more recent example than Russia of what happens when the rules, principles and standards of the

* Introductory address at the Annual Law Day of The University of Tennessee College of Law, at Knoxville, April 27, 1962.

** Dean, The University of Tennessee College of Law.

law break down and a totalitarian government takes over – private property is confiscated, the firing squad takes the place of the courtroom, and tyranny supplants due process and liberty. If America should become a totalitarian government, there would be little, if any, future for the American lawyer, as we know him. However, I am confident that America is not going to become a totalitarian state, and I am sure that this audience shares with me that conviction. My real theme tonight is, "Long may lawyers live!" They are the guardians of the American social order, and of freedom and justice under law.

American technology in the second half of the 20th Century has developed capabilities of becoming a real cornucopia, a horn of plenty for everyone. However, technology *can* reach its maximum development only in an environment governed by good laws. This is where lawyers make their contributions. The fees paid to lawyers by their clients and by the Government for the services of lawyers are in effect premiums on an insurance policy which tends to guarantee the continuity of the American way of life. The man at the race track is obviously more interested in the inequality of horses than in the equality of men. In a more restricted sense most of our citizens are primarily concerned with the economics and hurly-burly of day-to-day living, and are inclined to leave to lawyers the job of preserving the American way of life, with liberty under law.

The American way of life is a splendid heritage which must be guarded carefully, protected diligently, and handed down from generation to generation without diminution in value. Rights under law as an American citizen include the following: to live where you please, to work where you want to, to worship according to your own conscience, to have a fair and speedy trial if accused of a crime, to vote secretly for candidates of your own choice, to join or belong to organizations, to own property, to start your own business, and to manage your own affairs. Upon the lawyer, above all others, has been bestowed the guardianship of intellectual freedom, personal liberties, religious liberties, civil rights, procedural due process, freedom of speech, and freedom of the press.

It has been said that the measure of any civilization is the way the Government collects and spends its revenues. Our state and federal governments are steadily increasing financial supports for the welfare projects which count the most in a highly civilized society, such as the education of the rising generation, and the care and support of the old, the underprivileged and the maimed. We are traveling in the direction of a more humane state; harsh rugged individualism and unfeeling free enterprise are no longer free or rugged, in the older, uncivilized sense of

those words. In the Pioneer Era of American history, the lawyer's chief concern was with the wilfully bad man. Little or no attempt was made to regulate by law the fortunes and the misfortunes that surround the life of the good man. Today the lawyer's chief concern is the regulation of the health, happiness, and well-being of the life of the good man. Laws and administrative rules affect his hours of labor, his wages, the crops he can plant, his social security, and regulate his life in a host of other ways. It is a very high tribute to lawyers as the guardians of the essential features of the American way of life with liberty under law, that our splendid legal heritage has been preserved through social and legislative changes that are really revolutionary in their latitudinous scope and extent.

The importance of lawyers in American civilization is a fascinating subject, and we have here with us tonight a distinguished jurist who has not only made the law more fascinating for all of us, but also has exemplified in his own career on the Bench and at the Bar the finest in our legal heritage. Our chief honoree is a life-long citizen of Rogersville and is probably the best known and the most beloved citizen of Hawkins County. However, his reputation is by no means confined to that county. He is very highly regarded from Bristol to Memphis and from Chattanooga to Clarksville as a man, a lawyer, and a judge. In one respect he is almost unique: he is an able judge who is not too "judge-y." He has a ready repartee, a vivacious disposition and a keen sense of humor. He is an odds-on favorite throughout Tennessee as a raconteur of homespun stories. When he writes for our Law College periodical, the *Tennessee Law Review,* what he writes is read. It is probable that his sketches of Judge John S. Wilkes and Old Temp, the Sage of Jellico, have been more widely read and enjoyed than any other two sketches that ever appeared in the *Tennessee Law Review.*

I have been exceptionally fortunate in my associations with Judge Hale. I have been a visitor in his home, have fished with him, and, over a period of several years, he and I were collaborators on the Judicial Council of Tennessee. I have heard men in high places urge him to run for the office of Governor of the State of Tennessee, but he has never acceded to that temptation.

Our speaker was admitted to the Bar in 1913 at Rogersville, where he engaged in the practice of law, until he was elected to the Tennessee Court of Appeals in 1942. He has been reelected ever since as a judge of that important appellate court. The faculty and students of the College of Law are happy to have Judge Hale on the Tennessee Court

of Appeals, and that happiness is shared by the lawyers who practice before that Court.

Our honoree served as a Judge of the War Crimes Tribunal in Nuremberg in 1947 and 1948, and has donated his valuable books and records of those historic trials to the Library of the University of Tennessee. Any student who wants to get a really vivid picture of how horrible war really is, can probably get that picture in clearer details from those books and records than from almost any other way, short of actual experience.

The principal goal of U-T's College of Law is excellence in educating and preparing students for the practice of law. An effort is made by every law teacher to see that every teaching period makes a contribution to the intellectual development of the students.

An honor bestowed upon our College of Law was the installation in 1951 of a Chapter of the Order of the Coif, a national honor society. Coif chapters are granted only for high scholastic attainment, and only about one-third of the American law schools have been able to attain this coveted award. Only those students who at the time of their graduation are among the first one-tenth of the class are eligible for membership. The student Coif members elected last July to the Tennessee Chapter of the Order of the Coif were: Morris Denton, now practicing in Bolivar; Philip Durand, who is with a well-known Madison, Wisconsin, law firm; Frank Flynn, Jr., who is practicing in Knoxville; and Mahlon Townsend, the Head of the Business and Real Estate Law Department in U-T's College of Business Administration.

One honorary membership may be awarded each year to a member of the legal profession who has attained high distinction on the Bench and at the Bar. The Tennessee Chapter of the Order has proudly elected as its "Man of the Year, 1962" the Honorable Winfield B. Hale, of the Tennessee Court of Appeals. Judge Hale will speak to us on Chief Justice Grafton Green, one of the greatest judges Tennessee has ever produced.

And now, by virtue of the authority vested in me as President of the Tennessee Chapter of the Order of the Coif, it is a high privilege and an honor to deliver to the Honorable Winfield B. Hale of Rogersville, Tennessee, a Coif key and a certificate of membership in the ancient and honorable Order of the Coif.

CHIEF JUSTICE GRAFTON GREEN*

By Winfield B. Hale**

I suffer no illusions with reference to my being worthy of the honor afforded me tonight in awarding me with membership in the Order of the Coif. My only thought when I was informed of my selection was: well, they must be getting down close to the bottom of the barrel.

Dean Wicker informed me that I would be expected to prepare and deliver a paper on some legal subject or one related thereto. Accordingly, I decided to try an article on the late Grafton Green. This was a calculated risk because I knew that all lawyers here and all students of Tennessee law know that he was unexcelled by any judge in his or any other appellate jurisdiction. His distinguished service as Justice and Chief Justice of our Supreme Court covered the remarkable period from 1910 until his death in 1947.

Years ago I was impressed by this statement of Socrates: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially." This briefly summarizes the career of Justice Green.

If there is anything in heredity – and there surely is – then Judge Green was predestined for the law. His grandfather, Nathan Green, is regarded as one of the greatest of the many great judges who have graced the Supreme Court of Tennessee. He served with those other giants William B. Reese and William B. Turley along with Robert J. McKinney after the retirement of Reese. Judge Williams aptly described this as the "Golden Age of Tennessee Jurisprudence."

Nathan Green retired from the Bench in 1852 and became a professor of law in the Law School of Cumberland University at Lebanon. He died in 1866. His son, Nathan Green, Jr., was a member of the first law class to graduate from Cumberland. At the outbreak of the Civil War he entered the Confederate Army and served in it with honor and distinction until the final chapter was written at Appomattox. With the exception of the period covered by his service under the Stars and Bars of the Confederacy he was for sixty-two years a professor and teacher in the Law School of Cumberland. I had the privilege of sitting at his feet in 1912-1913, and I venerate and revere his memory. One of the members of my class, Cody Fowler, of Tampa, became president of the American Bar Association.

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* Address delivered at the Annual Law Day of The University of Tennessee College of Law, at Knoxville, April 27, 1962.

** Judge, Court of Appeals of Tennessee.

Those of us who went to Cumberland used to call it the poor man's Harvard. That phrase was discontinued during the New Deal when it was said the easiest way to get to Washington was to go to Harvard and then turn left.

Grafton Green, the subject of this paper, was born to Nathan Green, Jr., and Betty McClain Green on August 26th, 1872. His first employment after his A.B. degree in 1891 was as a reporter for the Nashville Banner for which he received $75.00 per month. When he told his father he was making this salary the Old Gentleman said that he would pay him that sum if he would enter the law school. The offer was accepted. Thus he became a lawyer. If any lawyer has any pride in his profession it is only natural for him to want his son to follow in his foot-steps, even though it is to become one of a noble band of glorious paupers.

This young man got his LL.B. in 1893 and opened an office in Nashville. Our former Chief Justice A. B. Neil had a long and intimate acquaintance with Judge Green prior to and after his accession to the Bench. Judge Neil said that he never knew of a case in which Grafton Green participated as a trial lawyer; that apparently he had no taste for the rough and tumble fights in the trial courts, being strictly an "office lawyer." Perhaps the reason for this was that Grafton Green was in essence a gentleman, and did not want to tramp on the toes of his adversary. It may be he was of such judicial temperament that he could not in all good conscience assail his opponent with broad sword and battle axe and like old Farragut at Mobile, say "Damn the torpedoes! Full speed ahead!"

It is possible that his training as a newspaper reporter affected his style of being terse, pithy and always to the point. When the Fourth Estate lost one who would have been a great reporter and editor it resulted in our profession gaining one of the greatest judges of all time.

Judge Green hated politics and avoided it as the Devil doth the Holy Water. It is said that one of his official family at Nashville had a weakness for liquor and a propinquity for politics. Judge Green always frowned upon any member of his entourage taking part in politics, so one day after having noticed this particular official had not been seen around the office for several days, he asked William F. Barry, an Assistant Attorney General, if he knew anything about this missing officer, to which General Barry said, "Yes, Judge; I know. He is over at such and such a hotel, drunk as a badger, with some of the daughters of joy around him and a big crap game going on." To

this Judge Green replied, "Well; that's fine; I was afraid he was out fooling with politics."

Strange enough, it was politics that started Grafton Green on his judicial career, that began in 1910 with his election as a member of the Supreme Court in a political revolution that shook Tennessee from Johnson to Shelby. More of this later, because to many it is a forgotten chapter in Tennessee politics.

At any rate, Grafton Green was elected to the Supreme Court in 1910 on what was called the "Free and Untrammelled Judiciary" ticket. He was re-elected in 1918, 1926, 1934, and 1942, a record unequalled in the history of the Supreme Court, which is strong evidence of the fidelity and ability with which he discharged his onerous judicial duties.

I doubt if Grafton Green, the lawyer, ever tried a criminal case of any consequence. He simply did not like trial work, especially the knock down and drag out battles that often accompany trials in criminal courts. But as a judge, he became master of every phase of criminal law.

To my way of thinking two of Judge Green's greatest opinions involved criminal cases, the first being *Dietzel v. State.*[1] Dietzel, a young man from a good family, was indicted for murder in the first degree committed in the course of a robbery. He was represented by eminent counsel and after a long and hard fought trial was convicted of murder in the first degree. The case rested on circumstantial evidence. But the jury found mitigating circumstances which in a way was a request for a life sentence instead of the death penalty. But under the law as it then existed the trial judge had the right to reject this finding of mitigating circumstances. This he did and imposed the death sentence. Justice Green's handling of the facts of this case is a masterpiece, and demonstrates beyond question the guilt of the accused. But with characteristic mercy Judge Green's opinion concluded with these words:

> "Nevertheless, since there is here, as in very case of circumstantial evidence, a possibility (a bare possibility in this case) of mistake, we prefer to heed the expression of the jury and commute this sentence to life imprisonment."

As so modified the sentence was affirmed.

The other case was *Scopes v. State,*[2] which aroused nationwide interest, and was generally known as the "Monkey Trial." It involved a statute[3] which prohibited the teaching of the theory of evolution in state universities and schools. The pseudo intelligentsia found in this

1. 132 Tenn. 47, 177 S.W. 47 (1915).
2. 154 Tenn. 105, 289 S.W. 363 (1926).
3. TENN. PUB. ACTS 1925, Chapter 27 (1925).

case an opportunity to level shafts at their pet hate, the South, which was then and still is their favorite whipping boy.

Clarence Darrow and other great lawyers entered the list for John T. Scopes, a school teacher, who dared to entertain and teach the Darwinian theory. The main defender of the Act in question was William Jennings Bryan, a great orator, who gave literal interpretation to every word in the Holy Writ.

Scopes was convicted. The judge imposed a fine of $100 which, incidentally, had not been fixed by the trial jury. The case reached the Supreme Court where it was ably argued pro and con. Judge Green sustained the constitutionality of the Act but held the judgment must be reversed because the trial judge had erred in imposing a fine of $100, not fixed by the jury as required by our constitution. Then the opinion concludes:

> We see nothing to be gained by prolonging the life of this bizarre case. On the contrary we think the peace and dignity of the State, which all criminal prosecutions are brought to redress, will be better conserved by the entry of a nolle prosequi herein.

This was done. The Act was sustained and still remains on the books.[4] But so far as we know it has never been invoked in any other case.

Another of Judge Green's famous criminal cases is that of *Davis v. State*.[5] Davis had an insane delusion that the person he killed was having adulterous relations with his wife. Acting under that delusion he had killed this man, for which he was convicted of murder in the second degree. In that case Judge Green wrote that "an insane delusion does not excuse from crime in Tennessee unless accompanied likewise by perceptional insanity," but held that such an insane delusion could reduce the offense from second degree to manslaughter, which of course is a modification of the old McNaghten "right and wrong" test.

Judge Green had a whimsical sense of humor which always was present in conversations with him and sometimes popped out in his opinions. In *Painter v. State*,[6] there was involved a charge that a mint vending machine was a gambling device. The player would insert a coin, in return for which he would get a pack of mints and also, at times, certain tokens which could be used in playing for a score, with no return of mints or otherwise. The majority of the Court sustained a conviction but Judges Green and Cook dissented on the ground that "the only thing of possible value involved in playing the machine was

4. TENN. CODE ANN. §49-1922 (1956).
5. 161 Tenn. 23, 28 S.W.2d 993 (1930).
6. 163 Tenn. 627, 45 S.W.2d 46 (1931).

the time of the player which . . . would be presumably worthless in the case of an individual whose mental equipment was such that he could find enjoyment in this pastime."

But in the subsequent case of *Heartley v. State*,[7] when the same question was before the Court, it adhered to the former opinion, and Judge Green concurred, saying:

> I have not thought that the operation of a machine like the one involved in the manner herein appearing constituted a substantial offense against our gaming laws. See dissent in *Painter v. State*, 163 Tenn., 627, 45 S.W.2d, 46, 81 A.L.R., 173. The majority of the Court think otherwise and the weight of authority outside the State is in accord with the majority. Cases like this are coming up at each term and the matter should be settled. I therefore yield my notions and concur in the judgment.
> Vindication of slot machines does not impress me as a cause of sufficient merit to justify me in keeping up my dissent.

Judge Green was a great and outstanding jurist in every branch of the law: equity, criminal law, common law, constitutional law, the law of contracts, the construction of wills, "which doth more perplex a man than any other branch of learning," ejectment law and in fact every phase of the law that affects the relations and rights of mankind. He knew the law, but over and above all he had a great fund of "uncommon common sense," always remembering that reason is the soul of the law; if the reason fails the law itself fails.

His opinions are models of conciseness. No one, no matter how dense, could read them without understanding the issues, the reasons for his decision, and adequate citation of authority. None of his decisions ever went beyond the framework of the case presented by the record. Always he avoided the lazy way of writing by saying "here copy" and then quoting at length from the pleadings, decree and evidence. On the contrary he would do it the hard way by boiling these matters down into a few words, but adequately presenting the issues raised and decided. He could say more in fewer words than any judge I have ever known.

So long as ability, diligence and moral integrity are cherished as the earmarks of a great judge, the opinions of Grafton Green will stand as a perpetual monument to one of the greatest judges ever produced by this or any other appellate jurisdiction.

I have stated that he detested politics as a matter of principle. He was not playing politics by merely giving the impression that he was free from and over and above politics. He simply did not like politics, period.

7. 178 Tenn. 254, 157 S.W.2d 1 (1941).

However, "There's a divinity that shapes our ends, Roughhew them how we will," and it is one of the ironies of fate that Judge Green's great judicial career was an incident to one of the most bitter political campaigns ever had in this grand old Volunteer State. But it was not of his making.

Joe R. Wilson (brother of Woodrow) was the city editor of the *Nashville Banner,* and is credited with observing: "Tennessee can furnish more kinds of politics than almost any other state in the Union, and then have a surplus on hand to divide with any who may be shy."

The events leading up to the launching of Judge Green's judicial career can be a long story, but I shall be brief. In a way it all goes back to the ambition of Robert Love Taylor to become United States Senator He was the most beloved man ever to grace public office in Tennessee. His philosophy of life was simple: "I believe in the gospel of sunshine and the religion of love." "Our Bob" (as he was generally known) when a young man achieved the practically impossible by being elected as a Democrat to Congress from the First Congressional District. The First District was strongly "anti-Secesh" in this antebellum day and remained staunchly loyal to the Union in what Winston Churchill has termed "the last war between gentlemen." I have read that the First District furnished more men to the Union Army than any other district in the United States, and likewise had many in the service of the Confederacy, some of whom were my ancestors.

After the "late unpleasantness" was over most of the Union men gravitated to the Republican party, while the old Johnny Rebs, after having been restored to voting rights, gravitated to the Democratic party. So the First District was and remains a GOP stronghold, always polling more than two to one over the hapless Democrats.

But, at any rate, wonderful to relate, Bob Taylor was elected to Congress in 1878 over Major A. H. Pettibone. This was due to the sheer force of his personality coupled with a gift of oratory that could almost charm a bird off of the limb. Two years thereafter the opposition regrouped its forces and defeated him for reelection.

Bob Taylor had more namesakes than any other man who has ever lived in Tennessee, one of whom is his nephew, our present great District Judge, whom you have endorsed for promotion to the Court of Appeals, Sixth Circuit.

He was elected Governor in 1886 and reelected in 1888, the constitutional term then being two years. In the campaign of 1886 he was pitted against his brother Alfred A. Taylor, father of Judge Bob, who was the Republican nominee. This was a campaign unequalled

in the annals of Tennessee or any other state so far as I can learn. These brothers conducted a joint campaign over the State without a word of bitterness marring the fraternal love they had for each other. It is generally referred to as the "War of the Roses."

There was a further complication: Their father, Nathaniel Green Taylor, was also a candidate for Governor on the Prohibition ticket. Probably he wanted to see that his sons were not corrupted by the convivial habits which at times entered into the politics of that date.

In 1896, after the intervening terms of John P. Buchanan and Peter Turney, Bob Taylor was again called to become the standard-bearer of his party as a candidate for Governor. This was due to a split in the Democratic party over the issue of "soft" money and "hard" money. William Jennings Bryan was the Democratic presidential nominee, having stampeded the Democratic National Convention in Chicago in 1896 by his famous cross of thorns and crown of gold speech. He in large part was opposed by the moneyed class. It is said that a prominent New York Democrat with large financial interests was asked if he was a Democrat still, to which he is said to have replied "Yes, damn still."

There was this same split in Tennessee. Strong forces were at work against Bryan and Tennessee was in danger of going Republican. Bob Taylor was then called upon to again run for Governor, and he did so urging the support of the national nominee. His personal popularity and oratorical ability helped hold the line for his party.

If I may digress, I may say that this was the same year that saw the emergence of Edward Ward Carmack upon the political scene. As a "Silver Democrat" he defeated the Honorable Josiah Patterson, who was a "Gold Democrat", for Congress from the Memphis District. Mr. Patterson contested this election before the House of Representatives, which was overwhelmingly Republican following McKinley's sweeping defeat of Bryan. A rising young Memphis lawyer, Kenneth McKellar, later destined for fame and honors from Tennessee, was his lawyer.

McKellar's senior partner refused to represent Carmack in this contest. His reasons were obvious – it was generally thought that Patterson would be seated. This was due to the belief once expressed by Speaker Thomas B. Reed who said that the only time he ever knew the House to vote along strictly partisan lines was when it was sitting in a judicial capacity, *i.e.*, in election contests.

Carmack was a brilliant man and as brave as he was brilliant. In his speech before the House in his own defense he boldly told this hostile forum, "I cannot appeal to you by saying that, while I proclaimed myself a supporter of Bryan at the front door, I was for McKinley in

the back alley. A man cannot be the kind of Democrat I am, Mr. Speaker, and aid the Republican party, any more than he can be the kind of Republican you are and aid the Democratic party."

In closing he said: "I speak, Sir, for my native State, for my native South. It is a land that has known sorrows; a land of legend, a land of song, a land of hallowed and heroic memories. To that land every drop of my blood, ever fiber of my being, every pulsation of my heart, is consecrated forever. I was born of her womb, I was nurtured at her breast, and when my last hour shall come I pray God that I may be pillowed upon her bosom and rocked to sleep within her encircling arms." Beautiful! Beautiful! Certainly not surpassed by any of the orations of Robert G. Ingersoll. He was slated by a Republican Congress.

In 1901 the Legislature elected Carmack to succeed Senator Thomas B. Turley who was not a candidate for reelection. He entered office March 4th, 1901, serving until March 4th, 1907.

For years Bob Taylor had nurtured an ambition to become United States Senator. Time and time again these ambition had been thwarted.

On January 11th, 1905, General William B. Bate was reelected to the Senate by the Legislature, but he died on March 9th, 1905, five days after his new term began. The Legislature was still in session, and as this was before the direct election law, it had the power to elect his successor. James B. Frazier was Governor and very popular with the General Assembly. Senator John I. Cox was Speaker of the Senate and therefore the next in line to succeed to the governorship in the event of a vacancy. It was charged that Speaker Cox manipulated a "snap caucus" of the Democratic members of the General Assembly to elect Governor Frazier as the successor of Senator Bate so that he (Cox) would become Governor. Whether this be true or not Governor Frazier was elected to fill the unexpired portion of the term of Senator Bate, and John I. Cox became Governor.

At this time Bob Taylor was out of the State on a lecture tour. He and his friends thought he had not been fairly treated in this matter and they also thought that Senator Carmack had a hand in it. So in 1906, when Senator Carmack was a candidate for renomination he was opposed by Bob Taylor, and in a primary held under the auspices of the State Democratic Executive Committee Taylor defeated Carmack. He was duly elected and Senator Carmack retired to private life to edit a newspaper in Memphis, and later in Nashville.

John I. Cox became Governor and was a candidate for the Democratic nomination to succeed himself. He was opposed by Malcolm R. Patterson, member of Congress from the Memphis district who, incidentally,

was the son of Josiah Patterson previously mentioned. He was an able lawyer and brilliant orator.

In what is said to have been the hottest convention ever staged in Tennessee, Cox was defeated and Patterson nominated due largely to the efforts of an athletic young lawyer from Nashville, Luke Lea, who took the gavel away from the Chairman, W. K. Abernathy, and then proceeded to run the convention.

Patterson was elected but soon came to the parting of the ways with Luke Lea, who had founded the *Nashville Tennessean* which vigorously espoused state-wide prohibition. He and other prominent men induced former Senator Carmack to become a candidate for the Democratic nomination for Governor against Patterson in 1908.

Then followed a joint debate between these two strong men that was followed with the greatest interest by all the voters. Carmack espoused prohibition; Patterson was for local option. Patterson won. Carmack then became editor of *The Tennessean.*

Very naturally the red hot convention which nominated Patterson over Governor Cox left many scars. Some time prior to November 8th, 1908, Col. Duncan B. Cooper, a prominent political figure, was instrumental in effecting a reconciliation between Governor Patterson and former Governor Cox. This was the subject of an editorial in the *Tennessean* written by Carmack which contained humor as well as acid. Among other things he said: "All honor to that noble spirit, Major Duncan Brown Cooper, who wrought this happy union of congenial and confluxible spirits, separated by evil fates, though born for each other."

This infuriated Col. Cooper and he told E. B. Craig that if his name appeared again in the *Tennessean* that either he or Carmack would die, although Col. Cooper said he told Craig that in the named event the town would not be big enough to hold them both. He sent a letter of protest to Carmack which, as might have been expected, provoked an editorial the following morning which was more cutting than the first.

Senator Carmack armed himself with a revolver. Cooper armed himself, and his son Robin, an esteemed young lawyer of Nashville, armed himself with a Colt automatic. That afternoon there was a chance meeting between Carmack and the Coopers. It happened on Seventh Avenue, near the intersection of Union Street in Nashville. Carmack and Robin Cooper fired. Col. Cooper did not. As is usual in homicide cases there was the question as to which of the parties drew and fired first. At any rate, Senator Carmack was killed instantly and Robin Cooper was wounded. The Coopers were indicted for murder.

Then followed a trial filled with all the political overtones to be

expected in a case involving such prominent personalities. It resulted in a verdict of murder in the second degree against both Coopers with a sentence against each of twenty years.

The case was then appealed to the Supreme Court. Apparently there was dissension in that Court with resultant delay. The opinion is to be found in 123 Tenn. beginning at page 37, and with the dissent takes up nearly two hundred pages.[8] The result was that the case was affirmed as to Col. Cooper but reversed as to Robin Cooper, who actually did the killing. Justices Shields, Neil and McAlister agreed on the judgment as to Col. Cooper, while Chief Justice Beard and Justices Bell and McAlister agreed as to the reversal of Robin's case.

Immediately upon the announcement of this decision and while the Court was in session Governor Patterson pardoned Col. Cooper. Robin Cooper was never tried again and as I recall was found fatally wounded from some unknown source not too long thereafter.

I have been travelling around Robin Hood's barn to get to the part subsequently played by Grafton Green. It is this: while the Supreme Court had this appeal under consideration it was alleged that Governor Patterson sought to pressure that Court into a reversal of the trial court, saying that if they did not do so they would be defeated when they came up for reelection in 1910.

Undoubtedly he sought to exercise a measure of control over the usual political machinery involved in cases of this sort. This resulted in much hue and cry among the people interested in maintaining the independence and integrity of the judiciary.

Then followed what has been termed a campaign for a "Free and Untrammeled Judiciary." A ticket composed of Beard, Shields, Neil, Landsen and Green was nominated by the "independent democrats" and in August, 1910, with the aid of most Republican voters was triumphantly elected over the Patterson ticket. The campaign was somewhat hectic.

And so it was that Grafton Green, the gentleman, the scholar, was launched upon his great and glorious career which contributed so much to our profession. All of us who are lawyers, those who have gone before and those who are yet to be, owe a great debt of gratitude to this great, good and just judge. May he never be forgotten.

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8. Cooper v. State, 123 Tenn. 37, 138 S.W. 826 (1909).

I thank you for your honoring me on this occasion and your patience in hearing me.*

* I am indebted to Robert H. White, State Historian, and to John H. Caldwell, attorney of Savannah, Tennessee, for their aid and assistance. I would like to have incorporated in these remarks the most interesting letter from Mr. Caldwell showing the influence the ladies of the house had in influencing Judge Green's decision to become a candidate, but will file it as part of the record.

RECENT DEVELOPMENTS IN LABOR LAW

By Jeter S. Ray*

The validity of the observation by the late Senator Robert A. Taft as late as 1953 that the law of the jungle still prevailed in labor-management affairs has been somewhat dented by the plethora of federal regulatory legislation during the past three and one-half years. Today most law offices are finding it necessary to delve into the subject in order properly to advise clients in such categories as employers and trade associations, employees and labor organizations, as well as insurance and bonding companies.

The limitations of this article are such that it will not be possible either to discuss extensively any of the enactments or to include all. For example, the Amendments to Title I of the Labor-Management Relations Act contained in Title VII of the Labor-Management Reporting and Disclosure Act of 1959 could well justify a full length article. Other recent developments not discussed include the maritime safety amendment to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq*)., the President's Executive Order dealing with equal employment opportunities for employees engaged in the performance of Federal Contracts (Exec. Order No. 10925, 26 Fed. Reg. 1977, effective Apr. 5, 1961) and the highly significant Manpower Training and Development Act of 1962 (Act of March 15, 1962, Pub. L. 87-415, 76 Stat. 23).

The following discussion of some of the statutes may do little more than indicate to the reader the subject matter and citation to the Code and some of the administrative and judicial interpretations. To borrow some language contained in two of the statutes, the purpose of this article will be achieved if it provides the necessary basic information by which the statements to follow "may be verified, explained, or clarified, and checked for accuracy and completeness."

I. Welfare and Pension Plans Disclosure Act[1]

Welfare and Pension Plans presently in effect are estimated to cover more than 90 million people, including beneficiaries, and amount to

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* Regional Attorney, U.S. Department of Labor. This article is based upon an address before the 13th Annual Mid-Winter Meeting of the Tennessee Bar Association and the views expressed do not necessarily represent the official views of the U.S. Department of Labor. The author is indebted to Mr. John Black, attorney on the Regional Attorney's Staff in Nashville, for his assistance in the preparation of this article.

1. 29 U.S.C. 301 *et seq*.

some $60 billion.[2] The Law prior to the 1962 Amendments was almost exclusively a disclosure statute rather than a regulatory measure, placing a duty on the administrator of every employee welfare and pension benefit plan, with certain exceptions, to publish a description of the plan and make an annual report.

This Act did not and does not apply to: (1) Plans which cover not more than 25 participants. (2) Plans administered by Government agencies (Federal, State and local). (3) Plans solely for the purpose of complying with workman's compensation or unemployment compensation disability laws. (4) Plans which are exempt from taxation under the Internal Revenue Code of 1954 and which are administered as a corollary to membership in a fraternal benefit society or by certain other non-profit organizations.

Federal District Courts had authority to enjoin violations of the publications requirements and to punish willful violations of the Act by a fine of $1,000 or imprisonment not to exceed 6 months.

The Act also provided for the recovery of the amount of $50.00 a day, at the discretion of a court of competent jurisdiction, by any participant or beneficiary who was denied publication of the description of the plan, or the annual report, by the plan administrator's failure or refusal to make such available within 30 days after it is requested in writing.

The law further applied the criminal penalties of 18 U.S.C. 1001 for the making of false statements in the description or annual report of any plan which is required to be filed under the Act and is sworn to.

Congress, in 1962, finding the Act to be weak and ineffective in several respects, passed amendments designed to cure some of these deficiencies by giving certain police powers to the Secretary of Labor.[3] These amendments were passed by Congress and sent to the President on March 15, 1962, who signed them into law on March 20, 1962. The nature of the Act as a disclosure and reporting measure, as contrasted with a regulatory law, was basically retained as was for the most part the language of the previously existing provisions. Under the amendments the Secretary of Labor has authority to issue interpretations under the Act and to prescribe in form or detail the manner in which reports shall be made. He is cloaked with investigatory powers to facilitate enforcement of the provisions. More information is required by the annual reports the covered plans must file, however, under the amend-

2. 108 CONG. RECORD 1762 (Feb. 7, 1962).
3. Act of March 20, 1962, Pub. L. 87-420 (87th Cong., 2d Sess.).

ments only plans covering 100 or more participants are required to file such an annual report. Officials and employees of welfare and pension funds are required to be bonded in an amount equal to at least 10 per cent of the funds to be handled, up to a maximum bond of $500,000. The amendments provide for criminal penalties for embezzlement or kick-backs in connection with plan funds. The new provisions specifically prohibit the Secretary from regulating or interfering with the management of any plan. If however, after investigation, it appears that a violation of the Act is occurring, he is authorized to seek an injunction against such violation in the appropriate Federal District Court. In addition the provisions require the Secretary to refer any information which may warrant consideration for criminal prosecution to the Attorney General. An Advisory Council composed of members from the fields of insurance, corporate trust, management and labor, along with representatives of other interested groups and the general public is provided for to assist the Secretary in carrying out his duties and to make recommendations as to further changes in the law as deemed necessary.

II. Labor-Management Reporting and Disclosure Act of 1959[4]

Perhaps the most formidable recent development in labor law was the passage, in 1959, of the Labor-Management Reporting and Disclosure Act. Based on a Congressional finding of a need "to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor-Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended," this Act purports "to provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes." This law is made up of seven titles, in addition to sections on definitions, findings and a statement of policy.

Title I is cited in the Act as a "Bill of Rights of Members of Labor Organizations," and sets forth five categories of what Congress considered basic rights that should be guaranteed to union members.[5] These guarantees are designed to insure that members shall have equal rights within the union to participate in the conduct of union meetings including the right to nominate and vote for candidates; that members

4. 29 U.S.C. 401, *et seq.*
5. H.R. Rep. No. 741, 86th Cong. 1st Sess. (1959) p. 7.

can assemble with other members and express any view, opinions or arguments they desire and that a member can express his views in union meetings on candidates or union business; that every member shall have the right to participate in decisions involving the rate of dues, initiation fees, and assessments by insuring the utilization of secret ballots and other safeguards; that every member may sue or bring other action against the union or its officers without fear of reprisals; and that each member is protected against improper disciplinary action. These rights or guarantees may be enforced by members through suits in Federal District Courts. The rights secured members under this title, however, do not confer the right to be a candidate for office to members.[6] The courts appear to have been consistent in looking closely at the facts to determine whether a person seeking protection under these guarantees is seeking them as a member. An officer or an employee of the union, even though he is also a member, is not entitled to the guarantees except in his capacity as a member.[7]

Title II of this Act sets forth reporting requirements. Under these provisions, reports must be filed with the Secretary of Labor by labor unions, officers and employees of labor organizations, employers, and other persons such as labor relations consultants. All these reports are matters of public information. Criminal penalties are provided for wilfully falsifying, withholding or destroying reports or other required information. When it appears that a person has violated, or is about to violate, the provisions of this title the Secretary of Labor may seek appropriate civil relief, including an injunction, from the Federal District Courts. These reporting requirements have been held to be constitutional under the Commerce Clause of the Constitution by the United States Court of Appeals for the Sixth Circuit.[8] This court also held, in the same case, that the Secretary of Labor was not obligated to establish probable cause or a reasonable basis for an investigation as to whether a union was complying with this title and that a subpoena duces tecum in connection with such an investigation was entitled to enforcement by the Federal Courts.

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6. Colpo v. Highway Truck Drivers and Helpers, Local 107, 201 F. Supp. 307 D. C. Del. 1961).
7. See Strauss v. International Brotherhood of Teamsters, etc., 179 F. Supp. 297 (E.D. Pa. 1959); Jackson v. The Martin Co., 180 F. Supp. 475 (D.C. Md. 1960); Burton v. Independent Packinghouse Workers Union, Local 12, 43 C.C.H. LABOR CASES §17,324 (U.S.D.C. Kan. 1961); Sheridan v. United Brotherhood of Carpenters, etc., 191 F. Supp. 347 (D.C. Del. 1961); Moschetta v. Cross, 43 C.C.H. LABOR CASES §17,055 (U.S.D.C.D.C. 1961).
8. Goldberg v. Truck Drivers Local Union No. 299, 293, F.2d 807 (6th Cir. 1961), *cert. den.* 82 S. Ct. 379 (1961).

Title III was enacted to prevent abuses in union trusteeships. The Act makes it mandatory that trusteeships only be established in accordance with the constitution and bylaws of the supervisory body and then only for certain specified purposes (for example: correcting corruption or financial malpractice). These provisions require special reports to be filed with the Secretary of Labor concerning a trusteeship. Generally the same enforcement provisions apply to the reporting requirements of this Title as are prescribed in Title II, including the criminal sanctions. Civil suit to secure compliance with the Title may be brought by a member, by a subordinate body affected by the violations, and by the Secretary on the complaint of a member or subordinate organization. A trusteeship is presumed valid for 18 months duration, after which the burden of proof is on the parent organization to justify its continuation. The courts which have reviewed the question of whether the right of union members and subordinate bodies to institute actions for civil relief alleviating violations of this Title is an alternative or a supplemental right to the Secretary's right to bring such an action are in disagreement.[9]

Title IV provides standards for union elections by requiring national or international labor organizations (except federations of such) to elect officers at least once each five years either by secret ballots among members in good standing, or at a convention of delegates chosen by secret ballot. Intermediate bodies are required to hold elections at least once every four years either by secret ballot among members or by officers representative of such members who were chosen by secret ballot. Local labor organizations must elect officers by secret ballot among members in good standing at least once every three years. These elections must be conducted in accordance with the organization's constitution and bylaws unless these are inconsistent with the provisions of the Act. This Title also sets forth various standards for conducting elections (for example: use of union dues or assessments and the use of any money of an employer to promote a person's candidacy is prohibited). The Secretary of Labor is authorized on the complaint of a member, to investigate the conduct of the election and, if probable cause that a violation of the Act has occurred is found, the Secretary may bring suit within sixty (60) days in Federal District Court, which, after finding a violation occurred which may have affected the outcome, shall order a

9. See Executive Board, etc. v. International Bro. of Elec. Wkrs., 184 F. Supp. 649 (D.C. Md. 1960), holding the right to be alternative. *Contra:* Flaherty v. McDonald, 183 F. Supp. 300 (S.D. Cal. 1960); and Rizzo v. Ammond, 182 F. Supp. 456 (D.C. N.J. 1960).

new election under the supervision of the Secretary of Labor. A Federal District Court has held that a member has no right of action in a suit seeking to set aside an election allegedly violating this Title, but that this right was exclusive to the Secretary of Labor, who alone may supervise elections.[10] This Title confers on each member the right of candidacy for union offices. However, the Federal District Court does not have jurisdiction over the subject matter of a pre-election action by a union member seeking vindication of his right of candidacy.[11]

Title V assigns fiduciary responsibilities to officers, agents, shop stewards or other representatives of labor organizations. Any member of the organization may seek appropriate relief from violations of these responsibilities if the union fails to seek such relief after being requested to do so. Embezzlement, stealing, or conversion of union funds by an officer or employee is made a federal crime. This Title requires officers, agents, and employees of unions with property and annual receipts in excess of $5,000 to be bonded, if such persons handle funds or property. Loans in excess of $2,000 to officers and employees by the union are prohibited. Unions and employers are forbidden to pay fines of officers and employees convicted of violations of the Act. Persons are prohibited from serving as officers or agents of a union, as labor relations consultants, or as a representative for a group of employers dealing with a union while a member of the Communist Party or within five years after termination of membership, or within five years after conviction or imprisonment for certain crimes, unless citizenship rights are restored, or unless the Federal Board of Parole has determined that the person is suitable to serve. This Title also tightens and clarifies the prohibitions in the Taft-Hartley Act concerning employer payments and loans to employee representatives.[12]

Under the provisions of this Title relating to fiduciary responsibilities, the Federal District Court for District of Columbia has held that members of the executive board and officers of an international union who refused to complete arrangements for, and call, a special convention after the right to such a convention had accrued to the membership, violated the fiduciary duties under the union constitution and this act.[13] In two separate cases this same court held that the fiduciary provisions of the Act prohibited the union from paying the legal fees of officers

10. Acevedo v. Bookbinders and Machine Operators Local No. 25, 196 F. Supp. 308 (S.D. N.Y. 1961); cf. Boling v. International Brotherhood of Teamsters, etc., Civil Docket No. 3713, not officially reported (U.S.D.C. ED Tenn., 1961).
11. Colpo v. Highway Truck Drivers and Helpers, Local 107, *op. cit. supra.*
12. 29 U.S.C. 186.
13. Moschetta v. Cross, 43 C.C.H. LABOR CASES §17,056 (1961); not officially reported.

charged with misappropriating union funds[14] and with misusing the powers of their office.[15]

Title VI contains certain miscellaneous provisions among which is an express grant of power to the Secretary of Labor to investigate, inspect records, and to question persons in order to ascertain whether violations have occurred or are about to occur. Criminal penalties are imposed for "extortionate picketing." The Act is not to be construed as reducing or limiting responsibilities of labor organizations and their officials under State or other Federal Laws, and the Act is not to be interpreted as barring current remedies of union members under State or other Federal Laws. This title also makes it a crime for any person, by force or violence, to coerce or intimidate union members for purposes of interfering with their rights under this Law. The Court of Appeals for the Sixth Circuit has held that the Secretary of Labor is not obligated to establish a "reasonable basis" for an investigation conducted under this title.[16]

Title VII of this Act contains amendments to the Labor-Management Relations Act (Taft-Hartley Act) and, as indicated above, will not be discussed herein.

III. Universal Military Training and Service Act[17]

Certain provisions in this Statute, or series of statutes, protect the individual who left his job to enter military service. This protection was first granted to individuals under the Selective Service Act of 1940.[18] The Act applies to all agencies and branches of the federal government and to private employers. It does not impose mandatory obligations on State governments.[19] Certain conditions are fixed as prerequisites to reemployment rights and certain rights after reinstatement are granted to the returning veteran. Remedies and damages are provided for veterans who are unlawfully denied their reemployment rights and government assistance including representation by the U.S. Attorney is afforded to enable procurement of the rights and benefits.

