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*Prepared by John T. Henniss

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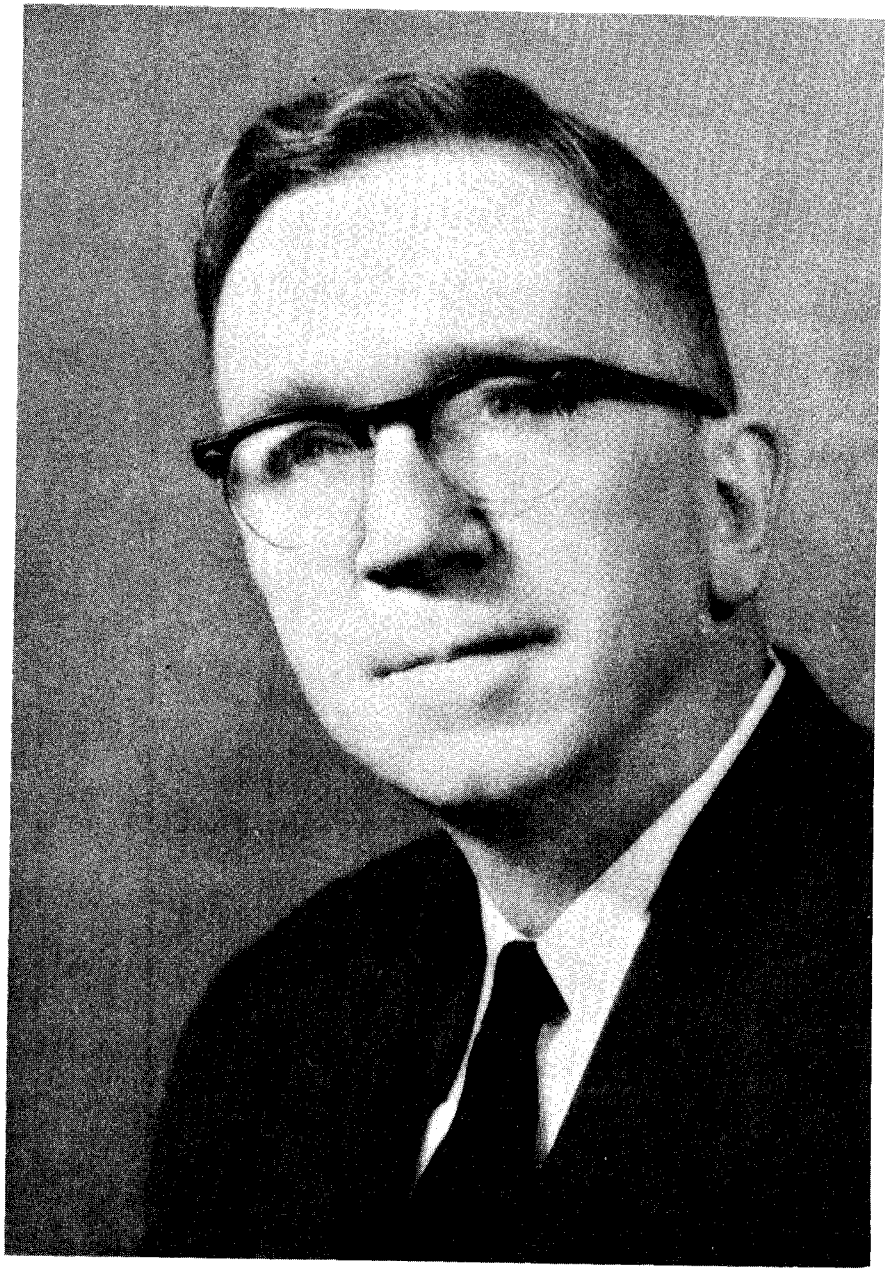

CHARLES G. MORGAN

President of the Bar Association of Tennessee
1957 - 1958

TENNESSEE LAW REVIEW

Volume 25 FALL 1957 Number 1

JUDICIAL ADMINISTRATION IN TENNESSEE*

By CLARENCE KOLWYCK**

No more prized honor could come to me than to be invited to talk to the assembled judges of Tennessee. So far as I am informed, this is the first such invitation extended to a president of the Bar Association of Tennessee. I hope it is a precedent, for effective judicial administration can be achieved only through cooperative effort between the organized Judiciary and the organized Bar, working toward a common goal — the public interest, our only excuse for existence.

Most state bar presidents set goals for their administrations. Mine has been to inspire in the individual lawyer a renewed sense of duty to his profession, to the courts and to the public. And may I suggest that the Judiciary too is not without responsibility, both to the legal profession and the public. But our common duty to the public is paramount to the interests of either.

In furtherance of our objective the Central Council at the outset adopted rigid rules of procedure in dealing with grievances. Though we have no way of ascertaining their deterring effect, the report of our Grievance Committee will show complete quiescence throughout the year. Many speeches have been made over the state, calling upon the lawyers to renew their faith in, and respect for, the courts, in recent years so unjustly criticized.

Knowing that respect for ourselves and for the courts will generate public esteem for both, we have sought to honor our forefathers in the law, and in so doing, to honor the law which has honored us. As an example we are raising funds with which to erect a monument to Judge John Haywood, who so profoundly impressed himself on the common law of our state as to merit the tribute of being its "father." I know of no other judge having been so honored by the Bar of Tennessee, except our late beloved Chief Justice Grafton Green.

So I stand before you today as one who profoundly respects Tennessee's legal traditions, the progenitors of our system of juris-

*Address delivered at the Seventy-Sixth Annual Convention of the Bar Association of Tennessee, June 12, 1957, before the Judicial Conference of Tennessee.

**President of the Bar Association of Tennessee.

prudence, both law and equity, and one who respects the judges of our courts, both the living and the departed, individually and collectively. But respect should not blind us to deficiencies in our judicial system. I am convinced that our present system of courts of general jurisdiction falls short of adequately serving the public interest. I have come to this conclusion after thirty years of practice, wide acquaintance with the lawyers of Tennessee, acquaintance with most of the recent presidents of bars of other states, membership in the A.B.A. House of Delegates, the American Judicature Society, the Institute of Judicial Administration and other affiliated organizations. Though I speak for myself, I believe I voice the opinion of a majority of the members of our Association.

Believing that reforms in our judicial system were long overdue, I set about last summer to feel out the sentiment of the leaders in our Bar. Somewhat to my surprise, I found little disagreement. But I was strongly advised to seek no remedial legislation in the General Assembly just ended, because of the possible impact on the 1958 elections. Now that the 80th Assembly is history and what I have to say can have no bearing on the forthcoming judicial elections, I want to summarize for you the ideas gleaned from hundreds of conferences with lawyers and judges, and numerous letters written and received, regarding our judicial system and its administration.

I shall treat the subject of Judicial Administration in a broad sense, inquiring whether both the system and its administration are adequate to the public welfare.

First, I will discuss the system. In one sentence, there seems to be general satisfaction with our appellate court system, but not so with our system of courts of general jurisdiction. There we have a multiple system of courts of concurrent, conflicting and confusing jurisdiction, never understood by the public and by few, if any, lawyers. Can this confusion possibly be in the public interest?

I believe we can agree that all matters of a judicable nature handled by our ancient county courts should be transferred to courts of general jurisdiction. Lives there a chancellor who can resolve all the defects of title chargeable to these courts? That leaves our chancery and circuit court system, the latter with a confused division and overlapping of unsystematic civil and criminal jurisdiction. Until all these courts are merged into one system, we can never have a system of judicial administration adequate to the public interest.

I do not make this statement without forewarning that I will be charged with sacrilege for suggesting, even thinking, that chancery courts should, in effect, be abolished. However, my investigation con-

vinces me that this fear is more a state of mind than of fact. But before I find myself in contempt of the judiciary of Tennessee, sitting *en banc,* let me explain. I suggest no more to abolish chancery than circuit court. I speak rather of a single system of courts, combining all the good qualities of both law and equity, with simple rules of procedure, such as we now have in the federal courts.

For thirty-three years I have been asking the question – why a separate chancery system? I have never received a convincing answer. Ours is one of only four states having a separate chancery system. Two others have chancery courts in modified form. General jurisdiction in all other states is vested in a system of courts combining law and equity jurisdiction, but generally operating under the rule that wherever common law conflicts with equity, *equity shall prevail.* What can be wrong with a system like that?

How did chancery courts happen to get started anyway? To use an oversimplified illustration, back in the late thirteenth century the King of England received a letter from Subject *A* which may have read like this: "Subject *B* has obtained a deed to my farm by holding a cutlass over my neck. The law says it can't look behind the deed. Can you help me?" Upon pondering this miscarriage of justice, the King called in his Chancellor, then an ecclesiastic, and said to him: "Here, read this. That law court has no conscience. Now, you go to Subject *B* and command him in my name to answer this letter. If he says the letter is true, then tear up that ill-gotten deed. If he denies it, command Subject *A* to produce proof of his charge. If the proof is convincing, then write Subject *A* a new deed in my name." This proving to be a quick way to redress wrongs, the King in 1348 made his Chancellor the "keeper of his conscience" to render summary judgements in such cases. Thus the chancery system began in England, as a sort of temporary court of certiorari.

But just as the common law courts had become arbitrary, the chancery system, once established, took unto itself more and more power and encumbered itself with rules whose abstruseness was executed only by the dialectics of the common law courts. Dickens was led to say: "Suffer any wrong that can be done you rather than come here." Equally apropos was Voltaire's sardonic reproach of the French courts: "I was never ruined but twice – once when I won a lawsuit and once when I lost one." The jealous cleavage of the two conflicting systems frustrated justice in England for six centuries. Finally, after the so-called "Hundred Years War for Legal Reform," the Judicature Act of 1873 put an end to the medieval scholasticism of both systems, merging them under a rule that "in all matters in which there is any conflict or

variance between the rules of equity and the rules of common law, with reference to the same matter, *the rules of equity shall prevail.*" England has continued to operate under that simple system, where today it is the exception if a case is not heard within three months of filing. Incredible as it may seem, the High Court of Chancery of England never attained the status of a court of record. My authority for that statement is *Gibson's Suits in Chancery.*

How did we come to have separate chancery courts in Tennessee? Of course we inherited equity practice from North Carolina, but not the separate chancery system. It was not adopted in Tennessee until 1827. Neither the Constitution of 1796 nor the one of 1834 mentioned either circuit or chancery courts and I have grave doubts of either being mandatory under the Constitution of 1870. Article VI, Section 1, merely states:

> The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace may also be established.

Referring to the Journal of the Convention of 1870, this wording seems to have been a compromise between two schools of thought: one insisting that no reference be made to either circuit or chancery courts and the other insisting that they be made mandatory by inserting the word "such" after rather than before the words "circuit" and "chancery." As approved, Section 1 seems more to recognize their existence than to make them mandatory. If the Legislature can abolish justice of the peace courts, why can't it likewise merge the circuit and chancery courts into one court of general jurisdiction?

What are some of the defects inherent in our dual system of courts? In my view, the very fact that they have almost completely concurring jurisdiction is a good argument for merging them and the fact of conflict in jurisdiction is still a better argument. How often is the client caught in a squeeze in that no-man's land where the lawyers have no way of knowing which court has jurisdiction and where the courts of law and equity each refuse to give full faith and credit to the other's decision on the same issue? Worse still is the incidence of both refusing to take jurisdiction. Why should we have to go to the Supreme Court to find out whether we picked the right court? Isn't a choice of courts an evil within itself? Between dual systems, as in England a century ago, it is inevitable that one will assert superiority over the other. Tennessee

is no exception – where the sacrosanctness of chancery lends prevalence to the belief that chancellors are better qualified than other judges, and that they have a monopoly on justice. Suppose they are – that merely points up the evil of the dual system. Chancery deals almost exclusively with property rights, while criminal court deals entirely with human liberties. Is it in the public interest that judges who pass on our liberties are less respected than those who pass on our property rights?

Chancery courts were created to speedily dispense justice to all people under Divine Law, regardless of any and all man-made law. Do they operate that way in Tennessee today? Consider, first, that the door is closed to poor people with claims less than $50.00. Consider the rule requiring that chancery cases be tried on depositions where the cost may exceed the amount involved. Is it equitable that depositions disregard the rules of evidence and throw open the door to perjury, often resulting in miscarriages of justice because the court cannot observe the demeanor of witnesses? Is it equitable that chancery is catacombed with such rules as will allow hundreds of pleadings to be filed over a period of years before a case is heard on its merits? Consider the cases where the court costs exceed the amount involved, to say nothing of the solicitor's fee, unless the fee be contingent, in which event the lawyer gets nothing and may even have to pay court costs. I have been cited a chancery case involving a demand for $1500, which the defendant won in the Supreme Court. Computing his time at $10 per hour, his solicitor found that the bill came to $1900. But not being of an avaricious nature he reduced his bill to the amount sued for. I am not informed whether the client quoted Voltaire when he mailed the check and fired his lawyer.

Some will say that we can't depart from *Gibson's Suits in Chancery* and *Caruthers' History of a Lawsuit,* quoting the dubious aphorism that you can't teach an old dog new tricks. But that is not the problem. It is rather one of persuading the dog to forget old tricks. The only rule a lawyer would have to learn would be to write the court a letter about his case, to be answered by a letter from adversary counsel, thereby permitting a speedy trial on the merits. The public is tired of tricks. Though perhaps beneficial at the turn of the century, the works of Caruthers and Gibson have progressively tended to impede judicial reform, stifle professional intiative and delay justice in Tennessee. Why not give both an honorable funeral and from the good of each erect a new standard of practice which even our clients can understand? We don't honor Henry Ford by driving a T-Model Ford in 1957. In my lifetime we have progressed from the horse and buggy to the atomic age. But in that time not a single material reform has been made in judicial

procedure in Tennessee. Great men that they were, I believe that if Gibson and Caruthers were living in our time they would be the first to forget old tricks. Farmers have combined the thresher with the reaper. Why can't we run Gibson and Caruthers through the combine and sift from the process simple rules that will more efficiently expedite justice?

How would this new system work? Our sister county of Bradley would be a good example. Having abolished all existing circuits and divisions, and, let us hope, the pernicious terms of court, which serve no purpose except to entrap the unwary lawyer, we would have one judge, presiding continuously over the Superior Court of Bradley County, with complete jurisdiction in all matters — common law, equity, criminal, probate and domestic relations, and operating under simplified rules of pleading and procedure, but with the substantive law and the law of remedies unchanged. Instead of Chancellor Woodlee traveling over fourteen counties and Judges Oliver and Hicks over seven counties, each holding court in Bradley County only three times a year, one of them could be assigned to Bradley County to hold court all the time. By combining two or more smaller counties the other judges could be assigned to small cohesive circuits with the same overall jurisdiction. Then the courts would begin to fill the needs of a people in a modern age.

Without receding from our major premise that a radical operation on our dual system of courts is basic to genuine judicial administration, we already have the machinery for improvising many needed reforms. First, we have your own Judicial Conference (Tenn. Code Ann. §§ 17-401 through 407; Pub. Acts 1953, Ch. 129) with unlimited powers to study our judicial system and make recommendations for improvement. Justice Tomlinson and Chancellors Woodlee and Frazer and your various committees have made commendable strides in implementing and breathing life into the Conference, which augurs well for its future influence. Next, we have Tenn. Code Ann. § 16-513 (Code 1932, Sec. 9928) giving to the Supreme Court rule making power over circuit and criminal courts, so long as such rules are not in conflict with existing law, and providing for an advisory commission, including the Attorney General, two circuit judges, one criminal court judge, one lawyer and the president of the Tennesssee Bar Association — believed to be the only statutory recognition of the organized Bar.

Then, we have the Judicial Council (Tenn. Code Ann. §§ 16-901 through 910; Pub. Acts 1943, Ch. 130; Pub. Acts 1945, Ch. 89; Pub. Acts 1947, Ch. 47) composed of one member each from the two appellate courts, one chancellor, one circuit and one criminal court judge, and two law school faculty members, two laymen and two lawyers, the latter six to be appointed by the Governor. Incidentally, I knew nothing of the

existence of the Council or of any rule-making power being vested in the Supreme Court until some six months ago. But I was not alone. Of fifteen judges whom I asked about the Council, only one had ever heard of it. The Act creating the Council could stand some improvement, such as provision that the trial court members be elected by the Judicial Conference and that the lawyers be elected by the organized Bar. It receives an appropriation of only $3,000, when it should be ten times that amount.

The duties of the Judicial Council call for a continual study of our judicial system, for the gathering, compiling and analysis of statistics on all courts in the state, for recommendations for simplifying and correcting faults in the administration of justice, and that an annual report be published on all such matters. The only known activity of the Council is that it meets semi-annually. It has no full-time secretary, it gathers no statistics, it publishes no reports and makes few recommendations. Of the twenty-one states having similar councils, ours is one of only three without a full-time secretary and, for that reason, one of the three least effective. Other states have administrative officers under the direct supervision of their supreme courts, which perform the same functions, but more effectively. The great advantage, however, in our Council is that laymen are admitted to membership.

The recent General Assembly directed the Legislative Council Committee to make a study of our judicial system and make recommendations as to its improvement by Senate Joint Resolution. Splendid as the project may be, a potent Judicial Council would have made this task unnecessary.

Finally, we have the Bar's Committee on Judicial Administration and Remedial Procedure and Law Reform, composed of nine outstanding members of our Association.

Thus we have machinery which, though disjointed, is reasonably adequate for makeshift reform in our present confusing systems of courts of general jurisdiction. The maximum that can be accomplished with what we have should be our minimum goal. First, I think the Bar's committee can be counted on for full cooperation. Second, I believe the Supreme Court, with the cooperation of the Bar and Judicial Conference, will welcome the opportunity to exercise its rule-making power to the fullest extent, which should include pre-trial procedure as a must, summary judgment as a possibility and, certainly, a requirement that comprehensive statistical data be regularly reported. Third, the Judicial Conference has wide authority to modernize and standardize procedure and recommend improvements. Finally, the Bar, the Judicial Con-

ference, the Supreme Court, the Court of Appeals and the public should resuscitate the Judicial Council and make it a vibrant and vital instrument for improvement of judicial procedure and administration. Much can be accomplished, even on its limited budget, by working with the Legislative Council Committee not so hampered by a paucity of funds.

To cite one example of what can be accomplished, at the next General Assembly we would have adequate statistics from which to mathematically determine where and how new circuits should be created. Perhaps justice would no longer be delayed in Anderson County, and let us hope that Wayne County would be permitted to vote for the judge who presides over its court. But wouldn't it be wonderful if we had a single system, with no more divisions, no more circuits, no more terms, no more conflicts and no more confusion?

Before the next legislative session, each of you judges will be secure in your tenure for another eight years. But in that time the post-war generation will have reached maturity and Tennessee's industrial growth will be phenomenal. Atomic energy will be common-place in industry and communication. It is not unlikely that the case load of your courts will increase 25% to 50%, and in some counties as much as 100%. It is a great tribute to our trial judges that so far they have kept their dockets reasonably current, even though yoked with the rules and dogma of a by-gone era. But we are in a new age and an undreamed of age is now dawning. We should not permit our antiquated court systems to be a millstone to progress in Tennessee.

In merging our courts into one system with streamlined procedure for immediate adjustment to changing conditions, we do no dishonor to Haywood, Green, Caruthers and Gibson, but rather do we honor them. They were pioneers in their day, even radicals. Judge Haywood reversed the common law of North Carolina to fit different conditions in Tennessee. Chief Justice Green's real greatness lay in his courage, which impelled him to offer his neck squarely on the political guilotine in one of Tennessee's darkest days. History records no instance of a monument being erected to anyone who slavishly followed the custom of another age. Dean Clark, who pioneered the federal rules, and Chief Justice Vanderbilt, who modernized the courts of New Jersey, have become immortal in their lifetime. Nor should I overlook Chief Justice Snyder of Puerto Rico who set up in that Commonwealth the most modern court system in America. I regret that illness prevents him from speaking to you tomorrow. Would that we had another Haywood at our Bar today. I can just hear him say: "Judge Haywood reverses the procedure of yesterday to meet the needs of today and to prepare for the growth of tomorrow."

Members of the Judicial Conference, the ideas I have advanced sprang from many sources. This talk has been read and edited by many lawyers and not a few judges. The response has been overwhelmingly favorable. My *only* dissents came from two judges. Typical was that of a truly great lawyer who wrote: "I am tired of being a slave to Gibson and Caruthers. Your findings and recommendations reflect a courageous diagnosis of this great illness of our system of pleading, practice and courts in Tennessee." From my own investigation and study of this subject over the past year, I am convinced beyond any doubt that the Bar awaits only the leadership of the Judiciary to modernize our judicial system and procedure to better serve the public interest in this modern age. If I have done nothing more today I hope, at least, like Chief Justice Holt of England, that I have "stirred certain points in order that wiser heads in time may settle them."

WHAT THE ORGANIZED BAR IS DOING FOR THE INDIVIDUAL LAWYER

By David F. Maxwell**

I am delighted to be here for two reasons. In the first place, it is always a great delight and pleasure to be with my friends from Tennessee who have worked so hard in the vineyard of the American Bar Association. And Governor, you have referred to the persons whom Tennessee has given the various states of the country, but you could very well have added that Tennessee at all times has given to the American Bar Association the cream of its legal talent.

I refer to men such as my good friend Charlie Morgan, here, and Ed Kuhn and Clarence Kolwyck and some of the others with whom I have worked in the House of Delegates of the American Bar Association, such as Jack Doughty and your former president, Weldon White, and Lon MacFarland, who was in the House a number of years, not to speak of men such as Walter Armstrong, who was a brilliant president of the American Bar Association, who was Tennessee's gift to the Association, and his likewise erudite son, Walter Armstrong, Jr., who is now chairman of the Section of Criminal Law of the American Bar Association.

These men have made a great contribution to the work of the organized Bar, and you members of the Tennessee Bar can be proud of your delegates in the House of Delegates.

The other reason I came down here is that it would be very ungracious for the president of the American Bar Association to decline an invitation to visit with the Bar of this great State. We came to you two or three years ago and we said to you, "There are only approximately fifty-five thousand members in the Association. There are two hundred and forty-one thousand lawyers in this great country. We do not feel that we are really representative of the Bar of the nation. We want more members from your State of Tennessee." And under the leadership of Ed Kuhn, and I don't know how you did it, he and I had a little private competition, and I think he won. He went out in the City of Memphis and somehow or another managed to round up a hundred members, as I remember it, and I fell two short in that greater City of Philadelphia with only ninety-eight. When I say greater, I mean by comparison in respect only to numbers. I am not here to debate the

*Address delivered at the Seventy-Sixth Annual Convention of the Bar Association of Tennessee June 13, 1957.

**President, American Bar Association. Member of Pennsylvania Bar.

comparative merits of Memphis and Philadelphia, but that was typical of the work you Tennessee lawyers did to give us a real hold on the lawyers of America.

And then we came down to you again two years ago, and we said, "We need money for our American Bar Foundation." And once again the lawyers of Tennessee entered into the spirit of the thing, realized the value of having a law center on the campus of the University of Chicago in Chicago, and you gave very graciously and generously and promptly of your resources. As a result of all that, we have today approximately ninety thousand members of the American Bar Association and almost double the number that we had when we first came to you. We have the most beautiful edifice and functional building on the University of Chicago campus that you'd ever want to see, and I suggest that any of you getting to Chicago on business, who haven't yet seen it, please go and take a look at it, because it belongs to you.

We have, in addition, an income of a little in excess, Mr. Governor, of a million dollars a year to devote to the work of the organized Bar, and in the public interest, and so now we have the facilities, we have the income. You have demonstrated your confidence in us, and we expect to keep the faith with you.

So in this administration we are dedicated to the proposition of service for lawyers. Now I can make no apology for that, because in my humble opinion it is the lawyers of this country who are best qualified by training and experience to protect the rights of the people. They have, through the ages, and I am not going to recite the various respects in which they have, because you all know them as well as I do.

The Declaration of Independence was drawn by a lawyer. Of the persons who signed the Constitution of the United States, a large majority were lawyers, and so right down the line it has been the lawyers who have defended the rights of the people. They are in a position to speak out on the great constitutional issues of our time and tell the government what is right and what is wrong.

If I ever had any doubt about that proposition, it was completely dispelled on the occasion of a visit I had to the Soviet Republic with the delegation of the American Bar Association last summer. There I found that lawyers had descended to a low ebb indeed. They have been shorn of every vestige of independent thought and action. In the Soviet the lawyers are required to be members of a union and a union composed not only of lawyers, but a union known as an installation which is an installation of government workers. All the people who work for the government are members of that union or installation. That installation

is controlled by a Presidium just as the whole Soviet Republic is controlled by a Presidium, a few men. And the membership of that Presidium are controlled by the Communist Party, just as the governing rulers are controlled by the Communist Party. So you can see to what extent they have down graded the lawyers of Russia. I estimate that in the whole Soviet Republic today there are only approximately twelve thousand lawyers to serve a population of approximately two hundred million.

But in the City of Moscow, with its six or seven million people, there are twelve hundred lawyers and, why? Because there is little for the lawyers to do in the Soviet. The government owns all the property. There is no such thing as free enterprise. They own the banks. They even run the little shoe shine vendor on the corner who gets a stock of shoe strings each week and has to report back to the government at the end of the week. How in the world they ever keep the books over there is more than I will ever be able to understand. They have two hundred buildings just devoted to the bookkeeping of all these various enterprises that are conducted by individuals for the government.

The compensation of lawyers is equivalent to their standing in other respects. The compensation of the average lawyer in the Soviet Union is approximately three hundred dollars a month, and I might add, for the benefit of any judges who are here, that is exactly the compensation of the judges too.

So you can see that it is no advantage for a lawyer to make up his mind to travel to the Soviet Republic and set up a practice. It was as a result of that experience and the result of what has happened in this country that we decided to do something for the lawyers of the country this year. Now what are we doing? (I must say that your President is very thoughtful of your time and attention, because he arranges it so that I don't begin making this address until half past one and I have to appear on television promptly at ten minutes of two, so therefore, you are not going to suffer too long.)

But in a nutshell, here are the points. First, we have brought you this year for the first time a monthly news bulletin which keeps you up to date with the activities of the organized Bar, both on the legislative front and at the headquarters in Chicago. I hope all of you here will read it, because you will find it very interesting and very timely; but, of course, you have to join the Association in order to get it. That's just a by-play.

The second thing we did this year was to supplement the insurance program which we brought you two years ago. Two years ago we brought you a program of the cheapest possible life insurance, and I am glad

the ladies are here so they can hear some of the benefits their husbands are getting. We gave the men of our members up to the age of fifty-five coverage up to six thousand dollars. This year we have supplemented that policy by a new contract which covers the men in what I like to call the middle years of life, the years between the ages of fifty-five and seventy. So that today we are offering insurance at the lowest possible rates that you can secure in this country to men of those ages up to six thousand dollars.

Three, and I am very happy that I am now in the State of Tennessee, the home of Jere Cooper, one of your most august and distinguished Congressmen. I only wish he were present to hear this, because I am now referring to our efforts to pass the Jenkins-Keogh Bill. Here in Tennessee, I am sure all of you know of the Jenkins-Keogh Bill. It is not intended to be a handout to lawyers. In fact, it isn't only for the benefit of lawyers. It is for the benefit of all self-employed persons, and all I ask is that the self-employed persons of this nation, of whom there are some ten million odd, be given the same privilege of setting aside a portion of their income every year upon which the tax will be deferred into a recognized pension fund so that they can get the benefit of that when they reach the age of retirement or sooner. It is a bill which should be passed. It is a bill that every lawyer should be for and should earnestly seek to get passed as a protection to his family, his wife and his children.

Now what has happened to that bill? We have organized this year what is known as the American Thrift Assembly. We have brought together a union of all of the organizations representing the self-employed of this country and we have attempted to present to the Congress a united front in support of that bill. At this present moment it is pigeonholed in Mr. Jere Cooper's pocket, as Chairman of the Ways and Means Committee. If any of you gentlemen have any influence with the Chairman, I wish you would use it now, because we have been assured by a poll that we've made that we have a vast majority of the Congressmen in favor of that bill, but we cannot as yet get it out of the Committee. The secret rests right here in the great State of Tennessee. Maybe you could use your influence, Governor.

Next, I want to refer to what we are doing for the men and for our lawyers in the armed forces. Believe it or not, ladies and gentlemen, the doctors, the dentists, the osteopaths, yes, even the veterinarians, are treated better in the armed services than the lawyers of this nation. They are given a higher rating to begin with and they are given more pay. We think that is fundamentally wrong. We believe that the lawyers who have exposed themselves to the training over a long period of years are entitled to the same treatment at the hands of our government as these

other professions, and so we propose to introduce legislation in the current Congress to bring that about.

And one last thing, and that is in the field of administrative practice. Now you have all heard, I am sure, of the Celler Committee and of the American Bar Association's recommendations for reforms and revisions in the practices of our administrative agencies, but I wonder whether you knew this: If any man, any lawyer in this room has been so naive as to think that he can go down, for example, to the Treasury Department in Washington and take his client and present his case there, then he is about to be sadly disillusioned because, of the thirty agencies where adversary actions are tried, there are at least ten that have special rules and regulations for the admission to practice which apply to lawyers as well as to all other persons. In the Treasury Department, as demonstrated by the Task Force of the Hoover Commission, of which I happen to have the honor to have been a member, the United States government spends three hundred thousand dollars upwards a year to investigate the character of lawyers who apply for admission before the Treasury Department.

Now we have the notion that if you are good enough to practice before the Supreme Court of the State of Tennessee, you are good enough to practice before any administrative agency or tribunal without any further ado, and one of the provisions of the bills which have been introduced into the Congress through the medium of the Celler Committee contains a provision that will make it possible for you to practice before any administrative tribunal simply by entering an appearance the same way that you would do in any court in Tennessee.

And another provision of that bill, to which I think your attention should be drawn, is that we recognize, of course, that there must be a certain latitude given to lay persons in practice before administrative tribunals. We appreciate the fact that on rate cases and other cases it is essential that lay persons be given access to the tribunals as representatives of others, but we say that the privilege should be very definitely limited, and in no sense should any lay person be permitted to practice law, in the sense that we understand it, before any administrative agency or tribunal.

Furthermore, inasmuch as every lawyer who practices before an administrative agency is subject to the same strict ethical requirements as you are when you practice before the courts, we think there should be a code or a standard of ethics for lay persons so that their conduct can be controlled in the same way, in the public interest, as the conduct of lawyers.

Now I wish I could go on and give you all of the facets of the program. There is one other thing that occurs to me in which you might be interested—it is the amazing extent of the legislative program of the American Bar Association. I had the research staff of the Cromwell Library look up the number of resolutions adopted by the Association in the legislative field in the years 1955 and 1956, and up to May of 1957, through the May meeting of the Board of Governors, which corresponds roughly to the eighty-fourth and eighty-fifth sessions of the Congress, we had one hundred and thirteen resolutions adopted by the American Bar Association on various phases of legislation, all of which involve the improvement of administration of justice or otherwise in the public interest. They involved forty bills pending in the Congress and one resolution in the House of Representatives.

Now in order to keep track of that legislation, in order to know how the program of the organized Bar is coming through with respect to that, we are going to establish a director of the Washington office, who will be charged with the duty of acting as a liaison to keep the various committees and sections of the American Bar Association, such as the tax section, which always has a terrific legislative program, informed as to the status of the legislation at any particular time, so that when it is necessary for a member of a committee or section to get down to Washington to testify, or has been called to consultation with some member of the committee, he will be able to make his plans accordingly.

And in addition to that, we propose to extend the jurisdiction of our Washington committee so that it will be charged with the duty of introducing any legislation in which the American Bar Association is interested.

I have tried to give you a thumb-nail sketch of some of the activities of the American Bar Association in which every member here has a vital interest. I wish that I could go on and tell you of the activities on the Foundation side. I assure you that they are just as interesting and just as vital and all in the public interest, but today I was dedicated to tell you what we are doing for the American lawyer, and I hope that you think we are really accomplishing something. If any of you have any idea, if any of you think we ought to do anything in any particular field, my door is open and I am glad to see you or get your letters or hear from you on the telephone. Please let us know if there is anything we can do for the Bar of Tennessee, and thank you very much for the patience with which you have listened to me. (Standing applause.)

THE IMPORTANCE OF LAWYERS IN GOVERNMENT*

BY ESTES KEFAUVER**

It is a great pleasure for me to meet today with the Bar Association of Tennessee. I have always liked to be among lawyers. When I was a very small boy my father owned the only hotel in the great city of Madisonville, Tennessee. All the lawyers used to stay there, when there was a session of court, and I used to sit on the porch and listen to them spin their tales of courtroom lore. It was then that I decided to be a lawyer.

You have asked me to speak with you today on the subject of the importance of lawyers in government. The degree and depth of that importance may be measured by a number of indications.

First of all, I want to point out that the majority of our nation's founders were lawyers. With their unparalleled foresight, they planned and executed a civil bible for all Americans. Their work has well withstood the tests that time has applied. Lawyers, as a profession, meeting in the Constitutional convention, were the leaders in the founding of our way of life. Lawyers, as a profession, are today trustees of the rights which their predecessors wrought.

The people look to you for leadership. Not only do they accept the fact that you supply the leadership, but they expect you to live up to the heritage first formulated by the men who founded our nation. This entails more obligations than those of any other profession. You are a group set apart.

As proof of the continuing importance of lawyers in government during our modern day, I offer the evidence that today sixty percent of the members of the Senate of the United States are lawyers. This should serve as a warning, as well as a compliment, to the profession. If the country is really going to the dogs, as some claim, then with this preponderance of lawyers in the Senate, the people will know where to place the blame. They can blame the lawyers! On the other hand, if you are essentially optimistic, as I am, then you must agree that a large part of the credit for whatever good is accomplished by our government must go to the legal profession.

The burden of my few words with you here today is a plea for lawyers, both inside and outside the government, to adopt the same

*Address prepared for delivery at the Seventy-Sixth Annual Convention of the Bar Association of Tennessee, June 14, 1957. Senator Kefauver was unable to attend due to Congressional business.

**United States Senator, from Tennessee. Member of the Tennessee Bar.

principles that those early members of our profession held with regard to a free exchange and interchange of ideas. In my library at home I have a book which I frequently pick up in the evening and read a few passages from. It is Madison's "Journal of the Constitutional Convention." It is impressive to note that among our founding fathers no idea was too "hot" to discuss rationally. I don't believe their work would have endured, as it has, if these predecessors of ours in the Constitutional Convention had been afraid of new ideas and free discussion of them. Running throughout the pages of this journal is the evidence of a devotion that is almost fierce to freedom of discussion and to the free search for ideas, and freedom of speech.

I fear that we have become much more timid as our nation has progressed. On a Sunday afternoon not long ago, I took Nancy and the children on a drive to Monticello. It is always an exciting thing for me to visit the home of this man who showed in everything he did a genius which is born only of intellectual curiosity. Whenever I step across the threshold of Thomas Jefferson's home, I feel that here is a man in whose company I would have liked to spend a long evening before the fireplace. His consuming curiosity—about the law, about philosophy, about government, about the weather—showed that here lived one of the really vital men of any time.

Do you remember the words from Thomas Jefferson's first Inaugural Address—those wonderful words that expressed so well his devotion to the principles of liberty, even for those with whom he disagreed? At the time of Jefferson's first inaugural we were not far removed from the Revolutionary War. Many still lived in the then infant Republic who had sided with the British during that war. And we were a small nation, just a handful of states, with the ocean to our faces and a vast wilderness to our backs—a small and weak nation. Yet Jefferson, unlike some men of little faith today, defended the good common sense of allowing anyone to speak freely. He said: "If there be any among us who would wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

Let us consider what Jefferson's words mean to us today in our relationship to the rest of the world, and especially to the Communist nations. In our relationship with communism the dangers of ignorance have reached a high point. There are some who believe most strongly that our way of life would be contaminated by contact with the Communist ideology. And so they objected to the appearance on a CBS program a couple of weeks ago of Mr. Khrushchev. In their view we Ameri-

cans are so soft and undiscriminating that we are unable to distinguish what is good from what is bad for our nation.

I say that this is an incredible view. I say we can talk with the Russians and also with the Chinese Communists without succumbing to evil or getting the worst of the bargain. Indeed, I see no alternative but to be aware of what is going on in the world. We need not fear facts. We need fear only ignorance of them or indifference to them. We must reaffirm our faith in the people of the United States and their ability to decide what is best for themselves.