Amendments to this law passed in 1960 extended to members of the National Guard who perform 3 to 6 months of active duty the same

14. *Ibid.*, at §17,057.
15. Alvino v. Bakery and Confectionery Workers' International Union, 43 C.C.H. Labor Cases §17,058 (1961); cf. Highway Truck Drivers and Helpers Local No. 107 v. Cohen, 182 F. Supp. 608 (E.D. Pa., 1960), *aff'd* 284 F.2d 162 (3rd Cir. 1960), *cert. den.* 365 U.S. 833 (1961).
16. Goldberg v. Truck Drivers Local Union No. 299, *op. cit. supra*, at 812.
17. 50 U.S.C. App. 549, *et seq.*
18. Act of Sept. 16, 1940, c. 720, 54 Stat. 890.
19. But see 50 U.S.C. App. 549 (b) (2) (c).

reemployment rights available to members of the Ready Reserve performing the same type and length of training. The amendments also adjusted the time period in which leave of absence rights must be asserted after the performance of military duty.[20]

Amendments enacted in 1961: (1) reinforced the reemployment protection of certain persons who perform additional military service under present conditions; (2) removed a requirement that rejectees must request a leave of absence from their employer for the purpose of determining their physical fitness to enter the Armed Forces; and (3) assured to persons who are called for preinduction examinations and who are subsequently accepted or rejected the right to remain in their employment pending their induction or rejection.[21]

The U. S. Supreme Court has stated that the statutes are to be liberally construed for the benefit of those who left private life to serve their country; that no practice of employers or agreements between employers and unions can cut the benefits Congress secured the veteran under these laws. The court further stated that the separate provisions of the statutes should be construed as parts of an organic whole and that each part should be given as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.[22] These laws do not grant the employee advantages (such as in seniority) which he would not have received or been entitled to had he remained in civilian life. Rather, their purpose is to restore to him, as nearly as possible, the position he would occupy, in point of time, if he had not entered the Armed Forces. The veteran's position, including seniority, status, pay, and other features of employment, may be changed for the worse during military service if the change results from action both nondiscriminatory toward the veteran and made in good faith.[23] Conversely, the statutes do not prohibit collective bargaining or other employment agreements from giving special employment advantages to the veteran. This, the Supreme Court has held, is consistent with our national public policy favoring veterans.[24]

IV. Fair Labor Standards Act[25]

This Statute, as originally enacted and amended prior to 1961, sets minimum wage, overtime, and child labor standards which apply to

20. 50 U.S.C. App. Supp. II 459 (g) (Act of July 12, 1960, Pub. L. 86-632, 74 Stat. 467).
21. Act of October 4, 1961, Pub. L. 87-391, 75 Stat. 821, amending 50 U.S.C. App. 459.
22. Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275 (1946).
23. Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).
24. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).
25. 29 U.S.C. 201 *et seq.*

employees engaged in interstate commerce and in the production of goods for interstate commerce. Certain workers and certain employers are exempt from the requirements of the minimum wage or overtime provisions or both. The Act charges the Secretary of Labor with enforcing its provisions through investigation, and when necessary, by injunctive proceedings. The Secretary also may prescribe, by Regulations, that records be maintained and he is authorized to seek, by court action, the back wages for any employee who so requests him if no unsettled question of law is involved. The employee who has been paid in violation of the Act is authorized to sue on his own behalf for back wages and may be awarded a like amount as liquidated damages, plus reasonable attorney's fees.

Amendments enacted in 1961 are designed to raise the minimum wage to $1.25 per hour and to extend the coverage to more than 3½ million additional employees. The increase to $1.25 for workers covered prior to the amendments is to be accomplished over a two-year period; the minimum of $1.15 became effective on September 3, 1961, with the $1.25 becoming effective two years thereafter. The newly covered employees will receive the $1.25 per hour and time and one-half for all hours over 40 per week on a step-by-step basis over a four-year period,[26] beginning at $1.00 per hour. The extension of coverage was accomplished by a broadening of the general coverage concept of the Act, and by narrowing or deleting some of the specific exemptions. The largest single area included was retail trade enterprises and others whose gross annual sales exceed $1 million. The amendments also allow the Secretary of Labor, when seeking an injunction, to request that the employer be restrained from withholding back wages owed the employees.[27]

This Act was upheld by the Supreme Court as a valid exercise of the Congressional power to regulate commerce. The court held that this power extended to the regulation of intrastate activities as such activities have a substantial effect on interstate commerce.[28] The Act is remedial in nature with a humanitarian purpose and therefore is to be liberally construed;[29] conversely, because of these characteristics, any exemption from its provisions must be narrowly construed.[30]

By enacting the 1961 amendments to the Act, Congress introduced

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26. See H.R. Rep. No. 327, 87th Cong., 1st Sess. (1961) p. 1.
27. See Act of May 5, 1961, Pub. L. 87-30, 75 Stat. 67.
28. U.S. v. Darby Lumber Co., 312 U.S. 100 (1941).
29. See Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, (1944); Mitchell v. Lublin, McGaughy and Associates, 358 U.S. 207 (1959); Mitchell v. Vollmer & Co., 349 U.S. 427 (1955).
30. A. H. Phillips, Inc., v. Walling, 324 U.S. 490 (1945).

a new concept as a basis for coverage by the Law's provisions. Prior to this time, the test of coverage was founded on the work performed by each individual employee. In order to come within the Act's provisions, the employee himself had to be engaged in commerce or in the production of goods for commerce, regardless of the business of the employer.[31] Thus, it was possible to have one employee in an establishment covered by the law, while a fellow employee, working beside him, would be outside the scope of the Act. Under the new amendments, however, an employee will be within the Act's general coverage if, in any workweek, he is employed in "an enterprise engaged in commerce or in the production of goods for commerce." Under this standard, all employees of a particular business unit may be covered by the Act without regard to the relationship of their individual duties to commerce or in the production of goods for commerce.[32]

The largest segment of the approximately 3½ million employees added by the 1961 amendments are those employed in retail trade and other enterprises whose gross annual sales exceed $1 million. Thus, almost 2.2 million employees in retail and service industries[33] were brought within the Act's coverage by means of the retail enterprise concept and a corresponding narrowing of the exemption previously granted to these type businesses. Generally speaking, subject to certain exceptions, all employees of a retail or service enterprise will be within the Act's provisions if the enterprise has two or more employees engaged in interstate commerce or production of goods for such commerce, if it has an annual gross volume of sales of not less than $1 million, if it purchases or receives goods for resale that move or have moved across state lines that amount to total annual volume of $250,000, and if the particular establishment within the enterprise has an annual gross volume of sales of $250,000 or more.

Approximately 1 million employees of the construction and reconstruction industry were also brought within the Act's provisions by including in the definition of "enterprise engaged in commerce or in the production of goods for commerce" any enterprise engaged in the business of construction or reconstruction which has two or more employees engaged in commerce or in the production of goods for commerce and which has an annual gross volume of business of not less than $350,000.

Another significant area receiving attention under the enterprise concept was the retail gasoline service stations, the coverage of which

31. See S. Rept. No. 145, 87th Cong., 1st Sess. (1961) p. 6.
32. Id., p. 76.
33. This and all subsequent references to statistics concerning coverage of the Act were taken from the chart in 107 CONG. REC. at p. 6616 (May 3, 1961).

brought approximately 86,000 employees within the scope of the Act. Generally the same tests apply to these type operations as are applicable to construction except that the annual gross volume of sales has only to be equal to $250,000. Urban, suburban and interurban transit companies, involving some 93,000 employees, are also included in the new enterprise coverage provided they too meet the tests of having two or more employees engaging in commerce or in the production of goods for commerce and have an annual gross volume of sales of not less than $1 million. Enterprise coverage is also extended to any establishment not otherwise provided for, which has two or more employees engaged in commerce or in the production of goods for commerce, if it constitutes all or part of an enterprise having an annual gross sales volume of $1 million or more. Except for such enterprises and construction enterprises, excise taxes at the retail level that are separately stated are excluded from the computation in determining whether the particular annual gross sales figure sepecified for any given enterprise is met. It would appear that one would not be overly speculative in predicting that the problems raised by this concept will create a fertile field of litigation before the law becomes settled.

One of the few provisions of the new amendments which has received the attention of a court is that section authorizing the Secretary of Labor to seek the restraint of the withholding of back wages for two years prior to suit through injunctive action. A Federal District Court recently ruled under this provision that the Court could order the payment of back wages even though the violations which resulted in these wages being due occurred prior to the effective date of the amendment. The Court stated that since the amendment did not impose any new sanction or create any new right, but merely affected the remedy, the defendant could not complain about its retrospective enforcement.[34]

V. WALSH-HEALEY PUBLIC CONTRACTS ACT[35]

This Act sets basic labor standards for work done on U. S. Government contracts involving $10,000 in value for materials, articles, supplies, equipment, or naval vessels. It applies to all employees, except office and custodial, engaged in or connected with the manufacture or furnishing of such items required under the contracts.

The Secretary of Labor is authorized to determine the prevailing minimum wage rate in an industry and, after such a determination, em-

34. Goldberg v. M & K Manufacturing Co., Inc., 44 C.C.H. LABOR CASES §31,246; 15 B.N.A. W.H. CASES 407 (U.S.D.C. Col. 1962).
35. 41 U.S.C. 35 *et seq.*

ployees engaged in performance of a contract must be paid not less than the wages so determined. They must also be paid at least one and one-half times their regular rate of pay for work in excess of 8 hours per day and 40 hours per week.

The Act contains prohibitions against a contractor employing child labor or convict labor. The contract must be performed in a manner and under conditions which are sanitary and not hazardous or dangerous to the health and safety of employees engaged in its performance.

The contractor is liable, on violating the law, for a sum equal to the amount due the employees under the law because of underpayment of wages, and for damages of $10 per day for each child or convict knowingly employed on the contract. Violations may also result in the cancellation of the contract with any additional costs charged to the contractor, and in the contractor being barred from receiving another government contract for three years.

The determination of whether coverage under the Act exists is an administrative question; federal courts will not require a predetermination of coverage as a condition of enforcement.[36] The Secretary of Labor is not required to determine separate minimum rates for each region or locality of the country to be paid employees covered by the Act, but may, where competition of bidders for contracts makes it appropriate, make one nationwide determination for a particular industry.[37] The two year statute of limitation established by the Portal-to-Portal Act, while not considered applicable to administrative proceedings under this Act,[38] is applicable in a court action against a contractor seeking payment of the liquidated damages found to be due the government by an administrative proceeding.[39] However, this two-year limitation does not bar the government from withholding payments on government contracts to cover damages by reason of violations occurring in excess of two years previously.[40] Liquidated damages provided for by the Act with respect to both the ten (10) dollars per day accessed for knowingly employing an underage minor and the amount equal to the back wages are not penal,

36. Endicott-Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

37. Consolidated Electric Lamp Co. v. Mitchell, 259 F. 2d 189 (C.A. D.C. 1958); Mitchell v. Covington Mills, 229 F. 2d 506 (C.A. D.C. 1955); Alabama Mills v. Mitchell, 244 F. 2d 21 (C.A. D.C. 1957).

38. See In Re Standard Ice Co., Decision of Hearing Examiner, PC-355 (Mar. 29, 1948), 7 B.N.A. W.H. CASES 914; In Re Al Jones Oil Co., Administrator's Decision, PC-587 (Dec. 31, 1956), 13 B.N.A. W.H. CASES 307.

39. Unexcelled Chemical Corp. v. U.S., 345 U.S. 59 (1953).

40. Ready-Mix Concrete., Ltd. v. U.S., 1130 F. Supp. 390 (Ct. Cl. 1955).

but remedial damages. Such liquidated damages, when found to be due, comprise a debt due the United States.[41]

VI. Davis-Bacon and Related Acts

These laws provide for minimum wages on construction work, based on wage determinations of the Secretary of Labor. With the exception of the Federal Airport Act, which requires the payment of *minimum* wages as determined by the Secretary, each of the following laws is a "prevailing wage law." This means that wages paid laborers and mechanics must not be less than the wage rates determined to be *prevailing* for these classifications of workers on similar construction in the locality.

These laws cover the construction, alteration, or repair of public buildings or public works by the federal government (under the Davis-Bacon Act) or financed by monies from the federal government. These laws are: Davis-Bacon Act (40 U.S.C. 27a, *et seq.*); Federal-Aid Highway Act, as amended (23 U.S.C. 101, *et seq.* and 26 U.S.C. 4041 *et seq.*); United States Housing Act of 1937, as amended; Housing Act of 1949, as amended (42 U.S.C. 1401, *et seq.*); Defense Housing and Community Facilities and Services Act of 1951, as amended (42 U.S.C. 1591, *et seq.*); National Housing Act (FHA), as amended (12 U.S.C. 1703, *et seq.*); School Survey and Construction Act, as amended (20 U.S.C. 251, *et seq.*); Hospital Survey and Construction Act (42 U.S.C. 291, *et seq.*); Federal Airport Act (49 U.S.C. 1101, *et seq.*); Federal Civil Defense Act of 1950, as amended (50 U.S.C. App. 2281).

Contractors or subcontractors who do not comply may have their contracts cancelled, money owed in back wages withheld from payments they would otherwise receive, and are subject to being barred from receiving further government contracts for a period of three years. In the case of the Civil Defense Act which provides for matching funds to be paid to the States by the Federal government for certain facilities which can be used for civil defense purposes, and which may include funds for the building of fallout shelters, the state may be denied the federal funds if the work is not performed in accordance with the Secretary of Labor's wage determinations and regulations.

The decision of the Secretary of Labor in determining the prevailing rate of wages in a community is final and conclusive and the courts have no jurisdiction to review such determination without proof of fraud or that the Secretary's action was so grossly erroneous as to amount to

41. U.S. v. A-AN-E Mfg. Corp., 15 C.C.H. Labor Cases §64, 621 (U.S.D.C. N.D. Ill. 1948); In Re Evalyn Fehrman DeWolfe, Decision of the Secretary of Labor, PC-250 (Apr. 15, 1946), 6 B.N.A. W.H. Cases 1165.

fraud.[42] The Secretary, in making such determinations, is not required to hold a formal hearing.[43] By determining the wage rates applicable to the work to be performed under a particular contract, the government does not give a warranty or assurance that the contractor will not have to pay higher wage rates[44] and is not liable for increased labor costs occasioned by external forces of the labor market.[45]

The Portal-to-Portal Act of 1947 (29 U.S.C. 251) contains a two-year statute of limitations which has application to the Fair Labor Standards Act and the Davis-Bacon Act as well as the Walsh-Healey Act, as pointed out above. In addition certain good faith defenses are provided.[46] Also pertinent to some of the statutes discussed are provisions of the Administrative Procedures Act (5 U.S.C. 1001 *et seq.*).[47]

The above Acts, together with the series of laws dating from 1892 and 1912, commonly referred to as the Eight-Hour Laws, point out the need for a comprehensive revision and codification to the fullest practicable extent of the various Federal Labor Laws. Such a revision could not only eliminate some of the overlapping and conflicting provisions in some of the statutes; it might even result in more uniformity and simplicity. The various Conventions and Recommendations of the Tripartite International Labor Organization would contribute materially to such an undertaking.[48]

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42. E. M. Gilbert Engineering Corp. v. U.S., 82 Ct. Cl. 616 (1936).
43. Gillioz v. Webb, 99 F.2d 585 (5th Cir. 1938).
44. U.S. v. Binghamton Construction Co. (1954) 347 U.S. 171 (1954).
45. B-W Construction Co. v. U.S., 324 U.S. 768 (1945); George Fuller Co. v. U.S., 63 F. Supp. 765 (Ct. Claims 1946)
46. Ray, *The Portal-to-Portal Act of 1947*, 20 TENN. L. REV. 151-68 (1948).
47. Ray, "Effect of the Administrative Procedure Act on the Regulatory Functions of the Department of Labor" in *Federal Administrative Procedure Act and the Administrative Agencies, Proceedings of an Institute Conducted by New York State University School of Law, February 1-8, 1947*, p. 438 *et seq.*
48. Ray, *International Regulation of Labor Relations*, 2 LAB. L. J. 647-54 (1951).

PLANNING AND ZONING: PRINCIPLES AND PRACTICE

By ROBERT W. PHAIR*

The title "Planning and Zoning" is taken deliberately to emphasize that zoning is only one of the component parts of planning. Planning concerns the public as a whole and governmental officials in particular, whereas zoning, while affecting the public as part of a Comprehensive Plan for the community, relates itself to specific uses of land and has a direct effect upon the economic worth of specific properties and those adjacent to it.

Planning is the broad concept for the orderly growth of communities. It establishes a pattern for the present and future expansion of communities, regardless of size. Normally, a city or town, recognizing the value of a plan for its municipal growth, will seek the aid of the Tennessee Planning Commission as authorized in *Tennessee Code Annotated* §13-101 *et seq.*, which maintains a competent staff to make the studies necessary to evolve a Comprehensive Plan. If desired, there are nationally recognized firms of planning consultants which can be employed for this purpose. The larger cities in Tennessee have felt it desirable to obtain independent authority to engage in planning by Private Acts amending their respective charters.

A Comprehensive Plan for a town, city, county or region would normally be based on a series of separate studies on such subjects as:

a. Land Use Plan – present and future
b. Major and Secondary Street Plans
c. Population Density Studies – present and future
d. Schools, Parks and Recreation Plans
e. Public Buildings and Utilities
f. Long Range Public Improvement Plan
g. Comprehensive Zoning Plan
    1. Zoning Text, prescribing various permitted uses.
    2. Zoning Map, delineating the use districts, commercial, residential, etc.

An adjunct of the planning function is the control of subdivisions by those responsible for planning.

Items "a" through "f" above are fact-finding functions of particular use to those in government, but also serve real estate and business interests. These facts should be ascertained by persons trained in this field, and, assuming their qualifications, they then submit their reports

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upon which those charged with the governmental function, whether elected or otherwise, can base their legislative decision. As a practical matter, these reports made without the pressures commonly exerted on elected officials can be used by those dependent upon the ballot, as not only the reason for, but in justification of actions taken. So where the local planning commission has earned sufficient prestige, it can render dual service to elected officials, not only in supplying needed uncolored factual data, but in permitting the elected officials to cite this data in support of their decision.

Who are the people to whom these functions are to be entrusted? Several of the leading universities, such as those of Michigan, North Carolina, Colorado, and California, give B.S. degrees in Planning and complementary subjects as well as post graduate courses leading to Masters degrees in Planning. The undergraduate work is similar to pre-architecture, landscape architecture, engineering and drafting. Graduates are then classified according to their training, experience, and specialties into rated categories and advance by years of experience and after tests similar to the ratings of the American Institute of Architects. A graduate planner has a career available in his chosen field and few will let themselves be bitten by the political bug, so that the prominence they receive through public appearance and through the press does not represent a political threat to the elected official who is dependent upon such limelight. Graduate planners are in short supply and there are many more job opportunities and advancements available than there are qualified applicants.

Taking the components of a Comprehensive Plan as they are listed above, but recognizing that individual planners or cities may prefer to add or subtract from this list, the basic survey is the stock-taking of the uses to which land in the affected area is presently being used. This is a door-to-door procedure and can best be done from accurate large scale ownership maps, enlarged aerial photographs with lot lines verified, and on the ground inspection or any combination of these. Once the present uses are ascertained, the other listed factors must be obtained so as to arrive at a projected Land Use Plan.

Major and Secondary Street Plans insure the matching of roads without dead-ends and jogs and assure road widths capable of handling present and future traffic loads. Both state and private legislation provide that once a Major Street Plan has been adopted no public road may thereafter be constructed without submission to the planning commission for recommendation. This phase alone has caused much concern among elected officials caught between the savings in free

right of way by varying the route of a road to coincide with the wishes of a land owner and the expense of condemnation to comply with the Major Street Plan. In operation, however, the barrier disappears when it is recognized that the Plan is a guide, and does not compel the road to follow the exact line on the Plan but allows for its adjustment for engineering, right of way, or other valid reasons, but only after these are given the public scrutiny their tax dollar cost requires. The Major Street Plan yields to good cause shown.

Population studies involve examination of census reports, chamber of commerce projections, industrial expansion, birth-death rates and a series of related factors. These studies are intimately involved in the School, Parks and Playground Plans. Trained planners take their population projections and relate them to both grammar and high school sites. There is a present trend toward large school sites of twenty-five acres or more allowing school buildings to be used in off-school hours as recreational centers, thus getting additional mileage out of tax dollars. A minimum desirable ration of one acre of park land per 100 population is recognized by planners.

Public utilities, water, electricity, sewage and garbage collection and disposal are controlling factors in community growth. Planners and municipal authorities must attempt to control municipal growth along areas where these amenities can be furnished by the municipality at reasonable costs, and yet not be accused of confiscation by the far-out developer who has skipped over closer-in, higher-priced land and screams for municipal services which are presently uneconomical to supply. Many devices, some legal, some mostly practical, have been employed to influence municipal growth along paths where utilities can be supplied without bankrupting the community.

The cry for "a new court house like Jones County", while valid as to need, may be beyond the pocketbook of a county, unless the planners can not only recommend a suitable location for it, but accompany the recommendation with an acceptable plan of financing within the capabilities of the community. What a relief to elected officials these planners can be, if, after they get the facts they come up with a solution those less trained in municipal finance overlooked. Planners are not magicians and can not produce municipal assets where none exists, yet their negative report is equally valuable to elected officials who might otherwise be pressured into commitments economically unsound.

These findings would be expected to set a target date and location for all the public improvements the community needs, court house,

jail, fire stations, water plants, sewage disposal, the housing of the whole municipal family of operations – and a plan on how to pay for them.

Up to now, for practical purposes, we have discussed a municipal research department expanded to a planning staff of trained experts to advise an appointed, non-paid board of interested citizens, called the planning commission. Nearly fifteen years experience as an attorney for a municipal, then joint city-county planning commission, has convinced this writer that an appointee to a planning commission becomes so enthralled in his task that he will unselfishly devote hundreds of hours to study of the problems of his community, without compensation, in absolutely independent thought, without favor and heedless of friendship, to achieve what he feels is just and right. Since it is common that the decisions of the planning commission are recommendations only, unpaid citizen appointees must occasionally see their carefully rationalized decisions overruled by emotional pleas and pressures brought on elected officials. So much for the principles of planning as an aid to the community in general and municipal officals in particular.

Lawyers, at first blush, see in planning confiscation and unreasonable, if not unlawful, restraint on the use of property. These questions usually arise when some property owner has slept through the public hearings on the enactment of the original Comprehensive Plan and is rudely awakened to find that down the street or next door a commercial enterprise is opening which he feels is the death knell to his home and family. Conversely, he may be refused a building permit to convert the spare front room into a beauty parlor or law office, or for that matter, having ignored the formality of securing a building permit, he finds a rude "Stop Work Order" tacked on the job. Away he goes to the court house screaming "They can not do this to me." But they can.

These illustrations come from violations of the zoning district map. The land use map is used as the basis for a zoning district map on which appear, usually in distinct colors, the areas zoned for various uses. These uses are specified in the Zoning Ordinance of which the map is a part. While in most districts the uses permitted are specified, be on the alert for phraseology, particularly in the industrial districts, where it is not uncommon to zone for any use "except" – followed by a list of excluded uses. Otherwise astute counsel have found themselves embarrassed after scathingly pointing to the permitted operation of a "slaughter house" on the property, if the zoning sought is granted, much to the disadvantage of his next-door-owner client, only to have his opponent calmly point out that the slaughter house he fears is

specifically *excluded* from the zone. It is generally too late, having fired such a misdirected salvo, to fall back and regroup so as to mount another offensive in the same battle.

Let us examine the legal history of zoning for a moment. The definition of zoning is reduced to its barest form by Mr. Metzenbaum when he says its purpose is to "keep the kitchen stove out of the municipal parlor."[1] It has been defined as a limitation on use, not concerned with ownership. In colonial times it was understandably found prudent to require storage of gunpowder away from inhabited areas. Napoleon established a Use Code in the mid 1700's similar to those established by the Prussians and the laws of the German Emperors, the effect of these being to segregate uses into compatible categories and relegating the others to:

1. Ostracized dangerous uses
2. Proscribing nuisances
3. Banishment of injurious uses

From these grew the town planning in England in 1909 which has found increased acceptance in that country to the present day.

New York, in 1916, was the first major city to enact Comprehensive Zoning, using a plan drafted by Harland Bartholomew. The philosophy of zoning was the source of much legal speculation until it was finally approved by the Supreme Court of the United States in 1926 in *Euclid v. Ambler*.[2] Mr. Bartholomew has continued as one of the foremost planning consultants and Mr. Metzenbaum, who was the successful counsel in the case (Newton D. Baker, *contra)* is the author of a three volume set entitled *Law of Zoning*. Congress enacted zoning for Washington, D.C. in 1920 to implement the original City Plan drafted by Major L'Enfant.

In Tennessee, it is believed that the City of Memphis pioneered in zoning when it sought and had passed Chapter 164 of the Private Acts of 1921 amending the Charter of the City of Memphis to authorize comprehensive zoning, create a planning commission and a board of adjustment. The place of this latter body in zoning (often called board of zoning appeals), will be discussed later.

In 1935 Shelby County was given authority in the field of planning and zoning by Chapter 625 of the Private Acts of 1935. Chapter 706 of the Private Acts of the same session created the Shelby County Planning

1. METZENBAUM, LAW OF ZONING 9 (1955).
2. 272 U.S. 365 (1926).

Commission, authorized the "Master Plan" (Land Use Plan) and the customary limitations that once the Plan was adopted,

> "no road, park, or other public way, ground, or space, no public building or structure, or no public utility, whether publicly or privately owned, shall be constructed – unless location and extent thereof shall have been submitted to and approved by such County Planning Commission . . ."

As each of the twenty-seven years have passed, adherence to this pronouncement increases. Its intent and purpose seems clearly to be in the public interest. At the same session of the Legislature in 1935, the Tennessee Planning Commission was created.[3] Zoning has consistently been held to the test of reasonableness, yet the same courts recognize and accept the arbitrariness present when, up to a particular line one owner may engage in certain profitable uses yet beyond this line these uses are prohibited to the adjoining owner.

Lawyers of the old school chafe at the limitation on use which zoning imposes under the guise of the police powers.[4] Those who lean heavily on the doctrine that "he who owns the ground, owns it to the sky" will have difficulty reconciling this with the zoning theory, even under the police powers. Lawyers should have less difficulty with the limitation on use imposed by zoning than "the end justifies the means" theory in the urban renewal cases or the abstract theory that fee simple title is at most only an easement subject to defeasance by the superior interest of the governing body of those other entities endowed with the power of taxation or condemnation.

Since *Spencer-Sturla v. City of Memphis*[5] and such pilot cases as *Brooks v. City of Memphis*,[6] *Howe Realty Company v. City of Nashville*,[7] and *Davidson County v. Rogers*,[8] it seems clear that planning and zoning are legitimate activities in Tennessee, absent fraud, illegal enabling statutes or zoning ordinances which are illegal or illegally applied. In zoning cases often the zoning ordinance itself is upheld, but is found to be illegal in its application to the subject property. A striking down in toto of a zoning ordinance which has been in effect and acted upon with the resulting purchase and sale of land based on thought-to-be permissive uses, causes economic chaos and disaster in any community, pending the time necessary to obtain corrective legislative authority or

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3. TENN. PUB. ACTS, ch 48 (1935); TENN. CODE ANN. §13-10 (1936).
4. Spencer-Sturla v. City of Memphis, 155 Tenn. 170, 290 S.W. 608 (1927).
5. *Ibid.*
6. 192 Tenn. 371, 241 S.W.2d 432 (1951).
7. 176 Tenn. 405, 141 S.W.2d 904 (1940).
8. 184 Tenn. 327, 198 S.W.2d 812 (1947).

re-enactment of zoning ordinances. Opportunists would exploit such a hiatus period by obtaining permits and gaining vested interests literally "putting the kitchen stove in the municipal parlor" until the breach can be closed. A vested interest can be obtained in zoning only by taking positive action based on it and making substantial outlays for plans, construction, and the like in excess of the "barely begun" rule announced in *Howe v. Nashville.*[9]

Now for the practice. First, suppose your community has no plan, no control on uses. If you are in Tennessee, direct an inquiry to the Tennessee Planning Commission. It would be worth your while to confer with private planning consultants, the names of whom are available from the Tennessee Municipal League or the yellow pages of the telephone book in the metropolitan cities. Your clients will be more concerned with the Zoning Plan. Normally it will be easier to get your client's land zoned the way he wants it, as part of the original or any major revision of the Comprehensive Plan, than later. The courts hold rather uniformly that once a Comprehensive Plan has been adopted, it will be changed only when the applicant carries the burden of showing that: (1) The original zoning was incorrect; or (2) there have been significant changes in the area justifying the rezoning. Reference will be made to these criteria later.

Suppose your client comes to you saying that he has been approached by the XYZ Oil Company which will pay him ten times the residential value of his corner lot, if he, the owner, will get it rezoned for a filling station. This case is not trivial. A $1,000 lot now has a $10,000 potential. In other words, your client has a $10,000 case and should pay his lawyer accordingly.

Zoning is for a long list of permitted uses. If the zoning change is requested there is no obligation on the owner to use it for the immediate purpose sought. In fact, it is immaterial that he has a prospective use for the parcel, although, psychologically, planning commissions and legislative bodies are less likely to approve a zoning change just so an owner may go speculative shopping for a user after the change is granted.

Spot zoning is frowned upon. So in *Grant v. McCullough,*[10] the Court quoted as a definition:

> "Spot Zoning is the process of singling out small parcels of land for use classification totally different from that of surrounding area, for benefit of owners of such property and to the detriment of other owners, and as such is the very antithesis of planned zoning."

9. See Footnote 7, *supra.*
10. 196 Tenn. 671, 270 S.W.2d 317 (1953).

Do not be of faint heart. Most of the zoning ordinances authorize a change to be initiated by an owner of property "in the area to be rezoned." Expand your thinking to an area basis. If possible, make your client's parcel an expansion of a nearby similar area or as a step-down or up between two non-compatible zones. Spot Zoning is a relative phrase. A ten acre tract in a 100 acre block could be as much a case of spot zoning as the little old lady's sundry store in the middle of the residential block in *Grant v. McCullough*.[11]

No part of the law lends itself so readily to demonstrative evidence as does a rezoning application – either for or against. A chart to readily visible scale – 1" = 200' or 1" = 500', at least – with the existing zoning districts surrounding the property may illustrate the logic of your application or the obvious "make me a buck" motive behind the application.

Be sure to study the entire zoning ordinance if this is your first zoning case. The laymen who are sitting on the Planning Commission are self-educated experts on this Code Practice. When you carelessly refer to "A-1" residential and the official designation in the Ordinance is "R-1", you have just proven to these gentlemen who have taken the time from their respective businesses to learn the Ordinance – without pay – that, even for a fee, you take up their time and do not think enough of what they are doing to know what you are talking about. Experience has shown that lawyers come before Planning Commissions with less preparation than they would when suing on an out-of-state sworn account in the General Sessions Court. Perhaps the poor showings and unsuccessful results inadequately prepared lawyers make – for a fee – encourage many do-it-yourself appearances by owners themselves ("You know me, fellows. Give me a break"); real estate salesmen, architects, civil engineers ("Look, fellows, if this does not go I will not get a dime.") Between these, the unprepared lawyer and the self-motivated applicant, there is little choice, and before an experienced Planning Commission the unprepared lawyer has even less chance of success.

Citizen members of Planning Commissions, and even more so, the elected legislative body of the municipality, are concerned with (not bound by) the attitude of the property owners likely to be affected by the change. If you take the case, and if in good conscience you do not think it has merit, have the integrity to turn it down. If you do, get your charts, plots, drawings of your proposal and decide its good points as well as bad. Take the proposal to the neighbors. An okay by one or

11. *Ibid.*

two influential ones will, as usual, influence the group who follow. If possible, have some local leader carry your petition. Heads of lodges, churches or civic clubs, can be of immense influence in this regard. If the neighbors will not sign the petition requesting the rezoning, have a second handy saying they "do not object." It is just as good. Be sophisticated and have clubs, lodges, and the like pass official resolutions "at which a quorum was present" to eliminate the possibility of its being only the opinion of the "corresponding secretary."

Having obtained all the "on the ground support" you can (it is hard work, ringing doorbells, usually at night, and repeating the same story every time), you are ready to gather your other witnesses to show (1) the error in the original zoning, or (2) the significant changes in the neighborhood justifying the change.

As to the first point, such things as the presence of an existing use in the vicinity which would indicate that the balance of the block should carry the same use comes to mind. It is even possible that the individual who actually drafted the zoning map would be willing to "fess up" to an oversight or change of mind for whatever credence his testimony may be worth. There is no substitute for qualified professional testimony of real estate men, appraisers, or professional planners to support your argument. Be prepared to offer the cure to the "increased traffic," depreciating effect on adjacent property" and "hazard to children" that invariably arise in opposition to any change in zoning. This author's experience provokes the philosophical conviction that a psychiatrist would see in the almost universal objection to change in neighborhood uses, a personal latent fear of aging or change which ultimately ends in death — that makes a zoning change an abhorrence and causes a clinging to the status quo.

On the "change in neighborhood" theory, get traffic counts from the State Highway Department or hire someone to make counts on specified days and hours of the day. Factual testimony by bankers as to increase in bank debits in the community indicates commercial growth and need for additional space for commercial expansion in general. If a banker will hazard a guess that his bank would deem the area a suitable risk for a loan for a commercial venture, so much the better.

Testimony as to increased traffic as justification for commercial use can usually be made by real estate experts. Match this with testimony from a traffic authority on how you propose to control or divert it, so as not to funnel it past schools or residential area. One method is to volunteer dedication and construction of road widening and free turn corners. Dedications and covenants running with the land to

insure a specific use cannot be exacted as a condition for zoning, but if "voluntarily" inspired oftentimes make the rezoning more palatable. As a matter of personal practice, it seems desirable to avoid cluttering titles with covenants to build specific structures or conduct only certain uses. More often than not the financing agency will require such a substantial change, or the ultimate tenants find the limitations so confining, that the project collapses, leaving the land burdened with the covenants.

So far, your proof includes the applicant, his prospective user, the neighbors who do not object, the banker, the realtor-appraiser, the planner, the traffic expert. In your argument to the Planning Commission you would think it unnecessary to caution against implications that they are total morons if the application is not granted; however, one otherwise experienced lawyer used the phrase, "If my twelve year old boy could not grant this case, I would whip him."

Now if your client is the aggrieved citizen who is about to be imposed upon by someone else's request for rezoning, reverse the above procedure. Please, "just the facts, m'am" – no heroics; although a tiny tear on a pretty face is a potent witness. Lack of original error or no substantial change in the neighborhood become questions of fact and may the best marshaller of facts win.

Bear in mind that your first hearing, if there is a Planning Commission, is before that body seeking its affirmative recommendation to the legislative body. Since zoning is universally held to be an undelegable legislative function, you will ultimately have your day in court, before the municipal legislative body, either with or without the "Good Housekeeping Approval" of the recommendation of the Planning Commission. The question rightly arises, shall I make all this testimony before the Planning Commission when I must ultimately make it again before the legislative body and especially when my appeal to the courts is from the action of the municipal legislative body, not that of the Planning Commission. The answer is, be prepared to make it twice. If it is good enough before the Planning Commission, it may appear so plausible the other side may drop out. It was once said of the great lawyer Rufus Choate, "He always seems to be on the right side of every lawsuit." Make your side "the right side."

A judicious planting of the seed that anyone opposing your client's proposal is standing in the way of progress and is an enemy of local growth may be as helpful as the idea that if they too go along with the proposal great things can happen economically to the whole area,

including the objector's property. It is a joy to see the skilled advocate in the role of "The Sower."

A tempting argument, but of small legal import, is that if Blackacre is rezoned in the middle of a residential zone, the Little Gem Manufacturing Company will come to town (or call off a threatened move, as the case may be) with resulting increase in tax revenue and additional payroll to bolster the local economy. Unless such rezoning is consonant with the Comprehensive Plan it should be denied or the Comprehensive Plan have a major overhaul.

Having survived (we hope) the public hearing before the Planning Commission, you must now undergo a repeat performance, this time (if not before) with a court reporter to make your record. It does not seem practical to rely on members of a legislative body to read a cold transcript. Appeal is from the action of the legislative body, with the recommendation of the Planning Commission and its exhibits and testimony before it (if preserved), together with the testimony as adduced at the hearing before the legislative body. Appeal is by common law certiorari, on the record, not *de novo*, the courts having declined to become super zoning boards with intimate knowledge of zoning conditions throughout the State. See *Brooks v. City of Memphis*;[12] *City of Memphis v. Sherwood Building Corp.*,[13] and, of course, *Hoover Motor Express Co. v. Railroad and Public Utilities Comm.*[14]

Now that we have "had the course" on the pros and cons of rezoning, let us go back and say that when your client first came in you should have considered, on his facts, whether the relief he sought could or should be obtained by either a *variation* or *exception* before the Board of Adjustment or Board of Zoning Appeals. What is that? Well, if you are going to take cases like these – and they just involve property rights and the resulting money – you had better "lend an ear." In a normal twice-monthly meeting of the joint Memphis-Shelby County Planning Commission, property uses, including subdivisions and re-subdivisions, involving $50,000,000 in value is a routine day. Both the City of Memphis and Shelby County assign a member of its legal staff to aid the Memphis-Shelby County Planning Commission in the legality of its proceedings as well as those of the separate City and County Boards of Adjustment.

Taking the above separately, *exceptions* are permissive rights, usually itemized, which the Board of Adjustment, or Zoning Appeals, is given

12. 192 Tenn. 371, 241 S.W.2d 432 (1951).
13. 343 S.W.2d 869 (Tenn. 1961).
14. 195 Tenn. 593, 261 S.W.2d 233 (1953).

jurisdiction to grant. These are normally routine in nature, such as extending a district a limited number of feet to coincide with a property line; grant public utilities or railroads permission to use properties for their purposes in any zone; permit reconstruction of non-conforming uses under certain conditions; permit land in residential districts to be used for off street parking in support of adjoining commercial districts or churches and the like. In each of these cases, the Board may lawfully exact conditions, such as dedication of additional right of way; erection of fences; control of lighting of parking lots and other similar precautions to preserve the character of the neighborhood and protect existing property rights. Again, these are permissive discretionary rights granted to the board by the municipal legislative body (under its charter by statutory delegation from the State via the Legislature) from which appeal lies to the courts by certiorari, without the intervening step of hearing and ordinance change by the municipal legislative body, as is in the case of rezoning. An interesting argument is that the power given the Board of Adjustment is, in fact, a delegation of the zoning power. If so, it is under such limitations and controls as to meet the test in the delegation-to-boards cases.

Variation — Technically, variations are limited to adjustment of permissive front, side or rear yard requirements when the topography justifies it, and the second, the Mother Hubbard, is the "hardship case." Again, Mr. Lawyer, the board's attorney has long since schooled them on the difference between a "convenience" for your client and "a practical difficulty or hardship" within the meaning of the ordinance. A self-made "hardship" is no hardship. The purchase or conditional purchase of a tract for a prohibited purpose in expectation of a variation could hardly be classed as a hardship, yet many able lawyers seem to have difficulty in recognizing this. The fact that the owner has now grown old and needs the revenue from a commercial use on his residential lot is not a hardship but represents a convenience. To grant the request would be piecemeal zoning under the ordinance or zoning erosion which is universally held to be the antithesis of comprehensive zoning.

Along with consideration of practice pro and con on rezonings, then of Board of Adjustment cases, an examination of your ordinance may disclose that what you seek along with several other uses may be granted as "special permits", either by the legislative bodies after hearing and recommendations of the planning commission, or as an exception by the Board of Adjustment, as the specific ordinance may provide. Under this category are such uses as doctors' clinics, hospitals, dormitories for students, bus and motor freight terminals, regardless of zone. Being

treated as exceptions or special permits, they do not vary the basic zoning and may be conditioned with additional set backs, screening, dedication for widening of streets, limitation in time, or the like, as may be deemed advisable to protect the established character of the neighborhood.

Two other matters deserve mention at this point. First, be familiar with the word non-conforming, either as to use of land or structures. This relates to a lawful use in existence at the time the land on which it stands was rezoned to a higher and more restricted category. Ordinances vary in treatment of these. Some permit them to continue in use and as structures but forbid their expansion, with the right to the Board of Adjustment to vary this stringent rule for good cause shown. Obviously, it is intended that the use ultimately terminate and become conforming. Other ordinances limit the time non-conforming uses may be continued and set up a time schedule on structures related to the depreciation tables acceptable to the Internal Revenue Service. Not the word *lawful.* If your client got into business by "accident" in a residential zone, that is, he is in business but by law has no business being there, then he can not claim to be a non-conforming use, entitled to remain, because he is there illegally in the first place.

Secondly, approval of subdivisions as a planning function is a great aid to the orderly growth of an area. Usually a recommendation of the Planning Commission is required before approval by the Legislative body. A great source of friction comes from the "wild cat subdivisions — the deeding off by metes and bounds of small tracts without regard to the Plan of the Community, the requirements for streets, curbs, gutters, sidewalks and other amenities. When this occurs next to a growing community, as soon as the area is incorporated, lot sizes are found out of keeping, streets, curbs, and gutters are sub-standard or non-existent, and when the parcel has changed hands two or three times, it is virtually impossible to hold the subsequent owners responsible. As a result, the taxpayers of the community must condemn and pay for the road widening and paving, the curb gutters and sidewalks to make this single lot conform with the neighborhood. Had there been compliance by the original owner, he would have borne these expenses to offset his capital gain. Unfortunately, the law puts the burden on the County Register to refuse to record the deeds as the only penalty. These gentlemen often feel that they have neither the time nor facilities to pass on such matters and the deeds go to record notwithstanding. Ordinances with strong provisions for issuing only one building permit for a main structure on a single ownership lot and with requirements for certificates of occupancy help in some degree, but usually the deed severance has taken place.

A mention of the Mapped Street Law, so badly misunderstood in many places, is germane to this discussion. With it, the integrity of the Major and Secondary Street Plan can be preserved. The Mapped Street Law merely states that once a Mapped Street Plan has been adopted, new uses of property in its path are limited to temporary types and those requiring little or no construction, intending, of course, to limit the ultimate cost to the public of acquiring the land. There is a standard provision that if the owner has a bonafide sale or use that conflicts, the municipality must at that time purchase by negotiation or condemnation, or failing that grant the owner permission to build or use as he sees fit. It serves as a warning to owners as to the future destiny of their property yet deprives him of nothing, except after compensation.

In conclusion, this writer's observations are as follows:

(1) Planning provides a guide for the orderly growth of communities. (2) It finds facts upon which those charged with municipal leadership may base their decisions. (3) Zoning matters should be given the professional attention they deserve in preparation, presentation and compensation. (4) Those undertaking zoning matters must become intimately familiar with the particular ordinance involved. (5) Care should be taken in filing applications as to type relief sought and body with whom filed. (6) Zoning adapts itself readily to demonstrative evidence. (7) Emotional appeals are a poor substitute for factual testimony.

CONDEMNATION — APPEAL FROM AWARD OF JURY OF VIEW

By Will Allen Wilkerson*

In order to appeal from an award of the Jury of View it is only necessary to file an appeal and bond for costs. This is all the statute[1] requires and the courts can add nothing to the statutory requirements.

There are some cases which make the point blank statement that exceptions to the report of the Jury of View and an order granting an appeal are prerequisite to an appeal from the award of the Jury of View.

For instance, in *Officer v. East Tennessee Natural Gas Company*,[2] the court says:

> We think it is clear from our cases that an appeal cannot be perfected until the jury of view has filed its report with the Clerk and a court is in session to pass upon "exceptions" and grant an appeal. In Baker vs. Rose, 165 Tenn. 543, 56 S.W. (2d) 732, 733, it was said: "We think there is nothing in the statutes regulating the procedure in condemnation suits which would require either party, dissatisfied with the report of the jury of view filed out of term time, to take any action with respect thereto, either by filing exceptions or by praying an appeal, until such action can be had in open court."
>
> Exceptions to the report of the jury of view as a general rule go to some irregularity in the proceedings, such as the right of the condemnor to a writ of inquiry, misconduct of the jury, or when the award is erroneous on its face or founded upon erroneous principles. Pound v. Fowler, 175 Tenn. 220, 133 S.W. (2d) 486. All such exceptions should be made at the first term of court following the filing of the report and are questions solely for the court's consideration and determination. This is the better practice in order to provide a prompt disposition of all purely legal questions and clear the way for a trial de novo by a jury upon the sole remaining issue as to just compensation. Overton County R. Co. vs. Eldridge, 118 Tenn. 79, 98 S.W. 1051.