Only yesterday I was talking with Senator Lyndon Johnson, the distinguished majority leader of the Senate. Senator Johnson made a speech last week in which he proposed, now that the way had been paved by Khrushchev's appearance, that the curtain be lifted further. He proposed that there be agreements for periodic broadcasts in both the Soviet and the United States, with Soviet leaders appearing on the American stations and American leaders having the opportunity in turn to visit in Soviet homes through television. "We have nothing to fear from this," Senator Johnson said to me. "The only man who has anything to fear is Khrushchev."

That is true. We are not afraid for the facts of American life to be exposed to the Soviet or anyone else. We have nothing to hide. I was glad to note that Senator William Knowland, the Republican leader, endorsed this proposal, and that Secretary Dulles also had kind words to say about it.

On the other hand, the Secretary objects to American newspapermen going into Communist China to report for American newspapers. This is the very opposite of a properly informed policy. These American reporters will not be there as agents of this or any other government. They would be there simply to report to you and to me what is going on in China. We have a right to know. The Chinese have said they may enter. We have said they may not. We need not be afraid to know the truth. We need be afraid only not to know the truth.

As Jefferson further said: "I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education."

Education is the meaning of freedom under law. Informed public opinion, the greatest law enforcer of all, can come only from those who understand the problems we face. We must never forget that if we are able to give the people light, they will find their own way. Each day we

are called upon to make our decisions. They cannot be honestly arrived at without deep thought and searching debate in the market place of ideas. And this thought and debate are made useful and informed through knowledge.

So it is with other areas of intellectual darkness. One of these is atomic power. With so many conflicting statements from the scientists, those who are supposed to know, it is difficult to be able to talk about this deadly weapon without becoming emotional. Yet it is a subject which requires the most careful and considered thought, not only among the higher echelons of technical opinion, but also down on the level of the little people, for they have as much to lose as anyone.

Yet fear and ignorance of the magnitude of such power have tried to force logical thought right out of our minds. We know so little about the dangers of fall-out, and so little about the possibilities of creative peacetime applications of this enormous energy that we refuse to consider these problems as our own. But we must consider them our own, for that is what they are.

Part of this dangerous lack of information and the anxiety it breeds is due to the recent epidemic of secrecy which has found its way into our government. Some of the operations of our Defense Department are necessarily conducted away from the public eye for obvious reasons.

But it is another matter when non-sensitive agencies adopt these same policies for no better reason than saving themselves possible embarrassment. In this category I would place much of the State Department's recent dealings in the Middle East. Some of you may recall the controversy growing out of the shipment of American tanks to Saudi Arabia, and the complete blank that Congress drew when it attempted to learn some details of the Eisenhower Doctrine.

This habit has invaded the domestic affairs of our country as well. Any day in Washington you can find officials "protecting" the people from information which might upset them. One of these issues is public power. I have seen the stamp of secrecy under many different forms—executive privilege, secret trades, restricted reports. We went all through that in Dixon-Yates. We are going through it again in Hell's Canyon. I sometimes wonder how we were able to find out as much as we have.

It is too easy to form an opinion grounded on personal bias, insufficient interest and slanted evidence. The most dangerous aspect of this is that opinions so formed are often more powerful than those based on careful inspection of the facts, impartiality and truth. Some of these conflicts are so basic that the mere mention of the phrase which identifies them is enough to set off a chain reaction of reflexes. Try this test on

the phrase "civil rights". You will get an emotional, not a rational, reaction. Minds on both sides have been closed, and are reluctant to open, even to hear the most logical and reasonable arguments.

Ignorance may be bliss, but bliss is not the aim of a progressive and intelligent people. We cannot think straight with insufficient knowledge, but the problems confronting us in a modern world require us to learn and keep learning. We must always seek the better solution, the newer method, the greater advance.

These principles are self-perpetuating. Knowledge breeds thought; thinking leads to the conception of new ideas; new ideas result in the search for more knowledge. For my part, I cast my belief with that of Woodrow Wilson. He said that if you give the people the facts, then they will come up with the right answer. You lawyers have a great responsibility in seeing that this is done.

Lawyers are to truth what doctors are to health, and this is your province. You must lead the way in maintaining an open mind. You must provoke the search for facts. You must encourage full and free discussion. Applying the rules of law and evidence to everyday life, you can offer leadership by example.

PROCEEDINGS OF THE SEVENTY-SIXTH ANNUAL CONVENTION OF THE BAR ASSOCIATION OF TENNESSEE

CASTLE IN THE CLOUDS HOTEL, CHATTANOOGA
JUNE 12-15, 1957

THURSDAY MORNING SESSION, JUNE 13, 1957
PRESIDENT CLARENCE KOLWYCK, PRESIDING

PRESIDENT KOLWYCK: The Seventy-Sixth Annual Convention of the Bar Association of Tennessee will be in session.

The Reverend Amos L. Rogers, Pastor of the Lookout Mountain Methodist Church, will pronounce the invocation.

REVEREND ROGERS: Almighty God, our eternal heavenly Father, we thank Thee for this group gathered together here. We would ask that Thy leadership and guidance will be felt throughout this convention. We thank Thee, oh God, for a strong America, and we thank Thee for the part that the legal profession plays in keeping it strong. We thank Thee, oh God, for the ties that have always been between the legal profession and law and the clergy and religion, and we pray that these ties might continually be strengthened. We would ask that Thou bless the officers here, and that Thou bless the members. Be with them in all that is done, in Christ Jesus' name we pray. Amen.

PRESIDENT KOLWYCK: Remain standing, please. Robert M. Summitt, Past Commander of the American Legion Post of Chattanooga and member of the American Citizenship Committee, will now lead us in the pledge to the flag.

PRESIDENT KOLWYCK: First, I want to call on my very good friend, Jess Parks, Jr., president of the local Bar. I have been concerned about the convention because they had an election of officers only two months ago and the past administration would have nothing to do with it. I had to wait till then to get started. The minute Jess was elected, he came to my office and said, "You forget about the convention. It's the responsibility of the Chattanooga Bar." I think during the course of the convention you will find that he has done a grand job.

MR. PARKS: I would like to take this opportunity to thank the much younger members of our Bar who have been so active in trying to make plans to make your stay here as convenient as possible and to mini-

mize all confusion because of the registrants having to reside at different motels and hotels throughout this area.

I think we are very fortunate to be living in a country such as ours with the world in a state of such unrest at the present time. The state of unrest, which, of course, has been brought about by the fears and the threats of Communism, and yet in the midst of all that unrest I don't believe that we in this country even know the meaning of the word fear. We take so much for granted.

I feel that it is well that we pause now and then in our daily activities and give some thought to the things that make this country so great. There are many reasons in my opinion, but outstanding is the right that we have to gather in a convention such as this, men and women who make our living by engaging in controversies. We are able to voice our thoughts and exchange ideas both publicly and privately, to the end that our country may progress and that our profession may continue to grow.

Those things can't be done in Moscow. Here we are not satisfied by simply getting our members together. We invite in political leaders from the national, the state and the local levels, and we give them a chance to voice their opinions and ideas.

Controversies, to me, awaken man's senses and sharpen his judgment. I feel that they make the truth appear more true and falsehoods appear more false, and thereby, out of this convention and out of the controversial issues which will be discussed in private and publicly from the rostrum, I know that we will get ideas that will help us to progress, both as a country and as a profession. So I hope that out of this convention will grow bigger and better controversies. That is for the benefit of all of us.

I am very happy to be able to welcome you on behalf of the Chattanooga Bar. As I stated awhile ago, the young members have taken a great interest in this convention. They have tried to organize their committees, hospitality and reception, so as to take care of all of your needs and wants. Milton McClure has charge of our hospitality committee. He has arranged for door-to-door transportation for all of you. We want you to get as much out of the convention as possible and enjoy yourselves to such an extent that you will not wait another nine years before you come back to see us.

Now ladies and gentlemen, I have been informed that it is customary for a key to the host city to be presented by the mayor of this city, but we find ourselves today in the independent county of Dade, as I understand it's called, in the sovereign State of Georgia. I don't know how our Mayor got entry into Georgia, and I don't know what key he is going to present,

but I would think it would be the key to the southern gates. I take pleasure in introducing to you at this time our Mayor of the City of Chattanooga, Tennessee, Mayor Rudolph Olgiati.

MAYOR OLGIATI: Thank you, Mr. Parks. Mr. Chairman and members of the Tennessee Bar Association, honored guests, ladies and gentlemen. Do you know, the State of Georgia claims half of the City of Chattanooga. If they ever move that line, I am going to be a resident of Georgia, because I just live three blocks off the Georgia line. So I don't know whether I will wake up in the morning and be the Mayor of Georgia or the Mayor of Chattanooga. So you see I'm living pretty close.

It is a pleasure for me, as Mayor of the City of Chattanooga, to say to you that we are happy to have you in Chattanooga, Lookout Mountain, if you want to call it, or in this greater Chattanooga, which takes in part of the State of Georgia.

You know, you talk about these controversies, and Mr. Parks said he hoped we have more controversies and how good they do a community. I don't know. If you have been in as many as I have in the last ten years, I don't know whether they are so good or not. I guess these controversies are pretty good if you are not on one end of that pressure stick, but it seems like I'm on one end of the pressure stick whenever we have a controversy.

But I do think that the lawyers are one professional group that have a great responsibility. I think a greater responsibility faces them in this country than they have ever had before, because we are making more progress in this country than we ever made before, and when you make more progress in this country than you have ever made before, you are going to have more controversial issues. And when you have more controversial issues, it takes more lawyers. So I think you face a great responsibility in society—a greater responsibility possibly than you have ever faced before.

I don't think there's any question but that the road program which is going into effect all over this country, with that hundred and one billion dollars' will bring on a lot of lawsuits.

You certainly have a responsibility to the people you represent, and you also have a responsibility to the community in which you live.

So it is a pleasure for me to say to you that we are happy to have you in Chattanooga; that we do hope your stay here will be enjoyable; and that a lot of good will come out of this convention. If we can serve you in the City of Chattanooga in any way, why, please call on us. We will be glad to do it. We do wish a very successful convention for you.

We are in budget session down at the city hall, and I must get back

down there. So do please excuse me, and I hope that if you need us we can serve you, that you will call on us. Thank you.

MR. PARKS: Well, as usual, I think I have started off on this program in reverse, because we are into the City of Chattanooga, Tennessee. But to get out of Dade County, we've got to go through Hamilton County before we get into Chattanooga, and how that will be maneuvered I am not positive. I was prepared this morning to introduce our County Judge of Hamilton County, Tennessee, the Honorable Wilkes T. Thrasher, but I find out that he is unable to attend because of the pressure of other duties. So he sent a good substitute, his son, Wilkes, Jr., who will endeavor to get you through Hamilton County so that you can enter the City of Chattanooga.

MR. THRASHER: Mr. President, distinguished officers, guests, and ladies and gentlemen. The County Judge did wish me to express his regrets that he could not be here with you this morning. He is working on the budget along with the County Councilmen and the auditors. Perhaps he might have thought that this was an opportune time to work on his budget while the Mayor is up here. You know, they usually have quite a bit of controversy over who is going to pay the bills, but his misfortune is my very good fortune. He did tell me to further advise you that any facilities of the County, if you can get past Dade County and just over the line, are at your disposal.

PRESIDENT KOLWYCK: Thank you, Jess, Mayor, Wilkes, Jr.

You know, there has been some question in my mind as to whether this was going to be an official convention, being in the independent state, it used to be, of Dade. It seceded from Georgia some years ago, but it finally rejoined the state. I was talking to Governor Clement last fall about how we could work this out. I suggested that we call the meeting to order at ten o'clock this morning down on the state line, with him on the Tennessee side and the Governor of Georgia on the Georgia side, and let the Governor of Tennesse petition the Governor of Georgia to allow us to hold this Convention in this County and State and promise us safe conduct back, if that became necessary. Somehow the Governor of Georgia didn't fall for that and I'm not at all sure whether we are welcome in Georgia or not, but at least we are here.

It is my pleasure at this time to present to you one of the best friends I have in the State of Tennessee, a man who was with me in the University of Tennessee. He is our President-Elect and will soon take over the gavel for the next year. The Honorable Charles G. Morgan of Memphis, President-Elect.

MR. MORGAN: President Kolwyck, ladies and gentlemen. When I left the room this morning my wife and daughter said, "Remember the

three ups in your response: "Stand up, speak up, and shut up." So, I am going to obey that admonition and make my talk very brief.

The lawyers in West Tennessee always look forward with a great deal of pleasure to coming to Chattanooga. We know we are going to have a fine time here. Your magnificent scenery is only exceeded by your hospitality. We are happy to be here, and we hope that next June all of you will be with us in Memphis. We will do our best to try to come up to the meeting which we have here.

PRESIDENT KOLWYCK: It is my pleasure at this time to also present another very good friend of mine and one of East Tennessee's outstanding lawyers, Allen A. Kelley of South Pittsburg, Vice-President for East Tennessee.

MR. KELLY: President Kolwyck, Mayor Olgiati, Wilkes Thrasher, Jr., my very good friend, Jess Parks, ladies and gentlemen. I am sure that I speak for all the lawyers in Tennessee and especially those in the Eastern Division of Tennessee in saying we are very much delighted to avail ouselves of the very warm welcome that has been extended to us by the City of Chattanooga, the Bar cf Hamilton County, and Bar of Chattanooga.

PRESIDENT KOLWYCK: The Vice-President for Middle Tennessee was demurring about making a response, so I told him that since Tennessee is constitutionally divided into three parts, and since we have heard from West Tennessee and also from East Tennessee, if he didn't respond from Middle Tennessee, I was afraid Middle Tennessee would be caught in a squeeze. So it is my pleasure to present to you my good friend, David R. Wade, Jr., Vice-President for Middle Tennessee.

MR. WADE: We from Middle Tennessee are likewise glad to be here in Chattanooga. We see that a very fine program has been set up and it will be our pleasure to participate to the fullest.

PRESIDENT KOLWYCK: I want to recognize the following officers and guests in the audience: Hon. Frank Gray, Jr., member of the Central Council from Middle Tennessee; Hon. Erby Jenkins, member of the Central Council from East Tennessee; Hon. Lon P. MacFarland, former ABA Delegate; Hon. W. Howell Forrester, Secretary-Treasurer, Junior Bar Conference and member of the Central Council; Hon. R. Newell Lusby, Vice-President, America Fore Group, New York, who is on the program of the Section of Insurance Law.

(The foregoing stood to appause.)

PRESIDENT KOLWYCK: I went to great trouble to get Justice A. Cecil Snyder, Chief Justice of the Supreme Court of the Commonwealth of Puerto Rico, to address the Judicial Conference at noon today, but at

the last minute he wired me he was sick and unable to be here. He was going to talk to the Judges on the system of courts he has set up in Puerto Rico. I was very anxious for him to give that speech, but he couldn't be here. So I thought of my good friend Richard Shewmaker, who has just gone out of the office as president of the Bar Association of the City of St. Louis, whom I've met in Bar circles and for whom I have formed a great admiration. When I called him, he said, "I know what you're up against. I had the same problem at the St. Louis Bar, so I'll be there." So he's here. Hon. Richard D. Shewmaker, will you greet the folks?

MR. SHEWMAKER: In a little while I have to make a speech to those judges, and you all could help me a great deal if you would help me resolve a problem that's been troubling me a good deal. That is this: Is it worse for a practicing lawyer to speak to a whole raft of judges from his own state or from a foreign state? If it was my own state, why, I would have to speak with a certain amount of tact, of course, but there are some things I would dare say, but with a foreign state I am a complete stranger. I don't know that I dare say anything. It's a great pleasure to be here.

PRESIDENT KOLWYCK: It has been our habit in recent years for Tennessee to invite the presidents of the adjoining State Bars to our convention, and of course, that has been reciprocated. Last year I had the pleasure of being the guest of the Texas Bar, at Houston, and I reminded them, of course, that there wouldn't have been a Texas but for Sam Houston and some other important people from Tennessee who helped make Texas.

Shortly after that I was a guest of the Missouri Bar at St. Louis, when Hon. Rush H. Lambo was president. I told them about what I had told people over at Houston, but suggested that I did not know that we could claim any ancestry of their principal citizen, but that I was sure that the mule with which he plowed the straightest furrow in Jackson County came from Columbia, Tennessee. It is my pleasure to present to you now Hon. Horace F. Blackwell, Jr., of Kansas City, Missouri, who is president of the Missouri Bar.

MR. BLACKWELL: As a representative of Missouri lawyers, I am, of course, honored to be your guest on the occasion of your Seventy-Sixth Convention. The custom of inviting adjoining state presidents to participate in the convention is, I think, a fine one, and Mr. Morgan, we are looking forward to your visit with us in Kansas City in September.

It is a pleasure to be here, and I am looking forward to being with you the next few days. Thank you very much.

PRESIDENT KOLWYCK: At this point on the program we were going

to have the report of the Committee on Obituaries and Memorials. Bill Waller left yesterday for Europe on his way to London and could not be here, and Raymond Denney agreed to make his report. But I received word from Raymond this morning that he can't be here until this afternoon, so that report will be deferred until the business session Saturday morning. In the meantime, my very, very good friend, a man with whom I started practicing law thirty years ago, who has meant a great deal to me, whom I persuaded to serve on a memorial committee in Chattanooga, to help raise the money for the Haywood Memorial, wants to say a few words to you now, because he will be unable to be with us at the business session Saturday. Hon. Charles S. Coffey, Sr.

MR. COFFEY: Mr. Chairman, honored guests, Raymond Denney was to make this talk to you and I have only just a very few words to say. Raymond would have been able, of course, to explain the matter very much more, but I desire to call your attention, at least, to one of the most important things that President Kolwyck has projected during his administration. That is the building of a memorial to Judge John Haywood, who was one of the great judges of Tennessee.

He came early in our history and his work has extended down through the history of the State. A recent book has been published on the life of Sir Edward Coke of England who is known as the father of the common law. At least, he preserved the common law from the encroachment of two kings of England. To the last he stood against the kingly power to maintain the strength and the dignity of the common law. So John Haywood, in Tennessee, is the man who has preserved and handed down to us the common law from England, through North Carolina, and finally to Tennessee, and we ought to memorialize him.

You will find a sketch of his life in the literature that has been handed to you, and I call your attention to that, and particularly to the blank check which is enclosed with it. We are asking for as liberal a contribution as you can make towards the building of a monument at the grave of John Haywood about eight miles out of Nashville. Please give the matter your earnest consideration.

PRESIDENT KOLWYCK: Mr. Coffey, I appreciate more than I can tell you your coming here and saying those words this morning. Mr. Maxwell, we will recognize you. You are going to speak to us at noon today. This is the Honorable David F. Maxwell, president of the American Bar Association. (Applause.)

We have tried during the year to get committeemen who could do the job. We have tried to get the best to do the job. It soon became evident that our Constitution and By-laws needed to be almost completely revamped. As a matter of fact, we think even in writing letters during the year we may have violated them.

So for chairman of that committee I tried to pick the best man. I picked the three-times Governor of Tennessee, the only man who has served three successive terms since 1825, I believe, and President of our recent Constitutional Convention. The Honorable Prentice Cooper, who will make his report to you at this time.

MR. COOPER: Of course, it is often said that good men can make any organization click, no matter how bad the constitution or by-laws may be. But Clarence has very appropriately, I think, made one of the points of his administration the improvement of our constitution and by-laws. To this end we will try to make as brief a report as we can, although it does cover a number of changes. (Governor Cooper thereupon discussed at considerable length the report of his committee, which had been previously furnished to the membership in printed form. Certain amendments to the report were suggested by Governor Cooper and from the floor, which were further considered by his committee and the action taken thereon incorporated in the final draft approved by the Assembly on the following Saturday.)

MR. CON MILLIGAN: May I ask a question, Mr. Cooper? In considering the proposed amendments, I was wondering if the committee had considered the question of an emeritus status for lawyers who had been members of the Association for a number of years and had reached a certain age. That might come within that honorary status that's referred to. One of our members recently wrote a letter to the American Bar Association calling attention to the fact that he had passed somewhat the age of seventy, and tendering his resignation. And he received a reply that was very enlightening, that he had automatically attained the status of emeritus and was a member for life without the further payment of dues. I wondered if this Association ought not to extend that same courtesy and consideration to all those of its members who have attained an advanced age.

MR. COOPER: The committee did not consider that matter, but I think it is an appropriate matter to be brought up at this time. President Kolwyck, would you care to comment on that matter or do we have time this morning?

PRESIDENT KOLWYCK: Our time is running short on it, Governor. The reason this report is being made this morning is that Governor Cooper is going to his anniversary at Princeton. Since this is a matter that will be passed on finally Saturday, I would suggest, Mr. Milligan, that you get together with some members of the committee, and if you want to work that out, that will be splendid.

MR. COOPER: My father is eighty-six years old and is still practicing, but I am sure he would be glad to be placed on such a roll, and I

think it is worthy of consideration.

MR. HARLAN DODSON: Mr. President, did the committee use the word "may" instead of "shall" in providing that those members of the Central Council who have already been elected would fill out the balance of their term? They say they may do it. Was that intentionally used rather than shall?

PRESIDENT KOLWYCK: Will you check that, Governor?

I regret exceedingly that our distinguished Secretary-Treasurer, J. Victor Barr, Jr., is unable to be here; he had a slight heart attack. In his absence the man who makes the wheels go around in the Tennessee Bar and has done so for the last four years, the Honorable John C. Sandidge, Executive Secretary, will combine Victor's report with his own.

(Mr. Sandidge gave the annual report of the Secretary-Treasurer and the annual report of the Executive Secretary.)

PRESIDENT KOLWYCK: Thank you a lot, John. If I am going to get a report off, I had better get started. (Mr. Kolwyck then presented the annual report of the President.)

(The meeting then adjourned for luncheon.)

SECTION LUNCHEON, THURSDAY, JUNE 13, 1957
CHARLES G. MORGAN, PRESIDENT-ELECT, PRESIDING

PRESIDENT-ELECT MORGAN: The Reverend Joseph T. Urban, Rector, St. Timothy's Episcopal Church, will pronounce the Invocation.

(Reverend Urban gave the Invocation).

PRESIDENT-ELECT MORGAN: We are running on a very tight schedule. I will not have time to introduce those at the speakers' table, because our main speaker has to appear on television in a few minutes. So without further ado, I present to you the Honorable Frank Clement, Governor of Tennessee, who will introduce the speaker for the occasion.

GOVERNOR CLEMENT: Mr. Chairman and my distinguished fellow members of the Tennessee Bar Association, I got up at five o'clock this morning and left New York because I wanted the privilege and the honor, while Governor, of introducing this distinguished President of our American Bar Association. I considered it a great privilege that you, my fellow lawyers, would give to me the opportunity of coming down and being with you, and the opportunity of introducing this distinguished friend of ours. He and I have shared the platform before, and he does such a grand job that a lengthy introduction by anyone is certainly not necessary. A recital of all the positions held and honors recorded to this speaker would be certainly privileged, but it would be time consuming.

Now someone said that the commendable desire to be oneself must also envisage one's duty to the organization of which one is a part, and this duty our speaker has fulfilled admirably. He is, I am sure, well-known to you, as he is to the other lawyers of the country. I am privileged tomorrow night to go to North Carolina to address the North Carolina Bar Association, and it will be a great pleasure to tell them of our Association with our distinguished President, Dave.

Suffice it to say, that since he became associated with the law firm of Edmonds, Obermayer and Rebmann in 1929, Mr. Maxwell's brilliant mind, his abundant legal talent, his awareness of his specific responsibilities, not only to one of our larger cities, but to the nation as well, have turned his time and his efforts and his talents in a multitude of different but very helpful directions.

Dave, we'd like to brag on you a lot longer, but the biggest thing we can say is that you're talking to the finest group of ethical and distinguished and able lawyers it has ever been my privilege to have any contact with, in or out of Tennessee. The lawyers who are members of the Tennessee Bar Association are dedicated to those things through the Association which are for the greater glory of God and for the progress and protection of the rights of the people of our State. It is a compliment to you that they would want you here, but it is a distinct compliment to us that you would honor Tennessee with this visit, and though you are just a little bit across the State line, you are close enough to Tennessee so that you can feel real safe and real secure because we are going to protect you, and our friends here in Georgia, I am sure, will see to it that you are protected, because they recognize, along with the rest of the people, what a great State Tennessee is.

I could tell you what I told Loyd Wright not too long ago about how we've turned to Tennessee in times of stress. You recall that we gave Cordell Hull to the world. I told him on that occasion we gave Jackson to the nation. I reminded him that when Texas was about to fall in the hands of Mexico, Dave, we sent Sam Houston down there to save them, and then when Hollywood needed a king of the wild frontier, Dave, they had to turn to Davy Crockett of Tennessee, and now we've been reading in the newspapers about some difficulties that our distinguished Secretary of Defense has been having, so we are going to please him with an Elvis Presley hound dog and all right away.

That being true, I want to introduce to you a man who will state his own convictions, a man whose talents speak for themselves, a man I am proud to call friend, the distinguished President of the American Bar Association, the Honorable David F. Maxwell. (Standing applause.) (Mr. Maxwell's address appears in the Addresses Section of these Proceedings *supra*.)

PRESIDENT-ELECT MORGAN: Ladies and gentlemen, I think you will agree with me that the American Bar is fortunate in having a man of the character and ability of Dave Maxwell who is giving his time and effort to the welfare of the legal profession. (The meeting was thereupon adjourned.)

ANNUAL BANQUET SESSION, FRIDAY, JUNE 14, 1957
CLARENCE KOLWYCK, PRESIDENT, PRESIDING

PRESIDENT KOLWYCK: On June 14, 1777, one hundred and eighty years ago today the Continental Congress adopted the "Stars and Stripes" as our National Flag—red for courage, white for purity and blue for justice, qualities which have made this nation the greatest on earth. Today "Old Glory" flies as a dove of peace around the world and is the symbol of hope for mankind everywhere.

Tonight it is many times fitting that we sing the National Anthem, renew our pledge to that Flag and invoke the blessings of Divine Providence on our nation and the food which we are about to enjoy. So, without further introduction, Miss Donna Parker, of Chattanooga, will sing "The Star Spangled Banner"; the Honorable John K. Maddin, Jr., of Nashville, Chairman of the Association's Citizenship Committee, will lead us in the Pledge to the Flag; and the Reverend Amos L. Rogers, Pastor of the Lookout Mountain Methodist Church, will pronounce the invocation.

(Miss Parker sang the National Anthem, the Pledge to the Flag was given by Mr. Maddin and Reverend Rogers pronounced the invocation, after which dinner was enjoyed.)

PRESIDENT KOLWYCK: Our National Flag has many names. The most common are: "The Stars and Stripes", "The Star Spangled Banner" and "Old Glory". A sea captain, William Driver of Nashville, while flying his flag twice around the world, was the first to call it "Old Glory". His Flag reposes in a glass-covered case just to the right of the entrance to the Smithsonian Institute.

To my left is another flag—a flag too seldom recognized, and too little respected by the citizens of Tennessee. It should hold special significance for this Association because it was designed by one of our members, LeRoy Reeves of Johnson City, who conceived the idea as a six-year old. As a captain in the National Guard, he was able to induce its adoption by the General Assembly of 1905, as its last act before adjournment.

Many historians have stated that its three stars signify the third state to be admitted into the Union after the original thirteen. That may well

be, but the three white stars, set in a blue field on a crimson background, were intended to represent the indissoluble trinity of the three Grand Divisions of the State.

Pursuant to a suggestion made to me by Governor Clement last fall, Jack Maddin prepared and presented to the State Board of Education a resolution calling for the display of the Tennessee Flag in all of the state-supported schools in the State of Tennessee. The resolution was unanimously adopted. At the fall term we hope to see not only the state-supported schools, but all of the schools of Tennessee, displaying the Flag of our great State.

Jack also caused our National Flag to be displayed in most of the Court Rooms of Tennessee. The Tennessee Flag should also be there.

Since we have no State Anthem, the "Tennessee Waltz" will now have to serve the purpose. Miss Donna Parker will now lead us in the "Tennessee Waltz", and to prevent "saddle weariness" during the next three or four hours, I suggest that everyone stand and sing out "The Tennessee Waltz".

(The audience sang the "Tennessee Waltz", led by Miss Parker)

PRESIDENT KOLWYCK: You don't get to be President of the Tennessee Bar but once, and on an occasion like this, you have to acknowledge some debts. To my left are Judge Sam J. McAllester, Sr. and Hon. Charles S. Coffey, Sr., with whom I started practicing law, and my friends for thirty years. I owe much to these gentlemen. Will they stand along with Mrs. Coffey? (Applause.)

Seated at the special table with Judge McAllester and Mr. and Mrs. Coffey are the chairmen of the various committees of the Chattanooga Bar Association who have worked so hard to make your visit enjoyable. Judge Joe N. Hunter, Chairman, Entertainment Committee for the Judicial Conference, and his wife, Grace; Betty Thomas, Chairman, Ladies' Hospitality Committee, and her husband, W. Neil, Jr.; Esther Roddy, Chairman, Ladies' Luncheon Committee, and her husband, Joe A. Milton D. McClure, Vice-Chairman, Convention Committee; William M. Hughes, Chairman, Finance Committee; Charles A. Noone, Chairman, Reception Committee; Thomas Crutchfield, Chairman, Publicity Committee, and his wife, Mary; S. Del Fuston, Chairman, Entertainment Committee, and his wife, Jean.

Seated at the special table to my right are members of the Central Council and their wives and other special guests: Hon. Allen A. Kelly, Vice-President from East Tennessee, and his wife, Martelia; Hon. David R. Wade, Jr., Vice-President from Middle Tennessee, and Mrs. Wade; Hon. W. Howell Forrester, Secretary of the Junior Bar Conference and Mrs. Forrester; Hon. Erby Jenkins, Member of the Central Council from

East Tennessee, and Mrs. Jenkins; Hon. Charles C. Trabue, Member of the Central Council from Middle Tennessee, and Mrs. Trabue; Hon. Lon P. MacFarland, former ABA Delegate, and Mrs. MacFarland; and J. R. Simmonds, Member of the Central Council from East Tennessee. (Applause.)

Seated next behind these special tables are the members of the Judiciary of Tennessee and the Attorneys General. The Associate Justices of the Supreme Court are: Hon. Alan M. Prewitt, Hon. Pride Tomlinson, Hon. Hamilton S. Burnett, Hon. John S. Sweptson and Hon. W. H. Eagle, Clerk Eastern Division (Applause.)

The Associate Judges of the Court of Appleas are: Hon. Winfield B. Hale and Hon. Peabody Howard, Eastern Division; Hon. Sam L. Felts, Hon. J. Roy Hickerson and Hon. Thomas A. Shriver, Middle Division; Hon. Lois D. Bejach, Hon. J. B. Avery, Sr., and Hon. C. S. Carney, Jr., Western Division. (Applause.)

Will the Judges of the Courts of original jurisdiction stand? (Applause) Will the Attorneys General Stand? (Applause)

Seated at Speakers' Table number two in front of me are, from my left: Hon. Luke M. McAmis, Chief Judge, Court of Appeals; Hon. John D. Higgins, President, Alabama State Bar, and Mrs. Higgins; Hon. A. B. Neil, Chief Justice, Supreme Court, and Mrs. Neil; Hon. Newton Gresham, President State Bar of Texas, and Mrs. Gresham; Miss Hallie K. Riner, President, Women Bar Conference; Hon. Maurice R. Bullock, immediate Past President, State Bar of Texas; Nancy Kefauver, wife of Hon. Estes Kefauver, Senior Senator from Tennessee; Dr. J. Paul Baird, President, Tennessee Medical Association; Chancellor Glenn W. Woodlee, President, Judicial Conference, and Mrs. Woodlee; Hon. Prentice Cooper, three times Governor of Tennessee, President of the recent Constitutional Convention and Chairman of the Association's Committee on Constitution and By-Laws, and Mrs. Cooper; Hon. John L. Bowers, Jr., President, Junior Bar Conference, and Mrs. Bowers; Hon. George F. McCanless, Attorney General of Tennessee, and Mrs. McCanless.

Seated at Speakers' Table number one, where I stand, are, from my left: Hon. George T. Lewis, Jr., member of the Central Council from West Tennessee, and Mrs. Lewis, who, at the Ladies' Luncheon today, was elected President of the newly organized Ladies' Auxiliary of this Association; The Reverend Amos L. Rogers, Pastor of the Lookout Mountain Methodist Church, who pronounced the Invocation; Hon. Jess Parks, Jr., President, Chattanooga Bar Association, and his wife, Louise; Hon. Charles G. Morgan, President-Elect of this Association, and his wife, Adrienne; Hon. John C. Sandidge, Executive Secretary, and his wife, Dot; my wife, Augusta, my chief counselor and advisor; Mrs. Malcolm McDermott, wife of our distinguished senior past president;

Hon. C. G. Milligan, senior past president, Chattanooga Bar Association; Mrs. Taylor Cox, whose husband will later appear on this program; Hon. John K. Maddin, Jr., Chairman of our Committee on American Citizenship. (Applause.)

The announced purpose of this Seventy-Sixth Annual Dinner of the Tennessee Bar Association is to honor all of our living past presidents to whom we owe so much. Tonight we have twelve of those presidents with us. I am sorry that the remaining eight were unable to be here.

Incidentally, this is a very powerful gavel. It was given to me by the Tennessee Bar Association when Aubrey F. Folts was president, when I was president of our local Association, and I shall always treasure it because he gave it to me and because it is heavy enough when you need it. We have announced that we are not going to have any long speeches tonight. Each of these folks know how long he is supposed to speak, and anyone who goes overtime, I am going to use it on him, and that applies even to our senior guest, because I have been waiting for thirty years to tell him what he could or could not do.

Before proceeding with the program, I have the happy privilege of awarding certificates of meritorious service to the following:

Hon. Charles G. Morgan, President-Elect from West Tennessee.
Hon. David R. Wade, Jr., Vice-President from Middle Tennessee.
Hon. Allen A. Kelly, Vice-President from East Tennessee.
Chancellor Glenn W. Woodlee, President, Judicial Conference.
Hon. John L. Bowers, Jr., President, Junior Bar Conference.
Miss Hallie K. Riner, President, Women Bar Conference.

I now have the honor of introducing our immediate, and one of our greatest past presidents, the Honorable Weldon B. White, a man of keen analysis, rare judgment, a great lawyer, and a tower of strength to me this year. As his final act of service to the Bar while on the Central Council, he will now call the names of the living past presidents and present to you those who are present. Mr. White.

MR. WHITE: It is indeed a pleasure for me to appear on this program. As Clarence says, it is my last and final act as immediate past president of the Bar Association of Tennessee. I approach it with mixed emotions. You know, those of you who have gone before me recognize that for a few days after you have turned over the reins of office to another, you are a little bit lonesome and lonely, not knowing just what to do. So I do stand before you tonight a little confused and disturbed, not only because of that, but because of the fact, as so many of you know about anyway, that I am the youngest grandfather among you.

I will now call the roll of our living past presidents in reverse order

of seniority. Those present tonight are seated at the special table directly in front of me. When I have called their names, they will please stand.

1954-1955 Edward W. Kuhn (Present)
1953-1954 J. Malcolm Shull (Present)
1952-1953 Alfred T. Adams (Present)
1951-1952 Lloyd S. Adams (Present)
1950-1951 John H. Doughty (Present)
1949-1950 W. Raymond Denney (Present)
1948-1949 Marion G. Evans (Absent)
1947-1948 Aubrey F. Folts (Present)
1945-1946 J. Sedden Allen (Absent)
1944-1945 Clyde W. Key (Absent)
1943-1944 Albert W. Stockell (Absent)
1941-1942 John C. Goins (Present)
1940-1941 John J. Hooker (Present)
1939-1940 John T. Shea (Present)
1937-1938 George H. Armistead, Jr. (Absent)
1932-1933 Harley G. Fowler (Absent)
1928-1929 William E. Norvell, Jr. (Absent)
1927-1928 Walter Chandler (Absent)

I want to also call the name of our distinguished former Secretary-Treasurer: 1937-1956, Thos. O. H. Smith. (Applause.)

That's the end of the introductions of the presidents. Clarence has arranged at this time for one who graduated in his class, 1927, at U-T, to say a few words not only as representative of that class, but also as a former student of our distinguished oldest living past president. He doesn't look too old to me, and his wife looks "plumb" young. It is a pleasure on this occasion to recognize and to present Judge Taylor Cox, a former Circuit Judge in Knox County, a past president of the Bar Association of Knoxville and Chairman of the Insurance Section, Bar Association of Tennessee, Taylor Cox.