A careful consideration of what the court is talking about is some irregularity in the Jury of View proceedings which would justify setting aside the award and appointing a new Jury of View. It does not relate to a situation where the sole complaint is about the amount of the award.

In the very next paragraph the court cites the case of *State ex rel. v. Oliver*[3] which expressly disapproves the statement of the Court in *Baker v. Rose*,[4] which is cited in the foregoing quotation. The court

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1. Tenn. Code Ann. §23-1418 (1956).
2. 192 Tenn. 184, 189 S.W.2d 999 (1951).
3. 167 Tenn. 154, 67 S.W.2d 146 (1933).
4. 165 Tenn. 543, 56 S.W.2d 732 (1932).

cited and relied upon both the *Baker* and *Oliver* cases. They both cannot be right if they are talking about the same thing.

Further, in the *Officer* case,[5] the court says:

> In concluding the opinion upon this question it was said: "In 2 Lewis, Eminent Domain, 789, it is said the statute authorizing appeals from the report of the jury of view must be construed in favor of the right of trial de novo before the court and jury, and, when the right of appeal is given by statute, no conditions can be imposed, except those prescribed by statute. Our statute prescribes no condition, and the courts can impose none to defeat the right of a trial de novo on the question of damages after a timely appeal unattended by fact or circumstance indicating defendants' intention to waive the right."

In fact, in the *Officer* case itself, the petitioner had only just appealed. There had been no exceptions and no order granting an appeal. The landowner had not appealed. When the case reached the circuit court for trial the petitioner moved to dismiss its appeal. The landowner objected to this. If the case had not been properly appealed in the first place for lack of exceptions and an order there would have been no question of dismissing the appeal. There simply would have been no appeal. The Tennessee Supreme Court wound up by remanding the case so that the landowner could perfect his appeal from the award of the Jury of View.

In *Pound v. Fowler*,[6] the court points out that if the only question involved is the amount of the award of the Jury of View that exceptions to the report are not proper, but that only an appeal should be taken. The court does say that if exceptions are filed only as to the amount of the award and no objection is made thereto, it is all right for the circuit court to act upon the exceptions, thereby extending the time within which to take an appeal. The court states:[7]

> While it was held in Clarksville & H. Turnpike Company v. Atkinson, 33 Tenn. (1 Sneed) 426, that inadequacy of damages afforded ground for exceptions to the report, it was not there considered that the trial judge had no evidence before him upon the question of damages, and could neither increase nor diminish the damages assessed by the jury. He could only appoint another jury of view to re-assess the damages. The exception to the report of the jury in this case was directed alone to inadequacy of the damages. Inasmuch as plaintiff did not challenge the exception as

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5. Officer v. East Tennessee Natural Gas Company, 192 Tenn. 184, 190, 239 S.W.2d 999 (1951).
6. 175 Tenn. 220, 133 S.W.2d 486 (1939).
7. Pound v. Fowler, 175 Tenn. 220, 225, 133 S.W.2d 486 (1939).

> insufficient, or upon the ground that appeal from the report of the jury of view was the remedy, it was proper for the trial judge to act upon the exception; and there could be no appeal from the verdict of the jury of view until the exceptions were disposed of.

The court also points out that the remedies by exceptions and by appeal are cumulative and successive and that if exceptions are filed there can be no appeal until the exceptions have been acted upon. The court states that exceptions should go to some irregularity or misconduct of the Jury of View. The court observes:[8]

> In 2 Lewis, Eminent Domain, 789, it is said: "The statute authorizing appeals from the report of the jury of view must be construed in favor of the right of trial de novo before the court and jury, and when the right of appeal is given by statute, no conditions can be imposed except those prescribed by statute."
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> This rule finds application here in determining whether the appeal is to be taken within thirty days after the report of the jury of view or within thirty days after disposing of exceptions to the report of the jury. We are of the opinion that the appeal should follow disposition of the exceptions and that the appealing party has thirty days after the exceptions have been disposed of to appeal from the report of the jury of view, as a means of obtaining a trial de novo in the court to which the jury made its report. We think this is necessarily so because the remedies by exceptions and by appeal are cumulative and successive. Baker v. Rose 165 Tenn., 543, 56 S. W. (2d), 732; Overton County Railroad Co. v. Eldridge, 118 Tenn., 79, 98 S. W., 1051. Exceptions to the report of the jury of view as a rule should go to questions of irregularity in the proceedings, misconduct of the jury of view, or when the report is founded upon erroneous principles.

In *State* ex rel. *v. Oliver,*[9] the defendant appealed from the award of the Jury of View and gave bond for costs. No exceptions had been filed and there was no order granting an appeal. The court held that the appeal was properly made; that neither exceptions nor an order granting the appeal was prerequisite to the appeal. The court says:[10]

> The report of the jury was returned by the sheriff, August 27, 1931. Neither party filed exceptions as ground for a new writ of inquiry as might have been done under section 1860, Shannon's Code, but on September 5, 1931, the defendants filed with the clerk of the court a formal prayer for an appeal from the report of the jury of view, and on the same day gave security for costs, as provided by section 1859 of Shannon's Code. This was in conformity with the procedure in such cases. Either party could ex-

8. Pound v. Fowler, 175 Tenn. 220, 224, 133 S.W.2d 486 (1939).
9. 167 Tenn. 155, 67 S.W.2d 146 (1933).
10. State *ex rel* v. Oliver, 167 Tenn. 155, 156, 67 S.W.2d 146 (1933).

cept to the report of the jury of view, and upon sufficient reasons appearing another inquest could be ordered. Upon the coming in of the report of the first or the second jury, either party could, under sections 1860, 1861, Shannon's Code, appeal for a trial de novo before the court and a traverse jury on the question of damages. Sections 3124, 3125, 3126, Code 1932. Mississippi Ry. Co. v. McDonald, 12 Heisk., 54; Tennessee Cent. R. Co. v. Campbell, 109 Tenn., 650, 75 S.W., 1012; Overton County R. Co. v. Eldridge, 118 Tenn., 79, 98 S. W., 1051; Baker v. Rose, 165 Tenn., 547, 56 S. W. (2d), 732.

The defendants' prayer for appeal with bond for costs met the requirement of the statute and put the case on the docket for trial de novo.

On the question of an order granting the appeal the court holds that such order is not necessary, saying:[11]

At the next term it went over under a general order of continuance, and at the June term the petitioner moved to affirm the report of the jury of view upon the ground that no appeal was granted from the report of the jury.

Nothing on the record indicates that defendants waived the right of trial de novo given by section 1861 of Shannon's Code, but on the contrary it is shown that they prayed and perfected an appeal as provided by the statute.

The appeal authorized by section 1861, Shannon's Code, from the report of the jury of view, is not on appeal from one to another tribunal. The jury of view was an agency of the trial court. Its proceedings were under a writ of inquiry from the court. That inquiry is reviewable upon exceptions, and upon appeal. The jury of view could not grant or deny the appeal. It was only necessary for the trial court to recognize compliance with the statute in order to acquire jurisdiction to review its own proceeding. Since no time is provided within which to appeal and file the bond, it was sufficient if done within the first term as held in Baker v. Rose, 165 Tenn., 543, 56 S. W. (2d), 732.

The court distinguishes a contrary statement made in an earlier case as follows:

The statement in Baker v. Rose, 165 Tenn., 543, 56 S. W. (2d), 732, 733, that 'an order of the circuit court granting the appeal was necessary' was not required for a decision of the case. The court held in that case that either party dissatisfied with the report of the jury of view filed out of term could pray an appeal during the term, and failure to pray the appeal before the report was filed was not a waiver of the right to a trial de novo.

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11. State *ex rel* v. Oliver, 167 Tenn. 155, 158, 67 S.W.2d 146 (1933).

In *Baker vs. Rose*[12] an appeal was perfected by a recital in the order on the report of the jury of view that the petitioner appealed, which appeal was granted. The question involved was whether the appeal had been made in time. The court held that it had, and added the comment: "An order of the Circuit Court granting the appeal was necessary."

This statement was specifically rejected by the court in the later case of *State* ex rel. *v. Oliver*,[13] *supra.*

The confusion which has cropped out in the later case did not disturb the court at all in *Overton County Railroad Co. v. Eldridge.*[14] The Court followed the statutory provisions and construed them in the simple manner in which they are written, to wit: exceptions may be made or an appeal taken from the award of the Jury of View, either or both and one is not dependent upon the other. The court says:[15]

> On the other hand, it is insisted on behalf of the defendant company that the filing of exceptions to the report of the jury of view, and the action of the court thereon, at the instance of either party, does not preclude the right of appeal, but exceptions and appeal are concurrent remedies and may be pursued at the same time. We are of the opinion this is the proper construction of sections 1860 and 1861 of Shannon's Code, and that either party is entitled to an appeal, whether exceptions are filed to the report or not.

The statements made in the later cases that exceptions and an order granting an appeal are prerequisite to an appeal from an award of the Jury of View are not sustained by the cases cited, and in fact were not applied by the court in which the statements appear.

The conclusion is that exceptions may be filed to the report of the Jury of View. These exceptions should be directed to some irregularity in the proceeding or misconduct of the jury and not to the amount of the award. If exceptions are filed an appeal may be made after the exceptions are acted upon. An appeal may be taken without making exceptions to the report of the Jury of View and without an order granting the appeal.

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12. 165 Tenn. 543, 56 S.W.2d 732 (1932).
13. 167 Tenn. 154, 67 S.W.2d 146 (1933).
14. 118 Tenn. 79, 98 S.W.2d 1051 (1906).
15. Overton County Railroad Co. v. Eldridge, 118 Tenn. 79, 85, 98 S.W.2d 1051 (1906).

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COMMENTS

CAPITAL PUNISHMENT

I. INTRODUCTION

Capital punishment is a subject steeped in emotions and brewed with uncompromising intensity. The urgency of the issue is accentuated because human beings are being put to death on the assumption that the proponents are on the side of the gods.

In this survey objectivity will govern the treatment. Some of the statements found in the text may appear too general, and therefore extensive footnotes have been added to cover controversial assertions. After the critical reader has investigated these sources for himself, it is hoped that the issues may be viewed in a broader perspective.[1] If it seems that arguments in favor of the abolition of capital punishment are given more authoritative support than the opposing arguments, the only answer is that far more material is available to support this side.[2] This may be explained to some extent by the fact that legal systems in most of the English-speaking nations have incorporated the death penalty. Since the status quo usually assumes the defensive, the burden of proof is placed on those who would change matters.[3] The proportionate amount of literature produced to date indicates that they have vigorously undertaken the burden of abolishing capital punishment.[4]

A. *Background*

Capital punishment is by no means a modern-day phenomenon, and even the most rudimentary knowledge of history calls to mind the fact that it has been carried out with varying degrees of regularity for a myriad of causes. The movement to make a public issue of the death penalty, on the other hand, is of relatively recent origin, dating from

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1. That a change of opinion may take place as a result of such study is attested to by the experience of this writer, as well as by the following statement made by Sir Ernest Gowers, Chairman of the Royal Commission on Capital Punishment: "Before serving on the Royal Commission I, like most other people, had given no great thought to this problem. If I had been asked for my opinion, I should probably have said that I was in favor of the death penalty and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study of the subject gradually dispelled that feeling. In the end I became convinced that the abolitionists were right in their conclusions — though I could not agree with all of their arguments — and that so far from the sentimental approach leading into their camp and the rational one into that of the supporters, it was the other way about." SELLIN, THE DEATH PENALTY: A REP. FOR THE PENAL CODE PROJECT OF THE A.L.I. 82 (1959).
2. KOESTLER, REFLECTIONS ON HANGING 165 (1957).
3. Texas Law Forum, Nov. 2, 1961, p. 1. But see Texas Law Forum, June 27, 1961, p. 6.
4. KOESTLER, REFLECTIONS ON HANGING 165 (1957).

the year 1764, when the Italian Cesare Beccaria composed a *Treatise on Crimes and Punishments.*[5]

At the time Beccaria's work was published, capital punishment was in its heyday in Great Britain. The number of offenses had increased to approximately 220 by the opening of the nineteenth century.[6] Since it was the policy to leave the remains of executed persons exposed to the public view, "gibbeted" carcasses dotted the countryside, forming both a Sunday afternoon entertainment for the citizens of the realm as well as serving for landmarks to guide tourists from other lands.[7]

In the early years of the American colonies, the British tradition was carried out to a lesser degree here than in the mother country.[8] When the colonies secured their independence, some of the newborn jurisdictions enacted measures which sharply curtailed the infliction of capital punishment.[9] States later began to abolish it altogether.[10] Michigan abolished the death penalty in 1847 for all crimes except treason, and no one has been executed for that crime since the passage of the abolition bill. Other states which now have complete or near-complete abolition are: Rhode Island (1852), Wisconsin (1853), Maine (1876), Minnesota (1911), North Dakota (1915), Alaska (1957), Hawaii (1957), and Delaware (1958). Nine states, then, can be considered as abolition states at present. Several other states have abolished capital punishment for short periods of time.

The international scene should also be examined briefly. The immediate effect of Beccaria's book was to instigate reforms in the torturous methods used to inflict death, but in 1787 Austria became the first nation to abolish death itself as a form of punishment.[11] Today the following countries do not include capital punishment in their legal system: Argentina, Austria, Belgium, Brazil, Colombia, Costa Rica, Denmark, Ecuador, Finland, Greenland, West Germany, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Uruguay, and Venezuela.[12] Germany and Italy reinstated capital punishment during the dictatorships of Hitler and Mussolini, but abolished it again after World War II.[13] Russia has been numbered among

5. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW 54 (1942).
6. 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, p. 4 (1948).
7. 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, p. 213 (1948).
8. 25 FED. PROB. 16 (1961).
9. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 3 (1961).
10. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 27 (1961).
11. 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, p. 291 (1948).
12. BULL. INT. COMM. JURISTS, Nov., 1961, p. 63.
13. DUFF, A NEW HANDBOOK ON HANGING 8 (1954).

abolitionist nations from time to time, but current developments there allow for application of the death penalty, especially for those crimes described as "political."[14]

As for the various methods applied in the past to bring about death, the subject is too broad for this survey.[15] Currently, however, we may look abroad to observe hanging in Britain, the guillotine in France, and garroting in Spain. If the United States can be said to have a characteristic method of inflicting death through the state, it must be that of electrocution, although 11 states employ lethal gas, 6 states hanging, and Utah offers the unique courtesy of giving the condemned prisoner his choice of hanging or shooting.[16]

B. *Dogma*

Thorsten Sellin, who has compiled a noteworthy study of the death penalty for the American Law Institute, divides the two major branches of controversy into the convenient categories of dogma and utilitarian arguments.[17] Although this survey does not propose any feasible solution to the problem in terms of subjective methods of thinking, a word about "dogma" is in order at this point.

The most frequent arguments brought forth either for or against capital punishment hinge around religion,[18] and for this reason a number of Scripture references are noted herein.[19] It is interesting to note that most of the various religious denominations in this country have taken public stands in favor of abolition.[20] The only major group which has not done so is the Roman Catholic Church, and although an official position is absent, there are able Catholic spokesmen in favor of retention, and others advocating abolition.[21]

Much controversy is centered upon the right of the state to take the life of a human being.[22] While some attempt to draw an analogy

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14. BULL. INT. COMM. JURISTS, Nov., 1961, p. 55.
15. See LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 220 (1960).
16. HANSEN, THE WORLD ALMANAC 311 (1962).
17. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 26 (1959).
18. 284 ANNALS AM. ACAD. POL. & SOC. SCI. 16 (1952).
19. *Genesis* 9:6; *Romans* 12:19; *Revelation* 13:10; *Matthew* 7:1; *Leviticus* 24:17; *Genesis* 4:15; *Exodus* 21:24; *Matthew* 5:38-39; *Leviticus* 20:10; *John* 8:7. For an example of the extremes to which Bible quotations have been carried as a justification for capital punishment see COKE, INSTITUTES 211 (1797), where Lord Coke seeks Scriptural support for drawing, hanging, bowelling, cutting the victim's heart out while alive, beheading, and hanging the remains of the quartered corpse in public places to serve as a warning to others.
20. Good Housekeeping, Aug., 1960, p. 158.
21. PA. GEN. ASS., REP., OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 8 (1961); 6 CATHOLIC LAW. 279 (1960).
22. For both sides of this issue see Texas Law Forum, June 27, 1961, p. 1 and Texas Law Forum, Nov. 2, 1961, p. 1.

to self-defense, others point to the inherent inability of man to judge his fellows with justice.

Both parties to the argument accuse the other of being overly sympathetic. Whereas the advocates of capital punishment ridicule the tears of the abolitionists for the plight of the condemned to the exclusion of the suffering of the victim and his family, their opponents claim that it is actually those who favor retention who are overburdened with misplaced sympathy, since they give evidence of this by lavishing favors upon murderers who happen to be rich or white or of the female sex.[23]

Public opinion merits a cursory glance here also, but this is indeed the most elusive of yardsticks. Polls can be found giving either side the *vox populi*;[24] the only positive fact to be gathered from the aggregate is that there has been a gradual shifting of opinion in this country toward abolition.

II. The Argument

A. *Deterrence*

Most of the utilitarian controversy concerning capital punishment oscillates around the issue of deterrence. Stated simply the question can be phrased as follows: Is the death penalty the most effective deterrent to the commission of capital crimes? Many of those favoring retention of capital punishment believe that death imposed for any reason, even as a legal function of the state, is to be regretted, but find justification in its unique value as a deterrent. Conversely, although many abolitionists admit to the right of the state to impose death upon lawbreakers if the people as a whole are benefited, they hold that the deterrent effect of capital punishment is nothing more than myth accompanied by ritualistic sacrifices.

Common sense, argue those favoring retention of the death penalty, is convincing evidence that the fear of death is the most effective deterrent. Isolated cases can be produced where a robber carried no

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23. See Footnote 1 *supra*.

24. McClellan, Capital Punishment 93 (1961); Sellin, The Death Penalty: A Rep. for the Model Penal Code Project of the A.L.I. 13 (1959). The Tennessee Supreme Court reflected public opinion in the recent case of *State v. Bomar*, 354 S.W.2d 763 (Tenn. 1962), where the court stated at page 766 with reference to rape: "In addition to its denouncement by the moral law, it has also been established as a crime by statute in every State in the Union *and in most of them the conviction therefore permits the infliction of the death penalty.*" (Emphasis added.) The italicized portion of this statement is not in accord with a recent Ohio legislative study which revealed that only nineteen of the fifty states have a provision for the punishment of death in connection with rape. See Ohio Leg. Serv. Comm., Capital Punishment 17 (1961).

weapon to the scene of the crime in order that he not be tempted to use it in making his escape; where a criminal has submitted to arrest rather than resist with a weapon; or where a criminal has moved to an abolition state in order to carry out a capital crime.[25] "Common nonsense!" say opponents of the death penalty, because isolated instances can also be cited to prove that the death penalty is encouraging capital crimes. Thus, psychologists suggest that the death-wish is an equally dominant factor in the human mind as is the instinct for self-preservation,[26] and there have been cases of criminals murdering solely because they were afraid of committing suicide, in which situation they decided to let the state overcome this fear.[27]

Turning from isolated examples, because of the tendency of each case to become offset by another, we arrive at an examination of statistics. Although statistics often form a distorted image of the true situation,[28] on the whole they seem to offer a more accurate criterion for rooting out the truth than does expert opinion. If the contention that the fear of death is a unique deterrent can be borne out by statistics, it should follow that abolition of the death penalty would be met by an increase in the number of crimes in proportion to population. To draw an analogy, suppose half of a group of children were inoculated with a certain vaccine reputed to make them immune to a certain disease, and the other half were not.[29] If the former group did not contract the disease and the second group did, it would be plausible to conclude that the vaccine had a deterrent effect on the disease. If, on the other hand, more of those vaccinated contracted the disease than did those not vaccinated, one might say that the vaccine had little effect on curbing the disease, and some would even be tempted to conclude that the vaccinated children became more susceptible as a result of the treatment.

It is a fact that the abolition states generally have lower per capita homicide rates than the death-penalty states.[30] For the past 20 years, five out of the eight states in this country with the lowest murder rates

25. 51 J. CRIM. L., C. & P.S. 253 (1960).
26. WEIHOFEN, THE URGE TO PUNISH 154 (1956).
27. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 338 (1953).
28. An argument frequently heard is that the statistics include only those who were *not* deterred by capital punishment, neglecting those who were in fact deterred. The fallacy in this line of thought is that it assumes capital punishment states to be more barbarous than abolition states, a self-incriminatory confession which has been discredited by Dr. Sellin's comparison of homicide rates in states with similar cultures. See SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 26 (1959).
29. 6 CATHOLIC LAW. 276 (1960).
30. 284 ANNALS AM. ACAD. POL. & SOC. SCI. 57 (1952).

were abolition states.[31] At the other end of the spectrum is Georgia, a state which has the highest homicide rate in the nation despite the fact that it also has the highest execution rate. Some may attempt to point out a fallacy here in that the abolition states may have higher levels of culture than the national average. Dr. Sellin took this into account in his survey, however, and interesting results emerged.[32] The charts illustrating the similarity of homicide rates in both capital punishment and abolition states cannot be reproduced here, but the footnote source provides a graphic example of the fact that in areas of homogeneous cultures the presence or absence of the death penalty has no effect on the number of homicides per capita.

If we are to assume that capital punishment exerts a deterrent effect, we should assume, not only that capital crimes would increase after abolition, but consequently that they would decrease with the re-establishment of the death penalty. In Great Britain a bill was introduced in the House of Commons to suspend capital punishment for five years to test the validity of this claim.[33] The bill passed by a slender majority in this house, and during the eighteen-month interval before the bill was submitted to the House of Lords, all those sentenced to death in England and all those awaiting execution were reprieved. Although the measure failed in the House of Lords, a brief test period was provided by the reprieves granted during the above period. The following figures may be of interest: During the 18 months before the suspension of the death penalty there were 256 murders in England. This number was reduced to 246 during the abolition period, yet rose again to 310 during the 18 months following failure of the bill to gain approval of the Lords and the subsequent reinstitution of the death penalty.[34]

In addition to the evidence available from the English experience, nine states in this country offer themselves as proving grounds for the contention that the abolition or reinstitution of the death penalty will give rise to an increase or decrease in the relative amount of capital crime.[35] One writer investigated the available homicide statistics in these states before, during, and after abolition. In only two of the nine states did the homicide rates show a downward trend during the years

31. WEIHOFEN, THE URGE TO PUNISH 149 (1956).
32. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 26 (1959).
33. CAN. B. REV. 488 (1954).
34. *Good Housekeeping*, Aug., 1960, p. 157.
35. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 34 (1959).

following reinstatement of the death penalty. This may have been due to the general rise of crime across the nation during the Prohibition period, but the fact that reinstitution of capital punishment penalties did nothing to curb this increase of violence points once again to the finding that criminals seem to pay little heed to the threat of death.

It may be of interest to some readers that Tennessee was one of the nine states that experimented with abolition of the death penalty, abolishing it in 1915 for murder and restoring it in 1919. In 1922 the attorney-general offered the explanation that the death penalty was placed on the statute books once again as a result of a "reign of crimes of the most heinous nature," which brought public pressure to bear on the legislature.[36] This observer evidently overlooked the fact that the murder rate continued to rise after the legislature's action and, ironically, was on the increase at the time the statement was made.[37] Another fact that the attorney-general might have been hard-pressed to explain was that the statute which abolished capital punishment for murder retained it for rape; yet the proportionate number of rapes continued to rise in face of the threat of death.[38]

Some advocates of abolition admit that the deterrent effect might be hindered because executions are now carried out behind prison walls in order not to offend the public; some even suggest that the horrors of executions should be widely publicized to achieve the maximum deterrent effect.[39] Only in recent years, however, have condemned criminals enjoyed this privacy, and we only need turn back the clock to the past century in England to observe what effect publicity might have on prevention of crime. In one prison in the latter part of that era, 164 of the 167 men awaiting execution had witnessed at least one execution, but the scene obviously failed to impress them.[40] Shortly before that time pickpockets were hanged for their heinous trespass against the state; yet historians tell us that pickpockets reaped their largest rewards from the pockets of the spectators assembled to watch the death agonies of a less fortunate comrade on the gallows.[41] Probably the most ironic argument against the deterrent effect of the death

36. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 374 (1953).

37. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 37 (1959).

38. SCROGGS, CAPITAL PUNISHMENT: SHOULD IT BE ABOLISHED? 22 (1926).

39. DUFF, A NEW HANDBOOK ON HANGING 45 (1954); CAMUS, REFLECTIONS ON THE GUILLOTINE 9 2d ed. (1960).

40. KOESTLER, REFLECTIONS ON HANGING 53 (1957).

41. 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, p. 178 (1948).

penalty is presented by the fact that hangmen have tasted the punishment which they themselves so often inflicted.[42]

Granting that public executions are relics of a more barbarous age, many argue that a greater frequency of executions would give the potential criminal something to think about, suggesting that even though he does not see executions being carried out in public view lurking in the back of his mind will be the knowledge that death is a certainty if he commits a proposed crime. At first glance there seems to be some validity to this contention, for at present the odds of escaping death as a punishment for capital crimes range from 50-1[43] to as high as 100-1.[44] Actually, the criminal faces a greater risk of being killed during the commission of the crime than after apprehension and conviction. Between 1934 and 1954, for instance, Chicago police and private citizens killed 320 criminals before arrest, while only 45 were sent to the electric chair in Cook County during the same period.[45] A British writer has likened the execution of a murderer in the United States to an "Act of God."[46]

Both executions and homicides have been on the decrease in this country during the past few decades, despite the increase in population. During the Thirties, there were 167 executions per year as an average; in the Fifties the average was 72 per year.[47] The number of homicides each year has decreased over 50 per cent since the Roaring Twenties.[48] Perhaps the mere passing of time has been responsible for this fortuitous change, for surely it cannot be attributed to the frequency of application of the death penalty. One study has disclosed that, taking into account the general decrease in the homicide rate in the United States, the rate following high-execution years is not proportionately decreased, nor is it increased after low-execution years; the contrary is true.[49]

In England the Royal Commission on Capital Punishment carried on an exhaustive study of many aspects of the problem for four years. That body came to the conclusion that, although capital punishment has some deterrent effect and that no punishment at all would not be feasible, the relation between homicide rates and the death penalty

42. DUFF, A NEW HANDBOOK ON HANGING 73 (1954).
43. 42 A.B.A.J. 115 (1956).
44. A.B.A. PROCEEDINGS, SECTION OF CRIMINAL LAW 6 (1959).
45. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 62 (1959).
46. DUFF, A NEW HANDBOOK ON HANGING 50 (1954).
47. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 29 (1961).
48. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 29 (1961).
49. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 365 (1953).

cannot be discerned.[50] In view of this a respected man of letters has proposed that such a final punishment as death should not be administered on the mere possibility that it is more effective as a deterrent than some alternative method of punishment.[51]

B. *Discrimination*

It has been alleged that the maxim of "equal justice under the law" is often ignored in the application of capital punishment to offenders against society. Some groups, notably the impoverished, minority racial groups, and members of the male sex, seem to carry the burden imposed by those determined to put certain classes of offenders to death for their crimes. Since Beccaria argued as far back as 1764 that death should not be meted out according to the social rank of the offender, this problem merits some consideration in the light of modern-day events.[52]

Statistics as to discrimination on the basis of wealth could not be found by this writer, but a man who has witnessed many executions, Warden Lawes of Sing-Sing, has stated that a person of means rarely reaches the electric chair.[53] This is probably due to the fact that court-appointed counsel are not able to compete with private defense lawyers in the court room, or that wealth has some degree of influence in obtaining executive clemency if the well-paid lawyer fails his client in court.[54]

Women have found favor with the courts in respect to their dower rights, and it appears that they find no less favor when they happen to be filling the role of murderess rather than widow. Between 1930 and 1960, for example, of the 3,724 persons put to death for crimes, only 31 out of that total were women.[55] To give a truer picture of the situation, although women commit 1 out of every 7 murders in this country, only one woman is executed each year as compared to 47 men.[56]

The area in which most of the discrimination controversy centers is the field of race relations. Outside the armed forces there were 3,568 executions in the United States between 1930 and 1957. Over half of this number involved non-whites.[57] The South executed more than

50. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 24 (1953).
51. CAMUS, REFLECTIONS ON THE GUILLOTINE 20 (2d ed. 1960).
52. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW 61 (1942).
53. 6 CATHOLIC LAW. 276 (1960).
54. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 63 (1961).
55. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 15 (1961).
56. Good Housekeeping, August, 1960, p. 155.
57. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 5 (1959).

twice as many Negroes as whites during this period; Tennessee, for instance, put to death 44 Negroes and only 22 Caucasians. These figures may be not surprising if more capital crimes are committed by minority racial groups. Thus Tennessee has a homicide rate of 7.1 per 100,000 population for whites compared with 61.5 for Negroes, slanting the proportion of executions in favor of the Negro rather than against him.[58] On the other hand, a broader survey of Southern states indicated that 20 out of the 23 persons awaiting execution were Negroes giving members of that race a lion's share of retribution.[59] It has been suggested that the living conditions imposed upon Negroes in the South may be responsible for a high rate of violence among them, since Northern states do not seem to have an unduly high rate of crime among this group.[60] One critic has observed that society usually gets those criminals it deserves.[61]

That it is easier to convict a Negro of a capital crime has been presented as an argument. The nation was granted an opportunity in 1959 to observe the workings of crime and punishment in Alabama, where a Negro named Jimmie Wilson was convicted of robbing an elderly white woman of $1.95 and sentenced to die for his crime, robbery being punishable in that state by death.[62] He was convicted on the basis of the prosecutrix's testimony, which was in direct conflict with his testimony, and the defense appealed on the ground that the trial judge had permitted the elderly woman to say that the defendant tried to ravish her. This rather inflammatory remark may be of dubious accuracy in light of the age difference between the prosecutrix and the middle-aged defendant, and it was a matter foreign to the issue at bar at any rate. The appellate court refused to rule that the jury had been prejudiced against the defendant by such testimony. Jimmie Wilson was saved from death only by a flood of letters which induced the governor to commute the sentence after the incident had received nation-wide publicity.[63]

Convicted Caucasians seem to fare better than Negroes out of the courtroom as well as within. Among the 439 prisoners in death row in Pennsylvania between 1914 and 1958, whites were given commutations three times as often as Negroes.[64] Ohio has produced similar statis-

58. 284 ANNALS AM. ACAD. POL. & SOC. SCI. 5 (1952).
59. Nation, March 10, 1956, p. 195.
60. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 63 (1961).
61. CAMUS, REFLECTIONS ON THE GUILLOTINE 31 (2d ed. 1960).
62. Time, Sept. 1, 1958, p. 9.
63. Christian Century, March 18, 1959, p. 322.
64. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 15 (1961).

tics.[65] We might be afforded a more objective view of the problem of executive clemency if we were to examine a situation removed from the prejudicial connotations that racial issues hold for us in this country. Australia has an interesting history of the effect of politics on the reprieve of a condemned prisoner.[66] Two of the six states in that country are abolitionist, but the other four are supposedly capital punishment jurisdictions. Although the law of these latter states provides for the death penalty, as a practical matter execution depends upon which political party is in power – the Labour Party favoring abolition and the other two parties favoring hanging in appropriate circumstances. One commentator remarked that "few citizens so carefully study the political scene in Australia as condemned murderers in these states."

The crime in which racial discrimination is a particular element is rape, a crime punished by death in practice only in the Southern states.[67] Whatever the reason for retention of this crime as a capital offense in that region, its application has given rise to accusations of its use as an anti-Negro measure. One twenty-four year study of seven Southern states revealed that 78 Negroes had been put to death for this crime as opposed to no whites.[68] A more comprehensive study of the South from 1930 to 1960 showed that only 42 of the 434 men executed for rape were members of the Caucasian race, and in the states of Florida, Louisiana, Mississippi, and Virginia a total of 90 rapists were executed – all Negro.[69]

The latter of these states presents an interesting case in point. In 1950 the Martinsville Rape Cases attracted considerable publicity to this small Virginia town. The NAACP took up the cause of the seven Negroes convicted of ravishing a white woman and sentenced to death. Those convicted admitted their guilt, but one case was appealed on the ground that the Commonwealth of Virginia had a policy of applying the death penalty for this crime only to Negroes, and that this discrimination was unconstitutional. In *Hampton v. Commonwealth*[70] the Virginia Supreme Court replied: "There is not a scintilla of evidence in the records to support this statement and it is contrary to fact." The court then proceeded to cite two completely irrelevant cases in support

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65. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 63 (1961).
66. 1957 CRIM. L. REV. (London) 397.
67. 25 FED. PROB. 3 (1961).
68. Nation, March 10, 1956, p. 197.
69. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 14 (1961).
70. 190 Va. 531, 58 S.E.2d 288 (1950), *cert. den.* 340 U.S. 914 (1950).

of its statement, and the seven men were summarily put to death.[71] The Virginia court must have held some esoteric information in abeyance when they charged that the statement regarding discrimination was "contrary to fact," for the NAACP brought forward these facts: From 1909 to the time of the *Hampton* decision 42 Negroes had been put to death in Virginia for rape as compared to no whites.[72] The court might have assumed, of course, that white citizens had refrained from this activity in the Old Dominion, but the NAACP had more facts: During the same period 809 whites had indeed been convicted of rape, but none were put to death.

Louisiana has adopted a novel procedure in relation to this crime.[73] If a Negro is apprehended for rape he is indicted for "aggravated rape," a crime punishable by death; a white offender caught in the same circumstances is indicted either for "simple rape" or "carnal knowledge," giving him a chance to escape with only one year of imprisonment if he happens to be convicted. *Time* magazine minced no words when it defined rape as a crime punishable by death involving a Negro in a Southern state.[74]

C. *Mistake*

Lafayette said, "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me."[75] Abolitionists sometimes point to instances where justice has failed.[76] The frequency of these occurences is a matter of conjecture, especially since the incentive to investigate a crime diminishes somewhat after an execution, but it is reasonable to assume that mistakes of justice have been relatively rare in our judicial system. Opponents of the death penalty argue that if there is any chance at all that a mistake could be made, this is good cause to search for another equally effective method of punishment in which such a mistake could be rectified. Death allows no margin for error. It has been suggested that to point out miscarriages of justice is really to avoid the issue, for these mistakes

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71. In Terry v. Commonwealth, 174 Va. 507, 6 S.E.2d 673 (1940), a Negro had been sentenced to life imprisonment for murder, not the death penalty for rape. In the other case, Legions v. Commonwealth, 181 Va. 89, 23 S.E.2d 764 (1943), a Negro had been sentenced to death for raping a white woman, but the factual allegations were so ridiculous that the Virginia Supreme Court freed the defendant in order to avoid a mockery of justice.
72. 284 ANNALS, AM. ACAD. POL. & SOC. SCI. 16 (1952)
73. 284 ANNALS, AM. ACAD. POL. & SOC. SCI. 16 (1952).
74. Time, March 21, 1960, p. 19.
75. KOESTLER, REFLECTIONS ON HANGING 106 (1957).
76. FRANK, NOT GUILTY (1957); KOESTLER REFLECTIONS ON HANGING 105 (1957); and for an intelligent partially-fictional study see BOK, STAR WORMWOOD (1959).

could be remedied by improvements in the machinery of justice. That this is an overly optimistic viewpoint is attested to by Justice Frankfurter, who reminds us that "the history of legal procedure is the history of rejection of reasonable and civilized standards in the administration of law by most eminent judges and leading practitioners."[77]

A more frequent error of justice is the execution of insane persons. It is a familiar precept of jurisprudence that one not legally responsible for his acts should not suffer punishment for the same. The rub occurs when the courts undertake to determine whether a particular defendant is responsible for his act. The standard employed by most courts in this country was first used as a formula in 1840 in the famous *M'Naghten* case,[78] and the M'Naghten Rule has remained unchanged in most jurisdictions since that time, despite the advances in medicine that have taken place over the past century. Basically, the rule places the burden upon the defense to prove that the accused did not know the nature and quality of his act, and if he did that he did not understand it to be wrong. Some jurisdictions have adopted the irresistable impulse test,[79] and the case of *Durham v. United States*[80] at least offers hope that changes in this branch of criminal law are in store; however, the fact remains that most states continue to follow the M'Naghten Rule. Justice Frankfurter ventured to denounce the Rule as a "sham" in his testimony before the Royal Commission,[81] and that body recommended that it be discarded in Britain as a test of legal responsibility.[82]

D. *Brutal Crimes*

One of the most telling arguments in favor of retention of capital punishment is that something must be done to rid society of the brutes who apparently will stop at nothing short of death. Surely the description of a carefully premeditated sex-murder of a small child plays upon the passions of each one of us, and stirs society toward retribution.[83]

Granting that capital punishment will eliminate the individual offender from our midst, yet unless this will serve as a deterrent to future crimes of the same sort his execution can hardly be justified in light of modern criminology, which has rejected the concept of vengeance

77. WEIHOFEN, THE URGE TO PUNISH 154 (1956).
78. 10 Cl. and F. 200, 8 Eng. Rep. 718 (1843).
79. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 105 (1953).
80. 94 App. D.C. 228, 214 F.2d 862 (D.C. Cir. 1954).
81. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 102 (1953).
82. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 275 (1953).
83. One writer has given the screw another turn by suggesting that the urge to punish sex offenders is a manifestation of the sex urge within ourselves. WEIHOFEN, THE URGE TO PUNISH 28 (1956).

in favor of deterrence and rehabilitation.[84] Killing the prisoner will do nothing to assuage the grief of the victim's loved ones — it is too late to prevent that crime. Will his death serve as a warning to others not to do likewise? This question has already been examined in the section dealing with the deterrent effect of the death penalty, but it is emphasized once again in order to illustrate that, although those in favor of retention argue with strident voice that something must be done to curb brutality, there seems to be no evidence that their proposed remedy has effectively solved the problem.

It might be of interest at this point to examine the character of capital criminals as a class to determine what proportion of that group can properly be termed "brutal." The public's view of the murderer is considerably blurred by the coverage given in news media to sensational crimes.[85] That only a small minority of murderers can be classified as professional criminals was brought out by the Royal Commission, which estimated that between 1900 and 1949 in England only 20 per cent, at most, of the murders committed involved professional criminals.[86] Another study has revealed that 80 to 90 per cent of all murders are committed by either mentally deranged people or those killing in a quarrel, drunken stupor, or as a result of passion.[87] Most of the sex-slayings of infants, it should be pointed out, involve insane people, and an insane person cannot be legally put to death even in a capital-punishment jurisdiction.[88] Perhaps the amateur murderer is a more correct image than the public's conception—the professional thug.

III. The Alternative

A. *Immediate Repercussions*

If it is true that the death penalty serves no better as a deterrent to capital crime than does life imprisonment, it may be worthwhile to consider this alternative. Before continuing, however, one myth must be disposed of. One of the admonitions of those opposing any alternative to the death penalty is that a reign of terror will follow in the footsteps of abolition. To a legal system firmly entrenched in the doctrine of *stare decisis*, the most obvious method of determining the truth or error of such a charge would be to turn to the experience in the past. It was

84. Even Blackstone, who advocated capital punishment, justified his views solely on the principle of deterrence. Ehrlich, Blackstone 734 (1959).
85. Koestler, Reflections on Hanging 145 (1957).
86. Royal Comm. on Capital Punishment, Report 330 (1953).
87. Koestler, Reflections on Hanging 49 (1957).
88. Royal Comm. on Capital Punishment, Report 229 (1953).

in 1810 that Samuel Romilly introduced a bill in Parliament to abolish the death penalty for shoplifting goods valued at five shillings or more.[89] Lord Ellenborough, at that time Chief Justice of the realm, had this to say to the House of Lords as they debated whether to embark on such a revolutionary venture: "My Lords, if we suffer this Bill to pass, we shall not know where to stand; we shall not know whether we are upon our heads or our feet. . . . Repeal this law and see the contrast – no man can trust himself for an hour out of doors without the most alarming apprehensions, that, on his return, every vestige of his property will be swept off by the hardened criminal." This prophecy from the lips of the Chief Justice helped to defeat the bill in the House of Lords, and it was not until 1832, after Romilly's death, that the measure finally met approval of both Houses. Lord Ellenborough's warning has been proved wrong by history and held up to ridicule time and time again. To answer the charge of modern-day Ellenboroughs, it can be countered that the abolition states of this country have somehow escaped a reign of terror and in fact provide more safety for their citizens than do the capital punishment states.

Another objection to abolition is that private vengeance would make itself felt. This seems to be a plausible allegation, but it should be observed that in addition to the fact that law enforcement is somewhat more efficient than it was in the vigilante period of the American West, the South has seen more lynchings in modern times than any other section of the nation, and capital punishment seems to be a regional institution in that area.[90]

B. *Life Sentence*

One of the objections offered to life imprisonment is that condemned murderers will form a discipline problem in prison. All prisoners are discipline problems to some extent or they would not be in prison, but murderers are the best behaved of any class of prisoner.[91] This may of course be because they are relying on good conduct to make them eligible for parole, and that part of the question will be discussed later. Murderers are also as capable of reform as any class of criminals.[92]

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89. KOESTLER, REFLECTIONS ON HANGING 24 (1957).

90. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 83 (1959).

91. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 17 (1961); SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 70 (1959).

92. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 18 (1953).

California has experimented with a model institution at Chino with successful results, although the prisoners are given a relative amount of freedom as the state tries to rehabilitate them.[93] Leyhill in England is a similar project.[94] Unless governments exercise some ingenuity in reforming criminals, a life sentence may indeed be a worse penalty than death, but this is beyond the purview of this discussion since murders are not unique problems in any reform program.[95]

Economic objections have also been raised against life imprisonment as an alternative to the death penalty. One governor has reported that this was one of the two most frequently given reasons for not commuting the death sentence, the other being vengeance.[96] What is the cost of life imprisonment? It has been estimated that a convict must be supported by society at the rate of $1,200 per year;[97] another figure cited is as high as $1,800.[98] This seems to be a considerable sum to devote to the interests of one who has transgressed the laws of society, but protecting the life and liberty of any accused does not come cheap. For instance, murder trials in which a life hangs in the balance may cost the state a large sum: the Chessman trials cost the taxpayers of California an estimated $500,000.[99] Others have argued on the other side of the ledger. It might be noted that a life sentence provides economic advantages as well as disadvantages for the state. Convicts could be placed in critical areas to perform useful labor for the state,[100] or they could even be farmed out on a cooperative system in order to earn wages which could be applied as compensation to the victim's family.[101] This would be a more realistic approach to "paying" for crime than killing the criminal. Once again the solution is found in innovations in our penal system.