MR. COX: I consider it an honor to be called upon to say a few words on behalf of us who studied under Dean Malcolm McDermott at the University of Tennessee Law School, and it is with retrospect that we look back, and particularly do I and those who were in our class in 1927, thirty years ago. That's a long time, but how well we remember Dean McDermott the first time we walked into our classroom. I am sure the other classes experienced the same reaction that we did. How well we remember the first assignment you gave us when you told us to read and study the Code of Ethics. That was the first assignment we had, and I am sure that we who studied under Dean McDermott and heard his forceful lectures, not only on the theory of the law, but on those

things that go to make up the character of a lawyer are proud that we were his students.

I don't want to direct my remarks and bragging, if I may call it that, to the class of 1927, but I am so proud of that class and so proud to be a member of it that I must necessarily refer to it a moment. In this class of 1927 there have been judges, there have been presidents of Bar Associations, both local Bar Associations and State Bar Associations, and you remember I said presidents, plural, and I dare say that no other class that ever walked out of the halls of the U. T. Law School can brag about that.

Dean McDermott, as a result of what we learned studying under you and listening to your forceful lectures on the law, together with the seasoning experience of the years that have passed, as we look back over them and recount the experiences that we have gone through, we have outlived the ambition to display ourselves before courts and judges. We love justice, law and peace. We have learned to bear criticism without irritation and censor without anger. We have learned how surely all schemes of evil bring disaster to those who support them, and that the granite shaft of reputation cannot be destroyed by the poisoned breath of slander.

We have learned, Dean McDermott, to hate vice, and we delight to stand forth as conquering champions of virtue. We esteem our office of counselor higher than political place or scholastic distinction. We detest unnecessary litigation, and we delight in averting danger and restoring peace by wise and skillful counsel. We have proved, Dean McDermott, that honesty is the best policy and that peace pays both lawyer and client better than controversy.

And on behalf of all of us who studied under you, I make these remarks, and am happy and honored to appear on this rostrum with you. Thank you very much.

MR. WHITE: And now it is my genuine pleasure to present to you the Dean of the Law School of the University of Tennessee, a graduate of Newberry College, where he received his academic work, and a graduate of Yale Law School, where he received his LL.B. degree. He's been at the University for some thirty years and has been Dean of the Law School about ten. It is my pleasure to introduce to you Dean Wicker, who will introduce Mr. McDermott.

MR. WICKER: In introducing our principal speaker, I cannot proceed very far without first mentioning the progress in legal education in this State within the past thirty years, for he is the keystone in this noteworthy span. As late as 1933, the pre-law requirement for taking the Tennessee Bar Examination was graduation from high school or its

equivalent; and, strangely enough, there was an official ruling that arrival at the age of twenty-three was the equivalent of a high school education. In 1933, too, the only legal training required to qualify for the Tennessee Bar Examination was the pursuit of the study of law for one year, either in a law school or in a law office. And here again we find an official ruling that a candidate could pursue the study of law without passing a single course or taking a single examination.

But times have changed. Today under the rules promulgated in 1952 by the Supreme Court of Tennessee, to be eligible to take the Tennessee Bar Examination a candidate must complete three years of pre-law study on a college level with the scholastic average required for graduation and must graduate from a full-time law school having a three year curriculum approved by the American Bar Association, or must graduate from a part-time law school with a four year curriculum approved by the Tennessee Board of Law Examiners. This change was the fruition of the work of many in our profession, our judges, our Bar examiners, our Bar Association officers, committees and individual members, and the faculties of the leading law schools of the State. But in my opinion, Malcolm McDermott, the man whom we of the legal profession of the Volunteer State are saluting tonight, played the leading role in the movement which culminated in the present requirements for admission to the Tennessee Bar.

Joining with me in the expression of a few words of praise on behalf of the three full-time day law schools of this State for our own Malcolm McDermott is Grissim H. Walker, Dean of the Cumberland University Law School, that fine young man who is doing an outstanding job in the law teaching profession.

While Dean of the U. T. College of Law, Malcolm McDermott brought Harold Warner to the University of Tennessee as a young instructor. Harold is still with us at U. T. He is my right arm in nearly all matters pertaining to the work of the College of Law.

Also, here to honor Malcolm McDermott is one of America's great law professors, Edmund M. Morgan. Professor Morgan is no longer young in years, but he still teaches law with all the zest, enthusiasm and keen insight of a ten year old describing his first circus. He is a nationally known law teacher who has the moral strength and courage to set and maintain the highest of standards for all of his students; yet, he is affectionately known as "Eddie" by thousands of his former students, among whom I am proud to be counted. After long and fruitful years at Minnesota, Yale and Harvard, upon retirement, Eddie Morgan came to Vanderbilt, where he is today making a notable contribution to legal education in Tennessee.

Malcolm McDermott, our guest speaker tonight, is one of the most distinguished personalities ever to come out of the picturesque hills of Rogersville and Hawkins County, Tennessee. He spent his boyhood in Chattanooga and is a graduate of the Chattanooga High School, an A.B. graduate of Princeton and an LL.B. graduate of Harvard. Malcolm began the practice of law in Knoxville in 1913. Just seven years later he became president of the Bar Association of Tennessee. He served as a part-time instructor in law at the University of Tennessee from 1915 to 1920, as Dean of U. T.'s College of Law from 1920 to 1930, and as full-time Professor of Law at Duke University from 1930 to 1954. He is now Professor of Law emeritus at Duke and is also a very active member of the McAllen, Texas, Bar. Malcolm has received national and international recognition as a lawyer and as an educator. For the years 1936-37, he was the Kosciusko visiting lecturer at the University of Krakow and at the University of Warsaw, Poland, both old and honorable Polish institutions. In 1945-46, he was the Congressional research counsel on labor legislation in Central America. In 1939, he was the recipient of the Ross Essay Prize awarded by the American Bar Association. In 1951-52, he was legal consultant for the Department of Defense at the Pentagon.

You may have noticed that I have passed very hurriedly over important milestones in Malcolm McDermott's career. No man's career can be dealt with adequately within the framework of a single category; and that is certainly true of our honoree on this occasion. Limitation upon the available program time for this introduction, as well as a pointed suggestion from Clarence Kolwyck, causes me to confine myself to the core of Malcolm's career, his achievements as a law teacher, for he has taught well and has made countless persons better lawyers for having known him.

When Malcolm McDermott was made Dean of U. T.'s College of Law in 1920, he was regarded as an iconoclast and had to labor against great odds. He worked hard towards raising standards, both for admission and graduation. His teaching methods and policies were then somewhat novel, and there were able men on his faculty who were not in accord with either his methods or his policies. The primary purpose of most law professors of the 1920 vintage was to impart information and the text book system was the traditional method. Malcolm McDermott had the exceedingly difficult job of shaking the other U. T. law professors of the 1920 period loose from their traditional lectures and text books, and getting them to adopt the case book method, a method designed to develop the analytical powers of the student and to make them think as lawyers.

Though in the early 1920's the opinion of the law school world was sharply divided as to the relative merits of these two methods, it is now

quite clear that if the policies and methods of instruction had not been changed from those in use in 1920, the U. T. College of Law would have dropped into the ranks of second class law schools. Malcolm McDermott had the foresight in 1920 to inaugurate these changes and policies and methods of instruction at the University of Tennessee.

I was not fortunate, as were many here tonight, to be one of his students, but I profited by being a member of his faculty for four years. The qualities of his mind and rectitude of his conduct exerted a powerful influence upon the conduct of both his faculty and his students. He radiated authority and created an atmosphere of respect for the Deanship.

My esteem and affection for Malcolm McDermott have grown with the years. Like all who have really known him, I have a high regard for him professionally and a deep affection for him personally. I know that his former students and faculty, and his colleagues at the Bar, have warm spots in the cockles of their hearts reserved especially for Malcolm McDermott. He has done his part, and more, to carry high educational standards into the bloodstream of the legal profession, both in this State and in North Carolina. It is a privilege, therefore, for all of us, and a great honor for me personally, to present to this splendid audience a man worthy of a high citation of merit for work well done in furthering the best in the educational process by which lawyers are made, Mr. McDermott. (Standing applause.)

MR. MCDERMOTT: President Kolwyck, Dean Wicker, distinguished lawyers and guests, and my brothers in antiquity. This is an occasion worth living three score and ten years and traveling more than twelve hundred miles for. It, of course, makes one deeply humble, but it is an event that would, of course, gladden the heart of any man with a human strain within him.

I know how unworthy I am of all that has been said here tonight so graciously, but may I say at the outset how grateful I am for the privilege of being permitted to come home and breathe the blessed air of my native State with you splendid fellow Tennesseans.

Now if there is any doubt about my role on this program it was dispelled this morning as I entered the lobby and the pink sheet was handed to me signed by the wives of the lawyers, and when you see that, that's a mandate to the Supreme Court. You take notice. I have learned that long ago, and perusing that sheet I found the program of the day, and in one of the later paragraphs it said at seven-thirty there would be a banquet and no speakers. Well, ladies, your mandate has been fulfilled.

I speak, or course, tonight in a representative capacity as a responder on behalf of those whom you have seen so graciously to honor. Were I

to go into personal reminiscences I would take you back a great many years. I happen to know here in Chattanooga, I think he was the third or the fourth president of this Association, Gene Jonathan Wheeler. My Father and he were law partners up until the time of my father's death. I well remember when I came home from the law office, where I had been permitted on rare occasions to go. I would tell my mother the partnership was going to be broken up because Gene Wheeler and my father would argue themselves red in the face at each other, and intimate broadly that neither knew any law. But, of course, I had to find out that that's the way lawyers do when they are very close to one another.

At any rate, my recollection for the Tennessee Bar goes back very far. My father and John Wheeler used to represent, I think, the receiver for the old Lookout Mountain Inn that was in receivership as was the dummy line that took us up the mountain, whereupon the counsel's son got the opportunity to ride free up the mountain, and that was the way I got to know this terrain so intimately. It is boyhood stamping grounds to me, my friends, and I love every inch of it. Now you may know I have in recent years gone from Tennessee by way of North Carolina to Texas. The lure was just too much for me. But I am not here to reminisce. It is a sign of old age, and I resent that. I am here to express to this younger group of men who have carried on so faithfully, so nobly, so finely the work of the profession, our admiration for their continuing effort and their conscience in all they have done and are doing.

I have traveled far, had the privilege of being in contact with many state Bar Associations. When I was in Poland, I remember attending a meeting of the Bulgarian Bar Association. I didn't know there was such a thing. It was most confusing. Perhaps that was because I didn't understand much of what was going on, and the Polish Bar Association was even more so, but that was before this last world war when they had a semblance of a legal system, but here you see going on in a typical American community of lawyers that basic ground work that is the foundation of greatness of our profession.

I am simply here to say to you that we oldsters, looking upon this younger generation, such men as my friend, Clarence Kolwyck, former student, young men, are well pleased with the progress, and we are grateful for what they are doing and what they are going to do, and all we can say now, with the fullness of our hearts, is God bless you and speed you in your good efforts.

May I thank you again on behalf of myself and my wife for the courtesy and hospitality you have so wonderfully extended to us. Thank you. (Standing applause.)

MR. WHITE: Mr. McDermott, I think this applause and the rising of the audience demonstrates to you how much we appreciate your being here, appreciate this fine message you have brought this evening, and I think a few appreciate the fact you have combined your expressions in so few words on this very hot night.

May I at this time, on behalf of the Association and the Central Council, present to our retiring president, Clarence Kolwyck, this very beautiful emblem, plaque, in appreciation of his untiring efforts during 1956 and 1957, in the interest of the activities of this Association and the administration of justice in this State.

This plaque says, "Clarence Kolwyck, in appreciation for his outstanding and inspiring leadership as President of the Bar Association of Tennessee, June 16, 1956 to June 15, 1957. Members of the Bar Association of Tennessee." It gives me pleasure to present this to you, Clarence. (Applause.)

PRESIDENT KOLWYCK: Weldon, to those of you who remain, I can't blame so many for leaving, next to the lovely lady on my left I shall treasure this as the finest thing that's every come my way. (Applause.)

Well, Dean, it's wonderful to have you. You retired after being, I think, the youngest president of the Tennessee Bar Association at the age of thirty-four years. You would be what we would call now a Junior Bar Conference member. Now let me see how many times you have retired. I think you retired from practicing law to be Dean of the University of Tennessee College of Law. You retired from there to be Professor of Law at Duke. You retired from there to renew your practice in Texas. And when you retire again, will you please come back to Tennessee and we will initiate you into the Junior Bar Conference.

But in the meantime we have something that we want you to take back with you to Texas, and it says this: It has the seal of the Bar Association of Tennessee at the top. It says, "Malcolm McDermott, Senior Past President of the Tennessee Bar Association, in appreciation for his distinguished service as president, 1920-1921. Members of the Bar Association of Tennessee." It's a pleasure, Dean. (Applause.)

I notice on page 14 of the program we have Dean McDermott's picture and right under it says that at nine p.m. there will be dancing on the patio. Now I assume that means that you and Mrs. McDermott will lead the grand march to the patio when we get through. There is supposed to be a full moon outside hanging at a forty-five degree angle above Lookout Mountain, and I say this in all truthfulness, that I ordered that moon eighteen months ago. When the date for this Bar Association meeting was fixed in Chattanooga, I found out when the moon would be full in June. It fulled on June the 12th at the tenth hour and second minute. So I hope it is shining out there, because the moon

shines brighter from atop Lookout Mountain than anywhere else in the world.

In 1892 a scrawny four year old Jewish boy landed at Ellis Island with his impoverished family, having escaped from the tyranny of the Russian Czar. As he scrounged for a living on New York's East side, with little formal education and no musical training, he began to write songs. After becoming the greatest composer of popular music in our time, he composed a song of gratitude to America. That song remained locked in a vault for twenty-one years, awaiting an appropriate time for release. So, when Hitler started on his rampage in Europe, he called on Kate Smith to sing that song over the air in 1938. Before the last note had died away, the world knew that Irving Berlin had composed a sub-title to the "Star Spangled Banner." Now, Miss Donna Parker will lead us in singing, "God Bless America," and the Reverend Amos L. Rogers will pronounce the benediction, and will you join with us in singing, "God Bless America"?

(The audience stood and sang "God Bless America".)

REVEREND ROGERS: May the peace that passeth all understanding abide within each of our hearts now and forevermore, in the name of the Father, the Son and the Holy Spirit. Amen.

(The meeting was adjourned.)

BUSINESS SESSION, SATURDAY, JUNE 15, 1957
CLARENCE KOLWYCK, PRESIDENT, PRESIDING

PRESIDENT KOLWYCK: The final business session of the Seventy-Sixth Annual Convention of the Bar Association of Tennessee will be in order.

This convention was announced as a speechless convention, and there will be no speeches today. Senator Kefauver sent word that he was hoping to get here today in time to make his speech that he expected to make yesterday. We will treat it as having been made, and it will be printed in the Addresses Section of the Proceedings issue of the Tennessee Law Review.

We will take up the matter of awards, first, and the Chair at this time will recognize Val Sanford, Chairman of the Committee on Legal Education and Admission to the Bar.

MR. SANFORD: Mr. President, and gentlemen of the Bar. As you may know, the Bar Association this past year instituted a program of sponsoring a contest in the field of legal ethics. We are awarding an annual prize to that law student regularly enrolled in a law school in the State of Tennessee who writes the best essay on a subject chosen in the

field of legal ethics. And this year the subject was, "The Duty of the Lawyers to the Courts." And the young man who won the prize this year is Mr. Charles O. Brezius of Lebanon, Tennessee, who is a student at Cumberland University School of Law. He is here today. I would like for him to come forward and receive this certificate. He has chosen to accept the complete set of Tennessee Code Annotated, and we have a certificate for him and would like for him to come forward and accept it.

It certainly is a great deal of pleasure for me to present this to you, and I hope that you will have a long, profitable practice and use of it, and I want to congratulate you on the excellent essay which you wrote in this contest.

MR. BREZIUS: Thanks a lot, Mr. Sanford. Thanks to the Bar Association of the State of Tennessee. It is mighty nice of your organization to give the law students of the State an opportunity like this. I'm looking forward to becoming a member of the Tennessee Bar and Bar Association of Tennessee. Thank you very much.

PRESIDENT KOLWYCK: The chair at this time will recognize Edward W. Kuhn, two times ex-president of this Association and Chairman of the Committee on Bar Activities.

MR. KUHN: Mr. President, and members of the Association, the section on Bar Activities this year initiated what we think is going to be a worthwhile project in that we have made two awards and will present two certificates: one to the lawyer who in our opinion contributed more to the legal profession and the administration of justice than any other during the course of the year; and another to the Bar Association in the State, local Bar, which did the most outstanding work. So this year, being the first award, the Association selected to receive the certificate, which will be in this form, is the Jackson-Madison County Bar, and I would like for Mrs. H. Leroy Pope to come forward and receive the certificate (Applause.)

MRS. POPE: Now I know why I am here.

MR. KUHN: Last night I told her to be present. She happens to be the one that runs that Madison County Bar. Her husband is the president of it, but she runs it.

MRS. POPE: He wouldn't like that at all.

MR. KUHN: We're going to give you this, and immediately take it back to complete it, so you can look at it, and if you will, return it.

MRS. POPE: I surely will. I thank you so much for Leroy. Thank you.

MR. KUHN: You might be interested in seeing the type of exhibit that the Madison County Bar entered this year. Of course, you can't

see all of it, but it is complete with all types of exhibits and material, and I will leave it here in case anybody would like to examine it.

Now the lawyer whom we think, in our opinion, contributed most to the administration of justice in this State is an indefatigable worker for two consecutive legislative sessions, to my personal knowledge. This man has written hundreds and hundreds of letters, has drafted scores of legislative bills, has held countless meetings. He has traveled to Nashville, and has just worked very, very hard during those two sessions, and this last session was no exception. He is a man who is very much devoted to the Bar Association and to the legal profession. He is an outstanding lawyer in Memphis, and I would like to present the certificate this year to the Hon. Hugh Stanton.

Hugh, in recognition of your outstanding contribution to the welfare of the State of Tennessee, we are happy to give you this certificate.

MR. STANTON: I appreciate it very much. I'd just like to say this much. The potential for service in the Bar Association, the organized Bar Association, is vast and unlimited on all levels, the county level, the State level and the American Bar level. We've got a big job to do, and it must be done.

PRESIDENT KOLWYCK: At the risk of prolonging this meeting one minute, I want to say that in my experience as president for one year, I know of nothing that has happened that gives me more pleasure than for this award to be made to Hugh Stanton, because I know what he has done during the past year.

Before I forget it, Dean Wicker has asked me to announce that there will be a Law Institute at the University of Tennessee on November 8 on the subject of Railroad Liability. The College of Law and the Knoxville Bar Association in cooperation with the Bar Association of Tennessee are planning an institute on the particular problems and techniques in railroad liability cases, including F.E.L.A. litigation.

Now we are going to call the roll very hurriedly of the committees for their reports. Is there a report from the Committee on Unauthorized Practice of Law? That report has been filed and there is no oral report.

Is there a report by the Committee on Publications?

MR. JOHNSON: The last time I stood up here was about eight years ago and I sounded like a fool and looked like one, and this morning I feel like one, but I hope nobody from home is here. Everybody sounds like they're in a good mood this morning, Clarence.

PRESIDENT KOLWYCK: Yes. Everybody's fine. Of course, you help it along a little there.

MR. JOHNSON: Well, always glad to help out.

(Mr. Johnson gave the report of the Committee on Publications.)

MR. JOHNSON: I move the adoption of this report, Mr. Chairman.

PRESIDENT KOLWYCK: Do I hear a second to the motion?

MR. WHITE: Second the motion.

PRESIDENT KOLWYCK: Any discussion? If not, all in favor of adopting this report, let it be known by saying aye. (Motion carried.)

Hugh, I'm going to have to call on you again, if you have a report to make on the Committee on Judicial Administration and Remedial Procedure and Law Reform.

MR. HUGH STAUNTON: I have filed it. It's about four pages. I am quite sure they will accept it as filed rather than have me read it.

PRESIDENT KOLWYCK: I think that suggestion will meet with unanimous approval.

The Committee on Public Relations. Does it have a report?

MR. SANDIDGE: It has been filed. Do you want it read?

PRESIDENT KOLWYCK: No.

MR. CRUTCHFIELD: Mr. President, I have it here, and I, too, would just like to file it, if I may.

PRESIDENT KOLWYCK: Thomas Crutchfield, the Third District member of this committee is acting for Hugh C. Gracey, the chairman.

MR. CRUTCHFIELD: Mr. President and members of the Bar, I am here for Mr. Hugh Gracey, the chairman of Public Relations Committee, and have his report. Now I have read this report over, and although it is an excellent report, I don't see there is any need in the world to prolong this meeting by my reading it, so if I may, Mr. President, I would like to move its adoption without reading it.

PRESIDENT KOLWYCK: Does it call for action?

MR. CRUTCHFIELD: No action at all. Just file it.

PRESIDENT KOLWYCK: Just let it be received and filed, then.

Is there a report from the Committee on American Citizenship? Did they file a report?

MR. SANDIDGE: No.

PRESIDENT KOLWYCK: I cannot refrain from speaking a few words about the work of that committee. I am sorry Jack Maddin couldn't be here. He had to leave for New York last night. He left the speakers platform as soon as he led the pledge to the flag. Jack Maddin was successful in getting the flag of our country displayed in practically all of the court rooms of this State, which I think is very important. If I were a judge, I would not hold court in any court room in Tennessee that did not display the flag of our country.

Now another thing that he did, which I intended to mention last

night, in the course of four pages of the speech that I threw away last night, is that I was in Governor Clement's office last fall discussing with him our legislative program for the forthcoming general assembly, and on the right of his chair was the American Flag and on the left was the Flag of Tennessee, and I was uncertain myself as to whether the one on his left was the Flag of Tennessee. So after we discussed the subject, the suggestion was made it should be in the schools, all the State supported schools of Tennessee, that is, the Tennessee Flag should be. And the Governor said to me, "I have just appointed you to the State Board of Education, and you are President of the State Bar, so it looks to me like it's your job." So, I called Jack Maddin and he prepared a resolution, presented it to the next meeting of the State School Board, and it was adopted unanimously. We hope that at the beginning of the school year in September the flag of our State will be displayed in all the schools of Tennessee.

The Committee on Ways and Means and Budget. Weldon White, do you have a report, Mr. White?

MR. WHITE: Mr. President, it has been filed and has been acted upon by the Central Council, and I just move, sir, that it be received and filed.

PRESIDENT KOLWYCK: Well, that doesn't call for any vote.

Now the Committee on Legal Education. Mr. Sanford, do you have a report?

MR. SANFORD: Mr. President, this report calls for no action on the part of the convention, so I simply would like to file it and move that it be received.

PRESIDENT KOLWYCK: I take it that it is unanimous in that respect, that we will receive it. Let it be filed.

The Committee on Resolutions.

I have been to Washington on several occasions during the past twelve months, conferring with Senators Kefauver and Gore and with other proper parties in reference to the passage of a bill creating one or more additional Federal District Judgeships for the State of Tenneessee. I am convinced that the work of the federal courts of this state has increased sufficiently to warrant the creation of additional judgeships. Even though it now appears unlikely that the bills pending in committee will come to a vote at this session of Congress, we should nonetheless continue our efforts, in the hope of success at the next session.

I report to you that I have appointed a special committee from the Central Council, composed of Erby Jenkins of Knoxville, Charles G. Morgan of Memphis, and Weldon B. White of Nashville as Chairman, with instructions to prepare an appropriate resolution to be offered to the Central Council and to this Assembly for consideration. At the

meeting of the Central Council yesterday such a resolution was presented and read by the gentlemen constituting the committee, and it received unanimous approval. I now call upon Weldon B. White to read this resolution to the members in general assembly for their consideration.

MR. WHITE: Mr. Chairman, The resolution reads as follows: (The text of the Resolution on additional Federal District Judgeships appears in the Resolutions Section of the Proceedings *infra.*)

I move the adoption of the Resolution.

MR. MORGAN: I second the motion. (After many seconds from the floor, the motion was voted upon and unanimously adopted.)

The Committee on the Unified Bar. Does it have a report? I believe it was filed.

MR. FOSTER ARNETT: Mr. President, Mr. Mayne Miller had to leave the State at the last minute and asked me to submit his report, and in view of the fact that it is merely a status report and recommends no action, I would like to file it and move you, sir, that it be treated as read.

PRESIDENT KOLWYCK: We will treat it as filed and read.

Now the Committee on Uniform State Laws. Evidently they have no report, so we will go on.

The Committee on Legislation, does it have a report? Eugene N. Collins is the Chairman.

MR. SANDIDGE: They had a report.

PRESIDENT KOLWYCK: We will treat that as filed.

The Committee on Professional Ethics and Grievances, H. H. McCampbell, Jr.

MR. MCCAMPBELL: We have filed the report, Mr. Kolwyck. It doesn't require any action. I suggest it be treated as filed.

PRESIDENT KOLWYCK: Very well.

Now we have a Committee on Legal Aid. Do they have a report? I hear none.

Now there are three special committees. I doubt that they have reports, but if they do they can come forward. That is the Committee on Domestic Relations, Lon MacFarland, Chairman.

MR. MACFARLAND: It is on file, Mr. President.

PRESIDENT KOLWYCK: Would you want to speak to it?

MR. MACFARLAND: No, sir.

PRESIDENT KOLWYCK: Incidentally, it might be of interest to you that Lon MacFarland has done a wonderful job on this committee, and the work that he has done stimulated the creation of a Domestic Relations Court in Davidson County. I don't say it caused it, but he did the spade work, and that was one of the results. Lon MacFarland, in July, will be on the program of the National Conference of Bar Presidents to

speak on the subject of domestic relations. I happen to be Chairman of the American Bar Committee on Domestic Relations. We have an hour on that program, and Lon will consume a third of that time.

Does the Special Committee on the General Sessions Courts have a report?

MR. SANDIDGE: It has been filed.

PRESIDENT KOLWYCK: Been filed.

And the Special Committee on Interprofessional Code, W. Edward Quick.

MR. QUICK: Mr. President, that report has been filed and acted upon by the Central Council.

PRESIDENT KOLWYCK: Do you want to speak to it?

MR. QUICK: No, sir, I don't think it is necessary.

PRESIDENT KOLWYCK: All right. They have worked out a very effective code between the medical profession and the legal profession, and the Executive Secretary advises me that it will be printed and a copy of it will be furnished to all the lawyers in Tennessee and all the doctors. Ed has done a wonderful job on that Interprofessional Code.

Now at the opening session Governor Cooper made his preliminary report on the amendments to the Constitution and By-laws, which have already been printed and were furnished to all of you. Governor Cooper spoke in detail about it on Thursday, and there were one or two minor corrections. Is there any discussion or any question about these amendments? If there isn't, why then, we are going to proceed with it. If there is no discussion, I will entertain a motion from Governor Cooper that his report be approved as printed and as amended by his committee.

MR. COOPER: Mr. President, I so move. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: Motion carried.

Is Raymond Denney here?

MR. DENNEY: Yes, sir.

PRESIDENT KOLWYCK: William Waller of Nashville, who is Chairman of the Committee on Obituaries and Memorials, left the first of the week for Europe on his way to the American Bar meeting in London, and he asked Raymond Denney to make his report to you today. Mr. Denney.

MR. DENNEY: Mr. President and members of the Association, this is one report that none of us wants to file and go unheeded. I am out of character in this sort of report, except to those who may know me, as I am very sentimental. I will read in a few minutes the names of all the members of this Association who have died within the last year.

First, William asked me to address myself to the part of the program of the president in regard to a memorial for Judge Haywood. It is with some regret, I know the Committee feels this way and President Kolwyck,

and some embarrassment, that we have failed to raise the quota this year. I think the reason for it is that the program started a little late, but we were assigned to raise seventy-five hundred dollars in cooperation with the Tennessee Historical Society, and the Tennessee Historical Commission to erect at a point eight miles from Nashville on the Nolansville Pike a memorial to John Haywood, who we all know was the father of the common law in Tennessee, and a great judge. There are many stories told about him, but I was thinking this about that situation. He was a great lawyer and commanded a great practice. I can hardly see how he could have his office out eight miles from Nashville on the Nolansville Pike when you went to see him in a horse and buggy. Maybe some of them walked. But those who walked, I don't expect they had any money. Today we maintain offices in these big tall buildings with fast elevators, and we can't get enough business. The place where John Haywood lived and the practice that he did in themselves make it evident that he was a great practitioner.

We have only raised three thousand dollars. I hope that we will have the seventy-five hundred dollars before this Convention adjourns. Haywood County donated five hundred dollars, and there have been some other donations. Just a hundred and fifteen lawyers have contributed to that fund, and I am sure that during the next administration when the matter is brought to attention in some way and on some system to the membership, we will raise our seventy-five hundred dollars and there will be an appropriate marker to that great lawyer who set the law on its proper path in Tennessee.

But now, to bring your attention to the very serious matter, very sad matter, I want to read the names of the members of our Association who have died during this last year. I know all of you will remember the few minutes every year that we saw most of these men and enjoyed their company, and after I read the names, I am going to ask you to stand in a moment of silent prayer for them.

W. Clyde Buhl of Knoxville, Tennessee; James H. Campbell of Franklin; E. E. Creswell of Sevierville; George W. Bagley of Wartburg; Elmer Davies of Nashville, the United State District Judge there. Floyd L. Dixon of Chattanooga; Jeff W. Donaldson of Knoxville; A. G. Ewing of Nashville; Robert Y. Farris of Chattanooga; Norman Farrell of Nashville; B. M. Fogo of Chattanooga; Horace Frierson of Columbia; E. Stuart Gill of Chattanooga; Benjamin S. Gore of Bristol; Finis E. Harris of Cookeville; Douglas N. Hester of Gallatin; H. H. Honnoll of Memphis; A. D. Hughes of Johnson City; S. H. Justice of Wartburg; Rufus B. Lacey of Memphis; Hamilton Little of Memphis, Chancellor, Part One of the Chancery Court in Shelby County; Garland S. Moore of Nashville; Max

Nemetz of Memphis; John Ed O'Dell, Jr., of Nashville; Harry T. Poore of Knoxville; Fred S. Powell of Nashville; R. E. Rice of Dyersburg; E. W. Ross of Savannah; S. L. Smith of Nashville; Horace B. Still of Clarksville; Clint B. Tipton of Memphis; R. K. Woody of Columbia; J. Davis Wooten of Tullahoma.

In memory of these men, many of whom we knew and loved, and all of whom some of us knew, I am going to ask you to stand in a moment of silent prayer. (There was a silent prayer.)

PRESIDENT KOLWYCK: At its annual Conventions this Association customarily elects to honorary membership certain distinguished guests of the Convention. At its meeting yesterday the Central Council recommended that the following guests be elected to honorary membership; David F. Maxwell, Horace F. Blackwell, Jr., Newton Gresham, John D. Higgins, William C. Farrar, M. M. Roberts and Richard D. Shewmaker. Do I hear a motion that they be elected?

MR. WHITE: I so move. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: They are declared elected and the Executive Secretary will prepare appropriate certificates of honorary membership to be sent to these gentlemen.

Well, it looks like we are getting down to the important part of this meeting, but before we proceed with the election of the officers, I want to say that David R. Wade, Jr., Vice-President; Allen A. Kelly, Vice-President, Wade, from Middle Tennessee and Kelly from East Tennessee; George T. Lewis, Jr., on the Central Council from West Tennessee, J. R. Simmonds, on the Central Council from East Tennessee; Charles C. Trabue, Jr., on the Central Council from Nashville, Middle Tennessee, have done outstanding service for this Association in the two years that I have worked with them, and I would like for them to stand and all of you give them a big hand.

Now that means that we have to elect to the Central Council one delegate from each of the three grand division of the State, and I believe that I will start with East Tennessee. Do I hear a nomination?

MR. CON MILLIGAN: Mr. Chairman, I would like to nominate Mr. J. Hallman Bell of Cleveland, Tennessee.

PRESIDENT KOLWYCK: Are there any further nominations? If not, do I hear a motion that the nominations close and he be elected by acclamation?

MR. JOHN FLETCHER: I so move, and that he be elected by acclamation. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: I will hear nominations for Central Council membership from Middle Tennessee.

MR. B. J. BOYD: I'd like to nominate my good friend Louis Leftwich of Nashville.

MR. WHITE: I second the nomination.

PRESIDENT KOLWYCK: Any further nominations? Do I hear a motion?

MR. STEVEN STONE: I move the nominations be closed and that he be elected by acclamation. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: Now we come to West Tennessee.

MR. HARRY LAUGHLIN: Mr. Chairman, I would like to place in nomination Mr. W. E. Quick, Memphis.

MR. HUGH STANTON: I second the nomination.

MR. STONE: I move the nominations be closed and he be elected by acclamation. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: Now that completes the Central Council. I believe we have to elect the Secretary-Treasurer annually. Now that is not John C. Sandidge, the Executive Secretary. That is the job held by J. Victor Barr, Jr. He is the official Secretary-Treasurer of the Association. Do I hear a motion for the nomination for Secretary-Treasurer?

MR. FRANK GRAY: Mr. President, I want to nominate for re-election as Secretary-Treasurer Mr. J. Victor Barr, Jr. As I think all the members know, Mr. Barr has recently had a mild heart attack. He is now recovering and will be full time at his office in a short time, and I nominate him for re-election.

MR. KUHN: I second it.

PRESIDENT KOLWYCK: Any further nominations? Do I hear a motion that the nominations cease and he be elected by acclamation?

MR. JOHN GOINS: I so move, Mr. Chairman. (The motion was seconded, voted upon, and carried.)

PRESIDENT KOLWYCK: He is declared elected, and I am very gratified, because it has been a pleasure for me to work with J. Victor Barr, Jr. during the last year, which is his first year as Secretary-Treasurer.

Now I will entertain nominations for Vice-President from East Tennessee.

MR. JOHN GOINS: Mr. Folts was to be here to make this nomination but I don't see him here. But I do wish to place in nomination the name of J. Hamilton Cunningham, immediate Past President of the Chattanooga Bar, as Vice-President from East Tennessee.

PRESIDENT KOLWYCK: Any futher nominations?

MR. GOINS: Mr. Chairman, I would like to stand on that one and move that the nominations be closed and Mr. Cunningham be elected

by acclamation. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: He is declared elected. Now we are going to jump over to West Tennessee to elect a Vice-President from West Tennessee.

MR. W. P. MOSS: Mr. President, I would like to have the privilege of nominating a gentleman whom I know you all will approve as Vice-President, no less than those of you who live in West Tennessee and know him so well, Mr. James Senter.

MR. J. H. DOUGHTY: I second the nomination.

PRESIDENT KOLWYCK: If there are no further nominations, I will entertain a motion that the nominations cease and he be elected by acclamation.

MR. WHITE: I so move, Mr. President. (The motion was seconded from the floor, voted upon, and carried.)

PRESIDENT KOLWYCK: He is declared elected. Now comes the important election, and that is the election of a Vice-President from Middle Tennessee who, under our current Constitution and By-laws, is automatically President-Elect, and next year will succeed to the office of president. Do I hear a nomination for a President-Elect or Vice-President from Middle Tennessee?

MR. WHITE: It is a great pleasure to me on this occasion to place in nomination a very delightful gentleman, a splendid lawyer, a real worker in the Bar. For the last two years I know he has worked on the domestic relations and the juvenile delinquency problem that we have in Tennessee. Clarence has told you he will be on the national program at the ABA in July. He has worked hard all these years. He has a lovely and charming wife; I wish she were here. It is my pleasure to place in nomination Mr. Lon P. MacFarland of the metropolitan area of Columbia, Tennessee, as President-Elect of the Bar Association of Tennessee. (Applause.)

MR. DOUGHTY: Mr. President, In Gatlinburg the gentleman who just nominated Mr. MacFarland, I believe, won by three votes. I had the pleasure of nominating Judge White. I simply want to have the pleasure, if I may, of seconding the nomination of Mr. MacFarland. (The nomination was also seconded by many other members from the floor.)

MR. DENNEY: Mr. President, I move the nominations cease and we elect a mighty good man as our President-Elect, Mr. MacFarland.

MR. WARREN KENNERLY: Mr. President, I would like to second that motion.

PRESIDENT KOLWYCK: In view of everybody having seconded the nomination of Mr. MacFarland, I take it that there will be no contest,

but we will put the matter to a vote (The motion was voted upon, and carried.)