C. *Parole*

Criminals sentenced to life imprisonment rarely serve their terms in the entirety. Any consideration of life imprisonment as an alternative to the death penalty, then, entails the question of parole. Penologists feel

93. BOK, STAR WORMWOOD 213 (1959).
94. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 219 (1953).
95. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 18 (1953).
96. A.B.A. PROCEEDINGS, SECTION OF CRIMINAL LAW 6 (1959).
97. Sat. Evening Post, Aug. 31, 1957, p. 148.
98. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 12 (1961).
99. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 12 (1961).
100. SELLIN, THE DEATH PENALTY: A REP. FOR THE MODEL PENAL CODE PROJECT OF THE A.L.I. 18 (1959).
101. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 223 (1953).

that parole is essential as a corollary to life imprisonment, for without it lifers would indeed pose a problem for prison officials. Assuming that reform is the keynote to the prison system today,[102] it appears useless to attempt to reform a person if there is no chance he will ever be sent back into society. As to the length of time that should be served before a lifer becomes eligible for parole, there is a conflict of opinion. In practice some states have found the average to be more than 20 years,[103] but the national average is closer to 10 years.[104] Some authorities have recommended between 10 and 15 years as a maximum,[105] and the Royal Commission heard testimony to the effect that in no event should a person be detained longer than 20 years unless he is found to be incapable of correction, because after that time he deteriorates mentally and physically as a result of his estrangement from society.[106] The Commission pointed out, however, that improved prison conditions might allow extension of this period without harmful effects.

The main objection to parole of any type is that paroled offenders will be a danger to the public. Ohio found, however, that of the 169 first-degree murderers sentenced to life since 1945 only 2 have been sent to the penitentiary for new offenses, one of these being armed robbery and the other assault with intent to commit a felony.[107] Ohio's percentage of success for paroled first-degree murderers is 94.1 per cent, while the average for all other parolees is only 74 per cent. New York found that only 2 of the 36 paroled lifers since 1943 have committed any infractions, one being a technical violation and the other burglary, and most of the 36 were to have been executed had they not received commutations.[108] California found that only 2 parolees out of 270 first-degree murderers were convicted again for homicide, and the success record of this group was 83 per cent, as compared to 50 per cent for all parolees in that state.[109] Wisconsin, an abolition state, returned only one-seventh of the 143 murderers paroled between 1943 and 1958 for any violation, including technical ones; Michigan, another abolition state, boasts of only 4 returnees out of 164 first-degree murderers paroled since 1938, only one of these having committed a new felony,[110] The

102. SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT 193 (1911).
103. PA. GEN. ASS., REP. OF THE JOINT LEG. COMM. ON CAPITAL PUNISHMENT 13 (1961); OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 81 (1961).
104. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 495 (1953).
105. Sat. Evening Post, Aug. 31, 1957, p. 156.
106. ROYAL COMM. ON CAPITAL PUNISHMENT, REPORT 230 (1953).
107. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 81 (1961).
108. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 82 (1961).
109. Sat. Evening Post, Aug. 31, 1957, p. 151.
110. OHIO LEG. SERV. COMM., CAPITAL PUNISHMENT 82 (1961).

Royal Commission made this statement: "The evidence seems conclusive that the release of life-sentence prisoners involves little risk at present."[111]

III. Conclusions

Almost two centuries have passed since Beccaria published his treatise advocating the abolition of capital punishment. The trend throughout the world has been to put his arguments into practice, but the fact remains that three of the great democracies of the West — France, Great Britain, and the United States for the most part — still inflict the penalty of death in the name of the state. Arthur Koestler has compared the argument in favor of the death penalty on the basis of deterrence to a Jack-in-the-box — drawing the analogy that, despite the myriad of facts and statistics compiled to disprove the deterrent value, the traditional beliefs continue to pop up again.[112] It has been rumored in some quarters, however, that the spring in this toy is becoming weaker, and there is even some talk of hiring a man in the name of society to creep up to the box and fasten down the lid, thereby suffocating Jack Ketch.[113]

Donald F. Paine

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111. Royal Comm. on Capital Punishment, Report 229 (1953).
112. Koestler, Reflections on Hanging 6 (1957).
113. Jack Ketch was the official hangman of the realm in England from about 1678 to 1686, and the name has been applied since that time to hangmen in general. Laurence, A History of Capital Punishment 95 (1960).

MALICIOUS PROSECUTION IN TENNESSEE

Freedom from unjustifiable and unreasonable litigation is of primary concern to both the legal profession and the public. Judicial processes are provided for the settling of disputes between parties and for the protection of society from criminal elements, but when these processes are used for a purpose other than the attainment of justice and thereby cause damage to the person wrongfully prosecuted or sued,[1] the courts allow recovery of damages in what is known as a suit for malicious prosecution.

The tort of malicious prosecution of criminal proceedings occurs when one initiates or procures the initiation of criminal proceedings against an innocent person, for an improper purpose and without probable cause, and the proceedings terminate favorably for the person thus prosecuted.[2] These conditions, with reference to malicious prosecution of criminal proceedings, likewise are generally required for the maintenance of an action for the malicious prosecution of civil proceedings. Considerations will be given in this comment to the decisions of the courts of Tennessee with reference to: (1) Want of probable cause; (2) Malice; (3) Commencement and termination of the proceedings.

I. Want of Probable Cause

To maintain an action for malicious prosecution, the plaintiff must show the absence of probable cause for commencing the prosecution, that is, the absence of such facts as would create in a reasonable mind, the belief that the plaintiff was guilty of the offense charged.[3]

A. *Concurrence of Elements*

In order for an action for malicious prosecution to be maintained there must be a concurrence of all of the elements of the action.[4] Thus evidence may show that the plaintiff in the original proceeding was motivated purely by malice in the commencement of the proceedings, yet if he had probable cause to believe that the accused was guilty he is

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1. "In England and a number of American states, no action will lie for the malicious prosecution of an 'ordinary' civil action, that is, one which does not directly affect person or property, but results if successful only in a judgment debt. . . . The contrary rule, however, is in force in a number of states [including Tennessee, see Lipscomb v. Shofner, 96 Tenn. 112, 33 S.W. 818 (1869.)] and has been adopted by the Restatement of Torts." 1 Harper & James, Torts § 4.8 (1956).
2. Swepson v. Davis, 109 Tenn. 99, 70 S.W. 65 (1902).
3. Kendrick v. Cypert, 29 Tenn. 291 (1849).
4. Kelton v. Bevins, 3 Tenn. 90 (1812).

not liable. And while malice may be, and commonly is, inferred from want of probable cause, the converse is not true;[5] want of probable cause can not be inferred simply from malice.

B. *Duty to Make Reasonable Investigation*

To have "probable cause," the instigator of the prosecution must in good faith have believed that the accused was guilty of the crime charged. Furthermore his belief must be reasonable, based on facts and circumstances sufficient to lead an ordinarily prudent person to believe that the accused was guilty of the crime charged. This means that he must have made such an investigation as an ordinarily prudent man would have made under the circumstances.[6] In determining this the jury should consider: (1) the availability of the information;[7] (2) the sources from which information was obtained;[8] (3) the failure to give accused an opportunity to make an explanation; and (4) the danger to the actor in making an investigation.[9]

The fact that the prosecutor is under a duty to make such investigation as a reasonably prudent man would make does not mean that he, at his peril, must correctly ascertain the guilt or innocence of the accused.[10] The question is not whether the accused is actually guilty, but whether reasonable grounds existed for believing him so.[11] Indeed, probable cause may exist even though no crime at all has been committed.[12] If, however, the instigator, prior to the commencement of the proceedings, in his investigation, finds any fact which leads him to believe that the accused is not in fact guilty, then the proceedings, if commenced, are without probable cause.

C. *Mistake of Law*

A mistake of fact, after such an investigation as an ordinarily prudent man would make, does not prevent the existence of probable cause. Many courts, however, hold that a mistake of law does prevent its existence. In that connection, it is said by a standard writer:

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5. Wheeler v. Nesbit, 65 U.S. 544 (1860); Evans v. Thompson, 59 Tenn. 534 (1873); Dunn v. Alabama Oil & Gas Co., 42 Tenn. App. 108, 299 S.W.2d 250 (1956).
6. Citty v. Miller, 1 Tenn. App. 1 (1925); Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W.2d 252 (1949).
7. *Ibid.*
8. F. W. Woolworth Co. v. Connors, 142 Tenn. 678, 222 S.W. 1053 (1920).
9. 1 HARPER & JAMES, TORTS §4.5 (1956).
10. Poster v. Andrews, 183 Tenn. 544, 194 S.W.2d 337 (1946).
11. Raulston v. Jackson, 33 Tenn. 128 (1853).
12. See *supra*, Note 4.

> Some courts have held that a mistake of law, as to whether such conduct amounts to a criminal offense, or to the particular offense charge, cannot protect the instigator of prosecution, apparently upon the antique and questionable theory that he is required at his peril to know the law. For the most part such cases have involved mistakes of law so extreme that they appear unreasonable even for a layman to make. The better view, which is supported by a few decisions, would seem to be that a reasonable mistake of law should stand upon the same footing as a mistake of fact, and will not preclude probable cause.[13]

Apparently, the only Tennessee case dealing with mistake of law is *Hall v. Hawkins*,[14] decided in 1844. In that case the Tennessee Supreme Court followed the former view mentioned above and held mistake of law will preclude probable cause. This may be classed as dicta, however, since the defendant in that case was held not liable on another ground, that is, his act was held not to be malicious.

D. *Advice of Counsel*

One of the most successful defenses to a malicious prosecution action is that the defendant acted on the opinion and advice of counsel. Before a party can rely on this defense, however, he must have sought and acted upon the attorney's advice in good faith.[15] He must have related to the attorney not only all material facts within his knowledge, but all facts which he had reason to believe existed at the time of making the statement and all material facts which he could have ascertained by reasonable diligence.[16]

It was formerly held by the Tennessee courts that advice of counsel was merely evidence of probable cause, and that the defendant failed in his proof unless the opinion of the attorney was warranted.[17] Now, however, the Tennessee courts seem to be in accord with the majority view in holding that the bringing of a suit pursuant to advice of counsel establishes the existence of probable cause and, as a matter of law, results in complete immunity from damages provided the requirement of good faith is fulfilled.[18] Thus the Tennessee court in adopting this rule in *Cooper v. Flemming*,[19] stated:

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13. PROSSER, TORTS 654 (2d ed. 1955); 1 HARPER & JAMES, TORTS §4.5 (1956).
14. Hall v. Hawkins, 24 Tenn. 357 (1884).
15. Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115 (1930).
16. Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115 (1930); Tennessee Valley Iron & R. Co. v. Greeson, 1 Tenn. Civ. App. 369 (Higgins, 1911).
17. Hall v. Hawkins, 24 Tenn. 356 (1844); Kendrick v. Cypert, 29 Tenn. 291 (1849); Cf. Morgan v. Duffy, 94 Tenn. 686, 30 S.W. 735 (1895); 12 TENN. L. REV. 303 (1934).
18. Bry-Block Mercantile Co. v. Proctor, 13 Tenn. App. 45 (1931); Citizens Savings and Loan Corp v. Brown, 16 Tenn. App. 136, 65 S.W.2d 851 (1932).
19. 114 Tenn. 40, 84 S.W. 801 (1904).

> While it is true that the advice of counsel may properly be considered by the jury as tending to rebut the existence of malice, we think the weight of authority is that its fundamental purpose is to establish the existence of probable cause and when said advice has been honestly sought, and all the material facts relating to the case, ascertained or ascertainable by the exercise of due diligence, have been presented to counsel, and a prosecution is commenced in pursuance of such advice, then it is the province of the court to charge the jury, as a matter of law that such advice of counsel entitles the party sued to complete immunity from damages.

It should be noted that this defense has been limited to communication with counsel or attorney, and "should not be extended to magistrates who are not ordinarily learned in the law."[20]

Often an attorney assumes the dual role of the agent investigating the facts and the attorney giving legal advice to bring the prosecution. In such case it is held that the attorney, like his client, must use reasonable diligence and make proper investigation before advising a prosecution. If the attorney fails in this, he is chargeable with knowledge of all the facts he could have learned by such diligence and investigation, and his client is likewise chargeable as a principal for the tort of his agent.[21]

E. *Effect of Result of Original Proceedings*

The disposition of the proceedings upon which the malicious prosecution case is based may have a bearing on the issue of probable cause. For example, in *Memphis Gayoso Gas Co. v. Williamson*,[22] the defendants had obtained in the circuit court an injunction preventing the plaintiffs from manufacturing and selling gas to the City of Memphis. On appeal, this was reversed by the Supreme Court. The plaintiffs then instituted an action for malicious prosecution. The court held that the judgment of a court of competent jurisdiction in favor of the plaintiff below was prima facie evidence of probable cause, even though that judgment later was reversed by a higher court.

Conversely where, upon preliminary hearing, a committing magistrate dismisses a warrant it has been held that this action is *prima facie* evidence of the want of probable cause, throwing on the prosecutor the burden of proof that he had probable cause.[23] However, the fact that

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20. Mauldin v. Ball, 104 Tenn. 597, 58 S.W. 248 (1900).
21. Ernst v. Bennett, 38 Tenn. App. 271, 273 S.W.2d 492 (1954); Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W.2d 252 (1949).
22. 56 Tenn. 314 (1872).
23. Williams v. Norwood, 10 Tenn. 329 (1829); Shelton v. Southern Ry. Co., 255 F. 182 (D.C. Tenn. 1918).

the magistrate does commit the plaintiff for trial is not prima facie evidence of probable cause, since the proceeding of the justice is ex parte examination simply to inquire whether the plaintiff should be put on his trial; it is not a final judgment on the facts.[24]

II. MALICE

The second element in an action of malicious prosecution is "malice". This term may be misleading in that malice does not necessarily mean that the instigator of the prosecution was motivated by hatred or ill will. It is enough that he had instigated the proceedings for any reason other than that of bringing of an offender to justice.

An excellent discussion of the nature of malice in malicious prosecution cases is contained in a charge to a jury which was upheld in *Brewer v. Jacobs*.[25] The court there said:

> The first inquiry you will naturally make is, what does the law mean by malice? The term does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but includes as well conduct injurious to another, though proceeding only from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another, and bent on the attainment of some desired end; such, for example, as the collection of a just debt, without due regard to the lawful rights of that other.

It has been stated previously that malice may be inferred from want of probable cause.[26] This inference, by the overwhelming weight of authority, is one that simply may be made by the jury; ordinarily it will not be made as a matter of law.[27] In an early Tennessee case, *Greer v. Whitfield*,[28] decided in 1879, the trial judge instructed the jury that the law would infer malice from want of probable cause. The Supreme Court, however, held this to be error and stated: "Malice may be inferred by the jury from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should be left to them." In one case, *Nashville Union Stockyards, Inc., v. Grissim*,[29] it was stated by the court that the law would infer malice from the "total absence" of probable cause, but it would seem that here the court was merely

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24. Kendrick v. Cypert, 29 Tenn. 291 (1849).
25. Brewer v. Jacobs, 22 Fed. 217 (W.D. Tenn. 1884).
26. See page 553, section A.
27. 1 HARPER & JAMES, TORTS §4.6 (1956); PROSSER, TORTS 660 (2d ed. 1955); Greer v. Whitfield, 72 Tenn. 85 (1879); Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 155 (1930).
28. Greer v. Whitfield, 72 Tenn. 85 (1879).
29. Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 155 (1930).

applying the established rule of law that when only one conclusion can be reasonably drawn from the facts the court need not submit the question to the jury. More commonly the inference of malice from want of probable cause is rebuttable. So it has been held that evidence which shows that the party acted "*bona fide,* and in the honest discharge of that which he believed to be his duty" will rebut the inference.[30]

The burden of proving malice, as well as want of probable cause, is, of course on the plaintiff.[31] This burden is sustained by the plaintiff when he shows that the defendant's motive in bringing the original suit was improper. Several examples of such proof can be found in the decisions of the Tennessee courts. So in *Thompson v. Schulz*[32] the defendant had instigated proceedings against the plaintiff on a charge of fraudulently misappropriating money which the defendant had intrusted to the plaintiff. On trial of the cause, however, it appeared that defendant's real motive in instigating the proceedings was to force the plaintiff to discharge liens held against defendant's property. The court found from this fact malice could be inferred. A more common example of improper motive from which malice may be inferred is the instigation of criminal proceedings in an attempt to enforce the payment of a debt.[33] A fairly recent example of this is found in *Dunn v. Alabama Oil & Gas Co.*[34] There the defendant and plaintiff entered into negotiations for the sale of a service station, and the defendant presented a bill for certain supplies. Plaintiff paid the bill with a draft drawn on her savings account, but the draft was not honored by the drawee bank because the savings book was not presented. The defendant then went before a General Sessions Court and made an affidavit charging that the plaintiff was guilty of the offense of passing a bad check. The plaintiff was subsequently arrested and brought before the trial judge who informed her that she could be sent to the penitentiary for the offense; whereupon she went to the bank, drew the money from her savings, and paid the draft. Plaintiff brought suit for malicious prosecution alleging that as a result of the proceedings she had suffered emotionally. The trial judge directed a verdict for the defendants, but the court of appeals reversed, stating that the jury could reasonably

30. Hall v. Hawkins, 24 Tenn. 357 (1844).
31. Kelton v. Bevins, 3 Tenn. 90 (1812); Cohen v. Ferguson, 336 S.W.2d 949 (Tenn. App. 1959).
32. Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W.2d 252 (1949).
33. HARPER & JAMES, TORTS §4.6 (1956); Poster v. Andrews, 183 Tenn. 544, 194 S.W.2d 337 (1946); Citizens' Savings & Loan Corp. v. Brown, 16 Tenn. App. 136, 65 S.W.2d 851 (1934).
34. 42 Tenn. App. 108, 299 S.W.2d 25 (1956).

find that the defendant was trying to enforce payment by the plaintiff of her check; that it was for this purpose that he brought and prosecuted the criminal proceeding against her; and that this prosecution of her upon the charge of a felony was without probable cause and with malice. The same inference of malice was permitted in *Lackey v. Metropolitan Life Insurance Co.*[35] There it appeared that the defendant had procured the bringing of disbarment proceedings against the plaintiff for the purpose of forcing the plaintiff-attorney to refrain from bringing suits for policy holders against the defendant-insurance company.

III. Commencement and Termination of Proceedings

A. *Commencement of the Proceedings*

The suit or prosecution upon which the malicious prosecution is brought must have been commenced, and it further must be shown that it was the defendant who caused the suit to be brought,[36] or that he aided, abetted, or actively ratified the prosecution.[37]

If the defendant's acts set in motion the machinery which proximately caused the commencement of the proceeding he is responsible for such commencement.[38] In this connection it may be noted that criminal proceedings can be commenced in one of three ways in Tennessee: (1) arrest on a warrant;[39] (2) arrest without a warrant;[40] and (3) presentment, indictment, or impeachment.[41] If any one of these three actions is proximately caused by the defendant's acts he is responsible.

The mere making of an accusation does not constitute procurement of the proceedings. For example, in the recent case of *Cohen v. Ferguson*,[42] defendant was informed by his employees that the plaintiffs had taken, without paying for it, a tire from a car in the defendant's junk yard. About an hour later the employees reported to the defendant that the same boys had again entered the yard without permission. The defendant then called the police to make an investigation, who upon their arrival saw the plaintiffs trying to remove a bumper from one of the defendant's automobiles. The police then took charge and arrested the plaintiffs. The plaintiffs were prosecuted, and acquitted.

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35. 26 Tenn. App. 564, 174 S.W.2d 575 (1943).
36. Star Service, Inc. v. McCurdy, 36 Tenn. App. 1, 251 S.W.2d 139 (1952).
37. Mauldin v. Ball, 104 Tenn. 597, 58 S.W. 248 (1900).
38. Star Service, Inc. v. McCurdy, 36 Tenn. App. 1, 251 S.W.2d 139 (1952).
39. Tenn. Code Ann. §40-801 (1956); Gilreath, History of a Law Suit §720 (7th ed. 1951).
40. *Ibid.*
41. Tenn. Code Ann. §40-301-302 (1956); Gilreath, History of A Law Suit §722 (7th ed. 1951).
42. 336 S.W.2d 949 (Tenn. App. 1959).

They subsequently brought action for malicious prosecution. The defendant had taken no further part in the official proceedings, did not appear before the grand jury that indicted the plaintiff, and testified only when compelled to do so by subpoena. In reversing the verdict in favor of the plaintiffs and dismissing the suit, the court stated:

> The giving of the information or the making of the accusation, however, does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.

The line between the giving of information and the procurement of proceedings is not, however, always easy to draw. This is brought by comparing *Star Service, Inc. v. McCurdy*[43] with the *Cohen* decision. In the *McCurdy* case the defendant merely reported that an automobile had been stolen from his parking lot, and the plaintiff was subsequently arrested as a result of this report. Evidence introduced on trial showed that plaintiff, after having made up back payments on the car, had a right to take it from the parking lot, and had paid the attendant. Plaintiff then brought suit for malicious prosecution and recovered. In affirming the judgment, the court said:

> It therefore matters not whether defendant directly ordered the arrest, if he set in motion the machinery which proximately caused the arrest; that is, if the arrest was not the act of the officer or other person making the arrest on his own volition.

A distinguishing fact between the two cases may be that in the *Cohen* case the officer saw the plaintiffs trying to remove the bumper from the car in defendant's junk yard, while in the *Star Service* case the arrest was made solely on the basis of the defendant's complaint. The distinction seems a vital one where the defendant's complaint is made without any reasonable basis.

The commencement of an ordinary civil action differs, of course, from the commencement of a criminal proceeding in that a civil action is commenced when the summons is issued with intent on the part of the person starting the suit to continue the action.[44] Therefore, if the acts of the defendant result in the issuance of a summons against the plaintiff the "commencement of the proceedings" requirement of a malicious prosecution action is satisfied. It is not necessary that there have been actual service upon the plaintiff.

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43. 36 Tenn. App. 1, 251 S.W.2d 139 (1952).
44. GILREATH, HISTORY OF A LAW SUIT §§720, 722; 26 TENN. L. REV. 437 (1959).

B. *Termination of the proceedings*

A right of action for malicious prosecution accrues only when it is shown by the original defendant that the prior proceedings have terminated in his favor.[45] In order to show a termination in his favor the plaintiff in the malicious prosecution action must prove that the court passed on the merits of the charge or claim against him under such circumstances as to show his innocence or nonliability, or that the proceedings were terminated or abandoned at the instance of the defendant under circumstances which fairly imply the plaintiff's innocence.[46]

An analysis of the Tennessee cases on the point shows that such termination can come at any time during the original proceeding. For example, in *Tennessee Valley Iron & Railroad Co. v. Greeson*[47] it was held that a failure or refusal of the grand jury to indict, followed by the discharge of the accused, was a sufficient termination of the proceedings to support an action for malicious prosecution. An entry of a *nolle prosequi* may be a sufficient termination in a criminal action. So in *Scheibler v. Steinburg*,[48] the defendant procured the prosecution of the plaintiff on a charge of knowingly receiving stolen property. The court having set the case peremptorily, the attorney general asked leave of the court to enter a *nolle prosequi*. Because of the absence of a witness the request was granted. The plaintiff subsequently brought an action for malicious prosecution. On the issue of termination of proceedings in favor of the original defendant, the court said:

> It would seem that the entry of a *nolle prosequi* would terminate the particular prosecution at whatever stage of the suit it might be entered. We are of the opinion, therefore, that the entry of a *nolle prosequi*, without the procurement of the defendant, is such a termination of the criminal prosecution in defendant's favor as is contemplated by the rule requiring that the original suit be terminated in favor of the plaintiff before he can commence his suit for malicious prosecution.

It is implied in the above statement that if the defendant in the original proceeding had procured the entry of the *nolle prosequi* the termination would not be "in his favor" under the rule. This is in accord with the rule stated above that the termination must be such as would fairly imply the innocence of the defendant in the original proceeding.

As a third mode of termination it has been held that where an

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45. Swepson v. Davis, 109 Tenn. 99, 70 S.W. 65 (1902); C. R. Boyce v. Early-Stratton Co., 10 Tenn. App. 545 (1930); Rosen v. Levy, 120 Tenn. 642, 113 S.W. 1042 (1908).
46. HARPER & JAMES, TORTS §4.4 (1956).
47. 1 Tenn. Civ. App. 369 (Higgins, 1911).
48. 129 Tenn. 614, 167 S.W. 866 (1914).

attorney general makes a fair investigation, requires an affidavit of the defendant, and lays the matter before the trial judge, the defendant's release by agreement of the attorney general and the trial judge is a sufficient termination in his favor.[49]

It should be noted that there can be a technical termination in favor of the plaintiff which is insufficient to support an action for malicious prosecution. For example, it has been held that where a committing magistrate finds sufficient facts to bind the plaintiff over and he is subsequently discharged due to the prosecutor's failure to appear and prosecute, such discharge is not a sufficient termination in favor of the plaintiff.[50] This also falls within the rule that there must be such termination as would fairly imply the innocence of the plaintiff.

One of the cardinal rules with respect to termination is that the court cannot "look behind the judgment of the court in the original proceeding".[51] In other words, if the judgment in the original proceeding was for the plaintiff, the defendant cannot subsequently maintain an action for malicious prosecution even though it later appears that some of the allegations in the original plaintiff's bill or declaration were malicious and without probable cause. This rule applies even though the original judgment may have been reversed on appeal, except, perhaps, where the original conviction was based on perjured testimony.[52]

IV. Conclusion

There are approximately seventy-five reported cases in Tennessee dealing with various aspects of the tort of malicious prosecution, and, for the most part, the law as set forth in these cases is in accord with that of other jurisdictions. The courts are presented with the difficult task of balancing the conflicting public policies involved in this type of litigation. On the one hand it is sought to protect the interest in freedom from unjustifiable and unreasonable litigation, and on the other there is the consideration that those who have been wronged or injured should have free access to the judicial processes to seek redress. Furthermore, it is necessary "that citizens be accorded immunity for *bona fide* efforts to bring antisocial members of society to the bar of justice."[53]

Robert W. Ritchie

49. Martin v. Wahl, 17 Tenn. App. 192, 66 S.W.2d 608 (1933).
50. Pharis v. Lambert, 33 Tenn. 228 (1853).
51. Swepson v. Davis, 109 Tenn. 99, 70 S.W. 65 (1902).
52. *Ibid.*
53. Harper & James, Torts §4.2 (1956).

OBSCENITY LEGISLATION IN TENNESSEE

"Since, therefore, the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely and with less danger scout into the regions of sin and falsity than by reading all manner of tractates and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read."[1] Thus wrote John Milton to the Parliament of England in 1644, responding to an ordinance passed by that body to license the press. While the *Areopagitica* is perhaps the best-known statement denouncing restraints on freedom of speech and press, the history of the struggle for freedom of expression has not yet seen a concluding chapter.[2] There have always been those who seek to impose their judgment on their fellow men, and this is particularly true with regard to manners and morals.

In presenting this survey of current legislation in Tennessee on obscenity,[3] the approach will be from two points. The first section will center on the state obscenity statute in correlation with recent decisions handed down by the United States Supreme Court. Because many suits involving obscenity charges originate under municipal ordinances, the laws governing obscenity in the four metropolitan areas of Tennessee will be discussed as well.

I. The State Statute

A. *The Law*

The law of obscenity in Tennessee revolves around a statute entitled "Obscene books, ballads, film or pictures — Misdemeanor."[4] The title attests to two facts: the statute is a product of a bygone era, as evidenced by the quaintness of the word "ballads," but it contains some modern innovations, as evidenced by the word "film." As a matter of fact the law has been on the statute books of this state since 1858, from which time it was left unchanged for some 100 years. In 1957 the legislature added films as a medium for obscenity, a medium which the law-givers of the previous century could not have anticipated.[5]

Since a considerable portion of this survey will be centered around

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1. Milton, Complete Poems and Major Prose 729 (Hughes ed. 1957).
2. For a recent survey see Am. Library Ass'n. The First Freedom (1960).
3. See Tennessee Town and City, November, 1959, p. 13 for a general survey of obscenity legislation, including a discussion of Tennessee cases.
4. Tenn. Code Ann. §39-3001 (1957).
5. Tenn. Pub. Acts, ch. 334 (1957).

the precise wording of Tennessee Code Annotated §39-3001, at this point it should be set out verbatim:

> If any person print, publish, import, sell or distribute any book, pamphlet, ballad, printed paper or film containing obscene language or obscene prints, pictures, or descriptions, manifestly tending to corrupt the morals, or introduce the same into any family, school, or place of education, or have the same in his possession for the purpose of loan, sale, exhibition, or circulation, or with the intent to introduce the same into any family, school, or place of education, he shall be guilty of a misdemeanor.[6]

Much of the controversy in suits attacking obscenity statutes has hinged on the element of *scienter* in the particular statute. To analyze the Tennessee statute on this point we might conveniently divide it into three parts. The first of these would consist of the prohibition directed against the printer, publisher, distributor, or retailer of obscene materials. This section, which runs through the phrase "manifestly tending to corrupt the morals," does not include any element of criminal intent, since no knowledge or *scienter* is required. This means that the printer cannot safely be so trusting as to assume that those bringing manuscript to him have refrained from any use of obscene language. If the obscene phraseology is present therein, he is guilty regardless of his lack of awareness of it. This also means that the retailer, that perennial scapegoat of the book-burners, must read every book in his shop, for if there is an "obscenity" anywhere he is guilty under the law.

Nor does the second portion of the statute require criminal intent, That section begins with "or" immediately after the first section. All the misdemeanant need do is to "introduce" the obscene material into "any family, school, or place of education." From a theoretical point of view, if a man unwittingly purchases an "obscene" novel and carries it to the quiet of his home to read, he is guilty upon the assumption that this introduces it to his family.

The third part of the statute, which involves having obscene matter in one's possession, does include a specific intent, but this intent refers to the first and second sections discussed above, which in turn require no knowledge or *scienter*. The conclusion to be drawn from this analysis, then, is that no criminal intent is necessary to constitute a misdemeanor under Code §39-3001.

What does "obscene" mean in the context of the statute? There is little help to be found in the enactment itself which would serve to

6. TENN. CODE ANN. §39-3001 (1957).

answer this question, but the language therein does suggest that there are varying degrees of obscenity, the variety punishable in Tennessee being that which "manifestly tend[s] to corrupt the morals." The key word here is "manifestly." The courts seem to have experienced some difficulty arriving at a concrete definition of this term,[7] some interpreting it as being synonymous with "evident,"[8] while others have distinguished the two words. One opinion stated that "manifest" means "beyond doubt," while "evident" means merely "clear to the understanding."[9] Whatever the interpretation applied to the word, the fact remains that the chain linking obscene materials with moral corruption must be relatively strong under the wording of the statute.

B. *The Cases*

A statute as long-lived as Code §39-3001 has seen surprisingly few interpretations by the courts. The early case of *State v. Pennington*[10] is an interesting decision despite the brevity of the opinion. There the indictment merely alleged that "an obscene picture" had been introduced by the defendant into the school, a picture "manifestly tending to corrupt the morals of said school." The court overruled the trial judge's sustaining of a motion to quash for uncertainty. Although the case may have been decided on a procedural issue, the fact that the wording of the statute was followed in the indictment indicates that overtones of substantive law may be involved as well.

The only other Tennessee case which actually construes the statute is *Cloyd v. State*.[11] There a third party had gone to the defendant, a retail clerk, and purchased from him photographs of men and women engaged in various sexual acts. The purchaser turned these over to the local police, who prosecuted under Code §39-3001. It was the contention of the defense that, in addition to procedural errors committed at the trial, the state obscenity law violated the Fourteenth Amendment to the Federal Constitution in that the uncertainty of the statutory definition of what is obscene violates due process. The court held that the statute was constitutional, pointing out that it was intended to prevent a common nuisance such as the sale of photographs in this case constituted, and that nothing in the Fourteenth Amendment precluded the state from taking such a measure. There may be some question as to whether the court was correct in view of later United States Supreme

7. 26 WORDS AND PHRASES 529 (1953).
8. State v. Kaufmann, 20 S.D. 620, 108 N.W. 246 (1906).
9. Russell v. State, 71 Fla. 236, 71 So. 27 (1916).
10. 73 Tenn. 506 (1880).
11. 202 Tenn. 694, 308 S.W.2d 467 (1957).

Court decisions. The defendant objected that the ambiguity in the wording of the statute made it impossible for him to determine in advance whether a crime was being committed. The court was evasive in its answer to this issue[12] but did go on to apply the test for common law lewdness as found in *Abbott v. State*:[13] "The common sense of the community as well as the sense of decency, propriety, and morality, is sufficient to apply those statutes to each particular case and point out what particular conduct is rendered criminal by them."[14]

This "common conscience" theory is inadequate as an answer to the basic question posed above, for in the absence of a personal Gallup Poll the book dealer will frequently not know how the "conscience" of the public will regard his wares. The theory has come under attack in the United States Supreme Court, particularly from the pen of Justice Douglas, who argues that such a standard would clearly be a violation of the Constitution if applied to other fields — religion, economics, politics, or philosophy. "How," asks Justice Douglas, "does it become a constitutional standard when literature treating with sex is concerned?"[15]

C. *The Constitution*

This is an appropriate juncture from which to proceed to an examination of the treatment given to constitutional problems by the United States Supreme Court. The most obvious issue concerns the freedom of speech and press provision in the First Amendment as incorporated in the Fourteenth,[16] and that was what Justice Douglas referred to in the dissenting opinion above. Unfortunately, perhaps, the view that freedom of speech and press extends to speech and writing dealing with sexual

12. Cloyd v. State, 202 Tenn. 694, 698, 308 S.W.2d 467, 468 (1957). "That is a criticism directed, not to the constitutionality of the code section, but to the question of whether the facts established by the evidence in any given case fall within the prohibitions of that code section." It is difficult to understand how the plaintiff-in-error could have been more direct in attacking the vagueness, since he specifically asked, "What is obscene?" The court failed to answer that question.
13. 163 Tenn. 384, 43 S.W.2d 211 (1931).
14. Cloyd v. State, 202 Tenn. 694, 698, 308 S.W.2d 467, 469 (1957).
15. Roth v. United States, 354 U.S. 476, 512 (1957). It has even been suggested that sex is "un-American," but many observers of the national scene would view this statement with a lifted eyebrow. AM. LIBRARY ASS'N., THE FIRST FREEDOM 190 (1960).
16. The First Amendment as such does not apply to the States. At a fairly early date it was "assumed" that freedom of speech and press is included in the liberties protected by the Fourteenth Amendment. Gitlow v. People of the State of New York, 268 U.S. 652. It has since been held that freedom of speech and press is as much a part of the liberty of due process as though the First Amendment had been copied into the Fourteenth. See, for example, Near v. Minnesota, 283 U.S. 697, 707 (1931): "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment."

matters has been confined largely to dissenting opinions. In *Roth v. United States*[17] a majority of the Supreme Court explicitly stated that "obscenity is not within the area of constitutionally protected speech or press."[18]

Interestingly enough, however, the Supreme Court in *Smith v. California*[19] recently struck down a municipal ordinance similar to the Tennessee statute, basing the decision on an absence of any *scienter* requirement in the law. There a city ordinance made it a crime for anyone to have in his possession for sale any obscene or indecent writing or book. The Court held the ordinance unconstitutional, reasoning that since the result of making the seller liable would be self-imposed censorship by book dealers; this would constitute an interference of free speech and press as protected by the First Amendment.[20]

Tennessee's obscenity statute presumably would be treated in the same manner if it were challenged before the United States Supreme Court. An interesting question arises as to what course the courts of this state will take as a result of the *Smith* opinion. Recent cases in other jurisdictions reflect a change in accord with that decision.[21]

D. *Facing the Issue*

The second constitutional problem also arises under the due process clause of the Fourteenth Amendment. In the area of freedom of speech and press, it involves the requirement of certainty. On this issue the decisions reveal shadow, not substance. The due process clause prohibits a law to be drafted in such a vague manner as to leave the citizen in doubt as to whether or not he is abiding by the law.[22] Thus defense attorneys have argued that any law attempting to define obscenity is inherently faulty under the Fourteenth Amendment, as the word "obscene" is not sufficiently precise in its meaning.

Courts have nonetheless made efforts to set up standards in this field.[23] The earlier and most infamous of these definitions saw its inception in *Regina v. Hicklin*,[24] where Lord Cockburn said that the test of obscenity was "whether the tendency of the matter charged as ob-

17. 354 U.S. 476 (1957).
18. Roth v. United States, 354 U.S. 476, 485 (1957).
19. 361 U.S. 147 (1959).
20. Smith v. California, 361 U.S. 147, 153 (1959).
21. City of St. Louis v. Williams, 343 S.W.2d 16 (Mo. 1961); State v. Kuebel, 172 N.E.2d 45 (Ind. 1961).
22. This problem is not confined to freedom of speech and press. See Cole v. Arkansas, 333 U.S. 196 (1948).
23. AM. LIBRARY ASS'N., THE FIRST FREEDOM 50 (1960).
24. L. R. 3 Q. B. 360 (1868).

scenity is to deprave and corrupt those whose minds are open to such immoral influences."[25] This in effect geared the content of reading matter to the lowest level of susceptibility in the community. Another standard, suggested by Learned Hand in *Kennerley v. United States*,[26] was established as a rule of law in the well-known *"Ulysses"* opinion by Judge Woolsey.[27] The criteria proposed was that the whole of allegedly obscene material should be judged by its impact on the average member of the community. The Tennessee test seems to be in accord.[28] The United States Supreme Court endorsed the *"Ulysses"* test in *Butler v. Michigan*,[29] and in *Roth v. United States*[30] elaborated upon it by stating that the proper test is "whether to the average person, applying contemporary community standards, the dominant the theme of the material taken as a whole appeals to the prurient interest."[31] "Prurient" refers to a person having lascivious longings.[32] What person is this?

It is readily seen that the law has failed to tell anyone exactly what is obscene, and it is unlikely that the community will give a satisfactory answer either. Leaving a question of law to the interpretation of laymen does not seem to be a wise course of action. Moreover, although in many areas the community estimate is a sound factor in judging permissible regulation, it is suggested that in general terms the Bill of Rights deals with matters that one is reluctant to leave to the community estimate. Men whose speech is acceptable to the community do not need the protection of the First Amendment, just as men whose religion is consistent with that of the community do not find resort to constitutional protection of freedom of religion necessary.

One writer has questioned the consistency of the policy of the Supreme Court in putting literary classics beyond the pale of obscenity law despite the fact that they contain passages similar to those found in banned books.[33] In the English tongue, Chaucer's "Miller's Tale" from the *Canterbury Tales* and Shakespeare's *Othello* serve as two examples of such favorable discrimination. Even the Bible, the handbook of many self-righteous book-burners, contain passages which might appeal to the "prurient interest."[34] One answer to the dilemma is that the Supreme

25. Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868).
26. 209 Fed. 119 (S.D. N.Y. 1913).
27. United States v. One Book "Ulysses," 5 F. Supp. 182 (S.D. N.Y. 1934), *aff'd*, 72 F.2d 705 (2d Cir. 1934).
28. Cloyd v. State, 202 Tenn. 694, 308 S.W.2d 467 (1957).
29. 352 U.S. 380 (1957).
30. 354 U.S. 476 (1957).
31. Roth v. United States, 354 U.S. 476, 489 (1957).
32. WEBSTER, NEW INT. DICT. OF THE ENG. LANG. 1996 (2d ed. 1952).
33. 1960 SUPREME COURT REVIEW 1, 13 (1960).
34. See the story of Lot and his daughters in *Genesis* 19:30-38 and the *Song of Solomon*. A minister recently remarked, "It is a blessing in disguise that some people don't read the Bible." Sat. Rev., March 3, 1962, p. 21.

Court can distinguish literature from pornography, but this brings out another inherent evil in any form of censorship – someone must act as censor. Some might be willing to allow members of the highest court in the land draw the line,[35] but not all censors are as discerning.[36] For example, the Postmaster General a few years ago deemed it inadvisable to allow Aristophanes' Greek comedy *Lysistrata* (5th Cent., B.C.) to pass through the mails.[37] The height of hilarity was probably reached when the Customs Bureau seized a Spanish translation of the Bible.[38]

E. *Commentary*

If the Tennessee obscenity statute reaches the United States Supreme Court it faces the test of constitutionality for lack of a scienter requirement. On the other hand, if the legislature should remedy this inadequacy, the chances of the revised statute gaining approval are very good under the present Supreme Court decisions.

II. Municipal Ordinances

Litigation involving the law of obscenity often arises out of local ordinances rather than out of state legislation. The leading recent decision of the Supreme Court, *Smith v. California*,[39] involved the interpretation of a municipal ordinance. For this reason the obscenity regulations of Knoxville, Memphis, Chattanooga, and Nashville are set out in this section.

A. *Knoxville*

Although there is a lengthy ordinance in the Code of Knoxville, the significant portion reads as follows:

> It shall be unlawful for any person to sell, offer for sale, display for sale, print, distribute or offer for distribution any book, magazine or other publication which prominently features an account of crime, or is obscene, or depicts, by the use of drawings or photographs or printed words, obscene actions and accounts, or the commission or attempted commission of the crimes of arson, assault with a deadly weapon, burglary, kidnapping, mayhem, murder, rape, robbery, theft, or voluntary manslaughter.[40]

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35. But Justice Black, for one, does not think so. "My belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found." Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 690 (1959).
36. If the book-burners are correct in their assumption that obscene matter corrupts the morals, then it follows that the censors will become corrupted and consequently will be unfit to perform their duties. Heywood Broun had this to say with regard to the censor: "For my part I always feel that if he can stand it so can I." Am. Library Ass'n., The First Freedom 274 (1960).
37. 1960 Supreme Court Review 1, 14 (1960).
38. Am. Library Ass'n., The First Freedom 35 (1960).
39. 361 U.S. 147 (1959).
40. Knoxville, Tenn., Code ch. 30, §57e (1953). Part "f" of the same section deals with obscene films and stage shows.