I here and now declare Mr. Lon P. MacFarland of Columbia, Tennessee, elected. (Standing applause.)

Now will all those who are present who have been elected to the Central Council or as Vice-President and President-Elect come to the platform, please.

This is Jim Senter from Humboldt, Vice-President from West Tennessee.

This is J. Hamilton Cunningham, the immediate past president of the Chattanooga Bar, my very good friend and one of the best presidents our Bar Association has ever had. This is Louis Leftwich, and I understand that his father at one time was president of the Bar Association of Tennessee. This is Mr. W. Edward Quick, from Memphis, Tennessee, a past president of the Memphis–Shelby County Bar, a very dear friend of mine, from a friendship formed in Naval Intelligence during World War II, and I'm happy, Ed, you are going to be on the Central Council.

Now I take it that since everybody has second the nomination, that you know Lon P. MacFarland from Columbia, and since there was no conflict, I can certainly express my own sentiments, that I have never seen a man elected President-Elect in this Bar Association that I was more pleased to see than Lon P. MacFarland. I predict that his administration will be one of the best this Association has ever had. (Applause.) And we now are going to hear a few words from Lon MacFarland.

MR. MACFARLAND: Mr. President, members of the Association, I appreciate very much your confidence in electing me President-Elect. I accept with gratitude and humility. I look forward to working for the interest of the Bar Association, the lawyers of the State of Tennessee, and the administration of justice. I promise you a lot of earnest, diligent work in carrying out the important business of this Association that has been so ably carried on by Clarence Kolwyck and the presidents who have preceded him. I look forward especially to working with my good friend Charlie Morgan. Thank you very much.

PRESIDENT KOLWYCK: Now I think we have gotten everybody elected who was supposed to be elected. That was the best cut and dried job that I've seen in a long time.

There is one more item before we hear from our incoming President, and that is the introduction of his lovely wife, Adrienne. Will you stand up, Adrienne? (Applause.)

I made my speech at the beginning of the convention. We reversed the process this year and decided to open the convention on Thursday rather than Friday in the hope that it would induce members of the

Bar to get to the convention early so they would get full benefit of the section meetings, and I understand the section programs were splendid. I am not going to repeat that speech now except to say, as I said Thursday, that when I was inducted in office last year Weldon White sprang a surprise by placing on my finger a ring symbolic of the Diamond Jubilee of this Association. I was admonished to wear it as a badge of honor and responsibility, and, I repeat, I have tried to wear it with humility, and I hope with honor.

I know of no occasion that gives me more pleasure than to present to you at this time your incoming President who has been a close and very dear friend of mine for some thirty years. I know his ability as a lawyer. He is one of the best in the State. I know his propensities for work and I know that his administration will be one of the best, if not the best, this Bar Association has ever had. Charlie, if you will come forward now we will perform the ring ceremony.

MR. MORGAN: Double?

PRESIDENT KOLWYCK: You know, that is an idea. I want to say that the wearing of this ring during the past year has meant more to me than most anything that has ever happened in my life. I have treasured this ring. I have tried to keep it untarnished by deed or act. I have never worn it when I thought I would get it scratched. Charlie, it is a pleasure to me at this time to put this ring on your finger, and I know that you will wear it as a badge of honor and responsibility during the next year, and that you will pass it on to your successor in the same manner as you receive it today. (Standing applause.)

MR. MORGAN: Fellow members of the Bar, I want to thank you for the opportunity of serving as your President for the coming year. I have never been one who has had the command of flowery language or ability to put into words my thoughts on occasions like this, but I do know this from experience, that the work of the presidents of the Bar Association is increasing each year. One man can't do it by himself, and whatever is done during the coming year will be done through the assistance of the members of the Association, and at this time I would like to ask each and every one of you who has any idea that you think will benefit the Association or the administration of justice during the coming year to write me, and I assure you it will be given full consideration.

Again, I thank you, and I hope that all of you will be in Memphis next year. We hope to have it completely air conditioned from the time you get off the train until you get back. Thank you.

MR. AUBREY FOLTS: Mr. Chairman, before you end, if nobody has made this resolution before, I want to first preface it by saying that when I nominated you two years ago at Memphis, I had faith that you would

do just the kind of fine administrative job that you have done, and I move that we, as an Association extend our appreciation to you and our best wishes. I will just present the resolution for myself to save you that embarrassment, and all in favor, let it be known by a rising vote of thanks. (Standing applause.)

PRESIDENT KOLWYCK: Before adjourning I want you to give a big hand to one of our greatest presidents, who goes off the Council this year. The Honorable Weldon B. White. (Applause.)

You will please stand while Dr. J. Fred Johnson, Pastor of the First Cumberland Church, will pronounce the benediction.

DR. JOHNSON: For Thy providence, oh God, that has sustained our needs, for Thy grace that keeps us and the experience of Thy love, for the country that we live in and the liberty we share and the heritage that we are devoted to, we give Thee thanks. We breathe Thy name for these guardians of our liberty to protect us from any evils that might come by improper administration. We pray Thy blessing upon the efforts that they have made, that the future will leave them in the retrospect of memory unashamed, and grant, oh God, that in the years ahead that we might have so lived and in this convention we might have so acted that truth would be further served and men would call us blessed to those who came after us.

Lead us in the way eternal. Guide us into all wisdom. Give us discernment to know the right and the strength and integrity to walk in it, for Jesus' sake.

And now may the blessings of God the Father Almighty, the grace of Jesus, the only Son, the love and communion of the Holy Spirit be upon you all now and forevermore. Amen.

ADJOURNMENT SINE DIE

REPORT OF THE PRESIDENT*

When I was inducted into office last year, Weldon White sprang a surprise by placing on my finger a ring symbolic of the Diamond Jubilee of this Association. I was admonished to wear it as a badge of honor and responsibility. I have tried to wear it with humility and I hope with honor. At the conclusion of this Convention I will pass it on to Charles G. Morgan of Memphis — I hope untarnished in fact or by deed, just as I know he will pass it to his successor.

Soon after the last Convention it became apparent that this job was too big for me and that the best I could give was far short of what the Bar deserved. I was faced with the choice of giving more of myself than I had anticipated or permitting the Association to "drift" during my term. I chose the former course, but it will be for the Bar to judge whether my efforts have been successful. I can only say that the time was expended with a sense of responsibility and in earnest effort.

The following is a resume of my time and effort: miles traveled, 24,970; letters written, over 2500 (computed by letterheads used); letters received, at least an equal number; cost to me above budgetary allowance, approximately $3672. Points visited outside Tennessee include: three trips to Washington, once as ex-officio delegate to the American Law Institute and twice to consult with the Staff of the Administrative Office of the United States Courts and the members of the Judiciary Committee of the Senate and House regarding additional United States District Judges for Tennessee; to Ann Arbor, Michigan, as ex-officio member of the Judicial Conference of the Sixth Circuit of the United States Court of Appeals; to Dallas, Texas, for the annual convention of the American Bar Association; to Chicago, for the mid-winter meeting of the National Conference of Bar Presidents; to Atlanta, for the annual convention of the Atlanta Claims Association and the Medico-Legal Clinic sponsored by the American Medical Association; and to Cincinnati, for the annual convention of the Family Service Association of America. I was the guest of and lavishly entertained by the Conventions of the State Bar Associations of Mississippi at Jackson; Texas at Houston; and Missouri at St. Louis. I was unable to accept invitations to the Conventions of the State Bar of Louisiana, on account of illness, and Arkansas, because of its proximity in date to our Convention.

*Clarence Kolwyck, President of the Bar Association of Tennessee, presented this Report at the Seventy-Sixth Annual Convention of the Bar Association of Tennessee, June 13, 1957.

My travels in the state have included: twenty-three trips to Nashville on official business at the Executive Office and to attend various committee meetings and four meetings of the Central Council; four trips to Knoxville for participation in the Traffic Court Institute, the Law Institute and the Law Day at the University of Tennessee College of Law, and a meeting with the Board of Directors of the Knoxville Bar Association; three trips to Nashville to participate in Law Day and the Law Institute at Vanderbilt University College of Law and the Seventh Annual Institute of Taxation and Accounting; to Reelfoot Lake to urge the Legislative Council Committee to recommend to the 80th General Assembly that ways and means be devised whereby the Public Acts could be printed as passed; to Brownsville to invite the County Court of Haywood County to contribute toward the cost of the Haywood Memorial; to Memphis, Jackson and Clarksville as a guest at the annual meetings of the bar associations of those cities, and to Memphis on two other occasions regarding committee work; to Oak Ridge, Tullahoma and Jackson, to participate in the three Mid-Winter Division Meetings conducted respectively by Vice-Presidents, A. A. Kelly and David R. Wade, Jr. and President-Elect, Charles G. Morgan, so hospitably sponsored by the Anderson, Coffee and Madison County Bar Associations under the leadership of their capable presidents, W. B. Lewallen, John M. McCord and H. Leroy Pope. For the sake of brevity, I will not mention numerous other trips, except to recall that I attended the Ramp Festival at Cosby, which is strongly recommended for unforgettable atmosphere and lasting flavor.

Before proceeding further with this report, I want to congratulate this Association on its choice of the other officers and Council Members who have been unfailing in upholding the high ideals of this Association and in zealously working in furtherance of its program.

There is yet another group, too frequently regarded as forgotten men, which I have not forgotten, as I am sure they will agree. I refer to the past presidents of this Association, to whom our Annual Dinner is dedicated. Their experience is a vast storehouse of information, vitally useful to any president. I have tapped it often and persistently. No project has been undertaken without their advice and counsel. One project was abandoned on their advice. Weldon B. White, a man of keen analysis and rare judgment, has been a tower of strength, willing at all times to listen and advise, to say nothing of having accepted the chairmanship of three important committees. Edward W. Kuhn has been equally cooperative, having accepted the chairmanship of a committee and, by invitation, having attended all meetings of the Central Council. Also, J. Malcolm Shull, Alfred R. Adams, Lloyd R. Adams

and John H. Doughty have willingly cooperated. Their advice has been substantial and sound and much appreciated.

This administration has not aspired to accomplish miracles, nor does it claim credit for many completed projects. Our administration is but another ring around that yearling tree dedicated by twenty-six lawyers at Bon Aqua Springs on July 4, 1882. We have merely tried to stir and fertilize and water the soil, trim off a few sprouts here and there and engraft some new ideas onto its spreading branches, so that succeeding administrations may fructify its growth in influence and esteem, spreading its branches and diffusing its manna from the lofty pinnacles of my adopted East Tennessee, across the verdant pastures of Middle Tennessee, to the placid waters of Reelfoot Lake in my native West Tennessee.

During this the first year of the fourth quarter century of our history, we have sought to take an inventory of accomplishments to date, giving credit where credit was due, and from past effort and experience to take a bearing for our future course, initiating new projects as indicated, not with the idea that they could be accomplished overnight — rather to establish a continuity of purpose, program and perspective. But over all, our ever-pervading goal has been to inspire in the individual lawyer a renewed sense of duty to his profession, the courts and the public.

Believing that public relations are basic to successful bar activity and that the press is our best and cheapest forum, I attempted an ambitious start by personally interviewing the editors of all leading dailies in the state, many reporters and all Associated Press representatives. I was rewarded with an agreement between the morning and afternoon papers to publish any news of the Bar's activities, even to the extent of alternately sharing a weekly column. My greatest disappointment is that this program was not implemented.

My next disappointment was that only one issue of the *Tennessee Lawyer* limped off the press this year. Without a forum such as this publication the members could not know what their Association was doing and, therefore, much effort has gone unnoticed. As an example, the members will not see the Central Council's effective rules on grievance procedure until they are published in the Annual Proceedings Issue of the *Tennessee Law Review,* a year after adoption. The *Tennessee Lawyer* should be revitalized into a monthly publication. The members *must* know what their Association is doing — else how can we expect their support?

Upon taking office, we were prepared to announce previously-planned membership in all sections and committees, with state-wide

representation and provision for continuity and rotation over a period of three years. All committees contained at least one member from each Congressional District. One-third of the membership, and chairmen as well, were taken from the Junior Bar Conference, with proportionate representation from the Women Bar Conference. Wherever possible, members who served on committees during the previous year were given a choice of committees. All committee assignments were by choice or prior agreement. Only one member declined to serve and that was because of a member of his family becoming an invalid.

The conferences and sections will hold sessions concurrently with this Convention. They and the many committees will make their own reports, which will be published in the *Tennessee Law Review*.. I shall only refer to them in connection with our overall program, except to especially commend John K. Maddin, Jr. and the members of his Citizenship Committee for their efforts in inducing the display of the American Flag in most court rooms of this state and his resolution, presented to and approved by the State Board of Education, calling for the display of our State Flag at all state-supported schools. Our State Flag was designed by a member of this Association, Leroy Reeves of Johnson City, and is too seldom recognized and too little respected by the citizens of this great state.

Reverting to the predominant purpose of our administration, we have daily striven to encourage a better spirit of fellowship among the lawyers in Tennessee and a renewed sense of individual and collective responsibility toward our profession, the courts and the public. That central theme has permeated not only our speeches to bar and lay groups, but especially our appearances before the Supreme Court on the occasion of the semi-annual oath taking of new licensees. We were also privileged to speak to the assembled students of the major law schools, where we did not hesitate to emphasize that the oath they would soon take means exactly what it says — that they must truly and honestly demean themselves in the practice of their profession. Translated, it means to all of us: honesty with our fellow lawyers, honesty with the courts, honesty with client and public alike and, most important, honesty with our own consciences — such is the Golden Rule of our profession. Some have suggested that I have been preaching. I would be the last to deny the charge.

The Supreme Court having revoked Rule 40 on the eve of our last Convention, it became imperative that the Central Council immediately formulate effective procedure for dealing with grievances. A comprehensive set of rules were drafted by a committee from the Central Council, headed by Weldon B. White, immediate past-president, and

were adopted by the Central Council. We cannot know the salutary effect of Rule 40 or these rules, but we are proud to say that the Committee on Professional Ethics and Grievances, headed by H. H. McCampbell, Jr., has been jobless during this administration. Should complaints arise, the rules are so drawn as to be self-executing.

Our next major project was the Haywood Memorial. Coming to Tennessee in 1807, after having served on the Supreme Court of North Carolina, Judge John Haywood soon distinguished himself as an advocate and as Tennessee's first historian. During a term of ten years on our Supreme Court he so impressed himself on our common law as to earn the title of being its "father."

His grave in the family cemetery at "Tusculum" was completely neglected until the Tennessee Historical Society and Commission were successful in redeeming it from private hands. After preparing it for a suitable monument, the Historical Commission invited the Association to erect a monument. Finding that the Association had approved the project at the Gatlinburg Convention and that further investigation revealed its complete worthiness, the Central Council voted to proceed. In cooperation with the Tennessee Historical Commission, a monument of obelisk design was chosen, to cost $7500. The Committee on Obituaries and Memorials, headed by William Waller, has raised approximately one-half that sum to date and it is hoped that the remainder will be contributed during this Convention.

If our profession is to enjoy public esteem, we must respect ourselves and our courts, our forefathers in the law and the progenitors of our system of jurisprudence. How better may we exemplify our inheritance than by erecting a monument to the "Father of our Common Law"?. But we do more than honor Judge Haywood. We honor the law that has honored us and symbolize to posterity that ours is a land ruled by law and not by man.

Our experience with the 80th General Assembly was little short of disaster. This is no discredit to Eugene N. Collins, Chairman of the Committee on Legislation, and Hugh Stanton, Chairman of the Committee on Judicial Administration and Remedial Procedure and Law Reform. In retrospect, they are to be congratulated on a score of 12 out of 30 bills approved by the Central Council. Desirable as the twelve bills were by way of corrective legislation, none were as meet in genuine judicial and procedural reform as were the five bills relating to: elimination of counts in declarations, pre-trial procedure, third party litigation, discovery procedure and a uniform system of General Sessions Courts. These five bills headed our priority list, but despite an all-out effort, no legislator could be persuaded to introduce the General Sessions

Court bill and the others either died in committee or failed of passage in the Senate or the House.

Certain reasons for this experience are evident and point the way to corrective measures. Insofar as the Association may be responsible, two faults stand out: first, it will be observed from the composition of both Houses of the 80th General Assembly that only 30% of the Senators and 28½% of the Representatives were lawyers, which is believed to be a very low percentage; secondly, the membership of the Central Council is not sufficiently representative of all areas of Tennessee, being too strongly centered in the metropolitan areas. The Committee on Constitution and By-Laws hopes to remedy this situtation by providing for the election of a member to the Central Council from each Congressional District, instead of two from each Grand Division. There are other more inexorable reasons for the Bar's ineffective legislative program. They will be discussed in another category of this report.

While on the subject of amendments to the Constitution and By-Laws, we soon found that the Constitution and By-Laws were so little in step with a growing Bar Association that strict compliance would have handicapped our program. Here we decided to snip off a few sprouts and engraft such amendments as would enable the Association to make unimpeded progress through the foreseeable future. In keeping with our guiding purpose through the year, we named as chairman the man believed to be best qualified — Hon. Prentice Cooper, three times Governor of Tennessee and President of the recent Constitutional Convention. The report of his committee has been printed for distribution at this Convention. The highlights include: recommended change of name to the less clumsy "Tennessee Bar Association," a reasonable and much needed increase in dues, provision for each Congressional District being represented on the Central Council, succession to the presidency of a vice-president elected when the Convention is entertained by his Grand Division and establishment of sections and committees to meet present needs, but allowing for flexibilty to meet future needs. All of the proposed amendments are believed to be wholesome and necessary.

Before passing to the last phase of our program, I want to emphasize that our refusal to accede to the many requests that we renew our efforts to convince the Supreme Court of the virtue of the American Bar Association standards of legal education and the unified or integrated bar was not from disinclination, but because time and tide did not seem propitious. An unsuccessful effort might have further postponed eventual fruition. However, skeleton committees on these projects are being maintained and they are doggedly going about making plans for a renewed effort when success seems more assured. These are projects

which should be relentlessly pursued to success. Personally, I am ashamed that Tennessee does not stand in the ranks of the twenty-five states with integrated bars and the nineteen states which have adopted full American Bar Association standards of legal education. Until these projects are accomplished this Bar cannot hope to rank among the leading bars in our country.

For the same reason we declined to again introduce in the General Assembly a bill giving full rule-making power to the Supreme Court — a project so heroically sponsored by Raymond Denney in 1951, but with such heart-breaking results. Even so, without such legislation, Tenn. Code Ann. § 16-513 (Code 1932, § 9928) gives to the Supreme Court the power to make rules for the circuit and criminal courts, but not to conflict with existing law. This section also provides for an advisory commission on rules, including two circuit judges, one criminal court judge, one lawyer appointed by the Supreme Court, the Attorney General, and the president of the Tennessee Bar Association, ex-officio. This last provision is believed to be the only statutory recognition of the organized Bar. If this commission could be activated, much could be accomplished in procedural reform, notably pre-trial practice, with summary judgment as a possibility. If judicial procedure is to be adequate to this modern age, an elemental step would be to "restore" rule-making power to the Supreme Court and efforts toward that end should never cease.

On the subject of judicial administration, I first discovered this year that we have provision for a Judicial Council (Tenn. Code Ann. § 16-901 through 910; Pub. Acts 1943, Ch. 130; Pub. Acts 1945, Ch. 89; Pub. Acts 1947, Ch. 47). Typical of how little is known of this Council is the response to my inquiry of fifteen judges — only one had heard of it. This act sets up machinery for compiling statistics on the courts of Tennessee and continually studying ways of improving them and making recommendations to that effect — roughly comparable to the Administrative Office of the United States Courts and uniform with similar acts of twenty other states. This Council is composed of one member each from the two appellate courts, one chancellor, one circuit and one criminal court judge, two law school faculty members, two laymen and two lawyers, the latter six appointed by the Governor. Much thought was given to attempting to amend this act by providing that the lower court members be elected by the Judicial Conference rather than being elected by the Supreme Court; that the lawyers be elected by the organized Bar; and that the appropriation of $3,000 be increased ten-fold. Here again, we were advised to be content with merely bringing the matter to the attention of the Bar, in the hope that succeeding adminis-

trations would study the act and make amendatory recommendations as a part of a long range drive for reforms in judicial administration.

The 80th General Assembly directed the Legislative Council Committee, by Senate Joint Resolution, to make a study of our courts and make recommendations for judicial, procedural and administrative reforms. It is possible that our Committee on Judicial Administration and Remedial Procedure and Law Reform may be able to induce such activation of the Rules Commission and Judicial Council that they, through the Judicial Conference (Tenn. Code Ann. § 17-401 through 407; Pub. Acts 1953, Ch. 129), composed of the judges of all courts of record, already vitally active, in cooperation with the Legislative Council Committee, can come up with recommendations for reforms that will be substantial. Historically, the Legislature will approve no judicial reform bills without judicial support. The last session was no exception. Historically, too, the Judiciary has been uncooperative and therein is our greatest roadblock. The Bar should strive to awaken in the Judiciary its responsibility in matters of judicial reform. It is not enough that the Judiciary merely does not oppose reform. It will only be when the Judiciary and the Bar work as a team that progress can be made. Perhaps the newly created Judicial Conference and the Bar's Committee on Judicial Administration and Remedial Procedure and Law Reform can work an exception at the next legislative session.

In concluding my report, I want to refer briefly to a talk made by me before the Judicial Conference, held concurrently with this Convention, in which I flatly challenged the wisdom of continuing our separate systems of courts of general jurisdiction, with concurrent, conflicting and confusing jurisdiction, consisting of a chancery system as opposed to a circuit system, with confused division and overlapping of unsystematic civil and criminal jurisdiction. I believe this dual system to be the greatest disease of our courts, procedure and administration. I believe that it is time we fell into step with 42 states which have the single system and with England which has had such a system since 1873. After discussing this question with many lawyers over the state I find a surprising unanimity of agreement.

I visualize a system combining law and equity, under simplified rules, giving equity predominance in event of conflict, with all-inclusive jurisdiction over all judicable matters, including probate, domestic relations and the like which would permit court to be in session continuously in most counties. The substantive law and the law of remedies would remain unchanged. Some will say the idea is visionary, but it is nonetheless inevitable and the quicker it is brought about, the quicker justice will be more efficiently expedited and the quicker the public

will cease to look with disfavor on our courts and our profession. So, concluding the first year of the last quarter century of our history, we add the last and *most important* graft, as we entrust the Bon Aqua tree to the nurturing care and skillful husbandry of Charlie Morgan and his successors.

I would be ungrateful indeed if I did not acknowledge my debt to President-Elect Morgan, Vice-Presidents Kelly and Wade, Secretary-Treasurer Barr, Executive Secretary Sandidge, the members of the Central Council and the three-hundred-odd active members of the various sections and committees, to whom are due the credit for any achievements of the year now passing. Conversely, any failure should be charged to me, for I was the captain of the ship.

Also, I want to acknowledge my everlasting gratitude to Jess Parks, Jr., President of my own Bar, to his many committeemen and the entire membership for relieving me of the many responsibilities attending the entertainment of this Convention, and in a manner and to an extent that evokes justifiable pride.

In closing, I brush aside a tear, or two, and offer thanks to Divine Providence that this Association has bestowed on me its highest honor, permitting me the privilege of giving a year of my life to the profession, to which I became dedicated as a six-year old. If, per chance, my "preaching" has inspired a better spirit of fellowship among ourselves, a renewed sense of duty to our profession, our courts and the public; if I have but stirred a ripple in the riptide of judicial reform, which is bound to come, then I am content.

CLARENCE KOLWYCK, *President*
Bar Association of Tennessee

FINANCIAL REPORT OF SECRETARY-TREASURER

January 1, 1956—December 31, 1956

RECEIPTS

Dues	$19,715.50
Group Insurance	3,272.09
Advertising—Tennessee Lawyer	595.50
Interest—Insurance Trust Fund	51.12
Royalty—Tennessee Chancery Appeals Cases	95.00
Bar Litigation Fund	1,136.00
Loan—Third National Bank	1,487.50
Miscellaneous	420.54
TOTAL RECEIPTS	$26,733.25
Balance from 1955	2,791.51
Total on hand	$29,564.76

DISBURSEMENTS

Office Expenses Including telephone, supplies, postage, rent, equipment, etc.		$ 5,783.28
Salaries (Two employees & Extra help)		11,820.00
F.I.C.A.		138.00
Contributions:		
American Bar Foundation	$100.00	
National Conference of Bar Secretaries	25.00	
National Conference of Bar Presidents	25.00	
		$ 150.00
Committee Expenses		1,146.86
Tennessee Law Review		4,000.00
Tennessee Traffic Court Program		78.09
Tennessee Lawyer		1,167.09
1956 Mid-Winter Meetings		360.79
Central Council Expenses		136.82
President's Expenses		1,000.00
Travel—Executive Secretary		900.00
Travel — Secretary-Treasurer		263.98
Court Costs—Unified Bar Case		201.50
Secretary-Treasurer's Bond		26.52
Bar Litigation Fund		503.63
1956 Annual Convention		212.70
Miscellaneous		608.71
		$28,506.97

RECAPITULATION

Total on Hand	$29,564.76
Disbursements	28,506.97
Balance in Bank—12-31-56	$ 1,057.79

The balance of $1,057.79 as reflected in the bank balance of December 31, 1956, actually represents a deficit in operating expenses. In the month of October ,1956, it was necessary to borrow the sum of Fifteen Hundred ($1,500.00) Dollars from the Third National Bank to make up this deficit and said sum was paid in January, 1957, after the incoming of dues for the year 1957.

It is my studied opinion and also my recommendation to this assemblage that the annual dues should be increased to Seven and 50/100 ($7.50) Dollars for those of us who have been practicing for five (5) years and under, and Fifteen ($15.00) Dollars for those of us who have been practicing for more than five (5) years. This increase, based on the present membership, would amount to between Eight Thousand ($8,000.00) Dollars and Ten Thousand ($10,000.00) Dollars yearly as an increase and said money could be used most beneficially for increased public relations and our growing concern against the unauthorized practice of law by banks, title companies and insurance adjusters. I unequivocally recommend this increase in dues for the benefit of each and every one of us within the Bar Association for the State of Tennessee.

Respectfully Submitted:
J. VICTOR BARR, JR.
Secretary-Treasurer

REPORT OF EXECUTIVE SECRETARY

In 1952, at its 72nd Annual Convention, the Bar Association of Tennessee finally decided to activate the office of Executive Secretary, which was created in 1881. We were practically the last State to have a paid executive for its Association. At that time, it was my privilege to be selected as the first occupant of this position in Tennessee. For nearly twenty (20) years Tom Smith had valiantly carried the load of Secretary-Treasurer and Executive Secretary in his own law office, and was allowed $100 per month for all expenses.

To my knowledge, Tennessee was 10 or 15 years behind in having a central office and a paid staff to manage its own affairs.

When the Association was organized, and held its first Convention in a resort hotel at Bon Aqua Springs, thirty miles west of Nashville, about 75 lawyers were members of the Association, and only fifteen (15) or twenty (20) attended the meeting. Today, here in the Castle in the Clouds, there will be approximately 700 lawyers, and their wives, in attendance, and the organized bar is composed of over 2500 lawyers and judges. Yesterday there were 70 who attended the meeting of the Judicial Conference held here in Chattanooga.

Most of the lawyers of Tennessee will acknowledge that they have been overly modest in promoting their own cause, as well as the cause of the administration of justice. (Witness the fact that during the last session of the Legislature so many of our members who sponsored our legislative program were subject to embarrassment on the floor of either the House or the Senate when they proposed a bill which was sponsored by the Bar Association of Tennessee.)

If we, the lawyers of Tennessee, expect to continue our role as leaders in the fight for the rights of our clients, in this world of organized industry, organized labor, organized medicine, organized ophthalmology, organized horse showmanship, organized beekeepers, organized elevator operators, organized state employees, organized federal employees, organized maritime unions, and organized teachers, we will have to unite. What better method of working together than through our State and American Bar Associations?

In 1952, we had 1600 paid members. Today we have 2033 paid members.

There are 700 practicing lawyers in the state who are not members of our Association. What are we, as members, doing to promote their participation in our profession?

This all boils down to the fact that we are trying to encourage full membership in the Bar Association of Tennessee, with ample funds for

services rendered. For instance, it takes nearly $12,000 a year to operate the executive offices in Nashville, exclusive of postage, printing, and the like. Our annual budget for the *Tennessee Law Review* has been $4,000 per year, and I am sure that with the cost today of printing, paper, and other items, which go into the *Law Review,* we will have to increase our budget for 1958 for this item alone.

Generally, we have issued the "Tennessee Lawyer" five or six times a year. This year, 1957, we have not neglected the publication but have used the money and time that would have gone into the "Tennessee Lawyer" to pay for the Legislative Bulletins which you receive weekly during the General Assembly, together with the summary at the end of the session. The Bar Association of Tennessee is indebted to the Tennessee Taxpayers Association, and to Mr. Harry Phillips for furnishing us the summary which we used in our bulletin each week. This, alone, has cost more than the $1,000 which the budget allowed for the "Tennessee Lawyer" for the year 1957.

The budget provided the Public Relations Committee with $825.00 to be spent on certain publications, during the year, and this money has already been spent. With it, we bought two sets of tape recordings to use on the radio, which have been used in several cities throughout the state. If any of you are interested in having your association use it, please write to the office in Nashville and we will see that it is scheduled for you.

I shall not report about all of the things that have been done by the Public Relations Committee, inasmuch as this will be in their report.

I should like to remind you of one vital service that is available to you as a member of the Association. That is the group insurance plan, which provides life insurance and hospital and surgical benefits. This plan went into effect in June of 1952, and to date, we have processed and paid claims totaling $173,498.00. $77,000 of this amount represents death benefits.

In April of this year, the new Life and Casualty Tower in Nashville was opened, and we were presented with an opportunity to have our office located there, with a more desirable arrangement than before, and with the cost only $6.00 more per month. So, we moved, and are located on the 20th floor. In addition to our regular office equipment such as desks, and typewriters, we have a mimeograph machine, addressograph machine, postage meter, and folding machine. We are now equipped to do a complete job in our own office. But, as you know, it takes money to fulfill our obligation to the legal profession.

We share the same floor in the building with the New York Life Insurance Company, and it has made available to us for small meetings

their conference room. If any small committees of the Association want to have a meeting in Nashville they should notify me ahead of time, and I can arrange with the Company to have that room available for committee meetings.

In conclusion, let me again say, as I say each year, how proud I am to be Executive Secretary of the Bar Association of Tennessee, and how much I enjoy working with all the lawyers and judges. This year, Clarence Kolwyck has been a tireless worker, and the things that he has done, and the things that he has started, will mean much to the Bar in years to come. In addition to all the work and travel and time he has devoted to the Bar Association, I can say without equivocation, or without fear of challenge, that he has used more stationery than any President we've ever had, and probably any we will ever have.

I also want to express my appreciation to Jess Parks and the Chattanooga Bar Association for the splendid work they have done in preparing for this Convention. I hope that all of you will enjoy yourself to the fullest, and will plan to come next year to Memphis, when Charlie Morgan and the entire Shelby County Bar will be our hosts.

Thank you very much.

REPORT OF COMMITTEE ON CONSTITUTION AND BY-LAWS

Your committee respectfully recommends for adoption the following amendments to the Constitution and By-Laws:

CONSTITUTION

ARTICLE I

Objects

That this article be amended by changing the name to:

"Tennessee Bar Association."

ARTICLE II

Membership

That the second, third, fourth and fifth paragraphs of this article be stricken in their entirety and the following substituted in lieu thereof:

"There shall be the following Conferences of the Association:

Judicial Conference, composed of all members of the Judicial Conference of Tennessee, as established by Chapter 129 of the Public Acts of 1953 of the General Assembly of Tennessee (TCA 17-401 through 407).

Women Bar Conference, composed of all women members.

Junior Bar Conference, composed of all members under 35 years of age, inclusive to January 1 following thirty-fifth birthday.

The Women Bar Conference and Junior Bar Conference shall have authority to make their own By-Laws for their own regulation, qualifi-

cation of members and dues, subject to the approval of the Central Council.

There shall be the following Sections of the Association representing specialties in the law implicit in the names of each section:

Section of Attorneys General
Section of Bar Presidents and Secretaries
Section of County Attorneys
Section of Insurance Law
Section of Labor Law
Section of Municipal Law
Section of Plaintiff Attorneys
Section of Real Property, Probate and Trust Law
Section of Taxation

In addition to the aforesaid Sections, the Central Council may establish such additional Sections as may be deemed necessary to carry out the objects of the Association. The Central Council may suspend or discontinue any Section if its functions may not be considered necessary in carrying out the objects of the Association, or may consolidate the functions of one or more Sections to better accomplish such objects.

The Sections shall have authority to make their own By-Laws for their own regulation, qualifications of members and dues, subject to approval of the Central Council, provided that membership shall be open to all members on a voluntary and unrestricted basis."

ARTICLE III

Election of Members

That this article be stricken in its entirety and the following substituted in lieu thereof:

"To become a member of this Association a lawyer's application must be accompanied by the equivalent of his dues for one year and he must be proposed by a member in good standing. Thereafter he shall be considered a provisional member until his application is approved by a majority vote of the Central Council."

ARTICLE IV

Officers

That this article be striken in its entirety and the following substituted in lieu thereof:

"The officers shall be:

President, President-Elect, three Vice-Presidents, one from each Grand Division of the State, Secretary-Treasurer and Executive Secretary. The Secretary-Treasurer and the Vice-Presidents shall be elected at each Annual Convention for a term of one year and to serve until their suc-

cessors are elected and qualified. The Vice-President elected from the Grand Division entitled to entertain the Annual Convention three years hence shall at the next Annual Convention succeed to the office of President-Elect and at the next Annual Convention to the office of President. Whenever it should become known at an Annual Convention that either the President-Elect or President is unable to serve the remainder of his term of succession or that a vacancy otherwise exists, such vacancy shall thereupon be filled from the membership in the Grand Division wherein the vacancy occurs. All such elections shall be by majority vote of members present and voting at the Annual Convention, and shall be by secret ballot, unless there is no contest for an office, in which event the election may be by voice vote. The Executive Secretary shall be elected annually by the Central Council at its first meeting following each Annual Convention to serve at the will of the Central Council. This amendment shall be effective at and after the Annual Convention following its adoption."

ARTICLE V

Central Council

That this article be stricken in its entirety and the following substituted in lieu thereof:

"The Central Council shall be the Board of Directors of the Association, consisting of the following: The President, the immediate Past President, the President-Elect, the three Vice-Presidents, the Secretary-Treasurer, the Presidents of the Judicial Conference, Women Bar Conference and Junior Bar Conference, and nine members to be elected, one from each Congressional District, to staggered terms as follows:

First, Fourth and Seventh Districts—one year.

Second, Fifth and Eighth Districts—two years.

Third, Sixth and Ninth Districts—three years and thereafter to terms of three years each, and those members who have served only one year of their two-year terms under the present Constitution shall complete their terms in lieu of election of new members from their Congressional Districts and upon completion thereof the unexpired term for such Districts, as hereby established, shall be filled upon expiration. All such elections shall be conducted as prescribed in Article IV. All members will hold office until their successors are elected and qualified. This amendment will be effective at and after the Annual Convention following its adoption.

The Central Council shall perform such duties as may be provided by the By-Laws except as herein otherwise stated.

The Central Council shall meet at least four (4) times per year at

a time and place designated by the President and in the manner prescribed by the By-Laws.

A majority of the members shall constitute a quorum of the Central Council."

ARTICLE VI

Local Council

That this article be stricken in its entirety and the numbers of subsequent articles adjusted accordingly.

ARTICLE VII

Adoption of Amendments of By-Laws

That this article be amended by adding the following:

"or by a majority vote of the members voting after twenty days notice by secret mail ballot, supervised, counted and duly certified by the Central Council."

ARTICLE IX

Meeting of the Association

That this article be amended by striking the first sentence and substituting the following in lieu thereof:

"The Association shall meet annually, but the three Grand Divisions of the State shall be entitled to entertain the Annual Convention in rotation, beginning with West Tennessee, then Middle Tennessee, followed by East Tennessee. The place shall be designated by the President in each instance, subject to approval of the Central Council. The members in good standing at such meetings shall constitute a quorum."

ARTICLE X

Alterations or Amendments to the Constitution

That this article be amended by adding the following at the end thereof:

"or by a vote of three-fourths of the members voting after twenty days notice by secret mail ballot, supervised, counted and duly certified by the Central Council."

ARTICLE XI

Duties of Local Council

That this article be striken in its entirety and the numbers of subsequent articles adjusted accordingly.

ARTICLE XII

Suspension of Members

That this article be striken in its entirety and the following substituted in lieu thereof:

"Any member may be disciplined, suspended, or expelled for cause by a two-thirds vote of the Central Council after thirty days notice, con-

sisting of a bill of complaint served by registered mail, return receipt requested, and after an appropriate hearing before the Central Council, if requested.

BY-LAWS

ARTICLE II

Secretary-Treasurer

That the third paragraph of this Article be amended by substituting the words and figures:

"Twenty-Five Thousand ($25,000.00) Dollars" for "Ten Thousand ($10,000.00) Dollars" and adding "effective January 1, 1958".

That the fourth paragraph of this Article be amended by changing the period at the end thereof to a comma and adding the following words:

"which shall conduct or cause to be conducted an audit thereof at least annually."

ARTICLE VI

Committees

That this article be amended by striking the article in its entirety and substituting the following in lieu thereof:

"The President shall appoint the following standing Committees and designate the Chairman, each to consist of such members as may be deemed necessary to accomplish the objects of the Association, to serve for the ensuing year and until their respective successors are appointed.

1. *Committee on Citizenship* — This Committee shall have jurisdiction of all questions in the field of citizenship, American, State and local, and of the American form of government with respect to public education and understanding of both the privileges and the responsibilities thereof.

2. *Committee on Committees* — This Committee shall cooperate with the President and Central Council in the study of standing committees, and recommend any changes in duties and the creation of such new committees as would add greater effectiveness to the work of the Association; and cooperate with the President, when requested, in selecting the personnel of committees.

3. *Committee on Constitution and By-Laws* — This Committee shall consider and recommend any changes or amendments in either the Constitution or By-Laws that may be considered necessary or advisable.

4. *Committee on Domestic Relations* — This Committee shall make a continuing study of all judicable phases of domestic relations, working in cooperation with other interested agencies, both public and private, and shall recommend to the Central Council such legislation or

remedial measures, as in its judgment, will be in the best interest of society.

5. *Committee on General Sessions Courts* — This Committee shall make a continuing study of the courts of inferior jurisdiction and recommend appropriate legislation for the creation of a uniform system of General Sessions Courts throughout the state.

6. *Committee on Inter-Professional Code* — 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 interprofessional relations.

7. *Committee on Judicial Administration and Remedial Procedure and Law Reform* — This Committee shall make a continuing study of all matters implicit in the name of the Committee, working in cooperation with the Judicial Conference and Judicial Council, and shall recommend such measures, whether by legislation or otherwise, as in its opinion will improve judicial administration, court procedure and the substantive law, to the end that justice may be more fairly, speedily and efficiently administered.

8. *Committee on Legal Aid and Referral Service* — This Committee shall actively encourage and assist in organizing and operating legal aid and referral service offices under the sponsorship of local bar associations, working where advisable with other interested agencies, both public and private.

9. *Committee on Legal Education and Admission to the Bar* — This Committee shall make a continuing study of the standards of legal education and rules for admission to the bar, working in close harmony with the Supreme Court and Board of Law Examiners, and make such recommendations, as in its judgment, will be most conducive to a high standard of professional competence and conduct.

10. *Committee on Legislation* — This Committee may initiate legislation and shall advise with the other committees and Central Council regarding any proposed legislation and shall be responsible for piloting through the General Assembly all bills which have been approved by a three-fourths vote at the last Annual Convention or in the interim by a three-fourths vote of the Central Council.

11. *Committee on Membership* — This Committee shall encourage desirable applicants for membership and shall formulate and recommend plans for maintaining and increasing the membership.

12. *Committee on Obituaries and Memorials* — This Committee shall prepare and submit at each annual meeting the names of all members who have died during the preceding year and the date of the death

of each of said members and may sponsor such memorial projects as may be approved by the Central Council.

13. *Committee on Professional Ethics and Grievances* — This Committee shall have jurisdiction over all matters pertaining to the professional conduct of all lawyers practicing in Tennessee and the reputation of members of this Association, subject to such rules, regulations and procedures as may be prescribed by the Central Council.

14. *Committee on Public Relations* — This Committee shall explore and use ways and means, commensurate with the ethics and dignity of the Bar, of establishing and maintaining mutual means for creating friendly and cooperatively helpful relations between the general public, lawyers and the Courts; this is to be accomplished via the press, the spoken word, radio, television, advertising and other legitimate and recognized means of communication.

15. *Committee on Publications* — This Committee shall have charge and supervision of all publications of the Association and such other duties as the President and Central Council may designate.

16. *Committee on Resolutions* — This Committee shall consider and approve all resolutions before they may be considered by the annual convention, which must be presented to said Committee not later than noon on the day preceding adjournment of the convention.

17. *Committee on Unauthorized Practice of the Law* — This Committee shall keep itself, and the Association, informed with respect to the unauthorized practice of law by laymen or lay agencies and the participation of attorneys therein, and concerning methods for the prevention thereof. The Committee shall seek the elimination of such unauthorized practice and participation by such action and methods as may be appropriate for that person, or lay agency including cooperation with, and assistance and advice to local bar associations and other organizations.

18. *Committee on Unified Bar* — This Committee shall make a study of methods and means of unifying the bar, and publicity in connection therewith, to the ultimate end that the Bar of Tennessee may be unified.

19. *Committee on Uniform State Laws* — This Committee shall cooperate with the National Conference of Commissioners on Uniform State Laws and with the American Bar Association, in recommending for adoption any desirable uniform laws, and shall cooperate with comparable committees from neighboring states in regard to reciprocity legislation.

20. *Committee on Ways and Means and Budget* — This Committee shall keep itself informed regarding the finances of the Association, shall recommend an annual budget to the Central Council and shall recommend both to the Central Council and to the Annual Convention such

changes in the amount of annual dues as it may deem necessary to finance the activities of the Association.

In addition to the aforesaid standing committees, the President, with the consent and approval of the Central Council, may establish such additional standing or special committees as may be deemed necessary to carry out the objects of the Association. The Central Council may suspend or discontinue any standing or special committee whose functions may not be considered necessary in carrying out the objects of the Association or may consolidate the functions of one, or more committees to better accomplish such objects."

ARTICLE VIII

Supplying Vacancies

That this article be amended by striking the article in its entirety and substituting the following in lieu thereof:

"All vacancies on Committees shall be filled by the President. Interim vacancies in office or membership in the Central Council occurring between Annual Conventions shall be filled by a majority vote of the Central Council; provided that all such vacancies shall be filled from among the members in the Grand Division or Congressional District, as the case may be, from which their predecessors were elected.

ARTICLE IX

Annual Dues

That this article be amended by striking the article in its entirety and substituting the following in lieu thereof:

"The annual dues of members of the Association shall be as follows:

First five years of practice ----------$ 7.50
Thereafter ----------$15.00
Student bar association members may be treated as provisional members and placed on the mailing list of the Association.

All annual dues shall be payable on the first day of each calendar year and shall be delinquent if not paid by the first day of March thereafter. If delinquency shall continue for one year, the member's name shall be dropped from the membership roles upon a majority vote of the Central Council. During delinquency the member shall not be entitled to any of the privileges of membership."

ARTICLE X

Amendment of By-Laws

That this article be amended by adding the following at the end thereof:

"Or by a majority vote of the members voting after twenty days no-

tice by secret mail ballot, supervised, counted, and duly certified by the Central Council."

ARTICLE XV

Honorary Members

That this article be amended by striking the article in its entirety and substituting the following in lieu thereof:

"All members of the Judicial Conference and all resident Judges of the Federal Courts shall be honorary members of this Association and are relieved from the payment of dues."

Respectfully Submitted,

PRENTICE COOPER, *Chairman*

DAVID BALLON
JOHN S. CARRIGER
DENNIS H. ERWIN
PERRY M. HARBERT
FOSTER P. LOCKE
WILRUR W. PIPER
MISS REBECCA THOMAS
JOE H. WALKER, JR.

REPORT OF SPECIAL COMMITTEE ON GENERAL SESSIONS COURTS

Your Special Committee on General Sessions Courts, respectfully report:

1. This Committee was appointed by President Kolwyck about the middle of November, 1956, to study the feasibility of the establishment of a uniform system of General Sessions Courts in the State of Tennessee, it being felt that the time had come to take some steps toward abolishing the system of Justice of the Peace Courts prevalent throughout the State.

2. This Committee met in Nashville on two occasions. On November 27, 1956, the Committee met, at which time there were seven of the nine members of the Committee present. At this meeting the general plan of a bill to be submitted to the 1957 General Assembly was outlined and it was recommended that the Honorable Harry Phillips of Nashville be requested to draft whatever bill the Committee proposed for submission to the legislature. At this meeting various aspects of the proposed bill were discussed and certain research assignments were made to certain members of the Committee, with the request that they make recommendations covering these points at the next meeting of the Committee, which was held on December 13, 1956. At this second meeting, there were only three members present but Mr. Harry Phillips was present also. The members who were unable to attend had made special reports by mail to your Chairman and their reports were incorporated into the proposed bill.

3. Mr. Phillips completed the drafting of the bill during the weekend of December 15, 1956, and shortly thereafter it was presented to the Central Council, which approved the bill and recommended that the bill be submitted to the 1957 General Assembly. We are attaching hereto as an exhibit to this report a copy of this bill.

4. The Committee is sorry to report that this bill, which was considered an excellent bill by everyone who read it, was considered politically inexpedient insofar as the members of the legislature were concerned. Your Chairman, the Executive Secretary of the Bar Association, John Sandidge, and the Secretary-Treasurer of the Bar Association, J. Victor Barr, made repeated trips to the legislative halls in the General Assembly but were never able to interest any one legislator in the bill to the extent that he was willing to introduce same and back same in the various committees and on the floor of either the House or the Senate.

5. The bill, itself, was favorably received by all the lawyers who read it, with a few exceptions. It was favorably received by the Press throughout the State of Tennessee, as can be shown by the flood of clippings from the various newspapers throughout the State, these clippings being in the possession of the Executive Secretary.

6. As a last resort, your Chairman, the Executive Secretary and the Secretary-Treasurer of the Bar Association, J. Victor Barr, decided that we would attempt to get the bill referred to the Legislative Council for study during the next two years, the Legislative Council having proposed a comprehensive study of the judicial system of this State during the next biennium. However, we are sorry to report that the attitude of the legislature was such that even this attempt to get the bill considered was defeated.

7. In summary, your Committee would like to state that it feels that the proposed bill was a good bill and one which should have received better treatment at the hands of the legislature. However, the Committee understands the factors which led to the failure of the bill on Capitol Hill. Your Committee would recommend that an intensive educational program on the part of the Bar Association be conducted to advise the people of the State of Tennessee of the advantages of General Sessions Courts, it being the thought of the Committee that this educational process will be necessary before any other statewide act on General Sessions Courts will have any chance in the legislature of this State.

Respectfully submitted,

T. T. McCarley, *Chairman*

John M. Kelly	Millard E. Queener
J. Paul Coleman	Charles L. Hancock
Horace L. Smith, Jr.	Allen J. Strawbridge
Clarence W. Phillips	Myron A. Halle, Jr.

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

Your committee received from its predecessor committee a series of bills and proposals for legislation which were studied by your committee and reduced to "tentative bill" form. The previous committees had made surveys of representative counsel, judges, district attorneys, and city attorneys throughout the state, and as a result had accumulated a substantial number of proposals for legislative change. These proposals were assigned to the several members of the committee, tentative bills drawn, mimeographed copies forwarded to each member of the committee who in turn studied them and voiced their approval or disapproval. Thirty-five bills were approved by a majority of your committee. On August 10, 1956, the committee met in Nashville and considered each of the bills before definitely recommending them to the Central Council. Most of the bills were approved by unanimous vote, although a number were approved by majority vote.

On August 11, 1956, your committee presented the thirty-five bills to the Central Council which, in turn, ratified or in instances suggested a modification, but approved for recommendation to the legislature thirty-three of them.

Your committee prepared the bills for submission to the Legislature, prepared a synopsis or syllabus of each bill to be attached as a front page for ready reference of the floor leader or member of the House or Senate who would present same.

Of the thirty-three bills recommended thirty-one of them came before the Legislature. The status of the thirty-one bills is as follows: thirteen bills were approved by both houses, by the Governor, and enacted into law. They are:

1. S. B. 28-Ch. 46 Scandalous matter in divorce bill—Cash
2. H. B. 24-Ch. 68 Suits on sworn account—Moore of Hamilton
3. H. B. 63-Ch. 21 Attorneys' fees in alimony cases—Barry & Estes
4. H. B. 155-Ch. 183 Attorneys-General Retirement—O'Brien
5. S. B. 44-Ch. 118 Statute of Limitation on innocent purchases—Howell
6. S. B. 192-Ch. 112 Gifts to Minors Act—Atkins
7. H. B. 44-Ch. 100 Service of process by publication in annulment—Henry
8. H. B. 81-Ch. 102 Guardianship under $500.00—Barry
9. H. B. 34-Ch. 153 Sworn answer of defendant in Chancery—Jones
10. H. B. 38-Ch. 154 Uniform Business Records Act—Henry

11. H. B. 61-Ch. 61 Service of process on Secretary of State—Barry & Boswell
12. H. B. 307-Ch. 395 Sale of Decedent's land in another county.
13. H. B. 169-Ch. 121 Fees in Workmen's Compensation matters.

For reasons unknown to your committee the following three bills were not introduced.

1. Third Party Litigants Act
2. Small Offense Act
3. Motion for New Trial Optional.

Five bills died in committee in the Senate and thereby failed of passage. They are:

1. S. B. 64 Failure of railroad to observe statutory precautions — Atkins
2. S. B. 298 Discovery Depositions — Mitchell
3. S. B. 299 Regulate Taking Depositions — Mitchell
4. S. B. 392 Prescribe statutory precautions to be observed at Railroad crossings — Atkins
5. S. J. R. 61 Legislative Council to study statewide General Sessions Court — Cash

And the following ten bills died in the House in committee:

1. H. B. 23 Department of Welfare to investigate in custody cases—Moore of Hamilton
2. H. B. 25 Precautionary railroad signs — Moore of Hamilton
3. H. B. 35 Verdict of ten (10) Jurors — Crutchfield
4. H. B. 37 Attorneys' fees in condemnation cases — Henry
5. H. B. 42 Attorneys to serve subpoenas — Johnson
6. H. B. 45 Court reporters in felony cases — King
7. H. B. 82 Estates under $500.00 — Barry
8. H. B. 92 Eliminate counts in declaration — O'Brien & Morris
9. H. B. 104 — Pre-Trial Conference—Flatt
10. H. B. 22 Disclosure of beneficiary of trust in Warranty Deed—Moore of Hamilton.

Out of the thirty-five bills drawn and approved by your committee, thirty-three of which were ratified by the Central Council, thirteen were enacted into law. The remainder have fallen by the wayside or await the action of a future committee. A majority of your committee feel that each of the bills that were delayed in their enactment or failed passage have merit and should be pursued by successor committees.

Your committee has delivered to the secretary of the Bar Association its files embracing all of the drafts of bills enacted, bills proposed, and suggestions for legislative change.

We respectfully submit that much awaits to be done to bring the practice, procedure and judicial administration in Tennessee to optimum

efficiency. The organized Bar is in a position to render invaluable service to the bench, the bar, and the public. The responsibility rests squarely upon the members of the bar and cannot, must not, and shall not be disregarded. Your committee will refer its files to its successor committee with the observation that the potential for service is vast. The procedure in our Courts must be simplified, the element of chance eliminated from the Temple of Justice, and the determination and adjudication of rights put within the reach of the laity. Justice must be administered so that the people will not dread to resort to the Courts as a means to settle their disputes, lest the expense be out of proportion to the relief sought.

Our aims must be simplification of procedure, removal of the elements of surprise and chance, to make allowance for discovery, to provide a free and open investigation as to the truth of the matters involved, and to reduce the costs of litigation, so that justice will be the better subserved.

Respectfully submitted,

HUGH STANTON, *Chairman*

JOE W. WORLEY
WARREN W. KENNERLY
JAMES F. CORN
SAM B. GILREATH
JOHN W. WADE
ALLEN M. O'BRIEN
ELMER L. STEWART
BARRETT ASHLEY

REPORT OF SPECIAL COMMITTEE ON JUVENILE, FAMILY AND DOMESTIC MATTERS

This Committee made a comprehensive study and report in 1956. This report was approved by the Central Council and was submitted to the Legislative Council of the State of Tennessee, which requested it by (1955) Senate Resolution No. 32. See report, 24 *Tennessee Law Review,* 737 (1956).

Developments in the year since the last report include:

I

Passage of Chapter No. 44 of the Public Acts of 1957, entitled: "An Act to expedite justice in Davidson County by establishing a Fourth Court of Davidson County, and regulating the practice thereof and of the Circuit Courts of said County." Section 2 of said bill provides:

"*Be it further enacted,* That the said Fourth Circuit Court of Davidson County shall be held in the City of Nashville, and shall have concurrent jurisdiction with the Circuit Court of Davidson County, the Second Circuit Court of Davidson County, and the Third Circuit Court of Davidson County on all matters involving divorces, annulments, separate support and maintenance, custody of children, support of children, care of children, adoptions, actions brought under the Uniform Recipro-

cal Enforcement of Support Act, certiorari and/or appeals from the Juvenile Court, and any and all other types and kinds of actions, litigation and proceedings involving domestic matters and the relationship of husband and wife, and parent and child."

Section 3 of said bill provides:

"Be it further enacted, That the Judge of the Fourth Circuit Court of Davidson County be, and is hereby authorized and empowered to appoint a special Master in any proceeding held in said Court to take proof and otherwise investigate any issue of fact involving the custody, support, and welfare of children raised in such proceedings and to report his findings on such issues to the Court, which said report shall have the Same effect as the report of a Master in Chancery proceedings. The Court is further authorized and empowered to tax the fee of the special Master as a part of the costs in such a case."

The Honorable Benson Trimble was appointed Judge of this Court which began functioning on April 15.

II

(a) Tennessee Code Annotated §37-235 which provided for appeal from judgment of Juvenile Courts was repealed by Chapter No. 317 of the Public Acts of 1957.

(b) Chapter No. 315, Public Acts of 1957 amended Tennessee Code Annotated §37-273 to make the Juvenile Court a court of record and to change the method of appeal to the Circuit Court as follows:

Chapter No. 315 entitled, "An Act to amend § 37-273, Tennessee Code Annotated, said Section being part of the Juvenile Court Law."

Section 1. *"Be it enacted by the General Assembly* of the State of Tennessee, That Section 37-273, Tennessee Code Annotated, be, and the same is, hereby amended by striking said Section in its entirety and substituting in lieu thereof the following:"

"The Juvenile Court shall be a court of record. When a Juvenile Court shall make any disposition of a child, either party dissatisfied with the judgment or order may appeal to the Circuit Court which shall hear the testimony of witnesses and try the case de novo. Said appeal shall be perfected within five (5) days thereafter, excluding Sundays. In its order the Circuit Court shall remand the case to the Juvenile Court for enforcement of the judgment entered by the Circuit Court."

III

The Legislature by Chapter No. 278, Public Acts of 1957 created a division of juvenile probation within the Department of Correction. The Caption of the Act provides as follows:

"An Act creating the division of Juvenile Probation within the De-

partment of Correction, providing qualification and method of selection of personnel for said division, defining juvenile probation, authorizing courts having juvenile jurisdiction and superintendents of state institutions for delinquent children to place persons within the jurisdiction of such courts or institutions of probation with field probation officers of said division, authorizing such courts and superintendents to place restrictions and dicipline upon such persons, authorizing termination of probation by court or by Commissioner of Correction, authorizing appointment of a committee to establish specifications for personnel of said division, providing for examination of applicants and certification of qualified persons for employment to Commissioner of Correction by the Department of personnel, making applicable existing Civil Service Regulations to certain positions in said Division, authorizing employment of personnel in said division, prescribing the method of compensation for employees and reimbursement for necessary travel expenses, providing juvenile probation service through said division to institutions for delinquent children and courts having juvenile jurisdiction and requiring the division to keep records and furnish reports."

Each of the above mentioned acts is considered an important step in the improvement of the administration of justice in connection with juvenile, family and domestic matters.

RECOMMENDATION

It is recommended that the Committee be continued and that it report to the Association from time to time with suggestions as to the improvement of the administration of justice in these matters.

Respectfully submitted,

LON P. MACFARLAND, *Chairman*	JOHN L. LENIHAN
CLAUDE CALLICOTT	MILDRED LUNN
TATE E. CARTY	LAURA BRASHER
JAMES L. GARTHRIGHT, JR.	SHIRLEY BAUMGARDNER

REPORT OF COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR

Your Committee is pleased to report that it engaged in the following activities:

1. Arrangements were made for the presentation of newly admitted lawyers to the Supreme Court and the Court of Appeals in each grand division of the State with appropriate ceremonies on each occasion.

2. Rules were prepared and announced for the first annual essay contest on legal ethics sponsored by this Association. The subject chosen this year was "The Duties of the Lawyer to the Courts". The contest was open to all students regularly enrolled in any law school in Tennessee.

The prize, a complete set of Tennessee Code Annotated, was awarded to Mr. Charles O. Brizius of Lebanon, Tennessee, who is a student at Cumberland University, School of Law.

3. The Committee was divided into three sub-committees and consideration was given by these sub-committees to the following subjects:

(a) Whether a system of temporary licenses for newly admitted lawyers should be instituted;

(b) Whether changes should be made in the requirements for eligibility to take the Tennessee Bar examinations;

(c) Whether changes should be made in the Bar examinations themselves, particularly with respect to the list of subjects required.

(d) Whether some requirements should be made with respect to practical training either for applicants for admission to the Bar or for newly admitted lawyers.

The Committee does not at this time make any recommendations in this regard, however, since the Supreme Court has under consideration a proposal to appoint a special committee to investigate and report directly to it with respect to these and other related problems.

Respectfully submitted,

VAL SANFORD, *Chairman*

WILLIAM T. GAMBLE	TOM W. MOORE
FRANK B. CREEKMORE	W. T. DIAMOND, JR.
WILL ALLEN WILKERSON	JOHN B. AVERY, JR.
ROBERT L. FORRESTER	JESSE E. JOHNSON, JR.

REPORT OF COMMITTEE ON OBITUARIES & MEMORIALS

The undersigned Committee begs to report that it was assigned by the President the function of raising funds for a monument to be erected in honor of Judge John Haywood over his grave at his old home place, "Tusculum," Davidson County, Tennessee. This is a joint project of the Tennessee Bar Association, Tennessee Historical Commission and Tennessee Historical Society—the latter two bodies having provided the land and easement and a concrete slab on which the monument will rest. Our President prepared a brochure which was sent all Tennessee lawyers, giving a sketch of Judge Haywood's life, together with copies of letters endorsing the project written by Chief Justice A. B. Neil of the Supreme Court, Presiding Judge Luke M. McAmis of the Court of Appeals, and Chancellor Glenn W. Woodlee, President of the Judicial Conference.

Our Association agreed to pay for the monument at an estimated cost of $7,500. Our President, however, obtained a donation of $500 from Haywood County and another contribution of $75 from an outside

source. As of the date of this report, June 5, 1957, your Committee has received donations from Tennessee lawyers aggregating $2,865. Some of these donations were from law firms, but estimating the number of individual participants in these firm donations, the contributions came from approximately 115 lawyers and averaged about $25 per person. Of course, 115 lawyers represent only a small percentage of the total number of lawyers who will desire to participate in this project, and the Committee hopes that the remainder of the Association's quota will be raised before the adjournment of the annual meeting.

Checks are made payable to the Tennessee Historical Society, which is an exempt organization under federal income tax law.

Respectfully submitted,
WILLIAM WALLER, *Chm.*

DECEASED MEMBERS JUNE 1956 TO JUNE 1, 1957

Name and Address	*Date of Birth*	*Date Adm. To Prac.*	*Date of Death*
W. CLYDE BUHL, Knoxville	1904	1926	5/24/57
JAMES H. CAMPBELL, Franklin	1904	1928	5/27/57
E. E. CRESWELL, Sevierville	1881	1907	12/9/56
GEORGE W. DAGLEY, Wartburg	1892	1931	11/28/56
ELMER D. DAVIES, Nashville (U. S. District Judge)	1899	1921	1/7/57
FLOYD L. DIXON, Chattanooga	1882	1914	3/21/57
W. L. DONALDSON, Knoxville	1880	1903	11/24/56
A. G. EWING, Nashville	1868	1891	10/29/56
ROBERT Y. FARIS, Chattanooga	1894	1920	6/18/56
NORMAN FARRELL, Nashville	1875	1897	3/20/57
BYRON MILLS FOGO, Chattanooga	1892	1917	2/8/57
HORACE FRIERSON, Columbia	1881	1902	8/29/56
E. STUART GILL, Chattanooga	1885	1910	5/2/57
BENJAMIN S. GORE, Bristol	1877	1908	11/20/56
FINIS E. HARRIS, Cookeville	1899	1925	8/28/56
DOUGLAS N. HESTER, Gallatin	1904	1930	3/7/57
H. H. HONNOLL, Memphis	1883	1908	8/29/56
A. D. HUGHES, Johnson City	1874	1900	1/29/57
S. H. JUSTICE, Wartburg	1875	1918	4/29/57
RUFUS B. LACEY, Memphis	1881	1906	2/27/57
HAMILTON E. LITTLE, Memphis (Chancellor, Part I, Chancery Court)	1899	1924	8/31/56
GARLAND S. MOORE, Nashville	1873	1906	4/27/57
MAX MEYER NEMETZ, Memphis	1910	1931	6/5/56
JOHN ED O'DELL, JR., Nashville	1906	1927	12/21/56
HARRY T. POORE, Knoxville	1889	1916	11/2/56
FRED S. POWELL, Nashville	1904	1939	5/14/57
R. E. RICE, Dyersburg	1883	1906	12/21/56
E. W. ROSS, SR., Savannah	1872	1892	12/16/56
S. L. SMITH, Nashville	1875	1902	9/9/56
HORACE B. STOUT, Clarksville	1887	1908	5/25/56
SAM TAUBENBLATT, Memphis	1896	1917	5/22/56
CLINT B. TIPTON, Memphis	1882	1907	5/14/57
R. K. WOODY, Columbia	1907	1930	4/26/57
J. DAVIS WOOTEN, Tullahoma	1901	1928	5/12/57

NON-MEMBERS

ERNEST H. BOYD, Cookeville	12/56
R. H. DRISKILL, Union City	1/57
OSCAR DYER, SR., Fountain City	3/57
SHELTON EDWARDS, Murfreesboro	12/56
MARTIN A. FLEMING, Chattanooga	3/57
MISS MARION GRIFFIN, Memphis	2/57
BEN W. HOOPER, Newport	4/57
DUDLEY J. MILLER, Roan Mountain	3/57
SAMUEL E. N. MOORE, Knoxville	12/56
W. B. PENDLETON, Nashville	5/57
JOHN C. PRINCE, Benton	11/56
E. B. RAYBURN, SR., Pulaski	12/56
HOMER H. SMITH, Blountville	2/57
JAMES M. SMITH, Parsons	1/57
D. FRED WORTH, Fulton	3/57
T. ASBURY WRIGHT, Knoxville	5/57
W. CARL WYATT, Newbern	3/57

REPORT OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

Almost contemporaneously with the appointment of the Committee, the Supreme Court of Tennessee revoked its Rule 40, pursuant to the provisions of which prior committees had been able to proceed state-wide since its inception.

As the result of that revocation, the Central Council, at its meeting held on the 18th of October, 1956, adopted Rules of the Bar Association of Tennessee governing procedure on grievances for violation of professional ethics. In general, these rules had the effect of placing the primary responsibility for the administration of grievance procedures back upon the local associations except in those cases where the individual concerned was practicing in a community where no local association existed. A copy of these rules is attached hereto as Exhibit A to this report, for the information of the entire bar.

During its year of service, this Committee has not been called upon to function at all as a whole. It is conceivable that the actions of the Supreme Court and of the Central Council of the Association in adopting the rules of procedure that it did, are responsible for this fact. Perhaps it would be wise to develop further experience with this procedure before recommending changes.

It is believed ultimately that some form of uniform statewide practice with regard to violations of professional ethics will have to be established. At present it would appear that legislation is going to be required so long as the court continues in the position of confining its diciplinary action to the framework of the statute governing the conduct of lawyers. The development of this problem would appear to be beyond the term of office of this Committee, but it is passed on to succeeding

committees for further study, in the hope that ultimately some more effective practice upon the subject can be developed.

H. H. McCAMPBELL, JR., Chairman

CONWAY MAUPIN	DAVE A. ALEXANDER
JOE C. WASHINGTON	W. H. LASSITER
T. ARTHUR JENKINS	TOM ELAM
DICK L. LANSDEN	CHARLES A. ROND

EXHIBIT A

RULES OF THE BAR ASSOCIATION OF TENNESSEE GOVERNING PROCEDURE ON GRIEVANCES FOR VIOLATIONS OF PROFESSIONAL ETHICS

WHEREAS, regulation of ethics and surveillance of grievances is perhaps the highest duty of the organized bar and is a prime responsibility of the Central Council of the Bar Association of Tennessee: and

WHEREAS, the duty is twofold: (a) to protect the ethical members of the legal profession from unjust charges of laymen or other lawyers, and (b) to protect the public from unethical practices of any lawyer licensed to practice in this state; and

WHEREAS, the act of any lawyer in unjustly or deliberately making false statements about or charges against a member of this Association, or otherwise reflecting on his professional standing, shall be deemed unethical conduct and considered as a grievance; and

WHEREAS, because of their great importance, matters of ethics and grievance should be the responsibility of all classes of members of the Association according to their age, experience and judgment.

NOW, THEREFORE, the Central Council adopts the following plan and procedure for the orderly process of the Committee on Professional Ethics and Grievances in handling matters relating to complaints made against those licensed to practice law in Tennessee:

1. The Committee shall be composed of lawyers who are at least 36 years of age, nine in number, one from each Congressional District. This Committee shall be assisted by an investigative committee of like number and residence appointed from the Junior Bar Conference.

2. Before any matter of ethics or grievance may be entertained it must be presented to the President or Executive Secretary in written form, containing a statement that the complainant will appear in support of the same and, except as to complaints from courts of record, must be duly acknowledged under oath.

3. If the complaint arises in a county wherein an organized local bar is in existence, the Executive Secretary will forthwith refer it to the

President of that association for action, but the state association retains the right to prosecute such complaint as in all other cases.

4. All other complaints, if in the judgment of the President or Secretary, they merit investigation, shall be referred by the Executive Secretary to the three members of the Junior Bar Conference's Investigative Committee residing in the Grand Division of the State wherein the complaint originated, who shall fully investigate the complaint and within twenty days file their report with the Executive Secretary, typed in triplicate on legal size paper.

5. If, in the opinion of the President or the Secretary, the investigation indicates probable unethical conduct, the report will be referred by the Executive Secretary to the three members of the Committee on Professional Ethics and Grievances appointed from the Grand Division of origin of the complaint, who will promptly meet, conduct a hearing, if indicated, and report their findings and recommendations within twenty days to the Executive Secretary, typed in triplicate on legal size paper, unless additional investigation is requested, in which event ten days will be allowed for such additional investigation as provided in paragraph (4) above and ten days thereafter for a report of the findings and recommendations.

6. If two members of the subcommittee should report, or the President, or the Secretary, should be of the opinion, that the conduct of the lawyer complained against is of such grave nature and importance as to merit consideration by the whole committee, the Executive Secretary shall promptly request the Chairman to call a meeting of the Committee at Nashville within ten days, and the committee will review the record de novo and file its findings and recommendations with the Executive Secretary within five days, typed in triplicate on legal size paper.

7. The report of the subcommittee or the full committee, as the case may be, shall be presented to the next meeting of the Central Council, which, by majority vote, shall take appropriate disciplinary action against the offending lawyer, subject to the rules of the Supreme Court.

8. If legal proceedings are decided upon, the President, with the consent and approval of the Central Council, shall designate trial counsel composed of at least two members of the Association from a Grand Division of the State other than that wherein the proceedings are to be filed, who, under the supervision of the Committee on Professional Ethics and Grievances, shall within thirty days prepare and file a bill of complaint, a copy of which, as well as all subsequent pleadings, shall be filed with the Executive Secretary.

9. At the trial of all such cases the Central Council shall be represented by the President, the President-Elect, or one of the two Vice-

Presidents, and the Committee on Professional Ethics and Grievances. These representatives will cooperate with trial counsel and will otherwise take such part in the proceedings as to them may seem proper.

10. If for any reason the authority of the Grievance Committee, the Investigative Committee, or trial counsel should be questioned, or if they should decline to serve, the President shall apply to the Chief Justice of the Supreme Court for an order authorizing or directing them to serve, as the case may be, or the appointment of other investigators or trial counsel.

11. From and after a recommendation for disciplinary action by the Committee on Professional Ethics and Grievances, or the subcommittee, as the case may be, and concurred in by the Central Council, it shall be the the duty of the President to keep the Chief Justice of the Supreme Court fully informed, in accordance with the Court's rules, as to all matters pertaining to the complaint, and if any portion of the foregoing announced principles or procedure should be in conflict with the rules of that Court, such rules of the Court shall control.

REPORT OF COMMITTEE ON PUBLICATIONS

The Committee on Publications respectfully reports that on the second Wednesday in October, 1956, the Chairman of this Committee attended the annual meeting of the Board of Directors of the Tennessee Law Review Association, Inc. At this meeting the finances of the Law Review Association and its contract with the Bar Association of Tennessee were discussed at length and in great detail.

On October 17, 1956, your Committee on Publications met at the Andrew Jackson Hotel in Nashville, Tennessee. Because of the distances involved, the members of this Committee being scattered from Memphis to Johnson City, it was impossible for a number of the members to attend and consequently the meeting was a small one. The same difficulty was experienced insofar as attendance at mid-winter meetings was concerned. The members of your Committee, however, have attempted to give serious consideration to the matters with which this Committee deals, the major matter being the contract of this Association with the *Tennessee Law Review*.

Under the contract which has been in effect, each member of the Bar Association receives four copies of the *Tennessee Law Review* at a cost of fifty cents each; with the provision, however, that the maximum cost to the Bar Association for the four copies has been $4,000.00. Printing costs have continued to rise, apparently even out of proportion to the general rise in prices, and the Law Review Association has suffered a loss because of this limitation.

After thorough consideration, your Committee on Publications feels that this arbitrary limit of a $4,000.00 maximum should no longer be imposed. It does not seem fair or equitable to impose this arbitrary ceiling regardless of the number of persons to whom the *Law Review* is supplied. Your Committee, therefore, recommends that this limitation be deleted from the contract.

The Law Review Association has offered to continue its services as in the past and to mail to each member of the Bar Association four copies of the *Tennessee Law Review* at a cost of fifty cents per copy per member. Your Committee recommends that this offer be accepted and that the Law Review Association be compensated by payment to it of fifty cents for each copy of the *Tennessee Law Review* mailed to the members of this Association.

Your Committee on Publications also wishes to compliment the Executive Secretary for his work on the publication, *The Tennessee Lawyer.* This publication has been well received by the members of the Association and your Committee recommends that it be continued.

Respectfully submitted,

ANDREW JOHNSON, *Chairman*
CHARLES T. HERNDON, III
WILLIAM M. ABLES, JR.
ROBERT F. TURNER
JETER S. RAY
THOMAS E. FOX
EDWIN C. TOWNSEND
CARUTHERS EWING

REPORT OF THE PUBLIC RELATIONS COMMITTEE

The following report of the Public Relations Committee is submitted for approval of the Bar Association:

I

The Committee on Public Relations, through authorization of the Tennessee Bar Association, established an award of a plaque to the newspaper giving the best publicity to Bar Association activities.

II

The Association also authorized the Committee on Public Relations to offer an award of $250.00 to the newspaper reporter who reports the best story or news item on Bar Association activities and the administration of justice.

III

There is also an award to the law student, in Tennessee, who writes the best essay on the Canons of Ethics and the award in this instance would be a set of the Tennessee Code or $100.00 in cash.

IV

The Committee on Public Relations secured three radio tape record-

ings for use in any Community through the medium of radio broadcasts. The Committee already had in its possession at the beginning of the year, two tape recordings and a new one was secured and reservations for the use of these recordings have been handled through John Sandidge, Executive Secretary of the Bar Association.