The body which administers this ordinance is a board of review, consisting of seven members appointed by the mayor, that determines which publications fall within the ordinance.[41] A vote of five members may bring about the issuance of a cease and desist order by the board.[42] One who ignores this order is guilty of a fine of five to fifty dollars, with each day of violation constituting a separate offense.[43]

The Knoxville ordinance has been successfully challenged in the case of *Werner v. City of Knoxville*.[44] There the court held that "the ordinance is so vague as to violate the Fourteenth Amendment by prohibiting the exercise of freedoms of speech and press which are guaranteed by the First Amendment."[45] The court also explained in a lucid manner the relationship between the First and Fourteenth Amendments and their application to obscenity legislation: "But fairness requires that criminal statutes inform those who are subject to such statutes as to what conduct on their part will render them liable for penalties . . . . The Ordinance under consideration fails to meet this requirement. Moreover, it includes acts which are included in the constitutional freedoms of the First Amendment and which are protected from State interference by the Fourteenth Amendment."[46] While the court was restricted from considering the ultimate question of "What is obscene?" because of the existing federal law on the matter, it did analyze the issue of vagueness and breadth under the Fourteenth Amendment with a clarity not manifest in the *Cloyd* decision involving the state statute. It is quite clear that the decision holding the Knoxville ordinance invalid is consistent with the United States Supreme Court decisions.

B. *Memphis*

This ordinance is brief in comparison with others, and for that reason it is reproduced here in full:

> It shall be unlawfull for any person to publish, circulate, give or sell, or cause to be published, circulated, given or sold, any book, writing, print, picture, newspaper, pamphlet or other work of an obscene, licentious, lewd, libidinous or libelous nature; or to publicly exhibit any lewd, obscene, indecent or libelous picture.[47]

This ordinance would seem to be clearly unconstitutional under the *Smith* doctrine requiring scienter and also under the "breadth" test of the *Werner* case. That portion of the *Werner* rule referring to vague-

41. KNOXVILLE, TENN., CODE ch. 30, §57 (1953).
42. KNOXVILLE, TENN., CODE ch 30, §57c (1953).
43. KNOXVILLE, TENN., CODE ch 30, §57h (1953).
44. 161 F. Supp. 9 (E.D. Tenn. 1958). See also 12 VAND. L. REV. 1096 (1959).
45. Werner v. City of Knoxville, 161 F. Supp. 9, 14 (E.D. Tenn. 1958).
46. Werner v. City of Knoxville, 161 F. Supp. 9, 14 (E.D. Tenn. 1958).
47. MEMPHIS, TENN., CODE ch 28, §770 (1949).

ness might not have any effect on it. The *Werner* case followed the "prurient interest" test of the *Roth* decision, and the former case seemed to turn on the fact that the ordinance prohibited accounts of specific common law crimes, in which case "The Board could, if so minded, eliminate from the bookstores and libraries many wholesome books and publications, a power that could be characterized as unfettered censorship."[48] The Memphis ordinance contains this defect because of the use of the word "libelous" coupled with the absence of scienter. We are faced once again with a regulation which, despite the heaping on of adjectives, fails to define "obscene" in any manner other than supplying synonyms of the evasive word itself.

The case of *Binford v. Carline*[49] involved a Memphis ordinance in force a few years before the enactment of the present one, but, because a procedural issue was held controlling, the wording of the specific law may be unimportant. In that situation the owner of a theater showing a Roaring Twenties version of "The King of Kings" sought to enjoin the Memphis Board of Censorship from enforcing its order to delete certain portions of the film.[50] The injunction bill was dismissed, and the theater owner successfully maintained an action in the circuit court on a writ of certiorari to get a de novo hearing. The court of appeals held that the circuit judge erred in granting common law certiorari where the board had not exceeded its jurisdiction or acted illegally within jurisdictional limits. The result of such a holding was to make the findings of fact by the board final, so the case may be said to stand for the general proposition that censorship boards in Tennessee are legally vested with power to determine what is or is not offensive to the public morals.

C. *Chattanooga*

The Chattanooga ordinance is also of sufficient brevity to be reprinted in full:

> It shall be unlawful for any person in the city to publish, circulate, give or sell, or cause to be published, circulated, given or sold, any book, writing, print, picture, newspaper, pamphlet or other work of an obscene, licentious, or lewd nature, or publicly to exhibit any lewd, obscene or indecent picture.[51]

No scienter requirement is present here, so the ordinance would most

48. Werner v. City of Knoxville, 161 F. Supp. 9, 13 (E.D. Tenn. 1958).
49. 9 Tenn. App. 364 (1928). See an interesting study of this case in 23 TENN. L. REV. 349 (1954).
50. If the 1928 film resembled the modern Biblical sagas "interpreted" by the theologians of Hollywood, even those abhoring censorship as a general policy might regret that the Memphis Board did not take even sterner measures in this particular situation.
51. CHATTANOOGA, TENN., CODE §30-28 (1960).

likely fall under the *Smith* doctrine. The wording seems to be adequate, however, to enable the statute to stand under the *Werner* test. This may be because the framers of the ordinance were aware of the holding in *Werner*.

D. *Nashville*

Nashville has the most elaborate law on this subject of any of the four large cities in the state. The principal portion of the law reads as follows:

> It shall be unlawful for any person, or his agent, to expose or offer for sale, sell, exchange, give away, distribute or circulate, within the city any comics, magazine, handbill, card, book, pamphlet or other publication, which contains indecent, *vulgar* or obscene pictures, language, writing or *other matters that are inimical to the public health, safety and morals.*
>
> Indecent, *vulgar* or obscene pictures, language, writing or *other matters that are inimical to the public health, safety and morals,* as used above, shall include, but not be limited to, indecent exposure of the female or male form; presentation of crime in a manner to create sympathy for criminals or desire for imitation, or weaken respect for the law; scenes of sadistic torture; *vulgar* and obscene language; treatment of divorce in a humorous or glamorous light; ridicule or attack on any religious or racial group.
>
> Nothing herein shall apply to regularly published daily newspapers or recognized works of a medical scientific or artistic nature.[52] (Emphasis added.)

The board is composed of five members appointed by the mayor, and all must be experienced in juvenile problems, but two must be women, one approved by the city PTA and the other active in church work.[53] The tenor of the ordinance, then, seems to be aimed at prohibiting obscene materials from coming into the hands of children. Although the ordinance itself does not prohibit all matter which would offend children, as did the statute which was held unconstitutional in *Butler v. Michigan*,[54] the board would presumably have to use caution in its actions in order not to convey the impression that the mind of a child is being used as the criterion.

It is suggested that the Nashville ordinance falls within the *Werner* rule, since the terms "vulgar" and "other matters that are inimical to the public health, safety and morals" are too broad and indefinite.[55]

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52. NASHVILLE, TENN., CODE §26-44a (1960).
53. NASHVILLE, TENN., CODE §26-44b (1960).
54. 354 U.S. 476 (1957).
55. It is rather puzzling that such nebulous language was used, especially in light of the fact that the drafters of the Nashville ordinance, like those in Chattanooga, had the benefit of hindsight with regard to the *Werner* decision.

Although the third paragraph of the quoted portion of the ordinance qualifies the prohibitions against crime reporting in making them inapplicable to specific types of materials, in an effort to elaborate the legislators seem to have omitted certain other areas which should have been allowed immunity.[56] The scienter requirement of the *Smith* case, however, might not affect the ordinance at hand, for the retailer of materials judged obscene by the board has twenty-four hours in which to remove the same from his place of business for the purpose of sale.[57]

Another interesting feature of the Nashville regulation is the specific provision that findings of fact by the board are final and subject to review only by certiorari to the Davidson County Circuit Court for illegality or lack of jurisdiction.[58] Whatever may be the merits of such a policy, it seems to be upheld by the *Binford* case discussed above in connection with the Memphis ordinance.[59]

E. *Commentary*

The Knoxville ordinance is the only one of the four which has been held unconstitutional to date. Presumably the Memphis and Chattanooga laws would both be found unconstitutional for the same reason that the state law would — for lack of a scienter requirement. There is a strong likelihood that both the Memphis and Nashville ordinances are too broad and uncertain to survive the *Werner* test.

DONALD F. PAINE

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56. Legal reports and periodicals are not exempted from the law, for example.
57. NASHVILLE, TENN., CODE §26-44c (1960).
58. NASHVILLE, TENN., CODE §26-44b (1960).
59. Perhaps this is statutory certiorari, but the ordinance in this city has adopted the common law rule.

CASE NOTES

CONTRACTS — SPECIFIC PERFORMANCE OF EMPLOYMENT CONTRACTS

Defendant, an employee of plaintiff, contracted that in consideration of his employment with plaintiff he would not, after its termination, enter into a competing business for six (6) months within a radius of 45 miles of plaintiff's place of business. Defendant's employment was for no set duration and could be terminated by plaintiff at will. The Chancellor, in a suit for specific performance, found that the contract was void. The Supreme Court reversed and remanded the cause to the Chancellor for determination of damages, finding that the contract was supported by adequate consideration and was not unreasonable. *Di-Deeland v. Colvin,* 347 S.W.2d 483 (Tenn. 1961).[1]

Enforcement of a contract whereby an employee agrees to restrain his activities after his employment, brings into conflict two basic public policy issues. First, should employers be allowed to contract to protect their business and should such contracts be specifically enforceable when irreparable injury would result from their breach. Second, should an individual be allowed to contract away his means of making a living in the future. The conflict has been resolved largely in favor of the first policy providing (1) the employer has a proper interest to protect; and (2) the restraint on the employee's ability to make a living or practice his trade is reasonable.[2]

Interests which employers are generally held to be justified in protecting are their trade secrets and goodwill. *Matthews v. Barnes,*[3] which was relied upon by the court in the principal case, involved an agreement by an employee of a relatively new type business of car rentals not to accept employment with anyone in competition with his present employer in Davidson County for a period of five (5) years. The employee in question, by reason of his employment, acquired knowledge of a peculiar system of doing business which his employer wished to keep a secret from his competitors. The court felt that protection of such trade secrets was of sufficient interest to the employer to allow him to restrain his employee's future conduct.

In *Arkansas Dailies v. Dan,*[4] the employer was a newspaper advertising broker and the employee was a salesman-manager who represented the company in a given area. The employee was personally acquainted

1. Di-Deeland v. Colvin, 347 S.W.2d 483 (Tenn. 1961).
2. 43 C.J.S. *Injunctions* §84, p. 571 (1945); Briggs v. Boston, 15 F. Supp. 763 (D.C. Iowa 1936).
3. Matthew v. Barnes, 155 Tenn. 110, 293 S.W. 993 (1927).
4. Arkansas Dailies v. Dan, 36 Tenn. App. 663, 260 S.W.2d 200 (1953).

with the firm's clients and had certain knowledge of their contracts with the firm. The court expressly found that the firm possessed no "trade secrets" but that the employee was their "goodwill" in that area. The court held that protection of this goodwill was sufficient cause to specifically enforce the employee's agreement not to solicit the business of any of the firm's clients or former clients for a period of three years.[5]

In a very recent case[6] the Court of Appeals reaffirmed the doctrine that a restraint upon one's ability to make a living must be reasonable if it is to be enforced by injunction. The decision involved a suit by an insurance company to enjoin a former salesman from violating an express provision in his employment contract by competing in the territory in which he formerly represented the plaintiff. It is to be noted that this contract was limited in both time (two years) and in area (five East Tennessee counties in which the defendant had represented the plaintiff.) The court further found that the defendant had acquired knowledge of names and personal acquaintance of customers and also the expiration dates of their policies. This knowledge is very similar to that in the *Dan* case, which though not a trade secret, was the essence of the employer's goodwill in that area. In granting the injunction the court in the principal case seems to be in line with the previous decisions on this point.

Though an employer has an interest which he may validly protect by restraining an employee's future acts, such restraint must be reasonable. What is reasonable is a question of fact with the elements of time and area both being relevant. An agreement not to enter a certain business, unlimited in time and area, is void as against public policy.[7] A restraint upon entering a certain business which was reasonably limited as to area was held valid though unlimited as to time.[8] It should be noted, though, that this was a sale of a business contract. The nature and territorial limits of the employer's business are relevant as to reasonableness.[9] Any restraint which includes more area than necessary to protect the employer, or is for a longer time than necessary, interferes too seriously with public policy without being of benefit to the employer.

D.C.S., JR.

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5. *Ibid.*
6. Federated Mutual Implement and Hardware Insurance Company v. Anderson, 351 S.W.2d 411 (Tenn. App. 1961).
7. Barner v. Boggiano, 32 Tenn. App. 351, 222 S.W.2d 672 (1948).
8. Scott v. McReynolds, 36 Tenn. App. 289, 255 S.W.2d 401 (1952).
9. Green Co. Tire and Supply v. Spurlin, 338 S.W.2d 597 (Tenn. 1961).

CRIMINAL LAW — FEDERAL PROCEDURE — COLLATERAL ATTACK FOR ERROR

In 1954 a jury in a federal district court found the defendant guilty of transporting a kidnapped person and an automobile in interstate commerce. The judge, before imposing sentence did not afford the defendant an opportunity to make a statement in his own behalf and to present information in mitigation of punishment as required by Rule 32(a) of the Federal Rules of Criminal Procedure. There was no appeal from the conviction and sentence, but the defendant, four years later while in custody under the sentence, filed a motion to vacate the sentence under 28 U.S.C. §2255. The United States Supreme Court *held,* by a five to four decision, that the error was not one which could be raised by a collateral attack on the sentence. *Hill v. United States,* 82 S. Ct. 468 (1962).

In so holding the court states: "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus."[1] The court cites *United States v. Hayman*[2] for the legislative history of 28 U.S.C. §2255. That case said that the statute was enacted to lessen the burden placed upon courts by habeas corpus proceedings. There have been numerous decisions holding that a proceeding under this section to vacate a sentence is a collateral attack on the judgment and can only be maintained on grounds which would warrant the granting of a writ of habeas corpus.[3]

One case is cited by the court as an instance of more compelling circumstances than those existing in the principal situation. In *Sunal v. Large*[4] the trial court had committed an error by not allowing the defendant to introduce evidence that his selective service classification was invalid. In holding that this was not an error subject to collateral attack, the court made the following statement:

> So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal. There have been, however, some exceptions. That is to say, the writ has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. . . . It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court — the existence of any evidence to

1. Hill v. United States, 82 S. Ct. 468, 471 (1962).
2. 342 U.S. 205 (1951).
3. 28 U.S.C.A. §2255, Note 251 (1959).
4. 332 U.S. 174 (1947).

> support the conviction, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, and other errors in the trial procedure which do not cross the jurisdictional line.[5]

From the holding in the principal case we can assume that failure to grant the defendant his right of allocution under the Federal Rules of Criminal Procedure is not, standing alone, an error that crosses the "jurisdictional line."

There seems to be no controversy as to what the outcome would have been if the attack on the sentence had been made on appeal rather than collaterally. The majority opinion cites with approval *Green v. United States,*[6] where dicta laid the foundation for interpretation of Federal Rule of Criminal Procedure 32(a). In that case Justice Frankfurter said: "Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing."[7] The court in the principal case seems to agree: "There thus remains no doubt as to what the rule commands."[8] The majority in the principal case, however, rejects this, standing alone, as a ground of collateral attack, as the court goes on to qualify itself: "Whether §2255 relief would be available if a violation of Rule 32(a) occurred in the text of other aggravating circumstances is a question we therefore do not decide."[9]

Section 2255 authorizes the setting aside or the correction of a sentence imposed in violation of the laws of the United States. The majority holds that the sentence was not illegal in that it was not in excess of that authorized by federal statutes. The dissent takes the view that the sentence was in violation of federal laws in that it was imposed in an illegal manner and that relief could be given under Rule 35 of the Federal Rules of Criminal Procedure.[10] Getting a foot in the door by this means, the minority proceeds to take the majority to task for a "begrudging interpretation" of Rule 35. Although the dissent's argument has considerable merit, especially on the grounds that a "normal reading of the English language" would seem to make Rule 35 available for collateral attack if the defendant were deprived of his right of allocution, perhaps the majority has taken the better view in holding that this is not a fundamental error which can be reached collaterally.

D.F.P.

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5. Sunal v. Large, 332 U.S. 174, 179 (1947).
6. 365 U.S. 301 (1961). This case did not involve a collateral attack.
7. Green v. United States, 365 U.S. 301, 305 (1961).
8. Hill v. United States, 82 S. Ct. 468, 470 (1962).
9. Hill v. United States, 82 S. Ct. 468, 472 (1962).
10. Heflin v. United States, 358 U.S. 415 (1959).

CRIMINAL LAW — ILLEGAL SEARCH AND SEIZURE

Highway patrolmen, while observing traffic, became suspicious of the cargo in defendant's truck, the bed of which was covered by a tarpaulin and cartons normally containing fruit jars were visible through the slatted sides of the truck bed. Although the truck was being driven at a moderate rate of speed and was not perceptibly being operated illegally, the officers followed the truck, stopped it and checked the defendant's operator's license. The officers then proceeded to search the vehicle, where they found 89 one-half gallon containers of corn liquor concealed. Defendant was convicted for transporting more than one gallon of intoxicating liquor, and on appeal the Tennessee Supreme Court, *held,* reversed. Search during which police officers discovered liquor on a truck which they had stopped was illegal where they observed no violations and had not been advised that the driver or vehicle was transporting liquor. *Reels v. State of Tennessee,* 355 S.W.2d 97 (Tenn. 1962).

The transportation of intoxicating liquor is not a specific offense unless a statute so provides.[1] In Tennessee, by statute, the personal transportation of more than one gallon of intoxicating liquor without a permit is a felony, punishable by a term in the penitentiary of not less than one year and one day, or more than five years.[2]

It has been held that the unlawful transportation of liquor constitutes a breach of the peace within the meaning of statutes relating to the duties of sheriffs and other officers, which authorizes arrests without a warrant.[3] Under other statutory authorization in Tennessee an officer may arrest without a warrant for a breach of peace threatened in his presence,[4] or where he, upon reasonable grounds, believes the person has committed a felony.[5] This is applicable in the case of a liquor law violation which constitutes a felony.[6]

In Tennessee, evidence procured by officers in an unreasonable search or seizure is not admissible against the defendant.[7] Thus, an officer cannot, without a warrant, search vehicles on probable cause for belief that they have contraband liquor on them.[8] But where the

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1. Premium Distributing Co. v. State, 89 Ga. App. 222, 79 S.E.2d 57 (1953).
2. TENN. CODE ANN. §39-2509 (1956). See TENN. CODE ANN. title 57 (1956), for exceptions to this statute.
3. Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1921).
4. TENN. CODE ANN. §40-803 (1956).
5. TENN. CODE ANN. §40-803 (1956).
6. Kelley v. United States, 61 F.2d 843 (8th cir. 1932); People v. Case, 220 Mich. 379, 190 N.W. 289 (1922).
7. Hampton v. State, 148 Tenn. 155, 252 S.W. 1007 (1923); Tenpenny v. State, 151 Tenn. 669, 270 S.W. 989 (1924).
8. Tenpenny v. State, 151 Tenn. 669, 270 S.W. 989 (1924).

officer can see the intoxicants in the vehicle from the outside, there is a felony being committed within his presence, and he is entitled to make a search and arrest without a warrant. In *Smith v. State*,[9] an inspection from the outside of an automobile at night, by a police officer, with the aid of a flashlight, which disclosed unconcealed vessels containing intoxicating liquor, was held not to be an unreasonable search. In the instant case, although the officers could see fruit jars between slats in the truck bed, they could not actually see the jars of liquor. An officer is not entitled to make a search or arrest, without a warrant, where the whiskey is concealed from his sight prior to the search.[10]

If a search and seizure is incident to a lawful arrest, then the search of a vehicle for, or seizure of, intoxicating liquor is proper as an incident to the arrest.[11] But in the principal case there was no lawful arrest and therefore where the main purpose of the officer in stopping the driver was to ascertain the presence of intoxicants in the vehicle, a search of the vehicle was unreasonable.[12] In *Robertson v. State*[13] it was held that officers must not abuse the right to require motorists to exhibit their drivers' licenses merely as a pretext for inspection of, or prying into, the contents of an automobile.

The guaranty of freedom from unreasonable searches and seizures is construed as recognizing a necessary difference between a search of a dwelling or other structure in respect to which a search warrant may be readily obtainable, and the search of moving vehicles, where there might be difficulty in obtaining a warrant.[14] Therefore, it has been said that the reasonableness of the search without a search warrant, of a vehicle, for intoxicating liquor, depends upon the inability of the officer to procure a warrant in time to make an effective search.[15] But valid search warrants can be issued only upon a showing of probable cause.[16]

If the officer stopping the vehicle has a reasonable belief that the vehicle is transporting intoxicating liquor, that is, if search is made upon probable cause, the search is valid even without a warrant.[17]

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9. 290 S.W. 4 (Tenn. 1927).
10. Lucarini v. State, 159 Tenn. 400, 19 S.W.2d 4 (1927); Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1921).
11. Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1921); State v. Adams, 103 W. Va. 77, 136 S.E. 703 (1927); Marron v. U.S., 275 U.S. 192 (1927); Kelley v. U.S., 61 F.2d 843 (8th cir. 1932).
12. Epps v. State, 185 Tenn. 226, 205 S.W.2d 4 (1947).
13. 184 Tenn. 277, 198 S.W.2d 633 (1946).
14. 30 AM. JUR., *Intoxicating Liquors* §459 (1940).
15. Carroll v. U.S., 267 U.S. 132 (1925).
16. Dumbra v. U.S., 268 U.S. 435 (1925).
17. Husty v. U.S., 282 U.S. 694 (1931).

In many jurisdictions an arrest need not precede the search,[18] nor does the right to search depend upon the right to arrest the one in charge of the vehicle.[19] It has been held, under this rule in Tennessee, that although an officer in misdemeanor cases has no right to make a search without a warrant except where he has made a lawful arrest, that, for an officer to stop an automobile driver for the purpose of inspecting his operator's license, it is an arrest. If the initial stopping of defendant was done in good faith, for the purpose of checking the driver's operator's license, even if no traffic violation had occurred, a subsequent search would not be unreasonable if based upon probable cause.[20]

In order to justify an arrest for unlawful transportation of intoxicants upon grounds that an offense has been committed within the presence of the arresting officer, the officer must have probable cause for a belief that the crime is being committed, since arrest cannot be predicated upon mere suspicion,[21] without more. The officer must have direct knowledge, acquired at the time, through his perceptual senses, that a crime is being committed.[22] An arrest for illegally transporting liquor cannot be based upon grounds that a crime was committed in the presence of the arresting officer where the fact of transporting liquor is not evident to the officer.[23] It is not necessary that the officer know beyond a reasonable doubt that the vehicle is in fact being used to transport liquor,[24] but mere suspicion, as in the instant case, that intoxicating liquor is being illegally transported in a vehicle, cannot form a justification for a search of the vehicle without a warrant.[25]

It is clear from the foregoing that if defendant was not stopped by the officers, in good faith, for the purpose of checking his operator's license, but merely as an excuse in order to provide an opportunity for searching the vehicle, any intoxicating liquors subsequently found would have been discovered by means of an unreasonable search, in violation of defendant's constitutional rights, and that evidence thus obtained would not be admissible against him under the Tennessee rule that evidence obtained by an unreasonable search is inadmissible.

S.M.W.

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18. Husty v. U.S., 282 U.S. 694 (1931).
19. Carroll v. U.S. 267 U.S. 132 (1925).
20. Robertson v. State, 184 Tenn. 277, 198 S.W.2d 633 (1946).
21. Allen v. State, 183 Wis. 323, 197 N.W. 808 (1924).
22. State v. Wills, 91 W. Va. 659, 114 S.E. 261 (1922).
23. Hughes v. State, 145 Tenn. 544, 238 S.W. 588 (1921).
24. ANNOT., 74 A.L.R. 1463 (1931).
25. State v. Kinnear, 162 Wash. 214, 298 P. 449 (1931).

LABOR LAW — ARBITRABILITY — PRE-EMPTION BY FEDERAL LAW

Complainant employer laid off thirteen of its employees, allegedly as a result of its decision to sub-contract certain work. Defendant union objected and demanded that the propriety and justification of the lay-offs be submitted to arbitration, as provided in the collective bargaining agreement between the union and the employer. The employer then filed a bill reciting that under the agreement the lay-off was solely a decision for management, and thus not subject to arbitration, and prayed that the court construe the agreement and determine whether the lay-off issue was properly arbitrable under its terms. The union filed an answer and cross-bill asserting that the lay-off was arbitrary and in violation of several provisions of the agreement, and asked the court to order the employer to submit the issue to arbitration under the terms of the agreement. In a declaratory judgment the chancellor held that the collective bargaining agreement gave "Management full discretion in the discharge of persons not required," and from the evidence found that "this discretion was not abused," and concluded that "the facts of this case do not present an issue for arbitration." The Court of Appeals *reversed* the chancellor, and a decree was entered declaring the dispute "arbitrable under the provisions of the applicable collective bargaining agreement." *Volunteer Electric Cooperative v. Gann,* 46 L.R.R.M. 3049 (Tenn. App. 1960).[1]

At the outset, the Court of Appeals recognized that in resolving the arbitrability question a matter of "critical importance" was the substantive law to be applied, *i.e.,* federal or state. While noting that both federal and state courts generally have concurrent jurisdiction over the enforcement of collective bargaining agreements in industries "affecting commerce", the court recognized that the Labor Management Relations Act[2] and the course of decision thereunder created a "new substantive law" for dealing with actions based on such agreements, citing the famed *Lincoln Mills* case.[3] Recognizing that one of the purposes of the federal act was to effectuate a uniform national labor policy, and that the holdings evinced a Congressional intent to pre-empt the field, the Court of Appeals concluded that "federal substantive law" was "applicable and controlling" in state court actions based on collective bargaining agreements in interstate industries.

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1. Certiorari not applied for. Not reported officially.
2. 29 U.S.C.A. §185 (1947).
3. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

Notwithstanding the fact that the pleadings were devoid of any averment that Volunteer was an industry "affecting commerce", the Court of Appeals applied federal law, noting that both parties in their briefs had relied upon certain sections of the Labor Management Relations Act and decisions thereunder, and such reliance was construed as the "equivalent to a statement" that the court was dealing with a collective bargaining agreement in an industry "affecting commerce," adding that if Volunteer should insist that it was not engaged in an industry affecting commerce under the Labor Management Relations Act, a petition to rehear would be entertained for the purpose of resolving that question.[4]

Thus the interstate or intrastate character of the industry involved appears to be controlling in determining whether federal or state law should be applied. The significance of such a conclusion is that the common law rule that executory agreements to arbitrate are judicially unenforceable is still the law in Tennessee.[5] A federal court of appeals likewise has recognized this rule.[6] It follows that in a Tennessee state court action to enforce a collective bargaining agreement provision to arbitrate, specific performance undoubtedly would be ordered if the industry was engaged in interstate commerce, and denied if it was an intrastate industry.

After deciding that federal law was applicable, the Court of Appeals exhaustively considered two landmark decisions of the United States Supreme Court[7] which were handed down during the pendency of the appeal of the principal case. One of these cases[8] originated in the United States District Court for the Eastern District of Tennessee. There, as in the principal case, the union brought suit to compel arbitration and the employer claimed that the particular type of dispute was not arbitrable. The collective bargaining agreement in that case, as well as in the *Volunteer* case, provided a broad and detailed grievance procedure with the arbitration decision thereunder being final and binding on both parties. The district court granted the employer's motion for a summary judgment, and the United States Court of Appeals for the Sixth Circuit affirmed, holding that the "so-called claim or

4. Volunteer's petition to rehear denied 47 L.R.R.M. 2251 (Tenn. App. 1960).
5. Key v. Norrod, 124 Tenn. 146, 136 S.W. 991 (1911); Cole Mfg. Co. v. Collier, 91 Tenn. 525, 19 S.W. 672 (1892); 8 VAND. L. REV. 73, 114 (1954).
6. Local 19 v. Buckeye Cotton Oil Co. 236 F.2d 776 (6th Cir. 1956), citing Murphy, *The Enforcement of Grievance Arbitration Provisions,* 23 TENN. L. REV. 959 (1955).
7. United Steelworkers v. American Mfg. Co. 363 U.S. 564 (1960); and United Steelworkers v. Warrior and Gulf Navigation Co. 363 U.S. 574 (1960). Both cases are discussed in 14 VAND. L. REV. 1105 (1961).
8. United Steelworkers v. American Mfg. Co. 363 U.S. 564 (1960).

grievance" was "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties."[9]

This holding was valid at the time the chancellor considered the *Volunteer* case. However, during the pendency of the appeal of the *Volunteer* decision, the United States Supreme Court reversed the Sixth Circuit decision in the *American* case, pointing out that Section 203 (d) of the Labor Management Relations Act favored arbitration as a means of resolving disputes, and that such "policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement are given full play." Justice Douglas, in writing the majority opinion, observed:

> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The *processing of even frivolous claims may have therapeutic value which those who are not a part of the plant environment may be quite unaware.* (Emphasis supplied).

Thus the arbitrability or non-arbitrability of a particular grievance must not be predicated upon the court's view of the merits of the claim, but upon whether a claim of this type was contemplated by the arbitration provisions.

While agreeing with the chancellor that the proof supported his holding that the exercise of a contractually reserved management function to lay-off employees was not abused, the Court of Appeals in the *Volunteer* case concluded that, under the *American* case, "we have no right to weigh the merit of this controversy in the course of determining arbitrability."

In addition to the Sixth Circuit holding in the *American* case to the effect that if the court found the grievance patently frivolous and without merit, arbitration would not be ordered, which was effective at the time the chancellor decided the *Volunteer* case, the courts had generally held that where the collective bargaining agreement embodied no express prohibition against sub-contracting, the employer had the absolute right to sub-contract part of its work.[10]

However, on the same day that the *American* decision was issued, the United States Supreme Court rendered its decision in *United Steelworkers of America v. Warrior and Gulf Navigation Company.*[11]

9. United Steelworkers v. American Mfg. Co. 264 F.2d 624 (6th Cir. 1959).
10. 57 A.L.R.2d 1399 *et seq.* (1958).
11. 363 U.S. 574 (1960).

The Court of Appeals in the *Volunteer* case found that the latter decision "made new law" bearing on the question of sub-contracting. In the *Warrior and Gulf* case, the union grievance was a protest against sub-contracting, allegedly resulting in the layoff of certain employees. While the two lower courts had held that sub-contracting was a function of management and the collective bargaining agreement expressly excluded "matters which are strictly a function of management" from arbitration, the United States Supreme Court nevertheless reversed, commenting:

> The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration. . . . Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

Recognizing that collective bargaining agreements are frequently unclear and susceptible to more than one interpretation, the Supreme Court in the *Warrior and Gulf* case pointed out that all doubt should be resolved in favor of arbitration.

Thus, despite its view that the provisions of the collective bargaining agreement "would make such layoff appear to have been the exercise of a reserved management function" the Tennessee Court of Appeals concluded that the union's grievance created an arbitrable question under the agreement. While "regretfully constrained to concur," Judge Hale in a concurring opinion in the *Volunteer* case expressed his disagreement with the United States Supreme Court holdings in the *American* and in the *Warrior and Gulf* cases rather caustically as follows:

> In the American case, it was said, 'The processing of even frivolous claims may have *therapeutic* values which those who are not a part of the plant environment may be quite unaware'. Thus we have 'therapeutics' added to 'psychology' as a touchstone in judicial construction. . . . I wish it were different, but the U.S. Supreme Court has obtained complete mastery over its coeval branches of government and has adopted the principle of the French Kings, some of whom went to the guillotine, 'le roi le veut', (the King wills it).

Judge Hale's reference to the processing of "even frivolous claims" because of the therapeutic value flowing therefrom, warrants comment. It cannot be gainsaid that the bargaining relationship between management and labor has matured to the point where the arbitration provisions in collective bargaining agreements are primarily designed for the resolution of real and genuine disputes which have some colorable basis of merit. Thus if "even frivolous" claims are to be arbitrated, as

the United States Supreme Court says they must, then the arbitration machinery could clearly digress from a valuable tool for the peaceful adjudication of industrial disputes, to a device of harassment by one party against the other by the pressing to arbitration of patently baseless, frivolous or clearly unconscionable grievances. Such a result, which would be both time-consuming and costly, and would tend to undermine rather than strengthen the arbitral process. As one of the critics of the *American* and *Warrior and Gulf* cases has said:[12]

> To indict the courts as a whole as incompetent to comprehend or take any part in the scheme of labor arbitration is as ludicrous as the assertion that arbitrators are incompetent as well.

It should be pointed out, however, that the submission to arbitration of even frivolous claims does not mean that they will be sustained. It simply authorizes the arbitrator to sustain or deny a particular grievance in accordance with the merits or demerits thereof. Thus while even frivolous claims may be arbitrated under the Supreme Court's mandate, there is no assurance of their outcome. Also worthy of note is that a union, as the collective bargaining representative for its members, may in good faith properly refuse to prosecute frivolous and baseless claims. Indeed, a union has a duty to its membership to discountenance clearly disruptive and unfounded claims.[13]

An earlier reference was made to the common law rule to the effect that executory agreements to arbitrate are unenforceable in Tennessee. This, of course, presents no problem when the industry involved is one "affecting commerce", as is frequently the case. However, the question is posed as to whether or not the interstate or intrastate character should be determinative in resolving the enforceability of an arbitration provision in a collective bargaining agreement. It seems somewhat anomalous for a state court to agree to enforce an agreement to arbitrate in one instance and decline in another simply because of the industry's intrastate character. The arbitral process was obviously created and designed as an inexpensive yet expeditious remedy for the resolution of disputes arising between parties to a collective bargaining agreement. There is serious doubt that such a unique device of self-government can continue to be as successful a substitute for industrial strife as it has in the past, if one party by the fortuitous circumstance of the industry being engaged only in intrastate commerce, be permitted with impunity to abrogate its agreement to arbitrate simply by refusing

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12. Levitt, *The Supreme Court and Arbitration*, in N.Y.U. 14th ANN. CONF. ON LABOR 235 (1961).
13. Ostrofsky v. United Steelworkers, 171 F.Supp. 782 (D.C. Md. 1959); *Aff'd*, 273 F.2 614 (4th Cir. 1960).

to do so and thereby leaving the other party without remedy, other than of course, economic coercion. And this latter remedy may be barred by a no-strike and no-lockout provision.

The common law rule respecting the unenforceability of executory agreements to arbitrate, was expressed in cases[14] antecedent to the enactment of the Labor Management Relations Act and other modern labor legislation, and it is submitted that this rule did not contemplate the collective bargaining agreements of today. The action of the Court of Appeals in the *Volunteer* decision may be characterized as a progressive step in the enforcement of voluntary agreements to arbitrate, and in the interest of maintaining parity between state and federal forums it is suggested that the legislature as well as the courts of Tennessee should seriously consider the adoption of a policy of enforcing all arbitration covenants in collective bargaining agreements.

The advisability and desirability of such a policy appears obvious, for the common law rule seems clearly antiquated under our modern day labor laws. Specific performance of an arbitration covenant would appear to be a relatively simple procedure, and there is no logical reason for denying specific performance merely because the industry is not involved in interstate commerce. There is a compelling reason to grant specific performance where the agreement also embodies an absolute no-strike provision, since the promise to arbitrate usually is considered the quid pro quo for the pledge not to strike.[15]

By adopting, however reluctantly, the federal law in the *Volunteer* decision the Tennessee Court of Appeals has given recognition to the federal policy (and obvious need) for uniformity of substantive law binding upon both state and federal courts in dealing with collective bargaining agreements. A contrary rule would inevitably result in constant competition between litigants to initiate their actions in the forum applying substantive law supporting the desired decision.[16]

The institution of self-government that arbitration provides is

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14. See Notes 5 and 6 *supra*.

15. See Note 3 *supra*.

16. Very recently the U.S. Supreme Court issued two timely and significant decisions which clarified some of the questions presented in the *Volunteer* case. In Charles Dowd Box Co. v. John F. Courtney, 7 L. Ed. 2d 483, decided February 19, 1962, the Supreme Court held that state courts have concurrent jurisdiction with federal courts over actions to enforce collective bargaining agreements in industries affecting commerce. And, in Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company, 7 L. Ed 2d 593, decided March 5, 1962, the Supreme Court held that state courts, in dealing with collective bargaining agreements in industries affecting commerce must apply substantive principles of federal labor law and incompatible local law must give way thereto.

surely a most significant outgrowth of our national labor policy. And it is anticipated that its existence will continue for many year to come. Such a valuable tool, however, can only survive, prosper and progress as a substitute for economic warfare only to the extent that the courts and legislature permit.

L.R.H.

NEGLIGENCE — ANIMAL ESCAPING FROM SLAUGHTER HOUSE

A large bull was brought to a slaughter house operated by the defendant-partnership in a populated area of a city. The animal, which was noticeably nervous and "skittish," was placed in an enclosure called a "scales pen," which was in turn enclosed in a larger shed adjacent to the defendants' main building. In some unascertained manner the bull escaped from the pen into the larger shed, and from there into the main building by tearing out a portion of the wall. Although no rope or similar equipment was available, the defendants began to chase the animal, but it escaped through an open door which if closed would have confined the bull to the defendants' premises. One of the defendants shot the animal with a .22 rifle, but the only effect of the wound was to enrage the animal, which then entered the premises of a distributor of petroleum products. Fortunately this area was surrounded by a fence, and the gate was closed behind the wounded bull. While one of the defendants left the scene to obtain a high-powered weapon, the other shot the animal again with the small-bore rifle. This further enraged the animal to an extent that it destroyed a portion of the fence and again escaped. An employee of the defendants pursued it with an automobile, knocking it down twice but failing to stop its flight. Soon afterwards, while still in a populated area of the city, the bull struck the plaintiff pedestrian, causing serious injury. On appeal from the refusal of the trial court to direct a verdict for the defendants and from the judgment in favor of the plaintiff, *held,* affirmed on the ground that the question of whether the defendants were guilty of negligence was for the jury. *Groce Provision Company v. Dortch,* 350 S.W.2d 409 (Tenn. App. 1961), *cert. den.* (1961).

In approving the action of the trial court in refusing to direct a verdict for the defendants on the negligence issue, the court of appeals pointed to the following acts of the defendant: maintaining a slaughter-

house in a populated portion of a city with no equipment available for emergencies; attempting to capture the animal by frightening and enraging it; leaving the door of the main building open while chasing the bull inside; and shooting the bull the second time with a small-caliber rifle although experience had shown that the weapon was ineffective.

Retracing the steps in this *corrida del toro,* it will be seen that there were two escapes involved: the first, from the main building; the second, from the distributor's enclosure. Actually there were two escapes prior to the first one mentioned, but neither of these resulted in an escape from the control of the defendant. The court found both enclosures — the defendant's building and the distributor's fence — to be proper ones under the Tennessee statute,[1] but pointed out that the acts of leaving the door of the building open and shooting the confined animal were sufficiently negligent to constitute a violation of *Tennessee Code Annotated* §44-1401, which makes it unlawful to "willfully" allow livestock to run at large. There would seem to be a considerable difference between the terms "willfully" and "negligently," but *Overbey v. Poteat*[2] interpreted the Act as follows: "It is our opinion that the Act is designed to cover both private property as well as highways, and the purpose is to prevent domestic animals from straying anywhere on account of the negligence or willful conduct of the owner." The present case seems to carry a little further the rule of the *Overby* case in making the owner of livestock liable for any damage which could reasonably be foreseen to result from the willful or negligent escape of livestock, as well as for damage to private property or damage to motorists on the highways.

Another element developed in the principal case is the duty of the owner of livestock to capture the animal once he has knowledge of its escape. The court specifically pointed out that, although their compliance with the fencing statute might have afforded the defendants some relief were it not for the negligence in allowing escape from the statutory enclosures, "those statutes cannot furnish an answer to that part of plaintiff's case based on the inexpert negligent efforts to recapture the animal. . . ."[3] This problem was involved in the earlier case of *Baird v. Vaughn*[4] where the defendant's agents were driving a bull through city streets when it escaped. The agents abandoned their search and on the following day the plaintiff was injured. Although the

1. TENN. CODE ANN. §44-1702 (1947).
2. 206 Tenn. 146, 332 S.W.2d 197 (1960). See also 5 TENN. L. REV. 471, 478 (1958), and 20 TENN. L. REV. 374 (1948).
3. Groce Provision Company v. Dortch, 350 S.W.2d 409, 413 (Tenn. App. 1961).
4. 3 Tenn. Cas. 316, 15 S.W. 734 (Shannon 1890).

opinion in favor of the plaintiff is very brief and does not discuss the matter, recovery might have been denied if the agents of the defendant had pursued the escaped bull with the diligence expected of a reasonable man, since it was not established that the original escape was due to the fault of the agents.

Modern cases in other jurisdictions support the rule that there is a duty on the owner to use due care in recapturing any escaped animal.[5] The recent Tennessee case of *Moon v. Johnston*[6] at least hints at this duty, although the court there used the principle to exonerate the defendant for his diligence rather than to find him liable for his neglect: "There was no proof that the herdsman could have reached the bull before the accident, or that the accident could have been avoided had he not stopped to close the gate."[7] This suggests that, if by due care the livestock owner could have recaptured the animal and thereby avoided the accident, he would have been liable for not so doing. The principal case likewise suggests that this is the Tennessee rule, even though the decision is also based on the defendants' negligence in allowing the bull to escape.

D.F.P.

NEGLIGENCE — LIABILITY OF VENDOR OF REAL PROPERTY

Possession of a house constructed by the defendant-vendor, the Memphis Development Company, was transferred to a man and his wife under an executory contract of purchase. Two days later the plaintiff, a minor daughter of the owner, was injured while storing clothes in the attic, when she fell through a covered opening in the floor which had been intended for an attic fan. The fan had never been installed and the opening had been smoothly covered with non-weight bearing material flush with the floor of the attic and with the ceiling. Neither the plaintiff nor her parents knew of the existence of this condition, and it was alleged that defendant's failure to disclose the hidden defect constituted negligence. The trial judge directed a verdict for the defendant on the ground that the doctrine of caveat emptor applies as between vendor and vendee after a sale of real estate, even as to concealed defects. This was sustained by the Court of Appeals,

5. Annot., 59 A.L.R.2d 1328, 1363 (1958).
6. 337 S.W.2d 464 (Tenn. App. 1959).
7. Moon v. Johnston, 337 S.W.2d 464, 470 (Tenn. App. 1959).

but on appeal to the Supreme Court, *held,* reversed. A jury might find violation of a duty to use due care to disclose or correct a dangerous condition, provided the vendor knows of the condition and of the risk and has reason to believe that the vendee will not discover the danger. *Belote v. Memphis Development Company,* 346 S.W.2d 441 (Tenn. 1961).