V

Every member of the Bar Association of Tennessee has received the pamphlet "Confidentially" in the mail and this was secured and published by the Committee on Public Relations with the help and cooperation of the Executive Secretary.

VI

The Committee on Public Relations secured a series of articles on different legal topics which it is believed will be of interest to the public. These articles have been furnished to every local Bar Association for publication in the local newspaper in that section of Tennessee. The local bar was to contact the newspaper and arrange for the articles to be reprinted on a schedule which would appear best for the particular locality and the newspaper concerned. These articles were furnished through Mr. John Sandidge's office.

VII

(a) The Committee on Public Relations has been able to secure the printing of several pamphlets which were made available for distribution by the local bar associations. In this connection, it was suggested that the local Bar in any city or town secure containers in which these pamphlets could be put in banks, title companies, the Court House and any other place where it was felt that the public would be inclined to take one of these pamphlets and read its contents.

The distribution of these pamphlets was necessarily left up to the local bar associations. These pamphlets, which have already been printed and are available for distribution, are as follows:

"Manual for Jurors in Tennessee"

"Handbook for Notaries Public"

"Have You Made A Will?"

(b) The Committee on Public Relations is also in the process of having printed the following pamphlets which will be ready for distribution in the near future:

"Do I Need A Will?"

"Crash! What To Do In Case of An Automobile Accident"

"Don't Be A Dupe When You Buy A House"

In conclusion, the Committee on Public Relations would like to express its appreciation for the very fine cooperation and help extended to it by your President and Secretary. We feel that in a small way a start

has been made towards better Public Relations. It is the definite feeling of the Committee that the Bar Association should continue, enlarge and emphasize its Public Relations work through any medium possible. However, the Committee, in spite of the tremendous importance of Public Relation work by the Bar Association, feels that it should be impressed on the individual lawyer that he is the best Public Relations advertisement and recommendation to the Public.

REPORT OF COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

Those members of the Association who follow the activities of this committee will recall that a few years ago an ambitious program of reorganization and reactivation was undertaken by the committee.

That program was begun with a comprehensive study and report on the whole problem of unlawful practice of law in Tennessee. The report concluded that the unlawful practice of law was rampant in the State and had to be curbed. The following general recommendations for the reorganization and revitalizing of the committee were made:

(1) Lengthen the tenure of office of committee members to two or three years so there will be continuity of effort, steady understanding of the committee's problems, and sufficient time to complete projects once undertaken. Terms should be staggered so each incoming president of the association can make appointments, but this and other mechanical problems are easily met.

(2) Allocate funds to the committee on an annual basis, recognize the importance of the work to be done, and the fact that it will take money, as well as effort, to do the job.

(3) Encourage and promote, wherever possible, close cooperation and exchange of material between the State and local Unlawful Practice Committees.

It was further suggested that powerful interests are firmly entrenched and heavily involved in the unlawful practice of law—that this is a situation which has developed over a great number of years and consequently one which we cannot hope to remedy except by long and painstaking efforts, projecting many years into the future. (Indeed eternal vigilance and activity on this front are to be expected—but extraordinary efforts and much litigation appear necessary in the immediate future to merely stabilize the front and launch soundly on a broad offensive.) The report then recommended that the principal offenders be dealt with one by one, and that a case once undertaken be prosecuted to a full and definite conclusion. The report further dealt fully with a particular case (Title Insurance Companies in Shelby County) and advised suit in that case.

We are happy to report now that while the efforts of the committee in the past few years to implement the above report have not been spectacular, they have been steady and unrelenting and a great deal has been accomplished.

The Central Council, President Kolwyck, and President-Elect Morgan have all recognized the need for continuity, as well as rotation, on committees. Witness the fact that by arrangement between Messrs. Kolwyck and Morgan two-thirds of the membership of committees appointed this year will be retained next year. We like to feel that the recommendations of this committee have been at least partially responsible for the initiation of that policy by Mr. Kolwyck (for which, incidentally, we would like to congratulate and thank our President.)

With reference to finances we are happy to report that as yet we have not found it necessary to draw on the general funds of the Association for anything. All the members of the committee have cheerfully paid their own travel and other expenses, even when appearing at American Bar functions as representatives of this committee.

The only expensive piece of litigation now in progress is the Title Company suit in Memphis, and that has been entirely financed from a special fund raised by voluntary contributions of the members of the Memphis Bar. Without any difficulty One Thousand One Hundred Thirty-six and 00/100 ($1,136.00) Dollars was raised for that fund. To date Five Hundred Eighteen and 63/100 ($518.63) Dollars has been expended for depositions and printing, etc, leaving a balance of Six Hundred Seventeen and 37/100 ($617.37) Dollars to see the suit through. The Central Council offered the committee One Thousand and 00/100 ($1000.00) Dollars to use in the prosecution of this suit, but as yet we have not drawn on that appropriation, and we hope that we shall not have to do so.

One of the most encouraging developments in the last year has been the increasing trend toward cooperative effort between the State and Local Associations. There have been numerous occasions when the State Committee has been able to supply helpful suggestions, pleading, briefs, etc. to Local Committees, and by the same token the Local Committees have undertaken important investigations that would have been impossible for the State Committee.

Coming now to the Title Company suit that has been pending in Memphis for over a year, we are sorry to report that we have not yet been able to conclude this litigation.

The suit was brought originally against the three major title insurance companies doing business in Memphis. The largest of the three companies which, incidentally, was owned by the largest bank in Mem-

phis, has, since our last report, quit the title insurance business altogether and closed it offices. We were naturally encouraged by this development and readily dismissed that company as a defendant in the cause. Thereafter, Mr. John Porter, our counsel, with the able assistance of Mr. Thomas F. Turley, Jr., the committee's legal advisor, proceeded to take proof in the cause, and some time ago completed and closed our proof. The setting of times for the taking of depositions was an immensely difficult thing, since the convenience of as many as ten lawyers had to be considered in selecting dates—to say nothing of the witnesses. It is this factor more than anything else that has caused the suit to drag. Even after our proof was closed we could not persuade the defendants to close their proof and finally we had to put the case down on the ten day rule docket for a setting, as a means of bringing the suit to trial. We were given a setting in June, but the defense immediately objected and moved the Court for more time. Over our objection the Court granted the Defendants a continuance to early October. We can think of no reason why the suit should not and will not be tried then. While this is not the place to review the proof or argue the case, we think it not improper to inform the membership that we believe the proof to be in good shape and we think we should receive a favorable decree.

Shortly after this committee was formed one of its members, Mr. Joe Van Derveer, of Chattanooga advanced the idea that we should begin laying the groundwork for another major step in our program—suggesting that the next group to receive our attention should be those lay adjusters who are practicing law. The worst offenders in this field seemed to be located in the eastern end of the state, the problem being particularly acute in Chattanooga. With the approval of the President, a meeting of the full committee was called in Nashville on October 17, 1956, to consider Mr. Van Derveer's suggestions. There we learned that Honorable J. Hamilton Cunningham, the then President of the Chattanooga Bar Association, had already appointed a committee to investigate the lay insurance adjusters in the Chattanooga area. The members of that committee were: Joe Van Derveer, Chairman, J. F. Atchley, Ray L. Brock, Jr., William H. Cox, Jr., Edward E. Davis, William P. Hutcheson, John Morgan, Milton D. McClure, Joseph M. Parker, John H. Reddy, Joe F. Timberlake, Jr., and John S. Wrinkle.

The Chattanooga committee was ready to begin its investigation, and, through Mr. Van Derveer, requested that the State Association join with it in the proposed undertaking. After a full review of the Chattanooga situation, the State Committee voted to form a joint sub-committee with the Chattanooga Association for the purpose of presenting a united front. A recommendation to this effect was made to President Kolwyck and President Cunningham—both of whom approved the recommenda-

tion. President Kolwyck simply appointed all the members of the Chattanooga Committee to serve for the State Association as well, and added two members from our roster, Mr. George F. Brandt of Johnson City and Mr. Houston M. Goddard of Maryville. The sub-committee has not yet made its final report, though in an interim report recently submitted by Mr. Milton D. McClure we are informed that the sub-committee has collected a great amount of useful data and should soon be in a position to recommend suit or other appropriate remedial action. We feel that completion of the work undertaken by this sub-committee should be one of the principal projects for our committee in the ensuing year.

LEO J. BUCHIGNANI, *Chairman*
THOMAS F. TURLEY, JR., *Legal Advisor*
HOUSTON M. GODDARD
JOE VAN DERVEER
JOHN R. RUCKER
M. E. QUEENER
R. B. PARKER, JR.
WILLIAM J. FLIPPIN
WILLIAM P. MOSS
GEORGE F. BRANDT

REPORT OF COMMITTEE ON UNIFIED BAR

The undersigned, acting for and at the request of Mr. Mayne Miller, Chairman of the Committee on Unified Bar, and for the gentlemen of that committee, asks leave of the President and the convention assembled to submit the following report:

Your Committee on Unified Bar would respectfully report as follows:

The Committee, consisting of Foster D. Arnett, Ralph H. Kelley, R. C. Robertson, John J. Hooker, Jack B. Henry, Harlan W. Martin, Lloyd S. Adams, Jr., James D. Causey, and Mayne Miller, considered that in view of the ruling of the Supreme Court of Tennessee in Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee, 282 S. W. 2d 782 (Tenn. 1955), and of the attitude of the General Assembly of Tennessee as expressed in Chapter 54, Public Acts of 1955 (T.C.A. §29-110) that the Committee should delay any direct action intended to bring about a Unified Bar. Instead, it was felt that an educational program should be undertaken.

Toward this end, efforts were made to obtain an exhaustive record of the practice and experience of all the states which have unified bars. This material has not been fully gathered as yet, but as soon as it is the Committee will will supply it to the Successor Committee on Unified Bar with the suggestion that a brochure fairly setting forth the arguments pro and con on the proposal be published and given wide circulation, not only among lawyers but to the Press and to the business world. It is felt by the Committee that it is only a matter of time until a Unified Bar will become a reality in Tennessee and that the educational program

outlined above is presently the best means of hastening this result.

Submitted on behalf of the Committee on Unified Bar.

FOSTER D. ARNETT

REPORT OF COMMITTEE ON UNIFORM STATE LAWS

Your Committee is glad to report that with the cooperation of the Association's Legislative Committee, the 1957 Tennessee Legislature passed both of the Uniform Laws recommended by your Committee to the Central Council of the Association and which were approved by it, namely the "Uniform Business Records as Evidence Act" and the "Uniform Gifts to Minors Act" and they are both now the law of this State.

Your Committee recommends that the President of the Association appoint a special committee to study the Uniform Commercial Code with the idea in view of the Association recommending it for passage to either the 1959 or 1961 Tennessee Legislature, depending on the number of States which may adopt the Uniform Commercial Code between now and the respective convening dates of said sessions of the Tennessee Legislature.

Respectfully submitted,

MILLER MANIER, *Chairman*

CRAIG H. CALDWELL
WILLIAM H. WICKER
J. HALLMAN BELL
ALFRED T. MCFARLAND
W. M. DANIEL, JR.
JOE DAVIS
FENNER HEATHCOCK
WILLIAM A. MCTIGHE

REPORT OF WAYS AND MEANS AND BUDGET COMMITTEE

PROPOSED BUDGET FOR CALENDAR YEAR – 1957

INCOME (Estimated)

Dues	$22,000.00
Group Insurance	3,500.00
Advertising – Tennessee Lawyer	850.00
Royalties – West Pub. Co.	50.00
Interest – Insurance Trust Fund	100.00
Miscellaneous	50.00
TOTAL	$26,550.00
Estimated Balance 1956	800.00
TOTAL	$27,350.00

DISBURSEMENTS

Office Rent	$ 1,266.00
Telephone	500.00
Office Supplies	1,200.00
Postage	1,000.00
Salaries	11,820.00
Tennessee Law Review	4,000.00
Tennessee Lawyer	1,000.00
President's Expenses	1,200.00
Travel Expenses — Exec. Sec.	900.00
Contributions	150.00
National Conf. of Bar Pres.	
National Conf. of Bar Sec.	
American Bar Foundation	
Newspaper Clipping Service	150.00
Equipment (incl. maintenance)	600.00
Central Council Expenses	125.00
F.I.C.A.	190.00
Committee and Section Expenses	1,000.00
Legislative Bulletin	600.00
Public Relations Committee	825.00
Junior Bar Conference	400.00
Unforeseeable Contingencies	424.00
TOTAL	$27,350.00

The above proposed budget was adopted by the Central Council at its meeting held in Nashville on October 18th, 1956.

Your committee on Ways and Means has given considerable thought and study to the program that the Bar Association of Tennessee is striving to carry through. It is the belief of this committee that in order to carry out this program, an increase in the dues will be necessary. We do not believe that this increase should be large but is the consensus of the opinion of the majority of the committee that the annual dues of the members of the association should be $7.50 for the first five years after date of license to practice law, and thereafter the annual dues of members should be $15.00.

Respectfully submitted,

WELDON B. WHITE, *Chairman*
SAMUEL B. MILLER
HYMAN T. KERN
WILLIAM M. HUGHES
MAYNARD TIPPS
J. VICTOR BARR
LON P. MACFARLAND
JOE C. DAVIS
ALLEN J. STRAWBRIDGE
FRANK B. GIANOTTI, JR.

RESOLUTION OF THE BAR ASSOCIATION OF TENNESSEE ADDITIONAL FEDERAL DISTRICT JUDGESHIPS

The following resolution was adopted by the Central Council of the Bar Association of Tennessee in Executive Session at Lookout Mountain, Tennessee, on Friday, June 14, 1957, and concurred in by the Bar Association in general assembly on the 15th day of June 1957, at Lookout Mountain, Tennessee, which resolution was and is in the following words and figures:

WHEREAS, the case load in the United States District Courts for the State of Tennessee has vastly increased in recent years due to the enlarged population of the State and litigation arising from the expanded jurisdiction conferred upon the Federal Courts by the Congress of the United States; and

WHEREAS, all criminal prosecutions in tax cases for the entire State of Tennessee are referred to the Middle District for indictment and most of said cases are tried in Nashville, and the land acquisition activities of the United States Corps of Engineers and the Tennessee Valley Authority have brought about a large backlog of condemnation cases; and

WHEREAS, in recognition of the huge backlog of cases accumulating on the docket of the Court for the Middle District of Tennessee, the Congress created a second judgeship, but on a temporary basis; and the Honorable William F. Miller was appointed to assist the Honorable Elmer D. Davies in presiding over said Court; and

WHEREAS, in recent months the Honorable Elmer D. Davies has died of a heart attack in the prime of his life, which heart attack was brought about by overwork as a judge of said Court; and the Honorable William F. Miller, a young and vigorous judge, has suffered a heart attack from the same cause which now incapacitates him from presiding over said Court; and

WHEREAS, the backlog of cases in said Court is so heavy that it is estimated that it would require the full-time services of two judges, presiding over the Court for two years, to try all cases presently on the docket, even though no new cases were filed in the interim; and new litigation is being filed far more rapidly that existing cases can be disposed of. A substantial backlog of cases exists on the dockets at Columbia and Cookeville as well as at Nashville; and

WHEREAS, since the additional judgeship created for the Middle District of Tennessee was a temporary judgeship, the United State District for the Middle District of Tennessee now has only one judge, and he is incapacitated during convalescence from a heart attack; and

WHEREAS, there is a desperate need for the creation of an addi-

tional permanent judge for the United States District Court for the Middle District of Tennessee; and

WHEREAS, during the past five years the private civil case load in the United States District Court for the Eastern District of Tennessee has increased by more than fifty percent over the average for the previous five years; and

WHEREAS, the private civil case load per judge in 1956 in the Eastern District of Tennessee was 244, or more than eighty percent in excess of the national average of 135; and

WHEREAS, impartial studies disclose that private civil cases require three-fold the amount of time for disposition as other civil cases; and

WHEREAS, despite extraordinary efforts on the part of the judges for the Eastern District of Tennessee and despite case termination by the two judges far in excess of the national average for the past five years, the backlog of private civil cases is steadily increasing in the Eastern District; and

WHEREAS, the Bar Association of Tennessee through a committee has made an investigation into the needs of the public with respect to an additional United States District Judge for the Western District of Tennessee: and

WHEREAS, from said investigation it has been determined that the case load has increased five-fold in the past fifteen years and as a result thereof the Court for the Western District handles and disposes of as many as five times or more cases than many of the Federal Courts in other states; and

WHEREAS, the survey and investigation of said Association reveals that this is being done only with exhaustive and super-human efforts on the part of the judge in the Western District; and

WHEREAS, it has been found that as many as four cases are set on the calendar for each day and in most instances the litigants are required to prepare all of these cases for trial and in many instances, said cases are continued to the next term of Court, which results in considerable loss of time and money on the part of litigants' attorneys and witnesses who have frequently traveled long distances to attend trial of said cases; and

WHEREAS, it is the opinion of the Association that the exhaustive efforts being made by the judge of the Western District to keep up with these cases cannot last indefinitely and that in the end he will be overwhelmed under an intolerable case load and his health impaired if not ruined entirely; and

WHEREAS, in many cases the judge holds court until late hours of the evening and sometimes on Saturday; and

WHEREAS, it is the opinion of the Association that the Federal

District Judges in Tennessee should not be penalized because they have worked night and day to keep their dockets current, since in many states and jurisdictions additional judges have been appointed because their dockets were not kept current; and

WHEREAS, it is the opinion of the Association that witnesses, litigants and attorneys should not be penalized by being required to be in attendance when there is no reasonable probability of their cases being reached for trial on the dates set.

NOW, THEREFORE,

BE IT RESOLVED BY THE CENTRAL COUNCIL OF THE BAR ASSOCIATION OF TENNESSEE, in regular meeting at Lookout Mountain, Tennessee, and by the meeting of the Association in general assembly at Lookout Mountain, Tennessee, that this Association recommend and urge in the strongest language and position possible that the Congress of the United States create an additional federal judgeship for East Tennessee, an additional federal judgeship for Middle Tennessee, and an additional federal judgeship for West Tennessee on a permanent basis, in order that justice may be administered effectively and expeditiously and in keeping with the usual high standards of the Federal Judiciary System.

BE IT FURTHER RESOLVED, that the Executive Secretary of the Association be instructed to send copies of this resolution to the Chairman and each member of the Senate Judiciary Committee; to the Chairman and each member of the House Judiciary Committee; to the two Senators from the State of Tennessee; to each of the nine members of the House of Representatives from the state of Tennessee; to Chief Judge John Biggs, Jr., Chairman of the Committee on Court Administration of the Judicial Conference of the United States; to the Honorable Charles C. Simons, Florence E. Allen, John D. Martin, Thomas F. McAllister, Shackleford Miller and Potter Stewart, Judges of the United States Court of Appeals for the Sixth Judicial Circuit; to the Honorable Elmore Whitehurst, acting Director of the Administrative Office for the United States Courts; and to the Editors of each of the daily newspapers in the cities of Chattanooga, Knoxville, Nashville, Memphis and Jackson, Tennessee.

The above resolution was presented to the Central Council of the Bar Association of Tennessee and to the annual meeting of the Bar Association of Tennessee in general assembly at Lookout Mountain, Tennessee by the Committee appointed by the President of the Association, Clarence Kolwyck, for the purpose of drawing this resolution, said Committee being composed of:

WELDON B. WHITE, *Chairman*

CHARLES G. MORGAN ERBY L. JENKINS

PRESIDENTS OF THE BAR ASSOCIATION OF TENNESSEE

1. 1881-1882—W. F. COOPER—Nashville
2. 1882-1883—B. M. ESTES—Memphis
3. 1883-1884—ANDREW ALLISON—Nashville
4. 1884-1885—ZENEPHONE WHEELER—Chattanooga
5. 1885-1886—W. C. FOWLKES—Memphis
6. 1886-1887—J. W. JUDD—Springfield
7. 1887-1888—H. H. INGERSOLL—Knoxville
8. 1888-1889—L. B. MC FARLAND—Memphis
9. 1889-1890—J. M. DICKINSON—Nashville
10. 1890-1891—G. W. PICKLE—Dandridge
11. 1891-1892—M. M. NEIL—Memphis
12. 1892-1893—ED BAXTER—Nashville
13. 1893-1894—W. A. HENDERSON—Knoxville
14. 1894-1895—JAMES H. MALONE—Memphis
15. 1895-1896—ALBERT D. MARKS—Nashville
16. 1896-1897—W. B. SWANEY—Chattanooga
17. 1897-1898—C. W. METCALF—Memphis
18. 1898-1899—J. W. BONNER—Nashville
19. 1899-1900—W. L. WELCKER—Knoxville
20. 1900-1901—GEORGE GILHAM—Memphis
21. 1901-1902—J. H. ACKLEN—Nashville
22. 1902-1903—R. E. L. MOUNTCASTLE—Morristown
23. 1903-1904—JOHN E. WELLS—Union City
24. 1903-1904—EDWARD T. SANFORD—Knoxville
25. 1904-1905—JOHN H. HENDERSON—Franklin
26. 1905-1906—EDWARD T. SANFORD—Knoxville
27. 1906-1907—F. H. HEISKELL—Memphis
28. 1907-1908—M. T. BRYAN—Nashville
29. 1908-1909—FOSTER V. BROWN—Chattanooga
30. 1909-1910—HARRY B. ANDERSON—Memphis
31. 1910-1911—PERCY D. MADDIN—Nashville
32. 1911-1912—L. D. SMITH—Knoxville
33. 1912-1913—ALBERT W. BIGGS—Memphis
34. 1913-1914—JOHN BELL KEEBLE—Nashville
35. 1914-1915—H. H. SHELTON—Bristol
36. 1915-1916—C. N. BURCH—Memphis
37. 1916-1917—JOS. C. HIGGINS—Fayetteville
38. 1917-1918—E. WATKINS—Chattanooga
39. 1918-1919—JULIAN C. WILSON—Memphis
40. 1919-1920—GILES L. EVANS—Fayetteville
41. 1920-1921—MALCOLM MC DERMOTT—Knoxville
42. 1921-1922—ELIAS GATES—Memphis
43. 1922-1923—THOMAS H. MALONE—Nashville
44. 1923-1924—WILLIAM F. FRIERSON—Chattanooga
45. 1924-1925—LOVICK P. MILES—Memphis
46. 1925-1926—FRANK M. BASS—Nashville
47. 1926-1927—THAD H. COX—Johnson City
48. 1927-1928—WALTER CHANDLER—Memphis
49. 1928-1929—WILLIAM E. NORVELL, JR.—Nashville
50. 1929-1930—S. BARTOW STRANG—Chattanooga
51. 1930-1931—WARDLAW STEELE—Ripley
52. 1931-1932—CHARLES C. TRABUE—Nashville
53. 1932-1933—HARLEY G. FOWLER—Knoxville
54. 1933-1934—EARL KING—Memphis
55. 1934-1935—LOUIS LEFTWICH—Nashville
56. 1935-1936—JOE V. WILLIAMS—Chattanooga
57. 1936-1937—WALTER P. ARMSTRONG—Memphis
58. 1937-1938—GEORGE H. ARMISTEAD, JR.—Nashville
59. 1938-1939—R. A. DAVIS—Athens
60. 1939-1940—JOHN T. SHEA—Memphis
61. 1940-1941—JOHN J. HOOKER—Nashville

62. 1941-1942—JOHN C. GOINS—Chattanooga
63. 1942-1943—SAM COSTEN—Memphis
64. 1943-1944—ALBERT W. STOCKELL—Nashville
65. 1944-1945—CLYDE W. KEY—Knoxville
66. 1945-1946—J. SEDDEN ALLEN—Memphis
67. 1946-1947—J. MAC PEEBLES—Nashville
68. 1947-1948—AUBREY F. FOLTS—Chattanooga
69. 1948-1949—MARION G. EVANS—Memphis
70. 1949-1950—W. RAYMOND DENNEY—Nashville
71. 1950-1951—JOHN H. DOUGHTY—Knoxville
72. 1951-1952—LLOYD S. ADAMS—Humboldt
73. 1952-1953—ALFRED T. ADAMS—Nashville
74. 1953-1954—J. MALCOLM SHULL—Elizabethton
75. 1954-1955—EDWARD W. KUHN—Memphis
76. 1955-1956—WELDON B. WHITE—Nashville
77. 1956-1957—CLARENCE KOLWYCK—Chattanooga
78. 1957-1958—CHARLES G. MORGAN—Memphis

SECRETARIES AND TREASURERS OF BAR ASSOCIATION OF TENNESSEE

1. 1881-1884—JAMES C. BRADFORD—Nashville
2. 1884-1889—JAMES W. BONNER—Nashville
3. 1890-1892—ALBERT D. MARKS—Nashville
4. 1892-1895—CLAUDE WALLER—Nashville
5. 1895-1900—CHAS. N. BURCH—Memphis
6. 1900-1902—R. LEE BARTELS—Memphis
7. 1902-1906—ROBERT LUSK—Nashville
8. 1906-1908—R. H. SANSOM—Knoxville
9. 1908-1916—CHARLES H. SMITH—Knoxville
10. 1916-1920—LEE WINCHESTER—Memphis
11. 1920-1921—BYRD DOUGLAS—Nashville
12. 1921-1922—C. RALEIGH HARRISON—Knoxville
13. 1922-1927—WALTER CHANDLER (Secretary)—Memphis
14. 1922-1933—W. L. OWEN (Treasurer)—Memphis
15. 1933-1935—A. L. HEISKELL (Secretary)—Memphis
16. 1933-1936—JAMES E. ATKINS, JR. (Treasurer)—Knoxville
17. 1935-1937—THOS. O. H. SMITH (Secretary)—Nashville
18. 1936-1937—WILL A. WILKERSON (Treasurer)—Chattanooga
19. 1937-1956—THOS. O. H. SMITH—Nashville
20. 1956-1958—J. VICTOR BARR—Nashville

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Charles G. Morgan, Memphis, President; Lon P. MacFarland, Columbia, President-Elect; J. Hamilton Cunningham, Chattanooga, Vice-President; J. D. Senter, Jr., Humbolt, Vice-President; J. Victor Barr, Jr., Nashville, Secretary-Treasurer; John C. Sandidge, Executive-Secretary, Nashville.

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AMERICAN BAR ASSOCIATION DELEGATES

Walter P. Armstrong, Jr., Memphis; John H. Doughty, Knoxville; Edward W. Kuhn, Memphis; Weldon B. White, Nashville.

JUDICIAL CONFERENCE OFFICERS

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JUNIOR BAR CONFERENCE

R. Lee Winchester, Jr., Memphis, President; Ernest Matthews, III, Nashville, Vice-President and President-Elect; John Wheeler, Chattanooga, Vice-President; Richard Jerman, Alamo, Vice-President; Jack B. Henry, Pulaski, Secretary-Treasurer.

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TENNESSEE BAR ASSOCIATION COMMITTEES 1957-58

STANDING COMMITTEES

CITIZENSHIP

Dick L. Johnson, Carter County, Elizabethton, 1st District.
Mrs. Erma G. Greenwood, Knox County, Knoxville, 2nd District.
William G. Brown, Hamilton County, Chattanooga, 3rd District.
Prentice Cooper, Bedford County, Shelbyville, 4th District.
Earl A. McNabb, Davidson County, Nashville, 5th District.
Dave A. Alexander, Williamson County, Franklin, 6th District.
Victor F. Schneider, Madison County, Jackson, 7th District.
Franklin W. Latta, Dyer County, Dyersburg, 8th District.
Blanchard S. Tual, *Chairman*, Shelby County, Memphis, 9th District.
Miss Annie M. Stout, Shelby County, Memphis, 9th District.

COMMITTEE ON COMMITTEES

John S. Carriger, Constitution & By-Laws, Hamilton County, Chattanooga, 3rd District.
Taylor H. Cox, Legal Education & Admission to the Bar, Knox County, Knoxville, 2nd District.
Charles C. Crabtree, Resolutions, Shelby County, Memphis, 9th District.
William H. D. Fones, Membership, Shelby County, Memphis, 9th District.
Warren W. Kennerly, Judicial Administration, Remedial Procedure & Law Reform, Knox County, Knoxville, 2nd District.
John J. Hooker, Tennessee Bar Center, Davidson County, Nashville, 5th District.
George T. Lewis, Jr., Inter-Professional Code, Shelby County, Memphis, 9th District.
Lon P. MacFarland, Domestic Relations, Maury County, Columbia, 6th District.
Lon P. MacFarland, Ways, Means & the Budget, Maury County, Columbia, 6th District.
George E. Morrow, Legal Aid & Referral Service, Shelby County, Memphis, 9th District.
Don G. Owens, Jr., General Sessions Courts, Shelby County, Memphis, 9th District.
Hugh Stanton, Sr., Legislation, Shelby County, Memphis, 9th District.

Thomas W. Steele, Unified Bar, Davidson County, Nashville, 5th District.
H. Francis Stewart, Publications, Davidson County, Nashville, 5th District.
Carl N. Stokes, Public Relations, Shelby County, Memphis, 9th District.
Blanchard S. Tual, American Citizenship, Shelby County, Memphis, 9th District.
Thomas F. Turley, Jr., Unauthorized Practice, Shelby County, Memphis, 9th District.
D. R. Wade, Jr., Obituaries & Memorials, Giles County, Pulaski, 6th District.
James W. Watson, Professional Ethics & Grievances, Shelby County, Memphis, 9th District.
William H. Wicker, Uniform State Laws, Knox County, Knoxville, 2nd District.

CONSTITUTION AND BY-LAWS

Earnest R. Taylor, Hamblen County, Morristown, 1st District.
Harvey Broome, Knox County, Knoxville, 2nd District.
John S. Carriger, *Chairman*, Hamilton County, Chattanooga, 3rd District.
Alfred T. MacFarland, Wilson County, Lebanon, 4th District.
William N. Dearborn, Davidson County, Nashville, 5th District.
Mrs. Jean Norman, Davidson County, Nashville, 5th District.
Richard H. Harsh, Sumner County, Gallatin, 6th District.
Ewing J. Harris, Hardeman County, Bolivar, 7th District.
M. Watkins Ewell, Dyer County, Dyersburg, 8th District.
Cooper Turner, Jr., Shelby County, 9th District.

DOMESTIC RELATIONS

L. Forster Miller, Jr., Washington County, Johnson City, 1st District.
Francis W. Headman, Knox County, Knoxville, 2nd District.
John L. Lenihan, Hamilton County, Chattanooga, 3rd District.
Malcolm C. Hill, White County, Sparta, 4th District.
William C. Wilson, Davidson County, Nashville, 5th District.
Lon P. MacFarland, *Chairman*, Maury County, Columbia. 6th District.
Joe C. Davis, Henderson County, Lexington, 7th District.
Melvin T. Weakley, Dyer County, Dyersburg, 8th District.
David Ballon, Shelby County, Memphis, 9th District.
Mrs. Ruby T. Martin, Shelby County, Memphis, 9th District.

GENERAL SESSIONS COURTS

T. R. Bandy, Jr., Sullivan County, Kingsport, 1st District.
Hugh C. Simpson, Knox County, Knoxville, 2nd District.
Horace L. Smith, Jr., Hamilton County, Chattanooga, 3rd District.
Baxter Key, Smith County, Carthage, 4th District.
T. T. McCarley, Jr., Davidson County, Nashville, 5th District.
Miss Rebecca Thomas, Davidson County, Nashville, 5th District.
Douglas T. Bates, Hickman County, Centerville, 6th District.
Will Tom Abernathy, McNairy County, Selmer, 7th District.
Sam C. Nailling, Obion County, Union City, 8th District.
Don G. Owens, Jr., *Chairman*, Shelby County, Memphis, 9th District.

INTER-PROFESSIONAL CODE

Thomas S. Curtin, Sullivan County, Bristol, 1st District.
Ben F. McAuley, Knox County, Knoxville, 2nd District.
Jess Parks, Jr., Hamilton County, Chattanooga, 3rd District.
Richard H. Harrison, Coffee County, Manchester, 4th District.
Joseph G. Cummings, Davidson County, Nashville, 5th District.
William C. Keaton, Lewis County, Hohenwald, 6th District.
John J. Ross, Jr., Hardin County, Savannah, 7th District.
Richard L. Dunlap, Jr., Henry County, Paris, 8th District.
George T. Lewis, Jr., *Chairman*, Shelby County, Memphis, 9th District.

JUDICIAL ADMINISTRATION AND REMEDIAL PROCEDURE AND LAW REFORM

Joe W. Worley, Sullivan County, Kingsport, 1st District.
Warren W. Kennerly, *Chairman*, Knox County, Knoxville, 2nd District.
James F. Corn, Bradley County, Cleveland, 3rd District.
Maynard Tipps, Coffee County, Tullahoma, 4th District.
Ferriss C. Bailey, Davidson County, Nashville, 5th District.
Robert L. Littleton, Dickson County, Dickson, 6th District.
William P. Moss, Madison County, Jackson, 7th District.

Barrett Ashley, Dyer County, Dyersburg, 8th District.
John S. Montedonico, Shelby County, Memphis, 9th District.

LEGAL AID AND REFERRAL SERVICE

John L. Bowers, Jr., Carter County, Elizabethton, 1st District.
Charles H. Miller, Knox County, Knoxville, 2nd District.
Milton D. McClure, Hamilton County, Chattanooga, 3rd District.
Mrs. Marguerite K. Lanham, Hamilton County, Chattanooga, 3rd District.
H. T. Holman, Lincoln County, Fayetteville, 4th District.
Alfred T. Adams, Jr., Davidson County, Nashville, 5th District.
Miss Bess Blake, Davidson County, Nashville, 5th District.
Hugh T. Shelton, Jr., Maury County, Columbia, 6th District.
James W. Van Dyke, Henry County, Paris, 7th District.
Fleming Hodges, Dyer County, Dyersburg, 8th District.
George E. Morrow, *Chairman,* Shelby County, Memphis, 9th District.

LEGAL EDUCATION AND ADMISSION TO THE BAR

H. H. Haynes, Sullivan County, Bristol, 1st District.
Taylor H. Cox, *Chairman,* Knox County, Knoxville, 2nd District.
L. H. Gammon, Jr., Hamilton County, Chattanooga, 3rd District.
Sam B. Gilreath, Wilson County, Lebanon, 4th District.
Val Sanford, Davidson County, Nashville, 5th District.
R. R. Haggard, Wayne County, Waynesboro, 6th District.
Carmack Murchison, Madison County, Jackson, 7th District.
L. W. Morgan, Haywood County, Brownsville, 8th District.
Frank M. Gilliland, Jr., Shelby County, Memphis, 9th District.

LEGISLATION

Harry Lee Senter, Sullivan County, Bristol, 1st District.
Harry W. Asquith, Knox County, Knoxville, 2nd District.
Eugene N. Collins, Hamilton County, Chattanooga, 3rd District.
Harry G. Sabine, Cumberland County, Crossville, 4th District.
K. Harlan Dodson, Jr., Davidson County, Nashville, 5th District.
Jerry C. Colley, Maury County, Columbia, 6th District.
Preston Parks, Fayette County, Somerville, 7th District.
J. B. Avery, Jr., Crockett County, Alamo, 8th District.
Hugh Stanton, Sr., *Chairman,* Shelby County, Memphis, 9th District.

OBITUARIES AND MEMORIALS

A. B. Bowman, Washington County, Johnson City, 1st District.
Frank Montgomery, Knox County, Knoxville, 2nd District.
Charles L. Claunch, Hamilton County, Chattanooga, 3rd District.
Jim Camp, White County, Sparta, 4th District.
O. B. Hofstetter, Sr., Davidson County, Nashville, 5th District.
D. R. Wade, Jr., *Chairman,* Giles County Pulaski, 6th District.
Gordon Browning, Carroll County, Huntingdon, 7th District.
C. W. Miles, III, Obion County, Union City, 8th District.
Emmett W. Braden, Shelby County, Memphis, 9th District.

PROFESSIONAL ETHICS AND GRIEVANCES

Thomas E. Mitchell, Washington County, Johnson City, 1st District.
H. H. McCampbell, Jr., Knox County, Knoxville, 2nd District.
A. A. Kelly, Marion County, South Pittsburg, 3rd District.
T. Arthur Jenkins, Coffey County, Manchester, 4th District.
Wilson Sims, Davidson County, Nashville, 5th District.
F. F. Locke, Lawrence County, Lawrenceburg, 6th District.
Jack Manhein, Madison County, Jackson, 7th District.
Allen J. Strawbridge, Weakley County, Dresden, 8th District.
James W. Watson, *Chairman,* Shelby County, Memphis, 9th District.

PUBLIC RELATIONS

Miss Hallie K. Riner, Carter County, Elizabethton, 1st District.
J. Carson Ridenour, Anderson County, Clinton, 2nd District.
Thomas Crutchfield, Hamilton County, Chattanooga, 3rd District.
James L. Bomar, Jr., Bedford Coundy, Shelbyville, 4th District.
Ralph B. Christian, Davidson County, Nashville, 5th District.
John R. Long, Robertson County, Springfield, 6th District.

H. Leroy Pope, Madison County, Jackson, 7th District.
Alex H. Gray, Haywood County, Brownsville, 8th District.
Carl N. Stokes, *Chairman,* Shelby County, Memphis, 9th District.

PUBLICATIONS

James N. Hardin, Greene County, Greeneville, 1st District.
Andrew Johnson, Knox County, Knoxville, 2nd District.
A. F. Rebman, III, Hamilton County, Chattanooga, 3rd District.
Granville S. Ridley, Rutherford County, Murfreesboro, 4th District.
H. Francis Stewart, *Chairman,* Davidson County, Nashville, 5th District.
W. Howell Forrester, Giles County, Pulaski, 6th District.
E. W. Ross, Jr., Hardin County, Savannah, 7th District.
Tom Elam, Obion County, Union City, 8th District.
A. L. Heiskell, Shelby County, Memphis, 9th District.

RESOLUTIONS

E. F. Smith, Sullivan County, Kingsport, 1st District.
R. R. Russell, Knox County, Knoxville, 2nd District.
Frank N. Bratton, McMinn County, Athens, 3rd District.
McAllen Foutch, DeKalb County, Smithville, 4th District.
J. Olin White, Davidson County, Nashville, 5th District.
James M. Porter, Robertson County, Springfield, 6th District.
Charles G. Neese, Henry County, Paris, 7th District.
Joe H. Walker, Jr., Lauderdale County, Ripley, 8th District.
Charles C. Crabtree, *Chairman,* Shelby County, Memphis, 9th District.

UNAUTHORIZED PRACTICE OF THE LAW

J. Paul Coleman, Washington County, Johnson City, 1st District.
Leonard E. Ladd, Roane County, Harriman, 2nd District.
Joe Van Derveer, Hamilton County, Chattanooga, 3rd District.
Richard W. Stevens, Lincoln County, Fayetteville, 4th District
A. B. Neil, Jr., Davidson County, Nashville, 5th District.
M. E. Queener, Maury County, Columbia, 6th District.
Robert H. Spragins, Madison County, Jackson, 7th District.
Theo J. Emison, Crockett County, Alamo, 8th District.
Thomas F. Turley, Jr., *Chairman,* Shelby County, Memphis, 9th District.

UNIFIED BAR

Mayne W. Miller, Washington County, Johnson City, 1st District.
Hymen T. Kern, Knox County, Knoxville, 2nd District.
H. Keith Harber, Hamilton County, Chattanooga 3rd District.
Bayard S. Tarpley, Bedford County, Shelbyville, 4th District.
Thomas W. Steele, *Chairman,* Davidson County, Nashville, 5th District.
Sam E. Boaz, Montgomery County, Clarksville, 6th District.
William E. Leech, Madison County, Jackson, 7th District.
Lloyd S. Adams, Jr., Gibson County, Humboldt, 8th District.
John S. Porter, Shelby County, Memphis, 9th District.

UNIFORM STATE LAWS

James R. Lyle, Sullivan County, Kingsport, 1st District.
William H. Wicker, *Chairman,* Knox County, Knoxville, 2nd District.
William M. Hughes, Hamilton County, Chattanooga, 3rd District.
Ewing E. Smith, Rutherford County, Murfreesboro, 4th District.
J. Paschall Davis, Davidson County, Nashville, 5th District.
William M. Daniel, Jr., Montgomery County, Clarksville, 6th District.
Lloyd Tatum, Chester County, Henderson, 7th District.
G. Griffin Boyte, Gibson County, Humboldt, 8th District.
Jack Petree, Shelby County, Memphis, 9th District.

WAYS, MEANS AND THE BUDGET

J. Louis Adams, McNairy County, Selmer, 7th District.
J. Victor Barr, Jr., Davidson County, Nashville, 5th District.
Erby Jenkins, Knox County, Knoxville, 2nd District.
Lon P. MacFarland, *Chairman,* Maury County, Columbia, 6th District.

TENNESSEE BAR CENTER (SPECIAL COMMITTEE)

John J. Hooker, *Chairman,* Nashville
Walter Chandler, Memphis.

Harley G. Fowler, Knoxville.
George H. Armistead, Jr., Nashville.
John C. Goins, Chattanooga.
Albert W. Stockell, Nashville.
Clyde W. Key, Knoxville.
J. Seddon Allen, Memphis.
Aubrey F. Folts, Chattanooga.
Marion G. Evans, Memphis.
W. Raymond Denney, Nashville.
John H. Doughty, Knoxville.
Lloyd S. Adams, Humboldt.
Alfred T. Adams, Nashville.
J. Malcolm Shull, Elizabethton.
Edward W. Kuhn, Memphis.
Weldon B. White, Nashville.
Clarence Kolwyck, Chattanooga.

MEMBERSHIP COMMITTEE

Robert L. Ogle, Jr., Sevierville, 1st District.
Walter B. Garland, Erwin, 1st District.
Jack D. Hodges, Johnson City, 1st District.
Mrs. Shirley B. Underwood, Johnson City, 1st District.
Foster D. Arnett, Knoxville, 2nd District.
Joseph A. McAfee, Knoxville, 2nd District.
Howard H. Baker, Jr., Huntsville, 2nd District.
Guy E. Yelton, LaFayette, 2nd District.
Ralph H. Kelley, Chattanooga, 3rd District.
C. P. Swafford, Dayton, 3rd District.
William M. Dender, Etowah, 3rd District.
Paul D. Kelly, Jr., Jasper, 3rd District.
Robert M. Summitt, Chattanooga, 3rd District.
James M. Jones, Jr., Lewisburg, 4th District.
W. P. Flatt, Jr., Cookeville, 4th District.
Richard F. LaRoche, Murfreesboro, 4th District.
W. Ovid Collins, Jr., Nashville, 5th District.
George H. Cate, Jr., Nashville, 5th District.
Ernest B. Matthews, III, Nashville, 5th District.
Harrington A. Lackey, Nashville, 5th District.
John D. Whalley, Nashville, 5th District.
W. M. Daniel, Clarksville, 6th District.
Jack B. Henry, Pulaski, 6th District.
Thomas Boyers, IV, Gallatin, 6th District.
Allen M. O'Brien, Springfield, 6th District.
Jerry C. Colley, Columbia, 6th District.
Hewitt P. Tomlin, Jackson, 7th District.
Lloyd Tatum, Henderson, 7th District.
Edwin C. Townsend, Parsons, 7th District.
William R. Menzies, Jr., Jackson, 7th District.
John C. Nowell, Jr., Trenton, 8th District.
C. R. Jerman, Alamo, 8th District.
Robert G. McLean, Alamo, 8th District.
William H. D. Fones, *Chairman*, Memphis, 9th District.
Miss Laura Brasher, Memphis, 9th District.
John T. Dunlap, Jr., Memphis, 9th District.
William B. Leffler, Memphis, 9th District.
James M. Tharpe, Memphis, 9th District.
Frank Glankler, Jr., Memphis, 9th District.

MEMBERS OF THE BAR ASSOCIATION OF TENNESSEE

as of July 31, 1957

A

Abernathy, Edward S., Chattanooga
Abernathy, Will Tom, Selmer
Ables, W. M., Jr., South Pittsburg
Abramson, Sorrell J., Memphis
Abshire, Patten, Chattanooga
Acklen, J. H., Memphis
Acklen, T. Robert, Sr., Memphis
Adams, Alfred T., Jr., Nashville
Adams, Benjamin Chinn, Memphis
Adams, Elliott D., Knoxville
Adams, Horace Clayton, Jr., Gallatin
Adams, Hoyte E., Jr., Shelbyville
Adams, James Louis, Selmer
Adams, Lloyd S., Humboldt
Adams, Lloyd S., Jr., Humboldt
Adams, Robert P., Trenton
Adams, W. Harrison, Memphis
Adcock, Ramon M., Smithville
Agee, Grady W., Memphis
Ailor, Earl S., Knoxville
Akers, Howard W., Chattanooga
Akin, William Fletcher, Nashville
Albanese, A. J., Nashville
Alexander, Dave A., Franklin
Alexander, Leon, Lebanon
Alexander, T. H., Jr., Franklin
Alexander, Robert L., Nashville
Alexander, Vance, Jr., Memphis
Allan, William L., Memphis
Allen, Ben, Elizabethton
Allen, Grayson C., Cordova, Alaska
Allen, J. Seddon, Memphis
Allen, James W., Nashville
Allen, James W., Jr., Nashville
Allen, Newton P., Memphis
Allen, Richard H., Memphis
Allen, William G., Washington, D. C.
Allen, William M., Collierville
Allred, L. H., Erwin
Almond, Edwin P., New York, N. Y.
Alper, Jerome M., Washington, D. C.
Alperin, Tillie, Mrs., Memphis
Ambrister, Floyd L., Knoxville
Ambrose, W. L., Jr., Knoxville
Anderson, Charles H., Chattanooga
Anderson, Donald G., Jellico
Anderson, J. W., Chattanooga
Anderson, James H., Chattanooga
Anderson, Joel H., Knoxville
Anderson, Joel H., Jr., Knoxville
Anderson, R. D., Nashville
Anderson, W. Cecil, Knoxville
Andrews, Forrest, Knoxville
Apperson, John W., Memphis
Appleby, Joe A., Lexington
Armistead, George H., Jr., Nashville
Armistead, John M., Knoxville
Armitage, O. C., Jr., Greeneville
Armstrong, Homer L., Memphis
Armstrong, Richard E., Jr., Kingsport
Armstrong, Walter P., Jr., Memphis
Arnett, Foster D., Knoxville
Ashley, Barrett, Dyersburg
Ashley, R. A., Jr., Dyersburg
Askew, John C., Jr., Nashville
Aspero, Anthony A., Memphis
Aspero, Nell Sanders, Mrs., Memphis
Asquith, Fred G., Knoxville
Asquith, Harry W., Knoxville
Atchley, Fielding H., Chattanooga
Atchley, James F., Chattanooga
Atkins, Hobart F., Knoxville
Atkins, Z. D., Nashville
Avery, Harry S., Alamo
Avery, J. B., Jr., Alamo
Avery, Thomas B., Memphis
Axelroad, Benjamin F., Sr., Tullahoma
Aycock, John Knox, Memphis
Ayres, John A., Knoxville
Ayres, John A., Jr., Knoxville

B

Babb, Dennis L., Knoxville
Babendreer, Eric, Memphis
Bacon, Herbert M., Morristown
Bacon, Roy B., Chattanooga
Badgett, William E., Knoxville
Baer, Isadore B., Memphis
Bagley, Thomas O., Fayetteville
Bailey, Charles J., Memphis
Bailey, Ferriss C., Nashville
Bailey, Ferriss C., Jr., Nashville
Bailey, Glenn, Erwin
Bailey, Robert H., Greeneville
Baird, William D., Lebanon
Baker, Howard H., Washington, D. C.
Baker, Howard H., Jr., Huntsville
Baker, John William, Knoxville
Baker, W. Howard, Memphis
Baker, William R., Nashville
Ballew, J. H., Nashville
Ballew, Robert K., Copperhill
Ballon, David, Memphis
Bandy, T. R., Kingsport
Bandy, T. R., Jr., Kingsport
Bangs, Milton S., Elizabethton
Banker, Luke E., Kingston
Barber, Richard M., Memphis
Barclay, W. A. Memphis
Bare, Clive W., Washington, D. C.
Bare, James G., Erwin
Barger, Al S., Chattanooga
Barger, Henry L., Chattanooga
Barker, Francis C., South Pittsburg
Barker, Henry N., Bristol
Barksdale, John M., Nashville
Barnes, Herschiel S., Cookeville
Barnes, Roy H., Erin
Barnett, Alex, Memphis
Barnett, Harry D., Memphis
Barr, J. Victor, Jr., Nashville
Barringer, Lewis T., Memphis
Barron, W. J., Morristown
Barrows, F. C., Chattanooga
Barry, Edward F., Memphis
Barry, W. F., Nashville
Barry, W. L., Lexington
Bartholomew, William J., Memphis
Bartlett, F. Graham, Knoxville
Bartlet, Rose L., Mrs., Memphis
Bass, F. M., Jr., Nashville
Bass, James L., Nashville
Bass, J. O., Nashville
Bass, Leslie, Knoxville
Bateman, William C., Memphis
Bates, Douglas T., Centerville
Bates, J. Alonzo, Centerville
Bates, John M., Nashville
Bates, Samuel O., Memphis
Batson, Dodson, Nashville
Batson, Richard H., Clarksville
Battle, Walter Preston, Memphis
Baugh, John C., Knoxville
Baum, Joseph H., Memphis
Beach, William O., Clarksville
Beal, W. Vincent, Memphis
Bean, Byron V., Nashville
Beare, Samuel T., Memphis
Bearman, Eugene J., Memphis
Bearman, Joseph M., Memphis
Bearman, Leo, Memphis
Beasley, Clint, Carthage
Beasley, Earl, Franklin
Beatty, Troy, Jr., Memphis
Beaty, Henry M., Jr., Memphis
Beaver, George M., McMinnville

Beck, Edgar S., Chattanooga
Beeler, D. S., Rutledge
Beeler, Luther L., Mrs., Nashville
Beets, Walter O., San Francisco, Calif.
Bejach, Wilena R., Mrs., Memphis
Bell, Alvin Y., Knoxville
Bell, Hallman, Cleveland
Bell, Henry D., Nashville
Benton, George O., Jackson
Berke, Harry, Chattanooga
Bernstein, Eugene, Memphis
Bernstein, Harry N., Memphis
Berry, Coburn D., III, Nashville
Berry, Edward H., Sikeston, Missouri
Berry, F. A., Nashville
Berry, Frank A., Jr., Nashville
Berry, Frank M., Greeneville
Berry, James I. Vance, Nashville
Berry, Tyler, Jr., Franklin
Berry, William W., Nashville
Bertucci, James J., Memphis
Bevan, Dale, Nashville
Biggs, Roy A., Martin
Binkley, Joe P., Nashville
Binkley, Marjorie, Miss, Nashville
Bird, Frank B., Maryville
Birmingham, L. W., Jr., Jackson
Birmingham, L. W., III, Jackson
Bishop, Bruce C., Chattanooga
Bishop, Karl, Nashville
Black, Charles G., Memphis
Black, William B., Tiptonville
Blackard, Charles G., Nashville
Blackburn, Clarence E., Knoxville
Blackburn, Thomas M., Jr., Knoxville
Blake, Bess, Miss, Nashville
Blakeney, Avery, Memphis
Blanchard, Jerred G., Memphis
Blaylock, Auvergne S., Memphis
Bledsoe, J. D., Jackson
Bledsoe, Marine W., Columbia
Blow, B. Clifton, Huntingdon
Blue, Brantley, Kingsport
Boaz, Sam E., Clarksville
Bobo, Sam, Shelbyville
Bogard, Rice W., Clarksville
Bogatin, Irvin, Memphis
Boggan, John M., Memphis
Bolt, L. B., Jr., Knoxville
Bolt, Oliver Z., Knoxville
Bomar, James L., Jr., Shelbyville
Boone, Daniel, Nashville
Boone, William G., Memphis
Boone, William G., Jr., Memphis
Boren, J. L., Jr., Memphis
Borod, Marx J., Memphis
Bostick, John, Miss, Birmingham, Ala.
Boston, William E., Lawrenceburg
Boswell, James H., Jackson
Bouldin, Granville S. R., Murfreesboro
Boult, Reber, Nashville
Bowen, William C., Nashville
Bowers, Floyd H., Knoxville
Bowers, John L., Jr., Elizabethton
Bowers, Steve, Nashville
Bowling, Winston K., Memphis
Bowman, A. B., Johnson City
Bowman, James G., Jr., Arlington, Va.
Boyd, B. J., Ashland City
Boyd, Frank K., Athens
Boyd, J. M., Jr., Dyersburg
Boyd, William H., Nashville
Boyers, Thomas, Gallatin
Boyte, G. Griffin, Humboldt
Boywid, Edward T., Memphis
Bozeman, C. Howard, Knoxville
Braden, Emmett W., Memphis
Bradley, Heramn D., Nashville
Brady, Vester G., Los Angeles, Calif.
Brandon, Malcolm R., Lewisburg
Brandon, Newman, Nashville
Brandt, George F., Johnson City
Branstetter, Cecil D., Nashville
Brasher, Laura, Miss, Memphis
Bratcher, Raymond A., Memphis
Bratton, Frank N., Athens
Brazzell, R. H., Nashville
Breedlove, W. Cornelius, Nashville
Brehm, J. Fred, Knoxville
Brenner, Lester H., Memphis
Bresler, Max, Memphis
Briggs, Raymond M., Memphis
Briley, C. H., Jr., Nashville
Brinkley, Robert F., Gallatin
Broadwell, Wm. E., Jr., Florham Park, N. J.
Brock, Ray L., Jr., Chattanooga
Brooks, Neil, Washington, D. C.
Broome, Harvey, Knoxville
Brown, Aaron, Paris
Brown, Bailey, Memphis
Brown, Charles F., Nashville
Brown, Edward S., Nashville
Brown, F. Nat, Jasper
Brown, Harold E., Chattanooga
Brown, Harry B., Jellico
Brown, Jack R., Chattanooga
Brown, James E., Knoxville
Brown, James Erskine, Knoxville
Brown, James R., Centerville
Brown, Joseph K., Bristol
Brown, William G., Chattanooga
Browning, Gordon, Huntingdon
Bruce, William S., Jr., Nashville
Brundige, Harold T., Martin
Bryan, Paul M., Memphis
Bryant, J. Frank, Johnson City
Bryson, Hoyt, Woodbury
Buchanan, Blaine, Chattanooga
Buchanan, J. P., Nashville
Buchignani, Leo J., Memphis
Buck, A. O., Nashville
Buck, Shelburne T., Clarksburg, West Va.
Buckner, James W., Murfreesboro
Buffon, Clifford D., Chattanooga
Buford, Thomas A., Memphis
Bullock, Wiley O., Memphis
Bullock, William O., Memphis
Bumgardner, J. Paul, Knoxville
Bumpus, Paul F., Nashville
Burch, Lucius E., Jr., Memphis
Burcham, Randall P., Fulton, Ky.
Burk, Hal F., Knoxville
Burks, Charles C., Knoxville
Burn, Harry T., Rockwood
Burnett, Jonathan H., Knoxville
Burns, James C., Jr., Shelbyville
Busby, Margaret A., Mrs., Memphis
Burton, Robert M., Memphis
Burton, William F., Jr , Nashville
Busby, Dick, Memphis
Busby, Richard G., Memphis
Butler, Howard F., Nashville
Butler, Melvin B., Nashville
Buxton, George H., Jr., Wartburg
Byrd, Frank C., Memphis
Byrn, William A., Jr., Nashville
Byrne, Arthur D., Knoxville

C

Cady, Charles T., Chattanooga
Cagle, Fred H., Jr., Knoxville
Caldwell, Ben E., Chattanooga
Caldwell, Craig H., Bristol
Caldwell, David G., Union City
Caldwell, John J., Savannah
Caldwell, Thomas A., Jr., Chattanooga
Caldwell, W. H. G., Nashville
Calhoun, Austin J., Memphis
Callicott, Claude W., Nashville
Cameron, C. Arnold, Cookeville
Cameron, John W., Chattanooga
Camp, Jim, Sparta
Camp, Lucius H., Sparta
Camp, Scott, Sparta
Campbell, Benjamin C., Cuyahoga Falls, O.
Campbell, Paul, Chattanooga
Campbell, Paul, Jr., Chattanooga
Campbell, Robert R., Knoxville
Campbell, Roy T., Jr., Newport

Campbell, Rufus, Ripley
Campbell, W. Hoyle, Knoxville
Canale, Daniel D., Memphis
Canale, John F., Memphis
Canale, Phil M., Jr., Memphis
Cannon, Dunlap, Jr., Memphis
Cannon, Stewart L., Jr., Johnson City
Cantor, Bernard H., Johnson City
Capps, Paul R., Morristown
Capshaw, Estle W., Cookeville
Carden, R. Campbell, Chattanooga
Carey, Hugh F., Jr., Memphis
Carlton, A. M., Brownsville
Carmichael, Hugh M., Sparta
Carmichael, Virgil F., Cleveland
Carney, James A., Nashville
Carpenter, Andrew, Nashville
Carpenter, William F., Nashville
Carpenter, William F., Jr., Nashville
Carr, Hal H., Blountville
Carrell, Howard I., Lawrenceburg
Carrier, E. P., Nashville
Carriger, Herman D., Johnson City
Carriger, John S., Chattanooga
Carroll, Dudley, Nashville
Carson, Richard L., Knoxville
Carter, Leland E., Memphis
Carter, William J., Johnson City
Carty, Tate E., Knoxville
Case, Ward R., Jr., Bellaire, Texas
Cash, Benjamin L., Chattanooga
Cash, Marvin M., Chattanooga
Cason, Vincent, Lebanon
Cate, George H., Nashville
Cate, George H., Jr., Nashville
Cate, James G., Jr., Cleveland
Cate, William H., Kingsport
Catlett, Ben S., Jefferson City
Causey, James D., Memphis
Chadwick, T. R., Clinton
Chain, Fledell, Meridian, Miss.
Chamberlain, James W., Nashville
Chambliss, Jac, Chattanooga
Chambliss, John A., Chattanooga
Chambliss, Robert N., Chattanooga
Chambliss, Sizer, Chattanooga
Chandler, Thearon F., Knoxville
Chandler, Walter, Memphis
Chandler, Wyeth, Memphis
Chase, Guy S., Johnson City
Chastain, Paul D., Knoxville
Chattin, Chester C., Winchester
Cheatham, David E., Pulaski
Cheek, Robert L., Knoxville
Cheers, Walter H., Dayton
Cherikos, William A., Flora, Ill.
Cheshire, J. Ross, Jr., Nashville
Child, Robert M., Knoxville
Chitwood, H. H., Nashville
Christenberry, Dexter A., Knoxville
Christian, Ralph B., Nashville
Clark, H. H., Cookeville
Clark, James, Kingsport
Clark, Paul, Knoxville
Clark, William F., Chattanooga
Clarke, James L., Jr., Knoxville
Claunch, Charles L., Chattanooga
Clay, Armistead F., Memphis
Cleaves, William E., Memphis
Clement, Frank G., Nashville
Clement, Robert S., Dickson
Clifton, C. E., Memphis
Cline, Claire C., Memphis
Clinton, Ike R., Memphis
Clodfelter, James A., Alcoa
Clouse, Ewing, Nashville
Cloys, George C., Jr., Union City
Cobb, Charles P., Memphis
Cobb, John B., Jr., Nashville
Cobb, Oliver P., Jr., Memphis
Cobb, Ollie F., Knoxville
Cochran, Carmack, Nashville
Cochran, Hunter K., Memphis
Cochran, R. T., Nashville
Cocke, Joe N., Somerville
Coffey, Charles S., Chattanooga
Coffey, Charles S., Jr., Chattanooga
Coffey, J. Shelby, Jr., Columbia
Coffey, Wilkes, Jr., Murfreesboro
Cohn, Bertrand W., Memphis
Coker, Chester C., LaFollette
Coker, David L., Decatur, Ga.
Cole, Leo L., Jr., Memphis
Cole, Randal B., Elizabethton
Cole, Sam F., Memphis
Cole, T. Edward, Knoxville
Coleman, J. Paul, Johnson City
Coleman, N. R., Jr., Greeneville
Collett, J. Howard, Maynardville
Colley, Jerry C., Columbia
Collins, Alvin B., Murfreesboro
Collins, Charles M., Memphis
Collins, Eugene N., Chattanooga
Collins, Ira T., Kingsport
Collins, Ira T., Jr., Kingsport
Collins, W. Ovid, Jr., Nashville
Condra, David O., Nashville
Conn, Hardin H., Nashville
Conners, John T., Jr., Nashville
Cook, William C., Dickson
Cooke, Elmer L., Lawrenceburg
Cooksey, John E., Lebanon
Cooley, James P., Rockwood
Coombs, George T., Kingsport
Cooper, John A., Nashville
Cooper, Prentice, Shelbyville
Cooper, William E., Knoxville
Cooper, W. P., Nashville
Cooter, O. Harmon, Knoxville
Corbitt, John C., Nashville
Corn, James F., Cleveland
Cornelius, Allen R., Jr., Nashville
Cornelius, Charles L., Nashville
Cornelius, Charles L., Jr., Nashville
Cortner, Alexander W., Clarksville
Cosner, Charles K., Nashville
Costen, John, Memphis
Coulter, Ransom H., Keesler AFB, Miss.
Counts, Earl M., Chattanooga
Courtney Robin S., Columbia
Courtney, Wirt, Franklin
Courtney, Wirt, Jr., Nashville
Covington, E. Mabry, Jr., Franklin
Covington, James E., Nashville
Cowan, Robert H., Nashville
Cox, Allen, Jr., Memphis
Cox, Arthur L., Memphis
Cox, Clarence H., Celina, Ohio
Cox, Judson R., Memphis
Cox, Poston, Memphis
Cox, Taylor H., Knoxville
Cox, Williston M., Knoxville
Crabtree, Charles C., Memphis
Craft, Henry, Memphis
Craig, E. Braly, Lewisburg
Craig, Raymond L., Jr., Knoxville
Craig, Wallace S., Shepherd AFB, Tex.
Craven, William G., Jamestown
Crawford, John C., Jr., Maryville
Crawford, Robert H., Chattanooga
Crawford, Roy D., Maryville
Crawford, Walter K., Cookeville
Crawford, William F., Memphis
Crawley, A. David, Memphis
Crawley, D. B., Memphis
Creasy, Luther, Gallatin
Creekmore, Frank B., Knoxville
Creekmore, Robert E., Knoxville
Crenshaw, Tom B., Memphis
Creson, Larry B., Memphis
Crislip, James A., Memphis
Crockett, Charles, Elizabethton
Crockett, Joseph V., Jr., Nashville
Crosley, William L., Nashville
Crossley, Robert L., Knoxville
Crouch, Billy J., Johnson City
Crownover, Arthur, Jr., Nashville
Crownover, R. N. Sims, Nashville
Crump, Charles M., Memphis
Crutchfield, Thomas, Chattanooga

Crutchfield, Ward, Chattanooga
Crymes, Henry M., Memphis
Cubbage, Benjamin C., Jr., Columbia
Cuison, Lino L., Johnson City
Culvahouse, J. Dudley, Decatur
Cummings, Clarence L., Murfreesboro
Cummings, Joseph G., Nashville
Cummings, Thomas L., Nashville
Cunningham, J. Hamilton, Chattanooga
Cunningham, James C., Clarksville
Cunningham, James R., Humboldt
Curry, Harold C., Memphis
Curtin, Thomas S., Bristol

D

Dailey, Louis I., Memphis
Dale, Albert L., Nashville
Dale, J. C., Jr., Nashville
Dale, William H., Columbia
Dance, Richard, Nashville
Daniel, W. I., Rutledge
Daniel, William M., Jr., Clarksville
Dann, Alex W., Jr., Memphis
Dannel, S. P., Loudon
Darnell, Alex W., Clarksville
Darrow, Raymond H., Nashville
Darter, O. Lloyd, Jr., Nashville
Davenport, Clayton, Bristol
Davenport, Frank, McMinnville
Davenport, William W., Nashville
Davidson, Philip, III, Nashville
Davidson, Theresa S., Mrs., Nashville
Davies, Elmer D., Jr., Nashville
Davis, Ben C., Kingsport
Davis, C. Frank, Morristown
Davis, Charles H., Knoxville
Davis, Charles H., Memphis
Davis, C. William, Pikeville, Ky.
Davis, Earl P., Memphis
Davis, Edward E., Chattanooga
Davis, H. C. Tanner, Memphis
Davis, James C., Nashville
Davis, J. Paschall, Nashville
Davis, Joe C., Lexington
Davis, Lindsey M., Nashville
Davis, Maclin P., Jr., Nashville
Davis, Wils, Memphis
Davis, William W., Knoxville
Dearborn, William N., Nashville
Deatherage, Herman K., Kingston
Defriece, Frank W., Bristol
DeJarnett, James W., Longview, Texas
Delius, John J., Memphis
Delozier, Hugh E., Maryville
Dement, Barton, Jr., Murfreesboro
DeMere, Leona M., Mrs., Memphis
Dempster, James W., McMinnville
Dender, Robert E., Jr., Indianapolis, Ind.
Dender, William M., Etowah
Denney, W. Raymond, Nashville
Denton, H. B., Bolivar
DeWitt, Ward, Jr., Nashville
Diamond, James P. Jackson
Diamond, William T., Jr., Jackson
Dickerson, E. Tucker, Manchester
Dickey, David W., Jr., Knoxville
Dietzen, C. Richard, Chattanooga
Dietzen, W. N., Chattanooga
Dillon, Geary P., Jr., Memphis
Dineen, John W., Chattanooga
DiRisio, Joesph F., Chattanooga
Dismukes, Bradley L., Lebanon
Dixon, Floyd L., Jr., Chattanooga
Dobbs, Robert L., Memphis
Dodds, Blanche E., Miss, Arlington, Texas
Dodson, K. Harlan, Jr., Nashville
Dodson, Thomas A., Sr., Kingsport
Doggett, John J., Jr., Memphis
Dolan, J. J., Memphis
Donaghy, Charles E., Knoxville
Donelson, Lewis R., III, Memphis
Donoho, James A., Hartsville
Dorsey, Gene T., Mrs., Memphis
Dortch, O. Lawrence, Nashville
Dossett, Thomas D., Johnson City
Doten, David C., Memphis
Doty, James F., Nashville
Doughty, John H., Knoxville
Douglas, Beverly, Jr., Columbia
Douglas, Lee, Nashville
Douglass, George P., Memphis
Douglass, William H., Memphis
Doyle, Andrew J., Nashville
Doyle, Clarence R., Nashville
Doyle, Jacobs H., Nashville
Drake, Currie, Milan
Draper, R. G., Memphis
Dudley, Charles B., Jr., Memphis
Duggan, Ben O., Jr., Chattanooga
Duggan, Ralph W., Athens
Dugger, George F., Elizabethton
Dugger, George F., Jr., Elizabethton
Dugger, John F., Knoxville
Duggin, Marshall E., Woodbury
Duggins, Harve M., Knoxville
Duke, F. Marion, Memphis
Duncan, Harold S., Chattanooga
Duncan, John J., Knoxville
Dunlap, John T., Jr., Memphis
Dunlap, L. Duane, Knoxville
Dunlap, Richard L., Jr., Paris
Dunlap, Thomas D., Humboldt
Dunn, Ross V., Nashville
Durham, B. C., Jr., Ripley
Durham, Thomas H., Memphis
Durham, William F., Gallatin
Duzane, Jerre G., Memphis
Dye, Stuart F., Knoxville
Dyer, Ross W., Halls

E

Eagle, W. H., Knoxville
Earthman, Harold, Murfreesboro
Earthman, Webber B., Kingsport
Easterly, Leon E., Greeneville
Eaves, Excell, Rossville, Ga.
Eblen, Elmer L., Kingston
Edmondson, Cathrine, Miss, Washington, D. C.
Edmondson, J. S., Memphis
Edwards, Elwood L., Memphis
Edwards, J. Connelly, Nashville
Edwards, Roscoe L., Truk, Caroline Is.
Egerton, M. W., Knoxville
Egerton, M. W., Jr., Knoxville
Elam, Tom, Union City
Eldridge, James H., Knoxville
Eldridge, Kathryn F., Miss, Chattanooga
Elledge, Fred, Jr., Nashville
Elliott, Allen M., Knoxville
Elliott, George D., Jr., Knoxville
Elliott, Glenn M., Memphis
Elliott, J. Y., Cleveland
Ellis, Leroy J., III, Nashville
Ellis, Lewis F., Chattanooga
Ellis, Newton D., Nashville
Ellis, Walter P., Chattanooga
Ely, L. C., Knoxville
Ely, Myron R., Knoxville
Ely, Richard T., Memphis
Emison, Theo J., Alamo
Emmons, Helen G., Miss, Memphis
Emmons, Walter F., Chattanooga
England, J. L., Decaturville
Englert, Roy T., Springfield, Va.
English, Alfred L., Shelbyville
Enoch, Lee A., Jr., Nashville
Entrekin, Ervin M., Nashville
Epps, J. H., Jr., Johnson City
Epstein, Louis J., Chattanooga
Erwin, H. Dennis, Erwin
Erwin, Thomas A., Chattanooga
Erwin, Thomas A., Jr., Chattanooga
Eschen, Harold H., Memphis
Estep, James D., Jr., Tazewell
Estes, Robert W., Milan
Etheridge, H. T., Jr., Jackson
Eubanks, Louis E., Memphis

Evans, George W., Chattanooga
Evans, James C., Nashville
Evans, Joseph W., Memphis
Evans, Lodge, Elizabethton
Evans, Marion G., Memphis
Evans, Thomas M., Nashville
Ewell, Gerald L., Manchester
Ewell, Leighton, Manchester
Ewell, M. Watkins, Dyersburg
Ewing, Andrew, Nashville
Ewing, Caruthers, Memphis
Ewing, Jess D., Memphis

F

Fair, Oscar M., Woodbridge, Va.
Faithful, Boyd L., Memphis
Faquin, Arthur C., Jr., Memphis
Faragher, John H., Nashville
Farmer, Fyke, Nashville
Farnsworth, Thomas C., Memphis
Farrar, James G., Memphis
Farrell, Louis, Jr., Nashville
Farris, Frank M., Jr., Nashville
Feild, Roscoe A., Memphis
Felknor, William B., Maryville
Felts, Sam L., Jr., Knoxville
Ferguson, Guy O., Elizabethton
Few, William W., Nashville
Fields, Charles B., Union City
Fields, H. L., Jr., Chattanooga
Fillauer, William K., Cleveland
Finlay, Edward, Jr., Chattanooga
Finley, Henry T., Nashville
Finnell, W. T., Cleveland
Fischer, Walter E., Clinton
Fisher, Glendon M., Jr., Nashville
Fisher, W. H., Memphis
Fisher, William H., III, New York, N. Y.
Fitzgerald, W. E., Knoxville
Fitzhugh, Mary Aylett, Memphis
Fitzhugh, Millsaps, Memphis
Fitzpatrick, Solon W., Carthage
Flatt, Wesley P., Cookeville
Flatt, Wesley P., Jr., Cookeville
Flautt, Margery A., Miss, Nashville
Fleming, George R., Clarksville
Fleming, W. S., Columbia
Fletcher, J. S., Chattanooga
Fletcher, J. S., Jr., Chattanooga
Flippin, William J., Milan
Floyd, Ferber S., Memphis
Flynn, Frank L., Knoxville
Foley, Jonathan J., Jr., Nashville
Folk, Reau E., Jr., Nashville
Folts, Aubrey F., Chattanooga
Fones, William, H. D., Memphis
Fonville, L. L. Jackson
Ford, Richard R., Knoxville
Forrester, Robert L., Watertown
Forrester, Walter I., Memphis
Forrester, William H., Pulaski
Fort, John T., Chattanooga
Fortas, William E., Nashville
Fortune, Harry N., Johnson City
Foster, E. Bruce, Knoxville
Foster, George L., Chattanooga
Foster, John I., Jr., Chattanooga
Foust, Raymond N., Nashville
Foutch, Henry C., Nashville
Foutch, McAllen, Smithville
Fowler, Arthur M., Loudon
Fowler, Hammond, Rockwood
Fowler, Harley, G., Knoxville
Fowler, Morgan C., Memphis
Fowler, Newell N., Memphis
Fowler, S. F., Knoxville
Fowler, S. F., Jr., Knoxville
Fox, Charles N., Memphis
Fox, Thomas E., Nashville
Fraker, B. B., Greeneville
France, W. Otis, Jr., Memphis
Francis, Burt, Nashville
Frank, Richard H., Jr., Nashville
Franklin, C. O., Memphis
Franklin, George W., Nashville
Franklin, Jack B., Memphis
Frazier, A. Bradley, Camden
Frazier, Fred B., Chattanooga
Frazier, French B., Chattanooga
Freeman, Lynn B., Springfield
Freeman, Max H., Memphis
Freeman, Simon D., Knoxville
Freemon, Howard P., Lawrenceburg
Freemon, Noble L., Lawrenceburg
Freemon, Noble L., Jr., Waverly
Friedman, Sam, Memphis
Friedman, Sophie G., Mrs. Memphis
Friedman, William E., Memphis
Frierson, J. Dawson, Jr., Columbia
Frost, Norman C., Atlanta, Ga.
Fuller, A. N., Chattanooga
Funk, John R., Nashville
Fuqua, Henry H., Memphis
Fuqua, Vincent L., Jr., Brentwood
Fuston, Del, Jr., Chattanooga