In reaching this conclusion, the court quoted and followed the *Restatement of Torts* §353 dealing with concealed conditions known to the vendor.[2] The status of the law in Tennessee on this matter has been somewhat unclear ever since the decision in *Smith v. Tucker*[3] nearly forty years ago. There the vendee had notified the defendant-vendor that a heavy concrete mantel had pulled slightly from the wall. The vendor's representative assured the vendee that there was no danger in the mantel and that he would have it repaired promptly. There was in fact nothing in the way of bolts or other supports to secure the mantel to the wall. About a week or ten days after the notification to the vendor of the defect, and before any repairs had been made, the mantel fell on the vendee's two year old son and fatally crushed him in the presence of his mother.

In a suit for loss of services and as an administrator of the deceased child, the plaintiff alleged that the defendant knowingly permitted the mantel to be constructed of inferior material and to be left in a dangerous and defective condition, and that "he sold said home with full knowledge that said mantel was improperly constructed and was dangerous to human life. . . ."[4] After the trial of the case a verdict for the defendant, and this action was sustained by the Court of Civil Appeals and by the Supreme Court.

So far as the facts are concerned, there was no definite finding in *Smith v. Tucker* that the vendor actually knew of the lack of bolts and realized the risk that the mantel would fall, although it is clear that both parties knew at least a week before the accident that the mantel

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1. The court further held in view of a specific understanding that the purchasers were not occupying the house as tenants but rather as vendees with the result that defendant would be liable as a vendor with regard to personal injuries to a vendee.

2. RESTATEMENT, TORTS §353 (1934) provides:
A vendor of land, who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to the person upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land with the consent of the vendee or his subvendee, after the vendee has taken possession, if
(a) the vendee does not know of the condition or risk involved therein, and
(b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk.

3. 151 Tenn. 347, 270 S.W. 66 (1924).

4. *Ibid,* p. 353.

was separating from the wall. As the opinion of the Tennessee Supreme Court points out:

> The evidence viewed in the most favorable light to the plaintiff, does not show actual knowledge of these conditions on the part of the defendant, Tucker, and no such claim is advanced in the brief and argument of able counsel for plaintiff in error. Tucker constructed these houses through a contractor, Scott, and Scott in turn had the mantels built by a subcontractor. . . . It is evident from what has just been said, that the plaintiff has failed to make out a case on the theory that the defendant, Tucker, sold his house with actual knowledge of its dangerous condition. There is no evidence to support this theory, and no recovery could have been sustained thereunder even if we should concede it to be sound in law.[5]

Unfortunately the opinion goes on to suggest that it is not sound law to find liability even where the vendor knows of the danger. So it is said, and this doubtless was the prevailing view throughout the country in 1924, that "Whatever may be the reason, no case can be found in the books where the vendor has been held liable in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises. . . . Whether this be on grounds of public policy, or because the rule of *caveat emptor* governs . . . the fact remains."[6]

The decision in *Smith v. Tucker* has been cited in the two standard works on torts[7] as holding that even a vendor who fails to disclose dangerous conditions actually known to him and which he should realize the vendee probably will not discover incurs no liability for non-disclosure of the danger. It likewise has been so interpreted in a number of Tennessee decisions. So in *Ropeke v. Palmer*,[8] decided a few years later and likewise involving a defective mantel which fell and, in this case, caused injury to the purchaser himself, the Court of Appeals stated that "Unless the plaintiff in the instant case can prevail upon the Supreme Court to overrule the *Smith v. Tucker* case we see no hope for him to succeed. In fact that case seems to go so far as to say that even proof of actual knowledge on the part of the defendant of defects in the house would not have rendered him liable."[9] This is only a dictum, for in the *Ropeke* case also there was no evidence that the vendor knew of the danger, but this dictum was quoted with approval by the Supreme Court in *Evans v. Young*.[10]

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5. Id., p. 358.
6. Id., p. 362.
7. 2 HARPER & JAMES, LAW OF TORTS §27.18, p. 1520 n. 15 (1956); PROSSER, TORTS §79, pp. 462-3 n. 95 (2d ed. 1955).
8. Ropeke v. Palmer, 6 Tenn. App. 348 (1927).
9. Ropeke v. Palmer, 6 Tenn. App. 348, 353 (1927); 24 TENN. L. REV. 1171 (1957).
10. Evans v. Young, 196 Tenn. 118, 264 S.W.2d 577 (1953).

A case which does seem to involve actual knowledge by the vendor, *McIntosh v. Goodwin*, arose in 1954. Like the *Belote* case this decision involved an attic fan opening which had been covered and concealed with non-weight bearing material. As to the knowledge of the vendor, who in this instance was the builder himself, the court stated:

> Unquestionably, the way the opening in the attic . . . was constructed, and its upper surface concealed with a grayish colored loose insulating material, with the knowledge on the part of the builder that the people who would occupy the dwelling most certainly would use the attic for storage purposes as well as to make inspection of the utility units stationed therein . . ."[11]

The Court of Appeals nevertheless held that a verdict was properly directed for the defendant at the close of the trial, quoting from the *Ropeke* case and adding: "The rule of caveat emptor generally applies to sales of land. The vendor does not owe purchaser duty to disclose to him dangerous conditions of the premises."[12] The rule was referred to as exceedingly harsh but required by earlier decisions.

In view of these cases it is not surprising that commentators expressed the opinion that Tennessee had not as yet adopted the modern *Restatement* rule that the vendor is under a duty to disclose to the vendee any concealed conditions known to him which involve an unreasonable danger to the health or safety of the vendee, and which he may anticipate that the latter will not discover by reasonable inspection.[13] The only actual holding in support of this view, however, seems to be the *McIntosh* case since in all of the other decisions on this matter there was no clear knowledge by the vendor of the condition and of the risk.

The instant opinion in the *Belote* case is the first one in which the Supreme Court itself discusses the liability of the vendor where actual knowledge is present. In this clear cut decision the Supreme Court, speaking through Justice Burnett, definitely holds that the harsh rule of caveat emptor should be modified so as to make the modern rule, now approved by the great weight of authority, applicable when the facts meet the test. The Court thus recognizes that under modern conditions more can be demanded from the vendor than was formerly the case. While it may be that the case of *Smith v. Tucker* has borne more than its share of undeserved criticism in view of the lack of knowledge of the risk in that case, our highest court has now made it quite clear that this jurisdiction has adopted the *Restatement* rule.[14]

W.J.D.

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11. McIntosh v. Goodwin, 40 Tenn. App. 505, 523, 292 S.W.2d 242 (1945).
12. *Ibid*, p. 518.
13. 24 TENN. L. REV. 1171, 1176 (1957); Roady, *Real Property, 1957 Survey*, 10 VAND. L. REV. 1188, 1195 (1957).
14. See Note 2, *supra*.

NEGLIGENCE — SIDEWALK DEFECTS — QUESTION FOR JURY

After parking her car and while proceeding across defendant's parking lot, plaintiff fell as she entered a "deep depression in the asphalt surface," thereby sustaining injuries. Plaintiff alleged that the depression was approximately 12 inches across and four inches deep, and difficult to see because of the absence of any break in the asphalt which would draw attention to possible danger. The court overruled defendant's motion for a directed verdict and allowed the case to go to the jury. Upon appeal from a judgment in favor of the plaintiff, *held,* affirmed on the ground that this was not a trivial defect. *Great Atlantic and Pacific Tea Co. v. Lyle,* 351 S.W.2d 391 (Tenn. App. 1961).

In cases like the principal case, the issue of whether the depression constitutes an actionable defect turns on the sufficiency of evidence of negligence.[1] This is ordinarily a question for the jury, but it will be decided by the court where there can only be one reasonable inference drawn from the facts.[2] While the Tennessee courts in cases of this type repeatedly have stated that mere height and depth of the defect will not alone determine negligence,[3] they have been reluctant to allow cases involving defects of less than five inches in depth or height to go to the jury.[4] So while the Tennessee courts have stated more than once that all circumstances must be looked to in order to determine liability,[5] the plaintiff could not get his case to the jury where the defect was only one-half to two inches in depth and eight or ten inches across,[6] the court stating that it was not every defect which caused harm that could be regarded as the result of actionable negligence. The court recognized, however, that the evidence of negligence must be

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1. Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958); City of Memphis v. Dush, 199 Tenn. 653, 288 S.W.2d 713 (1956); City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248 (1938); Rye v. City of Nashville, 25 Tenn. App. 326, 156 S.W.2d 460 (1941).
2. Batts v. City of Nashville, 22 Tenn. App. 418, 123 S.W.2d 1099 (1938); Rye v. City of Nashville, 25 Tenn. App. 326, 156 S.W.2d 460 (1941); Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958).
3. Noel, *Torts, 1959 Tennessee Survey,* 12 VAND. L. REV. 1350, 1353 (1959); 24 TENN. L. REV. 1047 (1957).
4. Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958), in which the defect was 1½ to 2 inches in depth. City of Memphis v. Dush, 199 Tenn. 653, 288 S.W.2d 713 (1958), in which the defect was 3½ to 4 inches in depth. City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248 (1938), where the defect consisted of a slight rise in concrete block of approximately 2 inches.
5. Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958); Batts v. City of Nashville, 22 Tenn. App. 418, 123 S.W.2d 1099 (1938).
6. Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958): "It is difficult to draw a line between actionable and nonactionable defects. . . . According to common experience, such slight defects as the one here involved are not so dangerous that harm may reasonably be expected to result from them."

gathered from all circumstances, and not from height and depth alone, emphasizing as the basic test the degree of danger and the likelihood of injury.[7] The likelihood of danger apparently was increased in the present case by the fact that the walk surrounding the depression was in a broken condition.

Another case which the court refused to allow to go to the jury involved a raised block of the walk rather than a depression, the height of which was approximately two inches.[8] It was found that this defect could not constitute actionable negligence, even though the raised block lay in shadows cast by a telephone pole and by foliage. Other decisions have resulted in the development of the Tennessee law to the point where the rule has been stated to be: "The test is the degree of danger, or the possibility of injury from the defect. Of course anything that in fact causes harm is to some degree dangerous; but to impose liability, the thing must be dangerous according to common experience."[9] As another case puts it: "Where the defect or obstruction is such that reasonable men would not differ in the conclusion that the obstruction or defect was not dangerous to travel in the ordinary modes by persons exercising due care, a verdict should be directed."[10]

It would seem that, while the Tennessee court repeatedly has stated that all the circumstances should be looked to in order to determine liability, the ones which have been regarded as of crucial significance in the past have been the height or depth of the defect. The present decision seems to attach a little more weight than earlier cases to other circumstances. Although there was some testimony that the depression was from six to eight inches in depth, the defect was alleged to be only four inches in depth, and yet the court sustained a refusal of the trial judge to instruct the jury that "depressions of less than five inches in depth are trivial" and not sufficient to constitute negligence. As in earlier decisions, there was no attempt to indicate that varying circumstances which are likely to be relevant.

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7. Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958), citing Rye v. City of Nashville, 25 Tenn. App. 326, 156 S.W.2d 460 (1941), in which it was stated that it was not every defect which in fact caused injury which should be treated as an actionable defect. After reviewing the Tennessee authorities on the subject the court held that the defect was not such that injury was foreseeable by common experience.
8. City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248 (1938): "And so, where the evidence is conflicting, or the facts such as to authorize different inferences as to whether the defect is a dangerous obstruction calculated to cause injury, the case must be submitted to the jury, but, where the defect or obstruction is such that reasonable men would not differ in the conclusion that the obstruction or defect was not dangerous to travel in the ordinary modes by persons exercising due care, a verdict should be directed."
9. Henry v. City of Nashville, 44 Tenn. App. 690, 318 S.W.2d 567 (1958).
10. City of Memphis v. Dush, 199 Tenn. 653, 288 S.W.2d 713 (1956), quoting from City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248 (1938).

It is evident that any attempt to catalogue in advance the various significant circumstances presents difficulties, for flexibility is needed in this area.[11] There are some factors, however, which have been indicated by various courts as affecting the possible liability of defendant. Among these factors are: (1) the condition of other walks in town and surrounding areas;[12] (2) the expense of maintaining the walks in better condition;[13] (3) the defendant's knowledge or notice of the defect;[14] (4) visibility under various weather conditions;[15] (5) the amount of traffic normally present;[16] (6) the duty to anticipate all typical weather conditions;[17] (7) the likelihood that people will traverse the dangerous area,[18] or will step or deviate so as to encounter the danger;[19] (8) variation, or lack of variation, in the appearance of the surface which makes the defect more evident, or less so.[20]

In general, circumstances must establish a probability and not a mere possibility of harm.[21] Furthermore it should be borne in mind

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11. See 24 TENN. L. REV. 1047 (1957), where it is stated that there has been much criticism of a rule based on the exact degree of depth and height.
12. Blomgren v. Ottumwa, 209 Iowa 9, 227 N.W. 823 (1929).
13. Vellante v. Town of Watertown, 300 Mass. 207, 14 N.E.2d 955 (1938). Even though the court did not feel that the evidence was sufficient to find negligence on the facts of this case, they stated the rule to be: "The expense of keeping ways in a high state of repair must be considered on the questions of reasonableness and diligence."
14. Quinn v. Stedman, 50 R.I. 153, 146 A. 618 (1929).
15. Slattery v. City of Seattle, 169 Wash. 144, 13 P.2d 464 (1932), where the court held that the duty to maintain the walks was a constant standard but that the amount of care required was subject to varying circumstances. In this case the court held that the duty to foresee possible use during all normal weather conditions would affect the amount of care required under particular circumstances.
16. Hooker v. Town of Hanover, 247 App. Div. 623, 288 N.Y.S. 290 (4th Dept. 1936): "What would be a proper care in one instance would be entirely inadequate under different circumstances. A greater obligation rests upon a municipality in respect to a much-traveled thoroughfare in a city or a thickly settled portion of the community than exists where the road runs through an isolated section of the country."
17. Sitas v. City of San Angelo, 143 Tex. 154, 177 S.W.2d 85 (1943). The court in this case held that the duty owed by the owner to maintain the way in a reasonably safe condition was owing during both good and bad weather.
18. Owen v. City of Los Angeles, 82 Cal. App. 2d 933, 187 P.2d 860 (1947). The court held that it was not the foreseeability that people would be in the area for that particular purpose, but the likelihood the people would be in the area for any purpose.
19. Cunningham v. City of Springfield, 226 Mo. App. 23, 31 S.W.2d 123 (1930), where court looked to location and position of telephone pole which on a rainy night had resulted in an accident when plaintiff had not been able to see the obstruction, it being foreseeable that danger might be present to those traveling the area.
20. So, in the principal case the court seemed to place emphasis on the fact that the depression was such that there was no break in the walk and in such a position that it was difficult to see as someone approached.
21. Forrester v. City of Nashville, 179 Tenn. 682, 169 S.W.2d 860 (1942); Batts v. City of Nashville, 22 Tenn. App. 418, 123 S.W.2d 1099 (1938); 63 C.J.S. *Municipal Corporations* 133 (1950).

that the significance of particular factors will vary with different cases. So it has been stated: "Indeed, so great is the effect of circumstances that the same conduct, under different circumstances or in different situations, may range from the highest degree of care to gross negligence."[22]

As noted earlier,[23] the Tennessee courts have indicated that the circumstance that the defect lies in shadows may not be of vital significance. So in one case[24] the court dismissed this factor by saying that visibility was "no worse in this case than in the *Batts* case." The accident in the case referred to, *Batts v. City of Nashville*,[25] took place at night, during rain and snow, with resulting poor visibility, but this did not prevent the directing of a verdict for the defendant.

Apparently the main circumstance suggesting negligence in the present case apart from the depression itself was the even texture of the parking lot, which would not attract attention to the possible danger from the depression. This factor was not present in some earlier cases where the verdict was directed for the defendant. While the principal case has enlarged the ability of plaintiff to reach the jury where a depression is less than five inches and presumably where an obstruction is less than four inches in height, it still remains to be seen what particular circumstances, as lack of variation in the material, will be considered as particularly significant. It is evident that attorneys should explore the entire area for factors which tend to show a substantial danger, or the lack of any foreseeable risk of injury.

T.K.T.

NEGLIGENCE — SUBSEQUENT EMANCIPATION — EFFECT ON FAMILY IMMUNITY

Defendant, an unemancipated minor, was driving an automobile in which her mother was a passenger. The mother was killed when the car struck a truck at a highway intersection. Within one year after the date of the accident and after the defendant had been completely emancipated by marriage and removal of disability by court decree,[1] the administratrix of the deceased parent brought an action for negligence for the benefit of the surviving husband and children other than

22. 65 C.J.S. *Negligence* 395 (1950).
23. City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248 (1938).
24. Rye v. City of Nashville, 25 Tenn. App. 326, 156 S.W.2d 460 (1941).
25. 22 Tenn. App. 418, 123 S.W.2d 1099 (1938).

1. TENN. CODE ANN. §23-1201 (1956).

the defendant. The defendant filed a demurrer, asserting that since she was an unemancipated minor at the time of the alleged wrongful death, and since the decedent could not have maintained the action due to family immunity, the administratrix could not maintain the suit. The trial judge sustained the demurrer and dismissed the action. On appeal to the Tennessee Supreme Court, *held,* an action for wrongful death of a parent, caused by the negligence of his unemancipated minor child, may be maintained by his administrator against such child after the child has been completely emancipated.[2] *Logan v. Reaves,* Tenn. Sup. Ct., Feb. 8, 1962; petition to rehear, April 16, 1962, denied.

The instant case presented a question of first impression in Tennessee and the holding may be unique, for a search of authorities does not reveal any decision exactly in point. Not only one, but two unusual aspects of the immunity doctrine are apparently incorporated in the result reached. It appears that: (1) the administrator is enabled to maintain an action through the survival statutes[3] although the decedent apparently would have been precluded from so doing by the immunity doctrine if she had lived; and (2) there was at least a partial removal of the family immunity by voluntary acts of the parties subsequent to the time of the alleged tort.

Considering the frequency of wrongs between parents and minor children, the number of cases concerning the family immunity doctrine has been surprisingly small until of late. Most eminent authorities maintain that no immunity existed at English common law, and very little concerning the matter can be found in early cases.[4] Only by consulting American decisions since 1891 can the limits of the doctrine be ascertained. In that year the leading case, *Hewlett v. George,*[5] held that a minor child could not maintain an action against her mother for false imprisonment. The court there said: "So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid, comfort, and obey, no such action can be maintained."

This doctrine has been followed in many, if not all, jurisdictions. The Supreme Court of Tennessee relied upon the Mississippi decision in an early case in holding that an unemancipated infant could not maintain a tort action against her father and stepmother for cruel and

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2. *Catherine B. Logan, Admrx. of Marie S. Seneker, Deceased v. Louise Seneker Reaves,* Tenn. Sup. Ct., Feb. 8, 1962; petition to rehear, April 16, 1962, denied. (Case unreported to date.)
3. TENN. CODE ANN. §20-607 (1956).
4. McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1060 (1930).
5. 68 Miss. 703, 9 So. 885 (1891).

inhuman treatment.[6] Tennessee has since precluded actions where an administrator of a deceased parent sought recovery against a minor son for the wrongful death,[7] and where a minor son sought to maintain a tort action against his father for personal injuries caused by the father's negligence in driving an automobile.[8] On the other hand the Tennessee Supreme Court has refused to extend the protection of the doctrine to an action between minor unemancipated brothers,[9] or to prevent a wrongful death action by the administrator of a deceased former wife against her former husband, where the divorce occurred before the wrongful killing, even though the defendant's children would be the recipients of the proceeds.[10]

The primary reason relied upon to support the doctrine is that the immunity is necessary to preserve the domestic tranquility of the home as well as the parental discipline and control.[11] The parents, rather than the children, are the parties primarily protected by the doctrine since they are more likely to be the actors within this relationship. The parents normally direct the activities in which the child may be hurt; they exercise disciplinary action against their children; and they have the responsibility for their care, protection and instruction. Furthermore, they are the ones who have the money to pay judgments. It is said that they may best perform their duties and functions toward the children if they may do so with immunity. Otherwise, it is contended, parental authority would be destroyed by threats of civil action against them by their children. Also, it is concluded that the beneficial results, the protection of all the homes, outweigh the adverse effects, the possible increase in wrongful acts because of the protection of the immunity and the injustice to the supposed few who have been wronged.

As to suits against the child by the parent, where no disturbance to parental authority is involved, however, the main justification for protection to children must be based upon domestic tranquility alone, or on the concept that any immunity must be symmetrical.

Although some may have considered this immunity as part of the substantive law, it appears that the Tennessee Supreme Court adopted

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6. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).
7. Turner v. Carter, 169 Tenn. 553, 89 S.W.2d 751 (1936).
8. Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952).
9. Harrell v. Haney, 341 S.W.2d 574 (Tenn. 1960); 28 TENN. L. REV. 422 (1961).
10. Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960); 27 TENN. L. REV. 458 (1960). Cf. Gordon v. Pollard, 336 S.W.2d 25 (Tenn. 1960), 28 TENN. L. REV. 573 (1961) (where action was not allowed after annulment for an act during coverture.)
11. PROSSER, LAW OF TORTS §101 (2d ed. 1955).

the better view in considering the rule as procedural in nature.[12] Thus the doctrine cannot be said to negate the duty of family members to refrain from wrongful acts toward one another, nor does it withdraw from tortious acts their wrongful character; it merely prevents them from being enforceable causes of action. Thus conduct between parent and child should not be compared with similar conduct between husband and wife. An otherwise wrongful act between husband and wife is covered by the common law unity doctrine; the effect is as if the act never happened.[13] Under the family unity doctrine, however, the conduct does not have the effect as if the act never happened; rather the act is regarded as committed and as wrongful. It is said that a breach of duty occurs, but due to the immunity doctrine, it is normally without redress.[14] Thus the Supreme Court rejected the defendant's contention that to allow recovery would be breathing "the breath of life into his claim," or that it was allowing subsequent events to resurrect a completely non-existent cause of action.

Initial consideration of the facts of the instant case might lead one to think that the court did not regard the subsequent marriage and the removal of the disability of minority as essential to maintenance of the action. The contemporaneous death of the mother terminated the family relationship between her and the defendant, and caused a complete ending of the family relationship which had previously existed; quite obviously, the defendant no longer had an obligation to aid, comfort, and obey her mother. So, as between the child and the deceased parent, the reason for the rule no longer existed. Such reasoning has been the basis of the holdings in several recent decisions involving the situation converse to the one under discussion in which the suit is brought by the injured party against the personal representative of the deceased member who negligently injured the plaintiff and died in the accident.[15] However, the court in the principal case impliedly rejected the termination of the family relationship by the death of the parent as a sole basis for allowing suit by distinguishing *Turner v. Carter.* In citing that case, where the immunity was successfully invoked in spite of the death of the parent, the court said that it appeared that the son who was being sued "had not been completely emancipated." Later in the opinion in the principal case, the court emphasized that "Mrs. Reaves was completely emancipated." This lan-

12. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930). See also RESTATEMENT, LAW OF TORTS §887 (a) (1934).

13. Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930).

14. *Ibid.* See also 5 VILL. L. REV. 521, 529 (1960).

15. Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960); Gortva v. Feldman, 12 Pa. D. & C.2d 188 (1958); Palcsey v. Tepper, 176 Atl. 2d 818 (N.J. Super. 1962).

guage suggests that the court is not allowing the sole fact of death to remove the immunity, but is relying at least as much on the emancipation of the child.

Assuming that the death of one of the parties is even a partial condition for the lifting of the immunity, a problem arises as to the interpretation of the wrongful death statutes. This statute does not create any new right, but merely keeps alive the right which the deceased, had she not died, would have had against the wrongdoer. Thus, if death is a condition for lifting the immunity in this case, it appears that a new, or at least a greater, right is given to the representative than was possessed by the decedent herself. Some precedent may be provided for this enlargement of rights asserted by the representative by the situation where a representative is given permission to sue for the value of the decedent's services to the family — something for which the decedent would have been unable to sue if he had lived. Other jurisdictions which, to date, have allowed death to terminate the immunity were not faced with this problem, for in those cases the actions were by a living plaintiff against the estate of the deceased party.[16]

Since the court did not reply principally upon the termination of the relationship by death, no other conclusion can be drawn but that the holding is based mainly upon the subsequent emancipation. This is a considerable step toward the abolition of the immunity doctrine. Most states have treated the immunity as of a permanent nature with the facts that determine its applicability being those that exist at the time of the wrongful act.[17] The present holding indicates that the Tennessee courts, however, may now determine the applicability of the doctrine as of the time of the initiation of the suit.

The result reached is in accord with the current trend toward restricting the invocation of the family immunity. Most torts authorities consider it desirable to reduce, or even eliminate, the immunity concept.[18] Certainly, little justification exists today for the original view that a father could not be sued by his daughter whom he raped.[19] In addition to those cases where the immunity was eliminated by the termination of the family tie by death, some courts have differentiated between negligent acts and those which were willful and malicious, saying the latter are not within the scope of family relationship, with

16. See Oliveria v. Oliveria, 305 Mass. 297, 25 N.E.2d 766 (1940) where the court allowed the action but relied on the fact that the death act involved created a new cause of action, and was not basically a survival act.
17. 19 A.L.R.2d 423, 438 (1951).
18. PROSSER, LAW OF TORTS 109 (2d ed. 1955); Harper & James, LAW OF TORTS §8.11 (1956); 43 HARV. L. REV. 1060 (1930).
19. Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905) — since overruled by Borst v. Borst, 41 Wash. 642, 251 P.2d 149 (1952).

the result that there is no family immunity. Other courts have similarly considered acts occurring in other relationships, such as employer-employee, as unprotected.[20]

The presence of insurance undoubtedly has been the major factor in the removal of immunity in many cases although only a few have openly discussed this aspect of the problem. It is, of course, evident that, if payment is to be made by the insurance company, the domestic tranquility or parental authority will not be harmed, although a problem with reference to collusion does arise. Many courts, however, have refused to permit removal of immunity upon this consideration, saying the presence of insurance cannot create a cause of action where one does not exist. Tennessee, on the other hand, has for some time allowed suit against charitable organizations which are insured. This seems in concert with the present interpretation of immunity as a disability.[21]

Although a desirable result seems to have been reached in the instant case, it does raise some new problems. The Statute of Limitations does not begin to run against an infant until he has reached majority.[22] Thus, in the converse situation where the child is suing the parent or his personal representative, it appears that an unemancipated infant would be enabled to bring a suit against the parent upon emancipation even if the alleged wrong occurred many years prior to his emancipation. If no permanent immunity existed, the child would not be precluded from asserting a stale claim. Furthermore, the disruption of domestic tranquility and parental authority may be as great as if no immunity at all existed, since the threat of suit while the child is waiting for emancipation may be as disturbing to family discipline as the suit itself. It is possible that these problems will lead to a restriction of the present holding to its facts, and that the immunity will be regarded as terminated only when the relationship of the parties has been altered on the death of the parent as well as by the emancipation of the child.

R.V.O.

WORKMEN'S COMPENSATION — DEPENDENCY — POSTHUMOUS ILLEGITIMATE CHILD

Claimant under the Tennessee Workmen's Compensation Act[1] was the child of a meretricious relationship between the deceased

20. See McCurdy, *Torts Between Parent and Child,* 5 VILL. L. REV. 521 (1960) wherein a general discussion of the different encroachments of the family immunity doctrine is made.
21. McLeod v. St. Thomas Hospital, 170 Tenn. 423, 95 S.W.2d 817 (1936); 14 TENN. L. REV. 468 (1959).
22. TENN. CODE ANN. §28-107 (1956).
1. TENN. CODE ANN. §50-901 *et seq.* (1956).

employee and a Memphis woman. The child, acknowledged to be that of the deceased, was born some six months after his death. The Chancellor denied the claim of this posthumous illegitimate child on the authority of *Sanders v. Fork Ridge Coal and Coke Company.*[2] On appeal to the Supreme Court, *held,* reversed on the grounds that a posthumous child is a "child" in the sense of the law, citing *Travelers Insurance Company v. Dudley*[3] and *Winfield v. Cargill,*[4] and that the Bastardy Act of 1955,[5] which makes the putative father liable for the support of an illegitimate child, is evidence of a public policy that an illegitimate child is a "dependent" under the Workmen's Compensation Act. *Shelley v. Central Woodwork, Inc.,* 340 S.W.2d 896 (Tenn. 1960).

The pertinent section of the workmen's compensation statute as enacted by the Tennessee Legislature reads as follows:[6]

> (a) For purposes of the Workmen's Compensation Act the following described persons shall be *conclusively presumed* to be wholly dependent:
>
> (1) A wife, unless shown she was voluntarily living apart from her husband at the time of the injury, and *minor children under the age of 16 years.*
>
> (2) Children between sixteen (16) and eighteen (18) years of age, or those over eighteen (18), if physically or mentally incapacitated from earning, shall prima facie, be considered dependent.
>
> (3) A wife, *child,* husband, mother, father, grandmother, grandfather, sister, brother, mother-in-law, and father-in-law who were *wholly supported* by the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his *actual dependents* and payment of compensation shall be made in the order named. (Emphasis added.)

The legislature contemplated three classes of children: The first, coming within section (a) (1), and entitled to the conclusive presumption of dependency; the second, coming within section (a) (2), and entitled to only a rebuttable presumption of dependency; and the third, coming within section (a) (3), entitled to no presumption, and carrying the burden of showing actual support at the time of death and for a reasonable period prior thereto.

Soon after the enactment of the workmen's compensation statute, the Tennessee Supreme Court was faced with the problem of determining in an illegitimacy situation what distinction the legislature had in mind.

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2. 156 Tenn. 145, 299 S.W. 795 (1927).
3. 180 Tenn. 191, 173 S.W.2d 142 (1942).
4. 196 Tenn. 133, 264 S.W.2d 584 (1953).
5. TENN. CODE ANN. §36-222 *et seq.* (1956).
6. TENN. CODE ANN. §50-1013 (1956).

Portin v. Portin[7] presented the situation of an illegitimate child who had been actually supported by the deceased employee for some time prior to death. It was held that the child could not recover under the provisions of section (a) (1) of Code §50-1013 because this section was intended to apply only to *legitimate* children, but that the child could recover under section (a) (3) since he could show that he was wholly supported by the deceased for a reasonable time prior to his death. This distinction was favorably quoted in *Memphis Fertilizer Company v. Small*,[8] decided by the Supreme Court in 1930, and was never challenged, either directly or by implication, until the principal case.

It was decided some time ago in Tennessee that a posthumous child is entitled to a conclusive presumption of dependency or, on the other hand, must show actual dependency is of particular significance to recovery by a posthumous child, since such child cannot possibly show actual support by the deceased employee. Further, under the *Portin* case classification, the posthumous illegitimate child would be unable to recover, since he would not fall within the class entitled to the conclusive presumption of dependency authorized by section (a) (1).

It was decided some time ago in Tennessee that a posthumous child of a valid marriage is a beneficiary of the conclusive presumption of dependency embodied in section (a) (1), since it was a "child" under the age of 16 years for purposes of workmen's compensation and therefore could recover under the Act without a showing of actual dependency.[9]

In more recent years, the court was faced with the question of recovery under the Act by the posthumous child of a void marriage.[10] It was held that the child was entitled to the benefits provided by the Act, on the ground that the child was legitimate by operation of the 1932 amendment to Code §36-832: "Annulment or dissolution of a marriage shall in no wise affect the legitimacy of the children of the same,"[11] and thus was conclusively presumed to be dependent on the deceased employee at the time of his death. The implications of the reasoning in this opinion indicate that the *Portin* case distinction was then still in effect.

Upon showing of actual support, a stepchild,[12] illegitimate minor

7. 149 Tenn. 530, 261 S.W.2d 302 (1923).
8. 160 Tenn. 235, 22 S.W.2d 1037 (1930).
9. Travelers Insurance Co. v. Dudley, 180 Tenn. 191, 173 S.W.2d 142 (1942).
10. Winfield v. Cargill, 196 Tenn. 133, 264 S.W.2d 584 (1953).
11. TENN. CODE ANN. §36-832 (1956). The 1932 Amendment added the words "annulment or."
12. Aluminum Co. of America v. Fendnall, 150 Tenn. 446, 265 S.W. 680 (1924).

sister,[13] grandchildren,[14] nephew,[15] and unrelated children[16] have been allowed to recover under section (a) (3). It has been consistently held that dependency, not relationship, is the test of the Workmen's Compensation Act. However, it was held in the *Portin* case that legitimate relationship was conclusive evidence of dependency under section (a) (1).

The old authority for the proposition that a posthumous illegitimate child cannot recover under the Act was *Sanders v. Fork Ridge Coal and Coke Company.*[17] There the claimant was the child of a supposed marriage contracted during the existence of a prior valid union. Under the law as it existed at that time, 1927, the child was clearly illegitimate; today, the result would be reversed by operation of Code §36-832, as applied in *Winfield v. Cargill.* The court cited *Portin v. Portin* in holding that an illegitimate child must have been actually supported by the deceased.

In the principal case, the court cited *Winfield v. Cargill* and *Travelers Insurance Company v. Dudley* to show that an unborn child is a child within the meaning of this statute. It then noted the old holding in *Sanders v. Fork Ridge Coal and Coke Company,* but pointed out the subsequent amendment of Code §36-832, as above discussed. The court then placed great emphasis on the Bastardy Act which makes the putative father liable for the support of his illegitimate children, and concluded that since an illegitimate child is now a legal dependent of the putative father, the child is entitled to share in the benefits of workmen's compensation.

Although the Court failed to take note of the *Portin* case and the classifications set out therein and likewise failed to discuss the significance of the three classes of children set out in Code §50-1013, it appears that it has substantially altered the old requirement for the conclusive presumption of dependency bestowed by section (a) (1). The old test was one of "legitimate relationship." The new test appears to be whether or not there was, at the time of the employee's death, a legal duty of support owing to the child. If so, the child is conclusively presumed to have been dependent on the workman and no showing of actual support is needed.

The theory of the Act seems to be that those persons should be compensated whom the court can presume that the deceased workman

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13. Bohlen-Huse Coal and Ice Co. v. McDaniel, 148 Tenn. 628, 257 S.W. 848 (1923).
14. Cherokee Brick Co. v. Bishop, 156 Tenn. 169, 299 S.W. 770 (1927); Sands v. Brock Candy Co., 171 Tenn. 235, 101 S.W.2d 1113 (1937).
15. Southern Motor Car Co. v. Patterson, 168 Tenn. 252, 77 S.W.2d 446 (1935).
16. Kinnard v. Tennessee Chem. Co., 157 Tenn. 206, 2 S.W.2d 807 (1928); Memphis Fertilizer Co. v. Small, 160 Tenn. 235, 22 S.W.2d 1037 (1930); Wilmoth v. Phoenix Utility Co., 168 Tenn. 95, 75 S.W.2d 48 (1934).
17. 156 Tenn. 145, 299 S.W. 795 (1927).

would have supported, had he lived. Before 1955, it could be conclusively presumed that he would have supported his legitimate children, just as it may be conclusively presumed that he would have supported a wife not voluntarily living apart. It could also be assumed that he would have continued to support *other* children whom he had *actually supported* for a reasonable time prior to his death. Since 1955, it may be conclusively presumed that he would have also supported his illegitimate children, in view of the legal duties imposed by the Bastardy Act.

A word of warning is in order here. The court noted that an illegitimate child is entitled to share in workmen's compensation benefits *where paternity is established.* This is in accord with holdings in other states which require establishment of paternity or acknowledgment of paternity by the workman prior to his death. Of course, where paternity cannot be established, no legal duty of support arises, and therefore no conclusive presumption of dependency.

J.R.S.

BOOK REVIEWS

FREEDOM AND RESPONSIBILITY. Edited by Herbert Morris, Stanford, Calif.: Stanford University Press, 1961. Pp. 546. $11.50.

One of the oldest, and still one of the most intriguing, philosophical questions is that of whether man has freedom of will in relation to his conduct. This subject has occupied the attention of most philosophers, and many persons in other areas, including theology and law.

A related question of more specific concern to lawmakers is the extent to which a person should be normally and legally responsible for the consequences of his conduct. In the language of Holmes, "The business of the law of torts is to fix the dividing line between those cases in which a man is liable for harm which he has done, and those in which he is not." (Quoted at p. 39). Legally, of course, the question is not confined to torts; it is probably even more significant for criminal law, and is present in most areas.

As philosophers and theologians have been unable to agree on these questions, it is to be expected that the law would not give final and definite answers to them. Points of emphasis change, conditions in society change, and the law gives answers which vary from society to society, and from time to time. But the questions remain — there is no escape from them.

The book under review is a collection of writings on these questions. The editor is a professor of philosophy and a lecturer in law, and the writings collected are the product both of philosophers and members of the legal profession. Among these authors are Aristotle, Kant, St. Thomas Aquinas, Freud, Jean-Paul Sartre, Bentham, Austin, Holmes, Walter Wheeler Cook, Jerome Hall, Seavey, Corbin, Fuller, Harper and James. A few judicial decisions are also included.

The selections are very interesting, and represent varied views. Specific topics discussed include causation, ignorance and mistake, legal insanity, and negligence, recklessness, and strict liability. The practicing lawyer is not likely to find in this book much that will be of direct help on a particular case, but it will give him perspective on how these questions relate to specific legal problems. And anyone concerned with the relation of law and society will find here much stimulating material on ageless questions.

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THE SUPREME COURT REVIEW, 1961. Edited by Philip B. Kurland. Chicago, The University of Chicago Press, 1961. Pp. i-vii, 332. $6.50

When the writer reviewed the first volume of this new law review of the University of Chicago, in the Spring 1962 issue of the *Tennessee Law Review,* he stated that it was hard to see how the level of the first annual volume could be sustained. He now believes that this can be accomplished.

The present volume consists of eight essays dealing with various aspects of the Supreme Court's business. Six of the essays deal with problems raised by particular recent cases. One deals with a current problem not so much occasioned by a particular case as by Mr. Justice Black's recent James Madison Lecture, *The Bill of Rights.* The remaining essay studies a former Chief Justice's activities and concern in securing what he considered appropriate appointments to the court.

Federalism and the Fourth Amendment: A Requiem for Wolf by Francis A. Allen, Professor of Law, The University of Chicago, examines *Mapp v. Ohio.* This case, overruling *Wolf v. Colorado,* is seen as likely to be less significant in its ultimate effects than either its critics or defenders anticipate. It is examined in light of the obligations which a federal system imposes upon the Court in its effort to make meaningful a national system of individual rights. The *Wolf* case is appraised as either too broad in its definition of the federal right or too narrow in its scope of federal power. Other decisions resting upon the *Wolf* case appear to have survived *Mapp.* The point that the *Mapp* case protects the criminal but not the innocent citizen from illegal search echoes a similar idea in Barrett's *Personal Rights, Property Rights, and the Fourth Amendment* in last year's review. The suggestion concerning the types of crimes which most often invite illegal invasions of privacy, and why, is most provocative. The problem of retroactivity in the *Mapp* principle is thoroughly explored.

In *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues,* Professor Harry H. Wellington of Yale University examines, in a brief note, the title case's interpretation of the Railway Labor Act so as to make it constitutional. In this case the union member objected to the union using his dues to support legislation and legislators he opposed. The technique of the court is approved, generally, as wisely avoiding passing upon the constitutionality of a governmental restriction on liberty unless it is clear that Congress has faced the issue squarely and determined that it was necessary to impose the restriction. In this particular situation, however, the author doubts that the Court can long avoid the issues it avoided in this

case, and suggests that the Court should have faced the constitutional decision, but declined to test union conduct by constitutional standards. That is, he makes the point that Congress did not require certain things, but merely permitted them.

David Fellman, Professor of Political Science, University of Wisconsin in his *Constitutional Rights of Association* examines *Louisiana v. Gremillion* protecting disclosure by NAACP, and compares it with cases involving disclosure of membership in the Communist Party. In historical origins the right of association or combination for political reasons was regarded as a by-product of the right of petition, but later was viewed as cognate to those rights of free speech and press, and equally fundamental. While it is clear that it did not include, however, an alliance for crime, the Supreme Court's view is that the right to assembly is fundamental to any system of ordered liberty. The problem of the hostile audience has too frequently been handled inadequately by local authorities. The conclusion that rights of association are the rule, and that exceptions should require convincing justification, seems unimpeachable.

Knetsch v. United States: A Pronouncement on Tax Avoidance is a brief but thorough and comprehensive treatment by Walter J. Blum, Professor of Law, The University of Chicago, of the 1960 case. The apparent ruling of the Court, and the weaknesses of the majority and minority opinions are explored and developed.

The machinations and activities of Chief Justice Taft in attempting to secure appointments, approved by him, to the Supreme Court, is the subject of *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments* by Walter F. Murphy, Associate Professor of Politics, Princeton University. The conservative views of Taft were sincere, and emphasized property rights' protections and the fear of what Taft viewed as socialistic interpretations of the Court. Most persons as uninformed in the matter as was the reviewer will be somewhat startled at the campaigns waged by Taft in his efforts to block the appointment of outstandingly competent lawyers with whom he disagreed. The course which constitutional law might have taken if some such men opposed by Taft had been appointed cannot be plotted, though it is quite clear that the course would have been different. The reviewer is one who thinks that a little more liberalism in the nineteen-twenties and the nineteen-thirties might have acted as a pressure valve and avoided the later more extreme shifts. The dangers of the technique used by Taft upon the Court and its prestige and role in our system, are serious.

Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot by

Jo Desha Lucas, Professor of Law, the University of Chicago, examines the famous case involving the gerrymandering of Tuskeegee. It treats the problems historically, including various attempts by Southern states to restrict Negro voting. The *Gomillion* case and others are examined in the light of the Fourteenth and Fifteenth Amendments. The geographic and apportionment problems now before the courts in the *Baker* case and the precedents are examined. The article was prepared, apparently, without the opportunity to examine the *Baker* decision. In his summary Lucas sees the title case as serving notice upon the South that the power of a state to determine the powers and boundaries of its internal political subdivisions is not absolute and cannot be used to defy or ignore the positive requirements of the Constitution. It is wondered to what extent *Baker v. Carr* will be viewed in the future as a similar notice to all the states in a related, though dissimilar area.

The First Amendment is an Absolute by Alexander Meiklejohn, former president of Amherst College, and Professor Emeritus of Philosophy, University of Wisconsin, is one of the most stimulating and provocative essays in the volume. It is brief but examines the question of the scope of the First Amendment with depth and insight. The conclusion that freedoms and regulation are not antithetical grows more valid as it is contemplated. The thesis that the First Amendment protects the presence of self-government is, it is submitted, fundamental. It is later expressed as being the intent of the First Amendment to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people. The author's conclusion is that the Amendment does not protect the freedom to speak, but the freedom of those activities of thought and communication by which we govern. It is seen as concerned not with a private right, but with governmental responsibility. These activities are seen as: understanding issues, passing judgment, and devising methods by which those decisions can be made wise and effective, or if need be, supplanted by others. The author would exclude from the First Amendment those communications not being used as activities of governing.

Derek C. Bok, Professor of Law, Harvard University, in *The Tampa Electric Case and the Problem of Exclusive Arrangements under the Clayton Act*, deals exhaustively with the problems of competition not only in the light of the legal materials, but in light of the situations governing competition, and the theories, and attitudes dealing with the phenomenon of competition. He examines the effectiveness of the various agencies that have dealt with the problem, and the developments of legal materials. The conclusion that major questions are still unanswered is demonstrated clearly. The author suggests an analysis and

approach that he feels will make possible more clear and organized doctrine. Though the area is one that the reviewer is not familiar with in any detail, he found the treatment illuminating and provocative.

The first annual volume expressed a hope to be of assistance to courts, and both of these volumes seem likely to achieve that goal. The first volume also expressed the hope of providing a medium of exchange between political scientists and lawyers; it would seem that the second volume approaches this goal even more effectively than the first. Another expressed hope, that of helping the intelligent layman understand the Court as an institution, though difficult to attain, is well fulfilled in both of these volumes. It is sincerely hoped that the Bench and Bar will utilize these annual volumes. They have a potential for great usefulness to them.

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TRADITION OF EVE. By Cyril J. Smith. The Naylor Company, San Antonio, Texas. 1961. Pp. 308, XIV. $6.00

This book is an interesting and well written narrative of the modern American woman and how she got that way.

The author practiced law in his hometown of Rockwood, Tennessee, for thirteen years and then moved to Houston, Texas, in 1942. He has practiced law there since that date.

During the last seventy years, the median age of marriage in the United States has dropped several years and the percentage of population that has married has increased by 15 per cent. The author attributes this increase in the popularity of marriage to the appreciation by the contemporary male of the fact that the modern girl with a job is a more advantageous mate than the girl of any earlier period.

The chapter on artificial insemination contains a frank discussion of the complicated social and legal problems of the fertile bride who marries a sterile husband. This chapter contains a critical analysis of both the cases and the medical consequences of this relatively recent biological innovation which primarily benefits women.

Other topics discussed include the following: the effect of the teachings of the early Christian Church on married women, and especially the teachings of Saint Paul on woman's inequality; the

Nineteenth Amendment to the Federal Constitution, giving women the right to vote; a proposed equal rights amendment; the family woman, the working woman, and the outstanding woman; the contrasting attitudes on the first job of the young man and the young woman, and life insurance benefits paid to wives.

According to the author, woman can best be understood when viewed as a product of her historical past and as one on the road to greater future progress. He is an effective advocate of equal rights for women. His thesis is that woman made her greatest advancement in each of the world's cultures when civilization was at its peak. Antipathy for woman in a man's world is fading and the author's forecast is that all inequalities and inequities based on sex will disappear eventually and woman will have equal rank, rights and opportunities with man, in all phases of economy, law, business and society.

WILLIAM WICKER

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TORT AND MEDICAL YEARBOOK, 1961. By Albert Averbach and Melvin M. Belli. Indianapolis, Bobbs-Merrill Company, 1962. Pp. 749. $25.00

The editors, Albert Averbach of Seneca Falls, New York, and Melvin M. Belli, of San Francisco, are well-qualified to edit this semi-annual publication of leading medical-legal articles of interest to anyone practicing law in the tort field. Both of these gentlemen are eminent trial lawyers and able authors in their own right, as evidenced by Belli's *Trial and Tort Trends* (10 volumes 1951-61), *Modern Trials, Modern Damages,* and numerous other legal and non-legal books, and Averbach's *Handling Accident Cases* (five volumes) and *Handling Automobile Cases* (two volumes), and numerous legal articles. Mr. Averbach and Mr. Belli are assisted by a Selection Advisory Board of leading trial specialists, doctors, jurists, and law professors. The publication in this first volume includes three well-selected articles from the *Tennessee Law Review,* including considerable portions of the recent symposium on aviation negligence.

In addition to the sections devoted to leading legal articles and leading medical articles, the book prints the most significant judicial decision of the year as nominated by the editors. Volume One highlights *Battalla v. State of New York,* 10 N.Y. S2d 237, holding that a cause of action is stated when it is alleged that claimant was negligently caused to suffer "severe emotional and neurological disturbances with

residual physical manifestations," although this necessitated overruling a prior decision to the contrary.

For the busy trial lawyer, and especially one who does not have easy access to the invaluable law and medical libraries, this publication will be especially significant and helpful. The indices for the odd and even volumes will be found in the even-numbered volumes. Any lawyer wishing to better equip himself for handling tort work will do well by reading these articles selected for publication in the *Tort and Medical Yearbook*.

J. D. LEE

Of the Knoxville Bar

WHEN NATIONS DISAGREE, A HANDBOOK ON PEACE THROUGH LAW. By Arthur Larson. Baton Rouge, Louisiana State University Press, 1961. Pp. x, 251. $3.95.

Almost a score of years before the publication of this *Handbook on Peace Through Law*, Hans Kelsen, in an effort to "guarantee peace," presented in his *Peace Through Law* (Chapel Hill, 1944) (a) a draft "Covenant of a Permanent League for the Maintenance of Peace" providing for an international court competent to decide *any* dispute between Members of the League submitted by *one* of the parties to the dispute, and (b) a draft Treaty establishing individual responsibility for violations of international law. Such responsibility under international law had already existed to a limited extent prior to World War I and has been extended in the Nuremberg and Tokyo war criminals trials after World War II. The General Assembly of the United Nations unanimously affirmed the "Nuremberg Principles." At its request the UN International Law Commission "formulated" these Principles and also adopted a "Draft Code of Offences against the Peace and Security of Mankind," while a special committee set up by the Assembly prepared a "Draft Statute for an International Criminal Court." With regard to the compulsory adjudication of international disputes, however, the United Nations has not gone beyond the optional system of the League of Nations.

It is with this latter problem that the book under review is concerned, whereas the problem of the responsibility of individuals for violations of international law is not even mentioned. This is somewhat surprising in this otherwise excellent *Handbook* by the Director of the World

Rule of Law Center at Duke University Law School; for if the primary objective of the "World Rule of Law idea" is "to strengthen . . . international law so that law will increasingly come to occupy the place in international affairs that it does in the domestic affairs of civilized nations" (p. 3), then it is necessary to replace not only the decentralized creation and application of law by greater centralization but also to substitute individual for collective responsibility. Dr. Larson may, perhaps, not have considered it necessary to go into the latter problem because of the above-mentioned United Nations efforts in the field. However, the Draft Code and the Draft Statute referred to above are still drafts only. Moreover, the General Assembly has also repeatedly stressed the need for a greater use of the International Court of Justice and the desirability of the greatest possible number of states accepting the Court's jurisdiction. Furthermore, no special research project on the problem of individual responsibility is included in Dr. Larson's *Design for Research in the International Rule of Law* (Durham, 1961).

Dedicated to the World Rule of Law idea, the *Handbook* deals in four parts with the "four main ingredients [of a] world legal system worthy of the name" (p. 4): the body of world law, its machinery, its acceptance, and its sanctions. The author uses the term "world law" instead of "international law" to signalize the change in purpose, range and content necessary in order to achieve world law's "one purpose — to keep the peace" (p. 22). He recognizes that custom and practice will continue to be important factors in developing and adjusting the body of world law to changing conditions (witness the beginning law of space and the changing UN Charter which this reviewer has attempted to demonstrate elsewhere) but he rightly stresses the necessity of efforts to "enrich, diversify, and universalize international law" through the application of "the general principles of law recognized by civilized nations" (Article 38 (1) (c) of the Statute of the International Court of Justice binding now almost all the states of the world) and through "the deliberate blanketing of troublesome areas with carefully thought-out treaties and conventions" (p. 23). His discussion of said general principles of law is particularly interesting.

With regard to the machinery of world law (Part II), the author considers various ways of improving the existing judicial system without amending the UN Charter or the Court's Statute. The main problem, however, is the acceptance and effective use of the system by the nations of the world. This is the subject of Part III, comprising two-fifths of the book. Here Dr. Larson shows why the Western world, the newly developing countries, and the Communist bloc could and should accept the system and demonstrates how much educational and informational effort is

needed, not only abroad but also in our own back yard (witness, *inter alia,* the Connally Amendment concerning the Court's jurisdiction the repeal of which the author argues detailedly and cogently). As far as the author's fourth element of a working legal system, compliance with the law, is concerned, he rightly points out (Part IV) that international awards and judgments have been carried out in all but a few cases and that compliance can be assured also by nonforce measures. Ultimately, however, the use of force may be necessary or at least a likely potentiality, and here, as Dr. Larson has to admit, we still are in the beginning stage. He concludes (Part V) with a discussion of what can be done concretely on the governmental, legal profession, research, public opinion and education "fronts" in order to "help build the law structure of peace" (p. 219). He quotes from Rousseau's *Emile:* "The best way to teach Emile not to lean out of the window is to let him fall out. Unfortunately, the defect of this system is that the pupil may not survive to profit by his experience" (p. 239). This "fall out" problem is a very modern one. Unfortunately, in the present interdependent nuclear world, the entire world will "fall out" if one bad "pupil" does.

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CHARLES C. TRABUE, JR.
President of the Tennessee Bar Association
1961-1962

TENNESSEE LAW REVIEW

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THE JUDICIAL STRUCTURE IN TENNESSEE*

By ALAN M. PREWITT**

It is a great pleasure to be here today and a great honor to be asked to address you again this year. Let me say at the outset that I very much appreciate the cooperation of the judges of this State in assisting their fellow members of the Bench in carrying on their work. For example, only last week it became my duty to make assignments in three instances, in one day. The cooperation has been excellent, and this cooperation tends to keep the dockets current, which is so important in the administration of justice.

This paper will be confined to a discussion of the judicial system in Tennessee and will be limited to the state courts. Under the Constitution of 1796, the courts were all created by the Legislature. That body created a Supreme Court of three members. The Legislature, also, from time to time, provided for Chancery and Circuit courts over the state.

It should be borne in mind that our Constitution of 1796 was adopted only eight years after the Constitution of the United States was adopted and was patterned largely after the latter document. At that time there was much antipathy towards the courts and judges generally. This was due, no doubt, to the tyranny that had so recently existed in England and from which our early settlers had fled, determined to set up in this country a republican form of government guaranteeing to its citizens those fundamental rights that we now enjoy as well as additional rights and privileges of our citizens. As other generations came along, the conditions gradually improved and the judges became more and more tolerant.

It is generally agreed that the demand for a change in the method of taxation and in our judiciary brought about the Constitutional Convention of 1834. After long discussion and debate, the Supreme Court was made a part of the Constitution, and for the first time became an

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** Chief Justice, Supreme Court of Tennessee.

independent arm of our state government. However, the membership of that body remained the same, that is, three members. In the few decades after the adoption of the Constitution of 1834, three outstanding judges composed our highest court; Justices Nathan Green, Turley and McKinney.

This system prevailed until the Convention of 1870 when the Supreme Court was again made a part of the Constitution but, in addition, this document provided for a court of five members and further provided that no more than two members should be from any one grand division of the state. There is also a mandatory provision in the Constitution of 1870 that the Supreme Court shall sit annually in Nashville, Knoxville and Jackson. The Constitution of 1870 clearly provides for three grand divisions of the state and we now have twenty-two counties in West Tennessee, forty counties in Middle Tennessee and thirty-three counties in East Tennessee. Under the Constitution of 1870, the Supreme Court is elected every eight years by the people.

As stated before, beginning in 1796, the Legislature from time to time has created Chancery Divisions and district law courts. Volume 41 of our Tennessee Reports carries the first list of Chancery and Circuit judges. This was in 1860. At that time, we had eight Chancery and twenty Circuit judges. Volume 204 of our Tennessee Reports carries the last published list of our Chancery and Circuit judges. This volume was published recently and shows twenty Chancery, thirty-four Circuit, and fifteen Criminal judges.

It is worthy of comment that in one hundred years of judicial history, we have had only fourteen additional Circuit Judges while the number of Chancery Judges has almost tripled. Of course, the full time Criminal Judges have relieved the Circuit Judges in some areas of some of their former duties and responsibilities.

The general jurisdictions of the Chancery and Circuit Courts are very well understood by our lawyers generally. It is my opinion that the reason the Chancery Divisions have grown proportionately more than the Circuit Courts is that in this one hundred year period more and more jurisdiction has been conferred on the Chancery Courts. Today Tennessee is one of the few states which has retained separate law and equity courts. However, I know of no movement to abolish our Chancery Courts and give equity jurisdiction to our Circuit Courts. You may have noted from a review of cases from other states that New Jersey still retains a Court of Chancery Appeals.

As we all know, litigation has increased greatly in Tennessee since 1870 and more courts have, of course, been required. From time to time,

after 1870, the Legislature has created intermediate appellate courts in Tennessee, such as the old Court of Chancery Appeals in 1895, the Court of Civil Appeals in 1907, and finally in 1925, the name of the Court of Civil Appeals was changed to "Court of Appeals," and its membership increased from five to nine, with geographical representation and restriction in the same manner as in the case of the Supreme Court. That Court was also required to sit annually at Jackson, Knoxville and Nashville, and the Court will now occasionally sit or meet *en banc,* with all nine justices present. This intermediate appellate system has evidently worked to the very substantial satisfaction of the lawyers and public generally, so much so that in the past thirty-five years there have been very few changes in this structure.

It should always be borne in mind that the purpose in establishing the old Court of Chancery Appeals, the Court of Civil Appeals, and finally the present Court of Appeals, was to relieve the Supreme Court of the great burden of work brought about by the increased litigation. By way of comparison, it is interesting to note that Arkansas has no intermediate appellate court. However, my information is that a case is rarely argued orally in their Supreme Court. Then, also, Tennessee has a larger population than Arkansas.

Mississippi has recently added three members to their Supreme Court, making nine in all, and they sit in three divisions – *A, B,* and *C.* That state has no intermediate appellate court but it also is smaller in population than Tennessee. I have talked to many Mississippi lawyers who felt that if their Supreme Court was reduced to five members and a Court of Appeals created of six members, three sitting in the southern part of the state and three sitting in the northern part of the state, a more satisfactory arrangement would be had. If this were done, then they would have a judicial structure similar to that of Tennessee.

Section 16-408 of the Tennessee Code provides that the jurisdiction of the Court of Appeals shall be appellate only and shall extend to all civil cases, except those involving: (1) constitutional questions; (2) the right to hold a public office; (3) workmen's compensation; (4) state revenue; (5) extraordinary remedies (mandamus, in the nature of quo warranto, ouster, habeas corpus in criminal cases); and also excepting (6) those which have been finally determined in the lower court on demurrer or other method not involving a review or determination of the facts; or (7) those in which all of the facts have been stipulated.

All cases within the jurisdiction thus conferred on the Court of Appeals shall, for purposes of review, be taken direct to the Court of Appeals in the division within which the case arose. The Eastern Division includes Hamilton County and the Western Division includes Shelby

County. As to all other cases, the exclusive right of removal shall be in the Supreme Court. Any case removed by mistake to the wrong court shall be automatically transferred by such court to the court having jurisdiction thereof.

The jurisdiction on appeal, as between the appellate courts, turns on the method of procedure in the trial court — whether or not the issues have been there presented and considered by such a method as did not call for a consideration, "review or determination" of questions of fact.[1] In other words, whether jurisdiction of an appeal be in the Supreme Court or in the Court of Appeals is dependent upon the method of trial in the lower court, and not upon the circumstance that after appeal no disputed fact remains open.[2] Of course, jurisdiction cannot be conferred by consent of the parties.

It might be well to take the time here to briefly review several of the exceptions to the appellate jurisdiction of the Court of Appeals, because, as is true with most of our statutory law, these exceptions have been the subject of considerable interpretation and discussion in the opinions of the Supreme Court.

I. Constitutional Questions

When the constitutional question is merely theoretical and wholly insufficient to determine the cause on appeal, or what we legally term "incidental," the Court of Appeals has jurisdiction.[3] All cases involving constitutional questions that are determinative of the case are appealable direct to the Supreme Court. However, the Supreme Court will look to the record to see if the constitutional question raised is purely for the purpose of bringing the case direct to the Supreme Court and where the question raised is not determinative of the case, it will be transferred to the Court of Appeals.

II. State Revenue

The jurisdiction in these cases has become more and more comprehensive. This arises, of course, from the fact that the State has exacted more and more revenue from its inhabitants and others liable. Therefore, in construing Article 2, Section 28 of our Constitution, especially as such Section pertains to privileges, the Supreme Court has upheld the Tobacco Tax, Gross Receipts Tax and other taxes classified as privileges, including the Sales Tax. It will be noted from a study of Supreme Court decisions that practically all of the cases involving state revenue have originated in Davidson County. This occurs, of course, on account

1. Gormany v. Ryan, 154 Tenn. 432, 289 S.W. 497 (1926).
2. King v. King, 164 Tenn. 666, 51 S.W.2d 488 (1931).
3. Williams v. Realty Development Co., 161 Tenn. 451, 33 S.W.2d 64 (1930).

of the fact that the home office of the Commissioner of Finance and Taxation is located in Nashville. Then also, under our decisions and statutes, practically all suits to recover taxes paid under protest must be brought in Davidson County. These suits are what we might term "localized transitory actions."

III. Mandamus

Mandamus is not the proper remedy where there is discretion in the lower court. While the Court of Appeals has no appellate jurisdiction of the cases involving mandamus brought up from a lower court, it does have inherent power to grant a writ of mandamus in aid of its own jurisdiction, as to compel a trial judge to sign a bill of exceptions in a case appealable to that court.[4]

IV. Quo Warranto

This action is translated, "By what authority?" It is a suit to question the authority of an officer. A suit in the name of the state on relation of the Attorney General to enjoin a corporation from illegal activities and to have the corporation dissolved and its charter forfeited is an action in the nature of a quo warranto proceeding, the jurisdiction on appeal being in the Supreme Court, and not in the Court of Appeals.[5]

V. Ouster

This is a summary proceeding which has for its objects the expeditious removal of unfaithful public officials, not merely to question their authority as in the case of quo warranto proceedings. Much discussion has been had in recent cases as to the right of trial by jury in ouster cases, however, for the time being at least, this matter would appear to have been settled by Section 8-2719 of the Code, which provides for a trial by jury as to any issue of fact. Nevertheless, it should always be borne in mind that ouster proceedings are summary in nature and trialable as equitable actions.

VI. Habeas Corpus

The provision in the statute providing that these cases come direct to the Supreme Court has been changed so that now only cases involving criminal law go direct to the Supreme Court. All others go to the Court of Appeals. This was probably brought about by the increase in litigation over the custody of minor children, such cases generally requiring an extensive examination of the facts.

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4. Hyde v. Dunlap, 3 Tenn. App. 368 (1926).
5. State *ex. rel.* v. Retail Credit Men's Association, 163 Tenn. 450, 43 S.W.2d 918 (1931).

VII. Demurrer and Stipulation of Facts

The Supreme Court has jurisdiction of all cases which have been finally determined in the lower courts on demurrer or other method not involving a review or determination of the facts, or in which all of the facts have been stipulated, and it may award writs of certiorari and supersedeas, where there is no material controversy over the facts as presented by the pleadings or bill and answer.[6] However, an appeal does not lie where a demurrer is overruled in a law court. A chancellor may, in his discretion, allow an appeal from an order which is not a final decree or judgment, but appeals in law cases may be taken only from final judgments. Of course, an order overruling a demurrer does not result in a final judgment.

As to stipulation of facts, it should be mentioned that jurisdiction on appeal cannot be deflected or conferred by a stipulation or agreement as to facts entered into following the trial. There is a distinction between a stipulation of what the facts are and an agreement that sipulated items of evidence may be looked to by the trial court in determining the facts, appellate jurisdiction in cases of the former class being in the Supreme Court and cases of the latter class being in the Court of Appeals.[7]

The scope of review of cases appealed to the Supreme Court and the practice and procedure in petitioning the Court for certiorari should also be mentioned. The concurrence of lower courts on facts where there is material evidence to support the findings is binding on the Supreme Court. In theory, the same rule applies in the case of a jury verdict. In civil cases, where there is either a verdict of a jury or the concurrence of lower courts, the Supreme Court does not weigh the evidence or attempt to determine the preponderance of the evidence. In other words, the only question in such cases which is open for review by the Supreme Court is whether or not there is material evidence in the record to support the findings. On the other hand, in criminal appeals, the question of the preponderance of the evidence is always open to review.

The petition for certiorari is a statutory writ and must be filed within forty-five days from the final decree of the Court of Appeals. Of course, the Supreme Court has discretion as to the granting of such writs. An application for an extension of time must be filed within the forty-five day period, provided further, than the time as extended must not exceed ninety days from the time the final decree is rendered by the Court of

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6. Cockrill v. People's Savings Bank, 155 Tenn. 342, 293 S.W. 996 (1927).

7. Cumberland Trust Company v. Bart, 163 Tenn. 272, 43 S.W.2d 379 (1931).

Appeals. Generally, no oral argument is heard on the petition. A respondent may assign errors and is not required to file a petition for certiorari, but the better practice is to do so.

It is recommended that counsel familiarize himself thoroughly with the Rules of the Supreme Court as added to, amended or modified from time to time. Many of the steps in filing certiorari, appeals in error and writs of error are jurisdictional and noncompliance is fatal.

You will observe that this discussion has been confined, for the most part, to the jurisdiction of the Supreme Court and of the Court of Appeals. Time does not permit a discussion of the matters of jurisdiction pertaining to Chancery and Law Courts. Suffice it to say that in bringing a case from the Chancery or Law Courts, it is well to bear in mind whether the case comes direct to the Supreme Court or goes through the Court of Appeals. If this is done, it will prevent considerable delay in the final determination of a lawsuit.

We are indeed fortunate in that Tennessee is one of the few states in which the appellate courts have been able to prevent a great backlog of cases from accumulating on their dockets. Each member of the Supreme Court of Tennessee has assigned to him about 135 to 140 cases annually. This number includes certiorari and criminal cases, and means that the Court disposes of about 700 cases a year.

There has been much discussion that it would be better for each member of our Supreme Court to have a law clerk. The Federal Government furnishes all of its District Judges, Circuit Court of Appeals Judges, and United States Supreme Court Justices with such assistance. This plan would no doubt, be very beneficial but this is a matter for the Legislature, which body has not seen fit as yet to provide this assistance.

As the years have passed, jurisdiction has been added and taken away from the several courts in Tennessee and no doubt this practice will continue as time goes on. However, I want to make clear that I am a firm believer in our present judicial system. Expansion will probably be necessary in the future, but basically I believe we should adhere to our present judicial structure in Tennessee.

In this connection, in closing, I would like to relate a story which the unexcelled Benjamin Franklin told in 1787, immediately following the writing of the Constitution of the United States. Franklin stated that as he descended the steps from Independence Hall in Philadelphia, he met an elderly lady whom he knew. The lady is supposed to have asked him whether the founding fathers had given the people a monarchy or a republic, and Franklin replied: "Madame, we have given you a republic, *if you can keep it.*"

ORIGIN AND DEVELOPMENT OF TRIAL BY JURY*

By ROBERT H. WHITE**

In all probability, there is no subject more profitable than a study of the history of jurisprudence. Since the beginning of time, each unit of the human race has struggled along on its allotted path through joys and griefs, triumphs and failures, all fashioned and grooved for the most part by a somewhat invisible network of habits, customs, mores, and statutes which surround society on every side and silently guide its daily life. And so, the history of jurisprudence becomes the history of man. The law-giver and the law-dispenser are the custodians of all that we highly prize – liberty and freedom. Cyrus and Alexander, Genghis Khan and Attila have passed away; their names are all but forgotten. But the laws of Confucius, Mohomet, and Justinian still live and will sway the destinies of future races as they have in the almost limitless past. Man and law exert a mutual reaction, and in the one we may vision the image of the other.[1]

From the beginning of recorded history there have been difficulties, arguments, conflict, and trouble. How were these problems settled prior to the rise of the jury system? This inquiry calls for a bird's-eye sketch of the mode of settlement of all such conflicts before the jury system was born. In presenting a brief sketch of the modes of settling such disputes, let us glance for a moment at the status of society during the Dark and Middle Ages. First of all, let us be reminded that the ability to read was confined largely to the clergy. The art of paper making was not discovered until the eleventh century, and printing had to wait some three centuries more. What few documents there were had been written on papyrus or parchment. Private persons rarely owned so much as one book. Most monasteries, which constituted the principal libraries, usually possessed only one copy of the prayer book. Alfred the Great complained that there was scarcely one of his priests who understood the liturgy of the mother-tongue, and that the clergy were still more ignorant. In the ninth century a high church dignitary asserted that there was not a complete copy of Quintillians's *Institutions* in all of France. Even so late as the middle of the fifteenth century, when Louis XI borrowed a copy of a medical book from the medical faculty at Paris, he had to deposit a considerable quantity of silver plate as a pledge for

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** Ph. D. Tennessee State Historian.

1. LEA, SUPERSTITION AND FORCE 14 (1870).

the safe return of the book.[2] This deplorable condition of Middle and Western Europe had resulted from invasion by the barbarian tribes usually referred to as the Huns, Goths, and Vandals. With a degree of ferocity unparalleled in the history of mankind, those barbarians sacked Rome and laid waste the culture and customs that had given the Queen City such renown. For ten centuries and more, the effects of this ruthless invasion were manifest in the greater part of Europe. Total strangers to Christianity, these rapacious hordes forced upon their conquered victims pagan rites and heathen ceremonies which had been inherited from past centuries.[3] Among those ceremonial rites and customs were fantastic efforts to discover the truth by resorting to a mode of trial that is coeval with the dawn of recorded history.

Let us now consider for a moment the oldest mode of trial, that of the ordeal. The antiquity of this mode of trial cannot be questioned. Moses, about the year 1450 B.C., outlined a procedure whereby the faithfulness or unfaithfulness of a wife might be ascertained. The jealous husband brought the accused wife to the priest who took some holy water into which dust from the floor of the tabernacle had been sprinkled. Then under oath the priest caused the accused woman to drink of the bitter water, assuring her that she would escape harmless if she were innocent. But, if guilty, then the bitter water would according to the Scriptural account "cause her belly to swell and her thigh shall rot." No penalty was invoked against the jealous husband even when the wife emerged from the ordeal Scot free.[4]

The basis upon which the ordeal was grounded was that the Almighty, when called upon, would detect and punish the guilty and hold harmless the innocent. Whoever escaped unhurt from the ordeal in whatsoever form administered was considered to have been acquitted by the Judgment of God! Sacred history abounds with numerous instances of the trial by ordeal, such as detecting the thief Achan for example. The runaway Jonah fell victim to the casting of the lot which, according to Solomon was directed by Jehovah, for said the wise man "The lot is cast into the lap, but the whole disposing thereof is of the Lord."[5] Profane history abounds with countless examples of trial by ordeal. Charlemagne, one of the greatest rulers of his time, incorporated into his *Capitularies* the following maxim, *In ambiguis, Dei judicio reservetur sententis,*[6] a translation of which is "Let doubtful cases be determined by the judgment of God."

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2. ROBERTSON, THE HISTORY OF THE REIGN OF THE EMPEROR CHARLES V 515 (1833).
3. 1 MOSHEIM, AN ECCLESIASTICAL HISTORY 231 (1851).
4. MOSES, NUMBERS, Chapter V verse 12-31.
5. SOLOMON, PROVERBS, Chapter 16, verse 33.
6. 8 CHARLEMAGNE, CARLOVINGIAN CAPITULARIES 33 cap., 259.

Something like five hundred years before the birth of Christ, we find definite proof that the ordeal had crept into literature. Sophocles, the author of the tragedy *Antigone,* had those accused of the crime of burying an accursed corpse exclaim "we are ready to take red-hot iron in our hands — to walk through fire."[7] Throughout the Dark and Middle Ages, fire and water were the two agencies most often employed in the trials by ordeal. Hincmar, a celebrated churchman of the ninth century, recommended boiling water inasmuch as it combined the elements of both fire and water — one representing the deluge, a penalty inflicted upon the wicked of old; the other was concerned with the fiery doom of the future, the Day of Judgment when Hell would receive her own.[8]

Trial by hot iron was a favorite mode by which disputed questions or various accusations were settled. One method consisted of placing on the ground at irregular distances six, nine, and sometimes twelve red-hot plough-shares. The accused was then made to walk over them barefooted and blindfolded, an obliging churchman guiding the culprit over the short but perilous distance. A classic example of this type of ordeal has been preserved by noted English authorities,[9] setting forth the details as carried out about the middle of the eleventh century. Queen Emma, the mother of Edward the Confessor and the wife of King Ethelred, had been accused of adultery with Alwyn, the Bishop of Winchester. His brother Bishops entered a plea that Alwyn and Emma be pardoned for their indiscretion. The Bishop of Canterbury, however, opposed whitewashing and hurled this challenge at the clerical fraternity: "My brethern Byshoppes, how dare ye defende her that is a wild beaste and not a woman." Queen Emma, disturbed over the plight in which she and Alwyn were involved, announced that she was "readye to abyde all lawful and most sharpest tryall." The powerful ordeal of fire was then invoked. The time and place of purgation were appointed, and the king and a host of his lords were on hand to witness the outcome of the fiery test. The dramatic scene is thus pictured by the ancient chronicler in picturesque language:

> Then she was blindfolde, and led unto the place between two men, where the Irons lay glowing hote, and passed the IX shares unhurt. Then at the last she sayde, good Lord, when shall I come to the place of my purgation. When they uncovered her eyes, and she sawe that shee was past the paine, she kneeled downe and thanked God. Then the King repented him, and restored unto

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7. SOPHOCLES, ANTIGONE 264-265.
8. LEA, *Op. cit.*, 223.
9. FABYAN, THE NEW CHRONICLE OF ENGLAND AND FRANCE 224-5 (1811). BAKER, CHRONICLE 18 (1678). I GRAFTON, CHRONICLE OR HISTORY OF ENGLAND 144 (1809).

her, and the Byshop also, that which before he had taken from them, and asked them forgiveness.

Some commentators have inferred with some probability of truth that the nine ploughshares which "lay glowing hote" glowed with nothing more dangerous than daubs of red paint! In this typical ordeal by fire, the trial consisted not in an attempt to convince the judges of the truth of your assertion, but in the performance of a task which had been imposed upon you. If you perform the task, God is on your side! If the accused Emma were actually blindfolded and received no aid or suggestion on the part of her guides, then it was due to the law of mere chance that she escaped without a scorched foot!

Another species of ordeal that dealt with heat related to that of boiling water. One of the general regulations required that the water be brought to the boiling point. The accused was then required to pluck from the bottom of the vessel with his bare hand a stone or a ring that had been tossed into the seething cauldron. Next, the hand was wrapped in a cloth to which was affixed a seal. Three days later the seal was broken and all awaited the dread question — was the hand clean or foul? A blister "as large as half a walnut" proved fatal![10] In that ignorant and superstitious age, men were unable to weigh testimony, against testimony, to cross-examine witnesses, to piece together facts, and arrive at the truth. Recourse was had to the supernatural by appealing o the Judgment of God!

Unquestionably craft and trickery in administering the ordeals of various types helped pave the way that led to the downfall of the custom. But ingenuity devised another mode of trial that was widespread and of lengthy tenure. Its general name was canonical compurgation. As its name implied, it was a clergy-administered procedure. The *modus operandi* consisted of the accused being able to bring forth a certain number of neighbors, friends, or even blood-kin who would testify under oath that they believed the accused had sworn the truth. The origin of this custom is to be traced to the unity of families. Inasmuch as the offender could summon his kindred around him to resist the attack of the injured party, so he took them to court to defend him with their oaths.[11] The number of compurgators varies, but usually the number twelve was most frequently used. However, there were variations as to number, high-born persons being required to enlarge the number of compurgators. Let's sketch one of the most noted cases wherein canonical

10. 1 TRAILL, SOCIAL ENGLAND 286 (2d ed. 1894).
11. 182 NORTH AMERICAN REVIEW 1-51 (Jan. 1859), a review of Louis J. Koenigswarter's book entitled Etudes Historiques sur les Developpements de la Societe Humaine.

compurgation was relied upon by the accused, a case referred to by numerous historians.[12]

In 584, a she-devil by the name of Fredegonda had strangled to death the wife of Chilperic, a King of France. Later, she married the King and had him slain by a hired felon. The thing that sorely vexed the vixen were some nasty whispers that her baby, Clotaire, had been sired by a court lackey. Of quick and positive temperament, she decided to repair her battered reputation and secure the throne to her offspring. Accompanied by three Bishops and three hundred nobles she appeared before an altar containing the sacred relics. Hear the verdict: "Alors Frédégonde jura, et fit jurer par trois cents témoins, par trois éveques en particulier, que Clotaire était vraiment fils de Chilpéric. Cette preuve suffit pour dissiper les soupcons."[13]

Quite obviously, direct and competent evidence on such intimate matters is difficult to obtain. But in order to clear away the disturbing rumors, Fredegonda resorted to the ceremony known as *canonica compurgation*. The rabble called it church-swearing. It was not an idle ceremony; neither was it a form of peacock pageantry nor a political demonstration. It was the serious observance of an accepted custom performed in a solemn manner and supported by strong religious sanction. For centuries, this form of trial held sway in all the civilized countries of Middle and Western Europe. The distinguished author of *The History of the Decline and Fall of the Roman Empire* pointed out that this obscure concubine (Fredegonda) established her chastity by the oaths of three hundred gallant nobles and three Bishops all of whom swore that the four-months-old infant prince had been actually begotten by her deceased husband.[14] An exceptionally able authority has asserted that the origin of compurgation is traceable to prehistoric times and that the custom was not formally abolished until the nineteeth century.[15]

Shakespeare is authority for saying that "The course of true love never did run smooth."[16] The same may be said of jurisprudence. The idea of law was of early birth, but justice was unusually slow in discovering some method of expressing itself. Some means of insuring truth in human testimony has been a thing desirable in every age, but the

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12. 1 MILLOT, L'HISTORIE DE FRANCE 116, 46, 47, (10th ed., 1817); LEA, *op. cit.*, 35-36; FABYAN, *op. cit.*, 90-92.
13. MILLOT, *op. cit.*, 47.
A free translation is: "Then Fredegonda swore and had three hundred witnesses and three Bishops in particular swear that Clotaire was truly the son of Chilperic. This proof was sufficient to wipe out the suspicions."
14. Vol. 2 GIBBON, HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 422 (5th Am. ed. 1833).
15. LEA op. cit., 29, 62.
16. SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM, Act I, Scene I.

search has been almost as baffling as the search for the philosopher's tone. And it might be added that the experiments have been well-nigh as numerous. Oaths constituted the bed-rock upon which canonical compurgation was based. But oath-taking in the Dark and Middle Ages proved not to be an unqualified success. So widespread did perjury become that it presented an insurmountable obstacle in the path of justice. Causes were decided by the *quantity* of the testimony, and not at all by the *quality*. Twenty false witnesses, or compurgators, were worth more than nineteen truthful ones. A dozen forgeries, backed by powerful swearing, were valued above eleven genuine documents. Some of the oaths of the Middle Ages were products of ingenuity and are entitled to high rank as works of imagination. But those oaths proved to be unsatisfactory. In the course of time, so little confidence came to be placed in a man's oath that Gundobald in the year 501 issued an edict to the Burgundians in which he stated his reason for granting the right of trial by battle. Said Gundobald: "We do this to prevent our subjects from attesting by oath what they are not certain of, nay, what they know to be false."[17] As is obvious, Gundobald's edict was offered as an antidote to perjury. Apparently he thought his subjects might as well risk their bodies as their souls. Consequently, he reintroduced the judicial combat which had temporarily been laid aside during the heyday of ordeals and canonical compurgation. Very soon after issuing his edict, the privilege of judicial combat was inserted into almost every European code and held sway for something like thirteen centuries, England finally abolishing Wager of Battle in 1819.[18]

Time will not permit discussion of certain peculiar trial procedures characteristic of our mother country, England. Among those strange and curious devices would be enumerated Wager of Battle, Wager of Law, Benefit of Clergy, Sanctuary, Peine Forte de Duré, and Deodands. Attention must now be centered upon the assigned topic, the Origin and Development of Trial by Jury.

In doing research upon the *origin* of trial by jury, I was impressed with the force of the second verse in the first chapter of Genesis – "and darkness was upon the face of the deep." With the assertion of one antiquarian who was trying to trace the origin of the jury system I am in hearty agreement, "Son origine se perd dans la nuit des temps."[19]

17. NEILSON, TRIAL BY COMBAT 5, 6 (1891); LEA, *op. cit.*, 99; II GIBBON, op. cit., 423; II MACKAY, Memoirs of Extraordinary Popular Delusions 262 (1856). XXII CORNILL MAGAZINE 715 (1870); MASSI, History of Duelling 3 (1770).
18. WATT, THE LAW'S LUMBER ROOM 119 (1895); LEA, op cit., 198-199. TRAIL, op. cit., 294.
19. FORSYTH, HISTORY OF TRIAL BY JURY 2 (2d.ed by Margan, 1875)
Forsyth credits a Frenchman, Bourguigon, with the above sentence in a treatise entitled *Mémoire sur le Jury*. The translation is "Its origin is lost in the night of time."

In attempting to deal with this intricate and baffling subject, it is necessary for lack of time to compress a long story into a few paragraphs. An excellent summary[20] of the opinions of leading legal writers as well as conventional historians regarding the origin of trial by jury was set forth by an Englishman, William Forsyth, in his excellent book entitled *History of Trial by Jury*. As to trial by jury in England, from which country we in America received it as a heritage from the Mother Country, Forsyth cites a statement by a High Commissioner that "in England it is of a tradition so high that nothing is known of its origin, and of a perfection so absolute that it has remained in unabated rigor from its commencement . . ." Spelman was uncertain whether to attribute the origin of jury trial to the Saxons or the Normans. Du Cange and Hickes credited the Normans with the honor of originating the system. That monumental authority on English common law, Sir William Blackstone, utilized a sort of safety valve of escape by calling it "a trial that hath been used time out of mind in this [English] nation and seems to have been coeval with the first civil government thereof." Meyer regarded the jury as partly a modification of the Grand Assize established by Henry II and partly an imitation of the feudal courts erected in Palestine by the Crusaders. Reeves, certainly one of the most distinguished law writers of England, believed that when Rollo led his compatriots into Normandy that they carried with them the mode of trial by jury, and that when the Normans invaded England they substituted trial by jury for the Saxon tribunals. Another eminent writer, Sir Francis Palgrave, stated that in criminal cases the jury system was unknown in England until set up by William the Conqueror subsequent to his invasion of England in 1066. Various writers, according to Forsyth, attribute the origin of the English jury to a recognition of the principle that no man ought to be condemned except by the voice of his fellow-citizens. Forsyth committed himself to the belief that trial by jury did not owe its existence to any positive law, that it was not created by any Act of Parliament, but grew out of usages and customs of society that eventually passed away. Forsyth concluded his observations by saying that "the jury does not owe its existence to any preconceived theory of jurisprudence, but that it gradually grew out of forms previously in use and was composed of elements long familiar to the people in general."

With such a diversity of opinion on the part of so many learned men, most of whom confessed that they were unable to pierce the dark veil enveloping the early history of trial by jury, it behooves anyone to be exceedingly wary about asserting that this or that is the

20. FORSYTH, *op. cit.*, 2-5.

sine qua non regarding the actual *origin* of "the great palladium of liberty and justice" – trial by jury.

As to the development of trial by jury, the term naturally suggests to our mind twelve men or women summoned into court to listen to the testimony of witnesses, give a true verdict "according to the evidence," and acting as judges of those questions of fact that are in dispute. But something like seven centuries had to elapse before trial by jury took this form. Originally, the jurors were called in, not to hear, but to give evidence. They were witnesses in fact. They were the neighbors of the parties and were presumed to know before they came into court the facts about which they were to testify. At the close of the eleventh century, when the so-called jury system was inaugurated, the population was sparse and neighbors really knew more of the doings of their neighbors than we of the present day. As population increased and everyday activities grew more complex, it developed that neighbors knew little or nothing of the facts in dispute. It was then that witnesses who did know some facts were called in to supply the requisite information. Thus it was that the jury laid aside its old character and acquired one entirely new. The very thing that qualified a man for jury service in the olden times, at a much later date disqualified him.

As to fixing the number of jurors, there was in early times great variety. A learned law writer, James Bradley Thayer, attributes the number twelve as being probably established during the reign of Henry II, although even then the number was not always uniform.[21] As time moved on, the requirement of twelve on the petit jury seemed to have become the settled rule. Toward the middle of the seventeenth century, Thayer cites an interesting reason for the number twelve by quoting from Duncomb's *Trials per Pais*,[22] written in 1665:

> And first as to their [the Jury's] number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve. I Kings, IV, 7 . . . Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters in law, in the Exchequer Chamber, and there were twelve counsellors of state for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in this number of twelve, that if the trial be by more or less, it is a mistrial.

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21. THAYER, A Preliminary Treatise on Evidence at the Common Law 85 (1898).
22. THAYER, *op. cit.*, 90.

An able English author of several works dealing with jurisprudence, Luke Owen Pike, does not appear to rely upon religious or Scriptural authority regarding the alleged sanctity of the number twelve. His comment[23] was as follows:

> As both Normandy and the north of England had been conqured by Scandinavian chiefs, it is by no means improbable that some old Norse or Danish superstition lurks under the modern preference of the number twelve for a jury.

With reference to the unanimity of juries, permit me to conclude by giving two opposing viewpoints. A caustic comment on the requirement for unanimity in rendering a verdict was expressed one and one-third centuries ago in a London law magazine.[24] In part, the criticism was as follows:

> To us it is a matter of no small astonishment, that so many centuries should have gone by since the establishment of the present jury system, and that during all that time so very little should have been said or written upon a rule, which must startle by its absurdity every man who investigates it in theory, and which, if we mistake not, would startle yet more fearfully any man who could take a comprehensive view of its workings in practice.
>
> Suppose that in any deliberative assembly held within the four seas, from the House of Lords down to the humblest club inclusive, it were proposed that the mode of taking the opinions of the members should be as follows: first, that the members should bind themselves by oath to vote according to their consciences; secondly, that they should hear the arguments and evidence for and against each of the propositions brought before them; thirdly, that they should submit to be locked up without meat, drink, fire, or candle, till they were unanimous; fourthly, that in case of an irreconcileable difference of opinion, this process of blockade and famine should continue till nature or conscience gave way, "whichsoever might first happen." Suppose, we repeat, that such a proposal as this were made to any assembly whatever out of Bedlam, how, we beg leave to ask, would it be received? Surely the proposer might think himself well off, if he were only laughed at for his folly, and received no serious mark of indignation from those whose consciences he had assumed to place under the dominion of hunger, thirst, and cold.
>
> And yet this is the very plan which the law of England adopts with respect to the decisions of juries. The jurors first take an oath, that they will *well and truly try the issue joined between the parties,* (or, in cases of felony, *well and truly try and true deliverance make, between the king and the prisoner,) and true verdict, give,* ACCORDING TO THE EVIDENCE, SO HELP

23. PIKE, A HISTORY OF CRIME IN ENGLAND 122 (1873).
24. VII THE LAW MAGAZINE OR QUARTERLY REVIEW 44-45 (1832).

> THEM GOD. After the evidence has been heard, and each man has formed his conscientious opinion upon it, he is required, however complicated and doubtful the question may be, to reconcile that opinion with those of his brother jurors, upon pain of imprisonment and starvation; and lastly, in case of inability to do this, he is imprisoned and starved accordingly, till, like a soldier at the halberts, or a heretic on the rack, he can endure no more.

Although discussing the question of unanimity, both *pro* and *con*, Forsyth had this to say on the *pro* side:[25]

> . . . One advantage resulting from the rule no doubt is that if any one juror dissents from the rest, his opinion and reasons must be heard and considered by them. They can not treat these with contempt or indifference, for he has an absolute veto upon their verdict, and they must convince him or yield themselves, unless they are prepared to be discharged without delivering any verdict at all. This furnishes a safeguard against precipitancy, and insures a full and adequate discussion of every question which can fairly admit of doubt; for if all at once agreed upon the effect of the evidence, it may be reasonably presumed that the case is free from difficulty, and too clear to admit of any difference of opinion. . . .

Time will not allow discussion of certain procedures connected with the further development of trial by jury. These features embrace the challenging of jurors, instructions to jurors by the Court, and the protection of jurors from extraneous influences, all of which are familiar in present day practice.

May I attempt to summarize some of the impressions gained from the research I have made in regard to trial by Jury?

1. William the Conqueror introduced the Jury System into England during the latter half of the eleventh century.

2. The Jury System, as known to us, is a heritage bequeathed by England.

3. The nature and function of the jury have been completely reversed. Originally, the jurors were witnesses; now they are judges of the facts.

4. The number of jurors has been changed from time to time, though the number twelve has predominated. According to Sir Patrick Devlin, English aversion to the decimal system may have been a factor in the selection of the numeral twelve. The English, as is well known, decreed that twelve pennies make a shilling instead of 10, 11, 13, or some other digit.

5. The jury is a judicial tribunal.

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25. FORSYTH, *op. cit.*, 204.

6. Unanimity in rendering a verdict is for the most part a prerequisite.

7. A Jury reaches a decision without announcing publicly any basis for such decision. The jury simply says yes or no, and is therefore a sort of oracle deprived of the necessity of being ambiguous or offering any explanation.

8. Eccentrics do not turn up on juries often enough to warrant the overturn of a traditional and well-tried method.

9. Although the jury has sometimes been charged with being "unaccustomed to severe intellectual exercise or to indulge in protracted thought", yet it has proved to be a practical, workable mode of settling controversial issues.

10. The jury is a safeguard against harsh or repugnant laws. If the law is too harsh and the penalty too severe, the jury simply declines to be a party for the enforcement of such laws — they vote to acquit.

Let us be thankful indeed for the jury system, even though it may retain some defects and imperfections. When trial by jury supplanted the fantastic theories and superstitious beliefs that underlay ordeals, compurgation, and the judicial combat, something was taken from the dominion of superstition and force and placed in the realm of common sense and justice. And what is Justice?

Let me conclude by citing the eulogy on justice by the renowned English clergyman Sydney Smith. Speaking of justice, in 1824,[26] he said:

> Truth is its handmaiden, freedom is its child, peace is its companion; safety walks in its steps, victory follows its train: it is the brightest emanation of the Gospel; it is the greatest attribute of God.

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26. SMITH, WORKS OF THE REVEREND SYDNEY SMITH 431 (1857).

THE COURTS AND THE ORGANIZED BAR*

By EDWARD W. KUHN**

Omnious warnings that the law is a disappearing profession have been sounded in high places by influential persons. With the rapid progress of science is need for it ceasing? Will medicine, engineering and scientific research remain the only professions? Will super abundant plenty put the law and the lawyer with the snows of yesteryears? Or will the law and the lawyer remain until the millennium makes over human nature? No one will dare resist the advent of the day when things are so well ordered, there is no conflict and so much plenty that there is no competition. But until then, there must be law, courts to enforce it and lawyers to protect it.

Traditionally, lawyers have had to bear their share of dislike and unpopularity. The citizens of Athens 2,500 years ago were familiar with the jibe that the task of the advocate was to make the worse appear the better cause. In Shakespear's "Henry VI" you will remember these familiar words, "The first thing we do, lets kill all the lawyers." And two centuries later when Samuel Taylor Coleridge was writing about the thoughts of the Devil, one stanza goes like this:

He saw a lawyer killing a viper
On a dung hill, hard by his own stable.
And the Devil smiled. For it put him in mind
Of Cain and his brother Abel.

In recent time we hear Sir Geoffrey Lawrence Q.C. in addressing the 1960 Washington annual banquet of the American College of Trial Lawyers putting the age old observations in modern dress when he said:

> We have been looked on as hired gladiators, professional assassins, who, for a suitable, that is to say exorbitant fee are willing to prostitute the gift of speech and debase the flower of civilized utterrance for the purpose of deception. It is said that the act of advocacy is not an art at all, but a spurious artifice compounded by wilful trickery and intellectual dishonesty whereby the face of Justice is clouded and victory goes to the party who had been lucky or wealthy enough to hire the better advocate.

And if the law is a disappearing profession what of our courts. In recent years we have seen a prolification of administrative tribunals with their own rules of procedure which specifically seem to take away the right to be represented by a lawyer. We have also witnessed the disturbing fact that the civil courts are no longer the forum of the

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** Of the Memphis Bar.

disputes which, in the long run, most affect the lives and the property of our citizens. There has been a shift away to what are called public inquiries, conducted by officials appointed by the administrative departments. The most recent and by far the most important is the movement being initiated on the West Coast by the Brown Committee to remove all cases involving motor vehicle accidents from the Courts and administering redress through boards governed solely by scheduled recoveries, eliminating entirely the concept of negligence, personal accountability and substituting liability without fault. And why? Is it not because once again the old, deep seated distrust and misunderstanding of lawyers are lifting their heads?

The organized bar believes that the purpose of all law is to order, conduct and adjust relations so as to promote and maintain the ideal relation among men which we call justice – the liberty of each limited only by the like liberty of all, recognition of the reasonable expectations of men in civilized society, reasonable because measured by compatibility with the expectations of others. To achieve that goal the lawyers have formed organizations, local, state and national, not dedicated solely to the advancement and aggrendiziment of its members, but to preserve our courts and our unique administration of justice.

What is the organized bar doing about the problem of the court and the law? The American Bar Association membership for the first time exceeds one hundred thousand lawyers and judges, has an annual budget of nearly two million dollars, is housed in a debt free marble edifice costing several millions of dollars, staffed by 160 employees, operated by officers and sixty-five committees dealing with every legal subject known to man, has seventeen separate legal sections devoted to fundamental legal subjects and hundreds of committees. Over three thousand members, from the officers, board of governors and House of Delegates representing fifty state bars, all the large city bars and every legal organization in the nation to the sub-committees in the newest section of all, Family Law, are daily contributing their time, effort and money to the preservation of our Anglo-Saxon heritage.

The recently created American Bar Foundation, the research arm of the American Bar Association, is engaged in research projects running into the millions of dollars, money largely donated by large national foundations which are beginning to see the American Bar Association and Foundation as great institutions devoted to the improvement of our law and courts. Research is carried on, not in the legal fields but in those broad subjects having to do with the administration of justice and largely in the field of court administration. So large and important has become the subjects of research that at its May meeting

the Foundation authorized the construction of another wing to the American Bar Center costing one-half million dollars, likewise, debt free. The American Judicature Society, now the third largest legal organization in the world is solely devoted to the improvement of our courts, its lawyers, its jury system.

The Tennessee Bar Association is now a voluntary organization of over 2,700 members, almost every practicing lawyer in the state. Its annual budget is now approaching forty thousand dollars. It is governed by its officers, a board of governors representing every congressional district with twenty committees and nine sections. There are sixty local bar associations in the state ranging from the Memphis and Shelby County Bar Association of over seven hundred members to the smaller bars of a dozen members, all governed by officers, governing boards and innumerable committees.

Bar business is becoming a big business. As said before the national organization is spending almost three million dollars now in its activities to which is being projected judicial and court seminars in each of the fifty states which is estimated will cost three-fourths of a million. Some state bars, notably California, Texas and New York have budgets of around one-half million. It is estimated that the fifty state bars will spend three and one-half million this year. There are no available figures on local bars but it is safe to assume that from bars as the New York City Bar with a quarter of a million dollar budget to the smallest county bar in Tennessee several million dollars is spent annually in an effort to preserve our way of judicial life. And these statistics do not include such organizations as the National Legal Aid and Defender Association which alone, through its subsidiary organization, the National Legal Aid Clinic programs, is supervising the expenditure of eight hundred thousand dollars given by the Ford Foundation for the improvement of legal training in our law schools.

And why all this organization, why all this expenditure of money, and effort, and what is it the organized bar desires and must have? And how can all this be related to the bench everywhere? By and large the quality of the bench will reflect the quality of the bar. Even if the ultimate goal is to select outstanding men as judges, still the stature of the man selected will depend upon the quality of the group from which he is chosen. The attitude of the bar toward the bench, as well as the quality of the bar, influences the quality of judicial performance. The organized bar wants judges selected in a better manner than now prevailing. It wants longer tenures, either for life or expanded periods of years, selected and maintained on the bench without constant recurrence of elevation by democratic processes as presently understood and prac-

ticed. It wants a judiciary absolutely free and divorced from all politics, petty or grand, be it dictated by any individual from the governor on down or from any institution or organization, even the bar association itself. The several bar associations want a voice in the selection of judges, both appellate and trial, not a dictatorial voice but a vigilant, informed, advisory voice. The organized bar is best equipped of all to preserve our judiciary from control by self-seeking minority groups or blocs, and the pressure is mounting daily, to see that only men of legal ability, judicial temperment, integrity, punctual habits and reasonable promptness in the dispatch of legal business ascend our benches, and that the reward for judicial ambition shall not be measured by the success achieved in managing the campaigns of successful political aspirants, whether they be local, state or federal. The record in Tennessee is not quite outstanding. Judicial qualifications and not availability should be the standard.

The organized bar desires that no qualified judge be asked or compelled to expend his substance, time and energy in the weary, expensive pursuit of gaining public favor at the polls. A judge should only run against his record not an opponent and the Jacksonian philosophy in so far as it is attempted to be applied to the judiciary must be defeated.

The organized bar wants better and more modern courts, better equipped and staffed, if necessary, with administrative assistance, with more effective rules for the ascertainment of truth in a true advocacy proceeding. The bar is not entirely satisfied with some of the present outmoded rules of practice and seeing in each odd year the legislature passing piece-meal legislation, just more patches on the quilt of justice. Neither does the bar advocate a sweeping repeal of practice and procedure in Tennessee but hopes for sound reasonable modern changes. The rule making power must be exercised by our Supreme Court, not the legislature.

The bench and bar today live in perhaps the greatest period of intellectual challenge since the long slow establishment of constitutionalism was accomplished at the hands of John Marshall in the last century. Social and economic realities, a continuous succession of scientific breakthroughs, unprecedented growth and sky rocketing population trends, the most important revolution in communication since the printing press, all of these are transforming the society that the law serves.

As a live and breathing thing the law must be profoundly concerned with these pervasive changes. You will recall Dean Pounds admonition, "The law must be stable but it must not stand still," which today has

greater force and relevance than ever. We are blessed with strong and flexible institutions, a constitution that remains a foundation and bulwark, legislative processes that, despite its inherent representative democratic imperfection, remain sound, responsible, alive. Even the presidency has proved its adaptability to new demands.

While I do not advocate courts becoming legislative tribunals, it is to the courts that we must look to give meaning to social change, which is to say to relate it to the past and to reconcile it with our continuing experience and our objectives as a people. There must be a spirit of change and a spirit of conservation. Justice Cordozo in his Paradoxes of Legal Science said it better as follows:

> The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the great problems of the law.

I emphasize change because it seems to me that, like it or not, we are headed for a volume and a degree of change in the whole fabric of our life wholly without precedent. We must be equipped in our legal usages, in our vision, in the breadth of our reference, to deal with them. We must deal with them far more speedily than we have ever done before. We must be more than students of the law, we must be students of society, historians before the history has happened. For the substance of our lives is not the law; we only use it. The substance of our life is the society in which we function, restless, aspiring, full of good intentions, full of errors, incredibly active, driven by the will to get things done.

The essence of the matter is change, change that over the years alters the whole context in which the law has its existence and seeks to have its meaning. In the words of the conservative Burke,

> We must all obey the great law of change, it is the most powerful law of nature, and the means perhaps of its conservation.

The perpetual challenge to the courts is to accommodate the law to change, in Sir Frederick Pollock's words, "to keep the rules of law in harmony with the enlightened common sense of the nation." There is no higher assurance of the performance of this endless duty than a judiciary that is independent in its judgments, broad in its interests, outspoken in its convictions, and free from political containment or preference.

Likewise the bar, with the assistance of the bench, must accept change if it is to fulfill its duty and promise to the people of the State. A completely new form of organization is necessary to replace the present voluntary association with its lack of continuity, its success or failure in its undertaking dependent upon a small group of dedicated volunteers, with different viewpoints from different parts of the state, responsible to no one, embarking on programs that come today, go tomorrow. If we

are to become priests at the altar of justice, we must have a type of state bar organization, that which has as its fountainhead, the Supreme Court of Tennessee. Lawyers as an organization should derive their authority from the court, not the legislature, as witness some silly act passed by the 1955 legislature at the behest of a rural legislator absolutely untutored in bar organization work and its objectives. I do not mean that the Supreme Court should conduct a state bar organization, but from the newest member admitted to practice to the Chief Justice there should be a complete framework upon which lawyer and judge alike can labor to accomplish a better administration of justice. Justice is peculiarly the treasure, the honor and the responsibility of the court and bar. Discipline of the bar is impossible without the full, speedy and hearty cooperation of the bench and delay by either component in removing from the bar or bench incompetent, undesirable and corrupt practitioners only brings disrepute to the hundreds of decent lawyers. While the bar is charged with the responsibility of initiating action, of presenting the same, it is powerless unless a strong, courageous court is willing to assume its responsibility of disbarring the unfit.

Neither can the bar in its efforts to stamp out unauthorized practice of law by untrained laymen, organizations or corporations, none of whom are governed by the high code of ethics that govern the lawyer, all in the spirit of protecting the public from chicanery and incompetence, meet with success unless the court in proper cases is willing to frown upon it and to link arms for the common good. Legal assistance for those unable to afford compensation and defense of the indigent in the field of criminal law must be protected by the court at the insistence of the bar. The raising of standards for admission to practice should be another cherished objective of both the bench and the bar.

The bench and the bar stand between the individual and the state, a strictly Anglo-American concept of regulated justice, a concept increasingly finding rough sledding in an ideologically torn world today, in a world where in the foreseeable future we live under the shadow of the possibility that civilization will be destroyed by accident, folly, madness or desperation. Liberty cannot prosper in a climate where a lawyer is not permitted to speak up in defense of a client against the will of the state. It is to preserve this ideal that the organized bar engages in its multiple activities, not just in the interest of the profession but as contributions to the public welfare. It is to preserve our system of a court regulated society that the bar insists that learned and independent judges be recruited from a trained, independent and courageous bar, a bar ever alert to defend independent courts against false and scurrilous attacks. Professional and scholarly criticism should be welcomed, but

such a bar perceives that baseless attacks and the billingsgate of the ignorant lower the public esteem of both bench and bar and erode respect for all law.

In our beloved state where so much remains to be done in the matters aforesaid, an united, single-purposed bench and bar can and must meet the challenges of the day to the end that no citizen shall be deprived of his God given rights, that justice shall be administered speedily and equally, and that the administration of justice shall not be the pawn of the powerful and wealthy, but the heritage of all people. To these aspirations the bar invites your sincere consideration to the end that our joint verdict will be that which truth dictates and justice demands.

A LAWYER LOOKS AT COMMUNISM*

By WILLIAM C. MOTT**

Back in the 1830's, a hundred and thirty years ago, an inquiring and perceptive Frenchman named Alexis de Tocqueville came to this country in search of the heart of what he called the American experiment. His great book about us, "Democracy in America," is based on his entire nine months of search and investigation on this continent but the *essence* of democracy, he discovered, was the importance of law in our society, the respect for law ingrained in our citizens. History records that his long conversations with the lawyers of that day began to overcome some of his aristocratic prejudices against the democratic form of government.

In his wide travel Tocqueville visited Nashville and Memphis. In the 1830's he did not have much of a chance to observe the flourishing law practices and active courts that were his to see, in say Philadelphia. Probably in his December of 1831 visit to Memphis he was more interested in looking for heavy underwear than for lawyers. He encountered temperatures of 14 degrees below zero having been consistently promised by all that the Mississippi never freezes over. In any event Tocqueville was impressed with what he saw of the frontier and the American frontiersman. So, too, was he impressed with the demand, even on the frontier, for communications which would ensure close touch with the ideas of the rest of the country and the world. One of his easier predictions would have been to forecast the assimilation of the established but still growing American concepts of law and justice. The growth and present stature of the Tennessee bar would have been no surprise to him.

Tocqueville was not the only inquiring Frenchman abroad in search of a better government for France in that decade of the 1830's. A distinguished countryman of his, the Marquis de Custine, took a trip into Russia at about the same time de Tocqueville came over here. Custine quite frankly states in the foreward to his remarkable journals that he went to Russia in search of arguments *against* representative government and returned from Russia a *partisan* of constitutions. Both reporters, Tocqueville and Custine, were swayed by their observations of the operation of law in the two countries. It is a rich experience to

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** Rear Admiral, United States Navy.

compare the tales of these two Frenchmen. One finds many present day parallels. It should be especially rich for lawyers because of the great part *they* took in helping de Tocqueville to formulate his analysis of our chances of survival as a nation.

Custine did not have the advantage in Russia of talking to Tennessee lawyers, Philadelphia lawyers or any other kind of lawyers because, as he points out in his journals, circa 1839, "lawyers do not exist in a country where there is no justice." He went on to quote from a Russian prince of the realm in these words:

> Russian despotism not only counts ideas and sentiments for nothing but remakes facts; it wages war on evidence and triumphs in the battle . . . for evidence has no defender in Russia, no more than justice, when they embarrass the power.

No wonder our Ambassador Bedell Smith was to call Custine's book "the first fellow traveller's confession of disillusionment with a God that always failed," and even though it was written in the 1830's "the best work so far produced about the Soviet Union." While Custine was recording his disillusionment with the absolutism and the lack of respect for law which he found in Russia, Tocqueville was concluding that our whole system is founded upon the rule of law. He was impressed with the role of lawyers in providing the checks and balances which are the hallmark of our government.

For instance, Tocqueville concluded after talking to many lawyers in this country:

> In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy. . . . I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

Tocqueville, by the way, was not insensible to the contrast between our system of government and the system which Custine found in Russia. I am sure that many of you are familiar with his remarkably prescient comparison of the two systems. Imagine a man being able to make a statement like this in the 1830's:

> There are at the present time two great nations in the world which started from different points but seem to tend toward the same end. I allude to the Russians and the Americans . . . all other nations seem to have nearly reached their natural limits, they have only to maintain their power; but these are still in the active growth. . . . The American struggles against the obstacles that nature exposes to him; the adversaries of the Russians are men. . . . The American relies upon personal interest

> to accomplish their ends and gives free scope to the unguided strength and common sense of the people; the Russian centers all the authority of society in a single arm. The principal instrument of the former is freedom; of the latter, servitude. Their starting point is different and their courses are not the same; yet each of them seems marked out by the will of Heaven to sway the destinies of half the globe.

When you read that prediction of Tocqueville you wonder how he could express such a detailed comparison in the 1830's which retains so much validity today.

I note these historical comparisons because it seems to me that if we are to have a rule of law in the world, we must analyze all obstacles to the acceptance of that rule. And when I say *we,* I mean we lawyers who are best equipped to do this job. I often wonder whether we who have always stood in the forefront when our country was in peril are doing all we could do in today's time of crisis. In fact, as I talk to some members of our profession I am not sure they realize that an hour of peril is upon us.

President Kennedy on January 30th of this year in one of the sharpest warnings of our entire history as a nation, for which Tocqueville predicted such greatness, spoke out to you and me in these words:

> I speak today in an hour of national peril and national opportunity. Before my term is ended, we shall have to test anew whether a nation organized and governed such as ours can endure. The outcome is by no means certain. The answers are by no means clear. All of us together — this administration, the Congress, this nation — must forge those answers.

And how is this nation of our organized and governed? Simply stated is the Jeffersonian principle that ours is a government of laws, not of men. And what was the root of the national peril of which our President spoke? He dealt with many domestic problems in his State of the Union message — the dollar gap, the housing problem, unemployment, education — but these problems have been with us before in history. They could hardly be the cause of "an hour of national peril." No, he was talking about something else and he told us what it was later in this message in these words:

> Our greatest challenge is still the world that lies beyond the cold war — but the first great obstacle is still our relations with the Soviet Union and Communist China. We must never be lulled into believing that either power has yielded its ambitions for world domination — ambitions which they forcefully restated only a short time ago.

What do you suppose President Kennedy was referring to when he uttered those lines, "ambitions which they forcefully restated only a

short time ago?" I judge he meant the Statement by the 81 Marxist-Leninist Parties released on December 5, 1960, and interpreted in chapter and verse by Mr. Khrushchev in a 2½-hour speech delivered January 6, 1961. The Statement of the 81 Communist Parties has become known as the Communist and Workers' Parties Manifesto. It ranks in importance with the original Communist Manifesto of 1848.

It is not the kind of a document that you would sit down and read for recreation. In fact, I know of no Communist document that is. In the first place it is about three times as long as the Constitution of the United States and would take me about two hours just to read to you, if you would sit still for it, which you would not. Even then you would not be apt to understand it unless you were one of that small group of people in this country who are known as Kremlinologists or Sovietologists. They are hard-boiled eggheads who can translate the language of dialectical materialism into Rudolf Flesch English.

Some Kremlinologists believe that it is downright dangerous for the ordinary comprehender of plain English to read anything written in what George Orwell in his remarkable book "1984" called "newspeak." They feel that it is almost impossible when we read Communist words and accord them ordinary dictionary definitions not to be taken for a propaganda ride.

But when you study the Manifesto and Mr. Khrushchev's speech together, the clear meaning of the documents begins to come through, and the messages should dispel any lingering complacency amongst our citizens. No wonder the President of the United States saw fit to make reference in his State of the Union Message to the Communist restatement of goals. No wonder our Secretary of State, Mr. Rusk, in his very first press conference outlined, underlined, and emphasized the importance of these documents to all who would comprehend the problems in our future relations with the Soviet Union and Communism. In response to the inquiry of a newsman as to whether the negotiated release of the RB-47 fliers might portend improved working relations with the Soviet Union he replied:

> But I would hope that we would not be unduly optimistic that relationships have basically changed just because of the events of the last, say, few weeks. One still has the manifesto of the Communist summit to read. One still has Mr. Khrushchev's January 6th speech to study . . . there are some serious days ahead and some hard work ahead.

The Secretary of State's reference was, of course, to the same documents I deduce the President had in his mind in his State of the Union message. I believe every American should read these two documents. I have

encouraged this at every opportunity since I read them upon their issuance. There is so much to be learned about our peril from them.

I might mention that there is also a significant lesson from what was not said in these two documents out of the Communist world. For 2½ hours Mr. Khrushchev interpreted the fifteen-thousand word Communist and Workers' Parties' Manifesto. In neither the Manifesto nor the Khrushchev interpretation does the word "law" appear. At no place does the word "justice" appear. And no phrase appears which would permit an interpretation that law and justice are concepts even entitled to consideration, let alone respect.

Contrast this with the reaffirmations of faith in law in any recent State of the Union message by a President of the United States, from Truman to Kennedy, from Roosevelt to Kennedy, from Wilson to Kennedy. You will find again and again reference to hope for the rule of law as a solution to the problems that face the world today. For instance, in President Truman's 1951 message we find this statement:

> We believe that free and independent nations can band together into a world order based on law. We have laid the cornerstone of such a peaceful world in the United Nations.

If you turn to the very last State of the Union message uttered by a President of the United States you will find this passage:

> Where nature makes natural allies of us all, we can demonstrate that beneficial relations are possible even with those with whom we most deeply disagree — and this must some day be the basis of *world peace and world law.*

And throughout President Kennedy's recent utterances to the world is demonstrated the respect of this nation for law and the legal processes which appear to offer the only hope for peace with justice in our world. Thus in the Inaugural Address:

> To that world assembly of sovereign states, the United Nations, our last best hope in an age where the instruments of war have far outpaced the instruments of peace, we renew our pledge of support — to prevent it from becoming merely a forum for invective — to strengthen its shield for the new and the weak — and to enlarge the area in which its *writ* may run.

Before a group which is so well represented by lawyers and those who understand law and respect for law, it serves little purpose to belabor the underlying role of law in facing the nation's menace of today. We all know the place of the law. We all know the importance of respect for the law. What can we do about it? The President has said in his Inaugural:

> Ask not what your country can do for you — ask what you can do for your country.

Last year I had the privilege of addressing some 50,000 Americans face to face. The audiences ranged from bankers through teachers to funeral directors. I think probably the question most often asked of me by members of these divergent groups was: "Well, what can I do? I recognize Communism poses a threat to my country and my future, but what can I, an individual banker, teacher, lawyer, or funeral director, do about it?"

The answer, it seems to me, varies in degree with the position of the person in society. Some people can do more than others. The teacher and the lawyer have special obligations. But *all* have the duty of understanding the threat and the challenge which communism has thrown down to our future and freedom as we understand it.

The American Bar Association has passed a resolution which called upon the schools and colleges of this country to present adequate instruction in the history, doctrines, objectives, and techniques of communism. It is the object of the American Bar Association by encouraging and supporting such teaching in our schools to help instill a greater appreciation of democracy and freedom *under* law and the will to preserve that freedom.

The country must look to groups like you for leadership, especially to the legal profession. A great many intelligent people must do a lot of homework if there is to be effective education of our people in the aims, objectives, and practices of communism. There must be the closest kind of cooperation between, for instance, lawyers, patriotic citizens, and educators.

In the State of Louisiana there began last month for some 60,000 students in 900 Louisiana high schools a six weeks course on the aims and threat of communism. The program, built into the required course in American history, is the result of careful planning and work by the Louisiana State Bar Association in conjunction with the State Board of Education. The Bar Association's Committee on American Citizenship prepared the course with great care, saw to it that educators were consulted and made partners in the effort, and sponsored a bill in the state legislature to give the course sanction of law. All of this was not done over night. It took *three years* and a lot of extra curricular homework by dedicated citizens before the program could start.

Believe me, gentlemen, speaking as a teacher, which I have been, I know that teaching of communism in the public schools is not an easy task. There is no place for amateurs in the field. In fact, amateur anti-communists are about as helpful as amateur brain surgeons. We do not need space age witch hunters. We need informed citizens who have done their homework.

The American Bar Association well understood, however, that such a teaching program might fail unless it had a base of broad public understanding and support. How do you acquire such a broad base? Well, you do it through the leaders in the community, the kind of leaders we have been able to produce in America in times of peril since the days of the revolution. The kind of leaders that are before me.

If we are to have respect for law at home and abroad we must first make sure that our citizens, beginning with our children, understand what that respect means. They must also understand the attitude of our great competitor for the mind of man toward the rule of law. Here there falls a special duty and obligation upon the legal profession. It falls, in my judgment, upon you.

LIBERTY UNDER LAW VERSUS COMMUNISM*

By WELDON B. WHITE**

The general purposes and objectives of the American Bar Association are to uphold and defend the Constitution of the United States; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience, in the field of the law, to the promotion of the public good; to correlate and promote such activities of the bar organizations, in the nation, and in the respective states, as are within these objects, in the interest of the legal profession, and of the public.

For about ten years, it has been my privilege to be a member of the House of Delegates of the ABA. This is the legislative body of the American Bar Association and it receives and acts upon reports of its various sections and committees. There are eighteen sections for carrying on the work of the association. The names of some of the sections are (1) Judicial Administration; (2) International and Comparative Law; (3) Labor Relations Law; (4) Legal Education and Admissions to the Bar. There are certain special committees which have been created through action of the House; such as the "Special Committee on World Peace through Law," which Committee's assignment is (1) to explore and report upon what lawyers can do of a practical, concrete character to advance the rule of law among nations, and (2) to stimulate interest and activities among lawyers and laymen for the advancement of world peace through the extension of the rule of law.

The third nationwide observance of Law Day USA on May 1, 1961 reached new high levels of public recognition and participation. The aims of Law Day, as proclaimed by the President of the United States, also provided the principal themes of the observances: (1) fostering respect for legal authority; (2) encouraging responsible citizenship by demonstrating that the rights of American citizenship also impose obligations; and (3) promoting public understanding of the rule of law as the foundation stone of our own society, and as a potentially powerful instrument of world peace.

The Association has another committee, called a "Special Committee on Committee Tactics, Strategy and Objectives." The report of this

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* Address to the Exchange Club of Nashville on September 12, 1961.

** Associate Justice, Supreme Court of Tennessee.

Committee deals with the current Communist activities and tactics. The Committee reported: "There is a glaring need for better understanding of the true nature and aims of Communism as contrasted with individual liberty under law."

The lawyers of America are aroused and fearful that Communism, unless checked immediately, will engulf all of the free nations of the world. We are now at the crossroads, and at a stage in history, when the free people of the world must choose between Freedom and Communism. I mean by that, a choice between freedom or slavery and oppression, capitalistic economy or collective misery, peace and prosperity or war and destruction. This is the decision to be made today not tomorrow or the day after. We can no longer close our eyes to the fact that the United States of America is the last great power that has the strength to thwart the Communist desire. The destruction of America is the number one aim of International Communism and has been since the rise of Lenin to dictatorship in October, 1917. Since that time, Communism has waged unrelenting warfare against us and it will continue to do so until it is successful, as Khrushchev says it will be, or until we crush it and defeat it, either by the force of arms, including nuclear power, if necessary, or by the force of ideas in the minds of men throughout the world. In the beginning, the Russian Communists called their program "class struggle". Later it was described by Lenin as the "permanent revolution". In 1949, the Communist named it the "People's Front for Peace". We now call it the "cold war". Whatever its name, this new kind of warfare has succeeded in bringing more than half of the people of the world under its influence and domination; and we have been so neglectful in promoting our system of Government and our way of life that one small island, just off the shores of Florida, has now willingly and boastfully become a satellite of Moscow. This is the same little island freed by us from Spain in 1898, and a short time thereafter we gave her complete independence. *The Russians* "free" and "liberate" a country, and immediately set into operation the police state to keep it in complete subjection.

The United States of America has always been the envy of the rulers of Russia. The struggle, between this country and Russia, had its inception long before the revolution on Black Sunday in October, 1917. Alexis de Tocqueville in his book *Democracy in America,* published 126 years ago, made a remarkable and astounding prophecy. He said:

> There are at the present time two great nations in the world which started from different points, but seem to tend toward the same end. I allude to the Russians and the Americans. The conquests of the Americans are gained by the plowshare; those

> of the Russians by the sword. The Anglo-American relies upon personal interest to accomplish his ends, and gives free scope to the unguided strength and commonsense of the people; the Russian centers all the authority of society in a single arm. The principal instrument of the former is freedom; of the latter, servitude. Their starting points are different and their courses are not the same; yet each of them seems marked out by the will of Heaven to sway the destinies of half the globe.

De Tocqueville was not only a prophet, he was a remarkable man in many ways. He was a successful politician and statesman during the second Republic of France and served as Foreign Minister. In this capacity, he came to the United States to survey the prisons of this country, and while here he made a deep and penetrating study of our form of Government. Upon his return to France he wrote the book *Democracy in America* which was published, as I have indicated above, more than 126 years ago.

In order for us, as Americans, to fight Communism, we should first understand the meaning of Communism, the purposes thereof and finally the end to which the Communist will go in order to absorb the society of all men. The Encyclopedia Brittannica defines Communism as "a term used to denote systems of social organizations based upon common property or an equal distribution of income and wealth". Marx, Engels and Lenin were intent on doing away with the nobility and the middle class, leaving no one to rule the country but the Proletariat. Lenin and Trotsky established their dictatorship as "a dictatorship of the Proletariat", but immediately abolished the newly won political and civil liberties in Russia, and renamed the party the "Communist Party". Lenin demanded a revolutionary elite who would bring to the cause "not their spare evenings but the whole of their lives". He said, in substance, give me a handful of professionals, and I will overturn the established order. Lenin insisted on a "party" of picked professional revolutionaries, entirely devoted to the cause, who, though only a small minority, would be able to act in revolutionary situations as a highly disciplined and resolute group. This concept has been at the heart of their operations ever since. Throughout the Soviet Union there are about 6,000 special schools maintained by the Party, and devoted exclusively to training professional propagandists. Those trained propagandists who have a gift for languages and other talents useful abroad, end up in foreign countries as diplomats, traders, technicians, secret agents and clandestine bosses of Communist movements. At this very moment, a Red Diplomat, in a Latin American Capital, may be giving to a local Communist leader money brought from the Kremlin, by a diplomatic pouch, to finance an "Anti-Yankee riot"; to set up a "student

organization"; or to help control a key "trade union". At the same time, another Moscow trained agent is similarly preparing an imperious demonstration in Burma. In this Middle East country, a Soviet "trade representative" is plotting with all local Communists to topple the pro-western prime minister. In one of Africa's newly independent nations, a check reveals that a Red Chinese "technician" is transmitting orders to the native graduates, of special schools for Africans, behind the Iron and Bamboo Curtains. All of this goes on while we, in America, are content to engage in the pursuit of happiness, and in the enjoyment of peace and prosperity.

I would not have us forego our pleasures or our pursuit of happiness or our enjoyment of peace and prosperity; but in order to keep and maintain these things which we cherish so highly, we, at the same time, should be busy in building up and maintaining, at all cost, the weapons of war necessary to keep and protect the form of Government handed to us by our forefathers.

The Communist dictatorship has created the most perfect example of the totalitarian state, in which no sphere of individual life is allowed to remain outside its all inclusive grip. Terror has, and is, being employed by Russia without hesitation or humanitarian considerations. Individual rights are disregarded, and individuals as such no longer exist. Great Britain declared war on Germany to honor a treaty made with Poland to keep her free and independent. What happened to Poland, and where is she today? As the Russian Army approached Warsaw in July 1944, the Soviet radio repeatedly urged the underground army of Polish patriots in the capitol, led by General Bor-Komorowski, to rise up and fight the Nazis. But, when the Poles launched the insurrection, the Soviet forces immediately brought their offensive to a standstill outside Warsaw, and waited patiently while the Nazis liquidated General Bor's 40,000 men. Then the Red Army resumed its advance, "liberated" Warsaw and established the handpicked Lublin Communist Government in power. The Russians are still the masters of Poland. The world has forgotten the basic reason and the basic purpose for which Great Britain went to war; that is, to protect Poland in her right to independence and to honor her agreement.

Now in 1961 what are the immediate objectives of the Communists? How do they propose to achieve such objectives? The Communists themselves have answered and reaffirmed their stand on these questions in two recent documents. The first is the Communist Manifesto of 1960 which is entitled "Statement by 81 Marxist-Leninist Parties" adopted unanimously, in Moscow, on December 5, 1960, at a meeting of the Communist Parties. The second document is the report on this statement

by Nikita Khrushchev, delivered at a top-level Russian Communist meeting on January 6, 1961. The free world once ignored the plans of Hitler, as revealed clearly in *Mein Kampf*, until it was too late to prevent World War II. We face even a greater danger now. We must not ignore what the Communists now say, and long have said, they are going to do. As a hymn of hate against America, the 81-Party Statement has no equal. The party-line is a program of strategy and tactics that may change from time to time to meet changing circumstances. It may disguise, conceal, or restate the basic doctrines of world Communism, but the fundamental ideology called "Marxism-Leninism" remains the same; a program for world domination and control. It remains constant always. Khrushchev recently said: "If anyone thinks we shall forget about Marx, Engels and Lenin, he is mistaken. This will happen when shrimps learn to whistle."

The Communist objective is, after all, to achieve a political dictatorship, together with control of religion, education, industry and all institutions and activities which in free countries normally operate and flourish independent of and outside the sphere of the State. The cold war is not the result of misunderstanding between our leaders and those of the Soviet Union but on the contrary it is the product of a conscious Soviet policy always looking toward world domination and subjection of all the people of the world.

In his speech in January, Khrushchev said further, "Communists are revolutionaries, and it would be a bad thing if they did not take advantage of new opportunities that arose and found new methods and forms providing the best way to achievement of the ends in view". The Manifesto of 1960 also says: "U.S. imperialism is the main force of aggression and war" and that the Communist favor "peaceful co-existence" and then the term is defined as follows:

> Peaceful co-existence of states does not imply renunciation of the class struggle. The co-existence of states with different social systems is a form of class struggle between socialism and capitalism. In conditions of peaceful co-existence favorable opportunities are provided for the development of the class struggle in the capitalist countries. Peaceful co-existence does not mean conciliation of the socialist and the capitalist ideology. On the contrary it implies intensification of the struggle of the working class of all the Communists parties for the triumph of socialist ideas.

Now what efforts are being made to awaken the American people to the emergency of this dangerous situation confronting the free world today? For one, the American Bar Association acting through its House of Delegates at a meeting in Chicago last February adopted a resolution recognizing the urgency of advising our citizens of the contrast between

liberty under law and Communism, upon the theory that an informed citizenry may successfully defend and preserve our American heritage. Favorable editorials from the press were numerous in regard to this resolution. The American Bar believes that it has contributed materially toward its announced purpose; that is, the desire "to instill a greater appreciation of democracy and freedom under the law and the will to preserve that freedom". The Tennessee Bar Association, acting through its Board of Governors, has adopted the same resolution. The Tennessee State Board of Education now has a copy of this resolution for its consideration.

Let us turn a moment to our form of Government which has as its basis the Golden Rule, the Mosaic Code, the Sermon on the Mount and complete religious freedom. The great documents from which we derive our precious heritage are the Magna Carta, the Declaration of Independence, the Constitution of the United States, and the Bill of Rights. American domocracy is both a form of government and a way of life. It is based upon both federal and state constitutions and the laws enacted from time to time by the legislative branches of the Government. It is a Federal Union of sovereign states providing citizenship for all, and guaranteeing individual freedom and liberty for all persons without regard to rank, social cast, race, color or creed. However, it places upon each individual the responsibility of eternal vigilance, to protect such liberties and freedom; and it also teaches that rights and privileges are based on duties and responsibilities, and that democracy is the only system that respects and values the individual human being.

We recognize that liberty and justice are more precious than life; that ignorance, selfishness and complacency are our three most deadly enemies, and we recognize above all that there can be no compromise with international Communism. We recognize that an educated and informed citizen is the best insurance of our freedom. We recognize that under our free capitalist society and economy there are at least three basic elements. One is personal liberty, the other the right of private property and another the right of free enterprise.

American democracy has the international objective of assisting people of many lands to achieve economic security and freedom to satisfy their individual means. Communism has the international objective of complete control of all economy through world domination. A free capitalist economy and society gives the individual the right, if he chooses, to buy, own, keep and enjoy, a home and the luxuries of life as well as the necessities of daily living. Private enterprise under our system makes it possible for the individual to go into business, to create,

to invent, to produce goods and provide services in keeping with his energy and his talents. A capitalist economy makes it possible for groups of individuals, professional groups and business groups, to organize for their own betterment. There can never be a time when economic differences between democracy and Communism can be compromised.

A person cannot be a true Christian or Jew and at the same time be a member of the Communist Party. A Communist does not believe in a Supreme Being. We in America enjoy and we fight for the privileges of individual religious freedom and the right of each individual to attend the Church of his choice and worship as he sees fit. This guarantee is contained in the First Amendment to the Constitution.

The chief objective of Communism is the domination of the world. The International Communist movement has one purpose; to help the rulers of the Soviet Union gain control of the world. Communism is more than just another political theory. It is a complete philosophy and way of life that is atheistic and materialistic to the core. Communism cannot be trusted to observe the standards of Western civilization and morality. When Communists negotiate with non-communists they are not seeking to establish peace; they are seeking to maneuver themselves into the best available position for continued war. In their push toward world domination they frequently win a battle by force of arms or by negotiation and they never fully lose a round. They may not have gained but they do not lose. We never really gain because we are not trying to annex new territory and we consider that maintaining the status quo in a given situation is winning the battle.

The Communists believe they can reach their real objective without war but by infiltration and subversion. They push and shove and attain certain objectives and then say they are ready to negotiate but their negotiation is based upon avarice, deceit and treachery. They cannot be trusted. It is my belief that our leaders recognize this situation and are acting accordingly.

During our 200 year history we have become a strong nation and a resolute and determined people but without warlike attitudes, our country seems loose, unorganized and unwieldly. When, however, the shores of our system of government are attacked we have on all occasions acted with unity and we shall continue to stand as one in the face of the enemy.

In closing, I submit that Hitler and the Nazis created a war machine for warlike purposes and Hitler announced repeatedly he intended to conquer the world by force of arms and without regard to human life. The Russians say to us: "We are not a warlike people." We desire to

negotiate. We want peace, but at the same time they work "the whole of their lives" to promote Communism by guile, deceit, treachery and fraud boring from without or from within but always pushing, working and shoving, trying in every way possible to subjugate the United States of America; but an enlightened, aroused and resolute people with the aid of Almighty God will repel the Soviets in their diabolical schemes.

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