G

Gaither, John P., Chattanooga
Galbreath, Charles F., Nashville
Galella, John, Memphis
Gallagher, Hugh C., Dayton
Galliher, O. R., Jr., Bristol
Gallimore, R. E. L., Martin
Galloway, Jim C., Memphis
Galloway, Victor R., Nashville
Gamble, Joe C., Maryville
Gamble, M. H., Jr., Maryville
Gamble, William T., Kingsport
Gambill, Marvin B., Memphis
Gammon, L. H., Jr., Chattanooga
Gandy, Braxton C., Memphis
Gant, Andrew M., Jr., Nashville
Garfinkle, Elkin, Nashville
Garland, Walter B., Erwin
Garland, Willard H., Erwin
Garlington, William C., Knoxville
Garner, James O., Memphis
Garner, Ned R., Memphis
Garner, Riley C., Memphis
Garrett, Harry L., Kingsport
Garthright, James L., Jr., Memphis
Gartner, Allen G., Washington, D. C.
Gatlin, Henry G., Jr., Nashville
Gee, Elisha, Jr., Memphis
Geer, C. C., Sparta
Gemignani, Arthur J., Memphis
Gentry, Gavin M., Memphis
Gentry, James W., Jr., Chattanooga
Gerber, Hal, Memphis
Gerber, William, Memphis
Gerwin, Daniel L., Memphis
Gianotti, Frank B., Jr., Memphis
Giardina, C. Frank, Memphis
Gibson, Mack B., Kingsport
Gilbert, Charles C., Jr., Nashville
Gilbert, Harris A., Nashville
Gilbert, Leon, Nashville
Gill, Emery B., Centerville
Gill, John W., Monterey
Gilley, Harry B., Manchester
Gilliam, Fred, Manchester
Gilliland, Ben D., Jr., Memphis
Gilliland, Frank M., Memphis
Gilliland, Frank M., Jr., Memphis
Gilliland, John R., Memphis
Gilreath, Sam B., Lebanon
Gladney, Robert W., Corsicana, Texas
Glankler, Frank J., Jr., Memphis
Glascock, Charles L., Memphis
Glasgow, James M., Nashville
Glasgow, S. McP., Jr., Nashville
Glazer, Herbert, Memphis
Glover, William A., Memphis
Gobbel, L. Russell, Arlington, Va.
Goddard, Arthur B., Maryville
Goddard, Homer A., Maryville
Goddard, Houston M., Maryville
Goddard, Lawrence C., Knoxville

Goehring, John A., Jr., Nashville
Goff, Marvin C., Jr., Memphis
Goins, Charles D., Chattanooga
Goins, John C., Chattanooga
Goldsmith, Irving, Chattanooga
Goodall, W. Thomas, Jr., Gallatin
Goodlett, Collier, Clarksville
Goodlett, Collier, Jr., Clarksville
Goodman, Benjamin, Memphis
Goodman, Thomas H., Thomasville, Ga.
Goodman, William W., Memphis
Goodpasture, Henry, Nashville
Goodpasture, Lurton, Jr., Nashville
Goodrich, Billy J., Jackson
Gordon, Gordon I., Memphis
Gordon, Jere C., Kenton
Gordon, William O., Memphis
Gore, Charles M., Bristol
Gore, Thomas P., Nashville
Gorrell, Frank C., Nashville
Gould, W. George, Red Bank, N. J.
Goza, H. Jennings, Jr., Memphis
Gracey, Hugh C., Nashville
Graham, Hardy M., Union City
Graham, J. T., Lynchburg
Graham, Raymond A., Chattanooga
Grant, Leo W., Jr., Oak Ridge
Gravely, Hillmond E., Knoxville
Graves, Frierson M., Jr., Memphis
Graves, Lamar F., Memphis
Gray, A. H., Brownsville
Gray, Frank, Jr., Franklin
Gray, Joseph W., Nashville
Gray, Walter R., Greeneville
Grayson, Thomas R., Jr., Mountain City
Green, Herbert M., Memphis
Green, Jake, Memphis
Green, John F., Winchester
Green, McKinley, Johnson City
Green, Paul A., Nashville
Green, Robert L., Memphis
Greene, John W., Knoxville
Greener, Eugene, Jr., Memphis
Greenwood, Erma G., Mrs., Knoxville
Gregory, Herman M., Athens
Gresham, Kenneth M., Knoxville
Gresham, Kenneth M., Jr., Knoxville
Grider, George W., Memphis
Griffin, Thomas J., Memphis
Griffiss, James J., Chattanooga.
Grigsby, A. J., Jr., Nashville
Grissim, J. M., Nashville
Griswold, Walter H., McMinnville
Grogan, Edward G., Memphis
Grosvenor, Charles N., III, Memphis
Grube, Howard M., Memphis
Grugett, William D., Covington
Guenther, Paul W., Memphis
Guild, Allen T., Gallatin
Guin, Jesse J., Jr., Knoxville
Guinn, Charles C., Etowah
Guinn, David M., Johnson City
Guinn, William F., Johnson City
Gullett, B. B., Nashville
Gwinn, L. E., Memphis
Gwinn, William W., Memphis

H

Haden, Benjamin, Kingsport
Hagan, Charles E., Pulaski
Hagan, R. W., Jr., New York, N. Y.
Hagan, Willard, Lebanon
Haggard, R. R., Waynesboro
Haggard, R. R., Jr., Waynesboro
Hailey, R. B., Sevierville
Hake, W. O., Nashville
Hale, E. W., Jr., Memphis
Hale, Julius D., Jefferson City
Hale, Nathan O., Knoxville
Hale, Shadrack P., Chattanooga
Hale, Winfield B., Jr., Rogersville
Hall, Dawson, Chattanooga
Hall, F. S., Dickson
Hall, Robert E., Knoxville
Hall, Roy, Jackson
Halladay, Donald L., Knoxville
Halle, Myron A., Jr., Memphis
Hammer, John C., McMinnville
Hampton, Peter W., Elizabethton
Hampton, Stuart, Elizabethton
Hancock, Charles L., Jackson
Hannings, Luke, Martin
Hanover, David, Memphis
Hanover, Jay Alan, Memphis
Hanover, Joseph, Memphis
Hanrahan, Daniel G., Memphis
Harber, H. Keith, Chattanooga
Harbert, P. M., Savannah
Harbison, William J., Nashville
Hardin, Carl R., Nashville
Hardin, James N., Greeneville
Hardison, Lee A., Jr., Memphis
Hardy, J. H., Chattanooga
Hargis, J. Frank, Nashville
Hargraves, N. B., Chattanooga
Harper, James L., Nashville
Harper, Vincent, Ashland City
Harper, W. F., Memphis
Harpster, James E., Memphis
Harrell, L. L., Trenton
Harrington, John F., Jackson
Harrington, J. L., Jr., Jackson
Harris, Ewing J., Bolivar
Harris, John I., Nashville
Harris, John W., Memphis
Harris, Louis C., Chattanooga
Harris, Phil B., Greenfield
Harris, Tyree B., III, Nashville
Harris, Walter B., Norfolk, Va.
Harrison, Clifford J., Jr., Nashville
Harrison, George C., Memphis
Harrison, Lawrence W., Memphis
Harrison, Richard H., Manchester
Harsh, David N., Memphis
Harsh, Richard H., Gallatin
Hart, John W., Union City
Harton, Harris M., Jr., Knoxville
Harvey, Stuart C., Miami, Fla.
Harvill, Fletcher E., Clarksville
Harwell, Kenneth, Nashville
Harwell, William A., Lawrenceburg
Harwood, Judson, Nashville
Harwood, Richard D., Memphis
Hasselle R. M., Memphis
Hastings, J. Friel, Memphis
Haston, Clarence E., McMinnville
Hatcher, Abram W., Huntsville, Ala.
Hatfield, B. E., Chattanooga
Hatfield, Gus D., Jr., Chattanooga
Hauk, E. Ray, Kingsport
Havron, James C., Nashville
Hawkins, Frank W., Johnson City
Hayes, Charles B., Jr., Monterey
Haynes, David S., Bristol
Haynes, H. H., Bristol
Haynes, James T., Memphis
Haynes, Joe R., Jr., Knoxville
Haynes, Walter M., Winchester
Haynes, William D., Memphis
Haynes, William O., Jr., Nashville
Haynes, W. W., Chattanooga
Hays, Lake, Memphis
Hays. Mark H., Sr., Chattanooga
Haywood, E. M., Nashville
Haywood, Rosa, Miss, Brownsville
Headman, Francis W., Knoxville
Heathcock, Fenner, Union City
Heiskell, A. L., Memphis
Heiskell, John McCall, Memphis
Helton, T. H., Lawrenceburg
Henderson, John H., Franklin
Henderson, Lonnie E., Memphis
Henderson, Olen W., Knoxville
Henderson, T. P., Franklin
Hendricks, Hugh W., Crossville
Hendrix, Roy W., Jr., Memphis
Hendrix, William E., Memphis
Henrich, Erie S., Memphis
Henry, Douglas, Nashville

Henry, Douglas, Jr., Nashville
Henry, Jack B., Pulaski
Henry, James H., Tullahoma
Henry, Joe W., Jr., Pulaski
Henslee, Martin K., Chicago, Ill.
Herndon, C. T., III, Johnson City
Herod, William E., Nashville
Herrell, Paul W., Chattanooga
Herrin, Kent, Johnson City
Herring, George D., Memphis
Herring, Luther D., Memphis
Herron, Grooms, Dresden
Herron, W. W., Lebanon
Hester, J. T., Jr., Nashville
Hickerson, Joe R., Winchester
Hicks, James H., Memphis
Hicks, Mark C., Jr., Jonesboro
Hiestand, O. S., Jr., Oak Ridge
Higgins, Kenneth D., Athens
High, C. Allen, Nashville
Hill, George A., Memphis
Hill, Malcolm C., Sparta
Hilliard, Pattie L., Miss, Nashville
Himes, Irving L., Memphis
Hines, C. Vernon, Nashville
Hinson, Thomas E., Lebanon
Hipp, Logan A., Jr., Charlotte, N. C.
Hirsberg, David H., Nashville
Hitch, Wallace D., Athens
Hitching, H. James, Chattanooga
Hite, Harry A., Chattanooga
Hodge, Albert L., Chattanooga
Hodges, C. A., Memphis
Hodges, Fleming, Dyersburg
Hodges, Jack D., Johnson City
Hodges, J. H., Knoxville
Hodges, Warner, Memphis
Hofferbert, Louis, Knoxville
Hofstetter, Oscar B., Nashville
Hofstetter, Oscar B., Jr., Nashville
Hofstetter, William S., Nashville
Hogan, John C., Memphis
Holbrook, Paul, Nashville
Hollis, Frank L., Camden
Holman, B. E., Fayetteville
Holman, Hubert T., Fayetteville
Holman, T. I., Jr., Nashville
Holmes, Marion H., Jr., Trenton
Holmes, Richard, Trenton
Holt, Ralph, Memphis
Holt, Robert J., Jr., Jackson
Holtsford, Hiram W., Lawrenceburg
Holtsinger, Eugene, Clinton
Hon, C. O., Chattanooga
Hon, C. O., Jr., Chattanooga
Hon, Daniel B., Chattanooga
Hooker, John J., Nashville
Hooker, John J., Jr., Nashville
Horn, A. E., Memphis
Horowitz, Abe, Columbus, Ohio
Horton, Quinton F., Oak Ridge
Horton, William A., Memphis
Housholder, Quentin L., Nashville
Houston, Carl T., Knoxville
Houston, Charles T., Silver Spring, Md.
Houston, George M., Memphis
Howard, John J., Jr., Memphis
Howard, Laurence B., Nashville
Howard, Lewis S., Knoxville
Howard, William F., Nashville
Howell, Morton B., Jr., Nashville
Howell, William D., Dover
Howser, Harold, Gallatin
Howser, Hugh C., Nashville
Hoyle, Walter, Chattanooga
Huddleston, Alfred B., Murfreesboro
Huddleston, Cameron D., Champaign, Ill.
Hudgins, Paul G., Union City
Hudgins, Ward, Nashville
Hudson, J. K., Memphis
Hudson, Charles H., Jr., Nashville
Hudson, Theodore, Nashville
Huff, William J., Midland, Texas
Huffman, Elridge C., Myrtle Beach, S. C.
Hughes, Allen, Jr., Memphis
Hughes, William M., Chattanooga
Humphrey, Currun C., Cookeville
Humphrey, Thomas E., Jr., Columbia
Humphreys, Allison B., Nashville
Humphreys, Harold M., Chattanooga
Humphreys, James F., Jr., Memphis
Hunt, B. H., Livingston
Hunt, Edwin F., Nashville
Hunt, George A., Memphis
Hunt, Robert C., Chattanooga
Hunter, Clayton B., Chattanooga
Hunter, E. G., Kingsport
Hunter, James M., Gallatin
Hurd, Edward F., Newport
Hurst, Selma C., Mrs., Chattanooga
Hurt, Bennet H., Memphis
Hutcherson, Floyd E., Rockwood
Hutton, E. L., Jr., Memphis
Hyden, Elwood L., Memphis
Hyder, J. Edward, Rogersville
Hyder, Oris D., Johnson City

I

Iddins, James F., Knoxville
Imrie, Elaine H., Mrs., Chattanooga
Ingle, F. M., Chattanooga
Ingraham, Frank C., Nashville
Ingram, Harriett, Miss, Nashville
Ingram, William B., Jr., Memphis
Inman, William H., Morristown
Irons, William C., Memphis
Irwin, James E., Memphis
Ivins, Richard N., Alexandria, Va.
Ivy, Fred E., Jr., Memphis

J

Jackson, Eugene D., Nashville
Jackson, Eugene D., Jr., Nashville
James, Thomas R., Memphis
Jarvis, Howard F., Knoxville
Jaynes, George W., Morristown
Jenkins, Edward J., Nashville
Jenkins, Erby L., Knoxville
Jenkins, T. Arthur, Manchester
Jerman, C. R., Alamo
Jessee, C. James, Jr., Greeneville
Jeter, Robert G., Dresden
Jewell, John J., Jr., Murfreesboro
Jewell, Thomas O., Chattanooga
Johnson, Andrew, Knoxville
Johnson, Carroll C., Memphis
Johnson, C. Rudolph, Dallas, Texas
Johnson, Dick L., Elizabethton
Johnson, George E., Chattanooga
Johnson, Jack, Athens
Johnson, James W. K., Knoxville
Johnson, Jesse E., Jr., Memphis
Johnson, L. Kenneth, Nashville
Johnson, Laurie L., Memphis
Johnson, Perry H., Lebanon
Johnson, Thomas A., Manchester
Johnson, William L., Memphis
Johnston, E. M., Elizabethton
Johnston, S. K., Chattanooga
Johnston, Lamont, Chattanooga
Johnston, Robert D., Knoxville
Johnston, Thomas F., Memphis
Jones, Benton H., Knoxville
Jones, Ezra, Nashville
Jones, Frank L., Jr., London, Ky.
Jones, Fred E., Memphis
Jones, O. Gordon, Jr., Oklahoma City, Okla.
Jones, Harry E., Dresden
Jones, James M., Jr., Lewisburg
Jones, Joe, Memphis
Jones, John Paul, Memphis
Jones, John R., Erwin
Jones, Lee Dameron, Jr., Memphis
Jones, Ollie F., Chattanooga
Jourolman, Leon, Jr., Portland, Oregon
Joyce, Eugene L., Oak Ridge
Joyner, Robert E., Memphis

K

Kaelin, Albert B., Birmingham, Ala.
Karr, Margaret, Miss, Memphis
Kaset, Simon, Chattanooga
Kay, Ruth Edwards, Mrs., Nashville
Keathley, Richard F., Memphis
Keathley, Royalyn, Memphis
Keaton, William C., Hohenwald
Keeble, David M., Nashville
Keeble, John B., III, Atlanta, Ga.
Keeble, Sydney F., Jr., Nashville
Kefauver, Estes, Washington, D. C.
Kegg, Earl C., Nashville
Kelley, Ralph H., Chattanooga
Kelly, A. A., South Pittsburg
Kelly, Fred A., III, Gallatin
Kelly, Paul D., Jr., Jasper
Kelly, Tom C., Jasper
Keltner, Cecil G., Memphis
Kemker, Harry, Memphis
Kemmer, Robert W., Spring City
Kendrick, Robert E., Nashville
Kennedy, Sam D., Columbia
Kennemore, James E., Memphis
Kennerly, Warren W., Knoxville
Kennon, James C., Memphis
Kern, Hymen T., Knoxville
Kerr, Ben Ransom, Murfreesboro
Kerr, H. D., Cleveland
Kerwin, J. E., Memphis
Key, Baxter, Carthage
Key, Clyde W., Knoxville
Key, Walter J., Jackson
Kieffer, Charlotte L., Mrs., Memphis
King, Ernest B., Bristol
King, Frank S., Jr., Nashville
King, H. G. B., Chattanooga
King, James L., Jr., Kingsport
Kinkle, Robert G., Memphis
Kinton, W. R., Trenton
Kinton, W. R., Jr., Trenton
Kirby, James C., Jr., Old Hickory
Kirk, Boyden M., Nashville
Kirkland, Lloyd C., Jr., Memphis
Kirkland, Sam D., Chattanooga
Kirkpatrick, Carl, Kingsport
Kirkpatrick, J. W., Memphis
Kirsch, William F., Jr., Memphis
Kittrell, Willard, Jr., Harriman
Kizer, Ben W., Maryville
Klass, Martin, Chicago, Ill.
Klepper, George M., Memphis
Klepper, George M., Jr., Memphis
Koch, Ray A., Nashville
Kohler, Ben, Jr., Atlanta, Ga.
Kohn, Ben W., Memphis
Kolwyck, Clarence, Chattanooga
Kramer, Jackson C., Knoxville
Kramer, R. Arnold, Knoxville
Kramer, R. R., Knoxville
Krivcher, Robert R., Memphis
Kuhn, Edward W., Memphis

L

Lackey, Harrington A., Nashville
Lackey, J. G., Jr., Nashville
Lackey, Vaden M., Jr., Nashville
Lackey, William W., Savannah
Ladd, Leonard E., Harriman
Lafon, Whit, Jackson
Lake, R. Henry, Memphis
LaManna, George C., Memphis
Lamb, C. D., Fayetteville
Lamb, James B., Fayetteville
Lambdin, J. Carl, Jefferson City
Landrum, W. R., Trenton
Lane, E. Charles, Kingsport
Lane, Hunter, Memphis
Lang, John H. C., Memphis
Langschmidt, Carl H., Jr., Memphis
Lanham, Marguerite K., Mrs., Chattanooga
Lanier, William F., Covington
Lannom, E. H., Union City
Lannom, Ruth F., Mrs., Obion
Lansden, David S., Nashville
Lansden, Dick L., Nashville
LaPenna, James J., Nashville
LaRoche, Richard F., Murfreesboro
Larkey, Kenneth C., Memphis
Lassiter, W. H., Huntingdon
Latta, Franklin W., Dyersburg
Laughlin, H. W., Jr., Memphis
LaVecchia, Louis G., New Alexandria, Va.
Law, Bruce, Memphis
Lawler, Edward J., Jr., Memphis
Lawler, Ralph R., Trenton
Lawrence, William H., Nashville
Laws, Dan M., Jr., Elizabethton
Lazarov, Sidney, Memphis
Lazenby, Russell G., Jr., Nashville
Leary, James E., Memphis
Leathers, Ramsey B., Nashville
Leathers, Raymond H., Nashville
Leaver, Walter C., Jr., Nashville
Ledbetter, Edwin, Savannah
Lee, D. Clayton, Pulaski
Lee, J. D., Madisonville
Lee, McAfee, Knoxville
Leech, Clark, Dickson
Leech, William E., Jackson
Leffler, William B., Memphis
Leftwich, Louis, Jr., Nashville
Leitner, Paul R., Chattanooga
Leming, Earl E., Knoxville
Lenihan, John L., Chattanooga
Leonard, Robert H., Knoxville
Leslie, Rupert W., Nashville
Lester, Harry S., Nashville
Levine, J. L., Chattanooga
Levine, Morris, Nashville
Levit, Ervin H., Memphis
Levitt, Joseph J., Jr., Knoxville
Levy, Herbert R., Memphis
Lewallen, W. Buford, Clinton
Lewis, Brandon, Nashville
Lewis, George T., Jr., Memphis
Lewis, John D., Nashville
Lewis, Sidney C., Dover
L'heureux, E. Paul, Memphis
Light, Amy, Miss, Nashville
Lindsey, Aaron D., Lawrenceburg
Lindsey, Wayne H., Memphis
Linebaugh, George P., Jr., Nashville
Ling, William J., Memphis
Littleton, Robert A., Washington, D. C.
Livingston, Robert I., Sr., Jackson
Loch, John W., Memphis
Locke, F. F., Lawrenceburg
Lockert, W. B., Jr., Ashland City
Lockett, Charles D., Knoxville
Lockett, George H., Harriman
Loden, William C., Mt. Pleasant
Loewenstein, Herman O., Nashville
Long, John R., Jr., Springfield
Long, William J., Bethel Springs
Lopez, Wallace, Memphis
Loser, J. Carlton, Washington, D. C.
Loser, L. B., Nashville
Love, Guy B., Knoxville
Lovett, John C., Benton, Ky.
Lowrance, Edward M., Memphis
Luck, William H., Memphis
Lunn, Mildred, Miss, Nashville
Lusk, Charles W., Jr., Chattanooga
Lusk, Walter L., Chattanooga
Lutin, Joseph J., Nashville
Luton, John S., Nashville
Lykens, Richard W., Sparta
Lyle, James R., Kingsport
Lynch, Edward D., Maryville
Lynch, John M., Nashville
Lynch, Pat, Winchester
Lynn, William H., Memphis

Mc

MacFarland, Alfred T., Lebanon
MacFarland, Lon P., Columbia

MacRae, Lachlan F., Donelson
McAfee, Joseph A., Knoxville
McAlister, Hill, Nashville
McAllester, Sam J., Sr., Chattanooga
McAllester, Sam J., Jr., Chattanooga
McAllester, Spears, Lookout Mountain
McAmis, C. Robert, Kingsport
McAuley, Ben F., Knoxville
McBride, Hubert A., Memphis
McCabe, James Edward, Atlanta, Texas
McCadden, J. E., Memphis
McCall, John T., Nashville
McCampbell, H. H., Jr., Knoxville
McCanless, George F., Nashville
McCarley, T. T., Jr., Nashville
McCarroll, John R., Memphis
McCartie, Joseph B., Memphis
McCartt, J. H., Wartburg
McCary, Joe T., Nashville
McClain, Bronce F., Johnson City
McClain, C. R., Knoxville
McCloy, W. Stuart, Memphis
McCluen, Lloyd G., Rockwood
McClure, Milton D., Chattanooga
McClure, Robert P., Knoxville
McConkey, James H., Chattanooga
McConnell, R. M., Knoxville
McConnell, Thomas G., Knoxville
McConnico, K. T., Jr., Nashville
McCord, John M., Tullahoma
McCord, Mollie R., Miss, Memphis
McCormick, George A., Memphis
McCormick, Grover N., Memphis
McCoy, Frank T., Jr., Nashville
McCroskey, Ralph A., Knoxville
McDavid, Marion F., Harriman
McDonald, U. L., Chattanooga
McDonald, W. Percy, Memphis
McDonald. W. Percy, Jr., Memphis
McDowell, May R., Mrs., Johnson City
McElroy, Billy, Camden
McElroy, Julius D., Memphis
McEwan, Robert C., Chattanooga
McGaughran, Seth B., Memphis
McGhee, Singleton M., Knoxville
McGugin, Dan E., Jr., Nashville
McHugh, William T., Nashville
McIntire, Everette L., Nashville
McInturff, Burkett C., Kingsport
McIntyre, Arch K., Erwin
McIntyre, George L., Bristol
McKee, John E., Jr., Memphis
McKeehan, Jack D., Chattanooga
McKelvey, W. Gordon, Nashville
McKelvey, W. Gordon, Jr., Nashville
McKenzie, O. W., Dayton
McKinney, J. Ross, Huntingdon
McKinney, W. N., Ripley
McKnight, Robert L., Memphis
McLain, William I., Memphis
McLean, Hugh K., Paris
McLean, Robert G., Alamo
McLellan, John S., Kingsport
McMurray, Robert L., Signal Mountain
McMurry, Robert W., Atlanta, Ga.
McNabb, A. B., Lebanon
McNabb, Charles E., Knoxville
McNabb, Earl A., Nashville
McPherson, Wendell E., Knoxville
McRae, Albert T., Memphis
McRae, Robert M., Jr., Memphis
McSween, Donald M., Newport
McSween, James C., Jr., Newport
McTighe, W. A., Memphis
McVeigh, Franklin J., Knoxville
McWilliams, Cletus W., Franklin

M

Mack, John B., Memphis
Madden, J. E., Memphis
Maddin, John K., Nashville
Maddin. John K., Jr., Nashville
Maddox, W. Poe, Huntingdon
Maddux, J. Jared, Cookeville
Magid, Mitchell S., Nashville
Magill, Joe E., Kingsport
Magruder, Lauch M., Jr., Memphis
Mahoney, John T., Chattanooga
Mahood, Chester R., Knoxville
Malone, Gayle I., Trenton
Malone, Taylor, Jr., Memphis
Malone, Thomas H., III, Nashville
Maner, Charles A., Knoxville
Manhein. Jack, Jackson
Manier, Miller, Nashville
Manire, James M., Memphis
Manker, David V., Nashville
Mann, John D., Washington D. C.
Mann, John T., Chattanooga
Mann, Robert T., Knoxville
Marable, John H., Tracy City
Marable, John H., Jr., Memphis
Margolin, Sam S., Memphis
Marks, Dempsey H., Clarksville
Marquis, Robert H., Knoxville
Marsh, Earl H., Knoxville
Marsh, Frank H., Jr., Knoxville
Marshall, Leslie, Lewisburg
Marshall, Richard, Nashville
Marshall, William D., Jr., Memphis
Marston, W., Emmett, Memphis
Martin, F. Linton, Chattanooga
Martin, Harlan W., Jackson
Martin, Henry E., Nashville
Martin, John D., Jr., Memphis
Martin, John M., Jr., Martin
Martin, Joseph, Nashville
Martin, Joseph, Jr., Nashville
Martin, Orville S., Johnson City
Martin, Ruby T., Mrs., Memphis
Martin, William R., Memphis
Masengill, Charles H., Blountville
Mason, Boyd, Tazewell
Mason, Phil C., Lake City
Mason, William E., Murfreesboro
Massey, Leonard D., Chattanooga
Matherne, L. K., Brownsville
Matherne, Marne S., Knoxville
Matthews, Ben L., Memphis
Matthews, Ernest C., III, Nashville
Matthews, John B., Memphis
Maupin, Conway, Greeneville
Maxey, Tony, Livingston
May, Robert M., Jonesboro
Mayer, Jules F., Dallas, Texas
Mayfield, Charles S., Jr., Cleveland
Mayfield, Collett, Nashville
Mayfield, Pearson B., Cleveland
Meacham, C. W. K., Chattanooga
Meacham, Cowdell A., Chattanooga
Meacham, Ellis K., Chattanooga
Meares, Romulus L., Maryville
Meek, Robert C., Nashville
Menzies, Rogers, Dyersburg
Menzies, William R., Jr., Jackson
Merchant, Mabel S., Mrs., Washington, D.C.
Merrill, Erich W., Memphis
Merryman, Lewis B., Jr., Elizabethton
Meux, Joe C., Memphis
Meyer, Charles A., Memphis
Meyer, Douglas A., Chattanooga
Michael, W. E., Sweetwater
Midgett, William L., Nashville
Miles, Charles W., III, Union City
Miles, Lovick P., Jr., Memphis
Miles, Roy A., Nashville
Miles, Roy A., Jr., Nashville
Miles, W. M., Union City
Millar, Glenn L., Jr., Memphis
Miller, Burkett, Chattanooga
Miller, Charles H., Knoxville
Miller, James K., Morristown
Miller, L. D., Jr., Chattanooga
Miller, Mayne W., Johnson City
Miller, Nannie B., Miss, Memphis
Miller, Palmer E., Memphis
Miller, Samuel B., Johnson City
Miller, Vaughn, Chattanooga
Millerlie, Herman T., Nashville

Milligan, C. G., Chattanooga
Milligan, Frederick M., Chattanooga
Milligan, S. J., Greeneville
Mills, J. W., Knoxville
Milwee, G. Q., Nashville
Minick, Norman R., Nashville
Minter, E. Lynn, Kingsport
Mitchell, John H., Jr., Memphis
Mitchell, Richard L., II, Cookeville
Mitchell, Roy L., Tullahoma
Mitchell, Tom, Jr., Memphis
Mitchell, Tom P., Memphis
Mitchell, Thomas E., Johnson City
Mitchell, William H., Sparta
Mitchell, W. Wright, Memphis
Mittwede, Harry L., Nashville
Mollino, Joseph A., Jr., Memphis
Molloy, Sam C., Memphis
Monroe, Thomas B., Jr., Chattanooga
Montedonico, John S., Memphis
Montgomery, Charles C., Paris
Montgomery, Frank, Knoxville
Montgomery, George D., Knoxville
Moody, Edward H., New York, N. Y.
Moon, W. D., Chattanooga
Moon, W. D., Jr., Chattanooga
Moore, Alvin O., Chattanooga
Moore, Charles C., Chattanooga
Moore, Don, Jr., Chattanooga
Moore, Frank K., Kingsport
Moore, Garland S., Nashville
Moore, Graham, Memphis
Moore, John C., Memphis
Moore, J. Washington, Nashville
Moore, Richard T., Newbern
Moore, Tom W., Pulaski
Moore, W. L., Nashville
Moorehead, John T., Memphis
Morgan, Charles G., Memphis
Morgan, Edmund M., Nashville
Morgan, Hugh J., Jr., Chattanooga
Morgan, James F., Chattanooga
Morgan, John K., Chattanooga
Morgan, L. W., Brownsville
Moriarty, H. B., Memphis
Moriarty, H. B., Jr., Memphis
Morrell, John O., Sevierville
Morris, Buckner S., Chattanooga
Morris, Conley E., Knoxville
Morris, T. O., III, Nashville
Morrison, G. L., Jackson
Morrow, Charles C., Nashville
Morrow, George E., Memphis
Morton, George W., Jr., Knoxville
Morton, John W., Oak Ridge
Morton, Julian G., Knoxville
Morton, L. C., Knoxville
Moseley, Raymond H., Chattanooga
Moser, Joseph A., Nashville
Moss, Clark P., Dyersburg
Moss, Joseph P., Nashville
Moss, W. P., Jackson
Mullinax, Livie F., Jr., Chattanooga
Mullinix, Glenn E., Murfreesboro
Mullins, Eugene R., Nashville
Mullins, George W., Jr., Murfreesboro
Mullins, William R., New York, N. Y.
Mummert, Paul F., Memphis
Murchison, Carmack, Jackson
Murchison, John F., Jackson
Murphey, Roy K., Morristown
Murphy, Charles M., Jr., Memphis
Murphy, Earle G., Cleveland
Murphy, Robert C., Nashville
Murrah, W. F., Memphis
Murray, A. H., Memphis
Murray, David P., Jackson
Murray, R. M., Huntingdon
Murray, Roger G., Jackson
Murray, Tom E., Nashville
Musick, Fred G., Knoxville
Myar, Sam A., Jr., Memphis
Myers, Fred L., Newport
Myers, O. V., Nashville

N

Nailling, Sam C., Union City
Nance, Edwin T., Shelbyville
Nave, James G., Cleveland
Neal, Fisher, Paris
Neal, Hollis A., Jamestown
Neal, Vernon, Cookeville
Neal, William P., Cleveland, Miss.
Nearn, Charles E., Memphis
Neblett, J. Leroy, Knoxville
Neel, Robert Y., Johnson City
Neely, Charles L., Memphis
Neely, John L., Jr., Knoxville
Neese, Charles G., Paris
Neil, A. B., Jr., Nashville
Nelson, Harry L., Jr., Nashville
Nelson, Leslie M., Nashville
Nelson, Robert M., Memphis
Nelson, Roy C., Elizabethton
Nesbit, Arthur P., Columbia
Nevils, G. Howard, Tazewell
Newell, W. Edward, Knoxville
Newman, Claire B., Jackson
Newman, Frank M., Donelson
Newman, James A., Nashville
Newman, Virginia M., Mrs., Memphis
Nichol, Harry G., Nashville
Nichols, J. H., Nashville
Nichols, Maurice H., Dayton, Ohio
Nicholson, Leslie A., Memphis
Nickel, Edward C., Memphis
Nickell, A. C., Johnson City
Nochlin, M. Perry, Nashville
Noe, Ralph H., Jr., Morristown
Noel, Dix W., Knoxville
Noland, James O., Clarksville
Noone, Charles A., Chattanooga
Noone, Roger W., Chattanooga
Norman, Jack, Nashville
Norman, Jack, Jr., Nashville
Norman, Jean, Mrs., Nashville
Norris, Edwin O., Kingsport
Norvell, J. Woodrow, Memphis
Norvell, W. E., Jr., Nashville
Nowell, John C., Jr., Trenton
Nunn, E. J., Jackson
Nunnelley, Thomas B., Memphis

O

Oakley, David L., Jr., Oak Ridge
Oakley, J. A., Livingston
Oakley, Millard V., Livingston
O'Brien, Allen M., Springfield
O'Brien, Charles H., Memphis
O'Brien, Jake A., Springfield
Ochs, A. Shelby, Lookout Mountain
Odom, Hager, Chattanooga
Oehmig, Daniel W., Chattanooga
Ogle, Ben C., Knoxville
Ogle, Henry T., Knoxville
Ogle, Robert L., Sr., Sevierville
Ogle, Robert L., Jr., Sevierville
Ogle, W. Henry, Sevierville
O'Hara, Philip M., Detroit, Michigan
O'Hearn, William W., Memphis
Olschner, Joseph C., Greensboro, N. C.
Olson, Blaine W., Memphis
O'Millinuk, Walter, Chattanooga
O'Neil, William P., Knoxville
Onstott, John H., Nashville
O'Rear, Alf. R., Chattanooga
Osborn, H. H., Nashville
Osborn, Z. T., Jr., Nashville
Osment, Horace, Nashville
Osoinach, John A., Memphis
Osradker, Dorothy, Miss, Memphis
Oughterson, T. T., Stuart, Fla.
Overend, George D., Jr., Chattanooga
Overton, John V., Knoxville
Owens, Don G., Jr., Memphis

P

Pack, David M., Sevierville
Page, John D., Mt. Pleasant

Palmer, Edmund T., Dyersburg
Pappas, John C., Knoxville
Pappas, Theodore G., Atlanta, Ga.
Pardue, Woodrow W., Kingsport.
Pardue, W. Rufus, Nashville
Parish, William W., Memphis
Parker, Herman R., Knoxville
Parker, Paul E., Knoxville
Parker, R. B., Jr., Nashville
Parker, Reeder, Waverly
Parks, James B., Chattanooga
Parks, Jess, Jr., Chattanooga
Parks, Preston, Somerville
Parrish, Audey W., Nashville
Parrish, Charles S., Jr., Nashville
Parrott, Fred W., Newport
Parsons, H. Marvin, Kingsport
Parvin, F. H., Greeneville
Patty, Hubert D., Walland
Paul, Howard R., Memphis
Payne, Lewis C., Nashville
Pearman, Jess E., Harriman
Pearson, Clinton R., Memphis
Pearson, R. L., Memphis
Peck, Joe P., San Francisco, Calif.
Peeler, William J., Waverly
Peiser, Louis E., Memphis
Pennington, J. Eugene, Madisonville
Pentecost, Cayce L., Dresden
Pepper, Harry L. Springfield
Pepper, N. E., Memphis
Percy, William A., Memphis
Peters, William H., Jr., Knoxville
Petree, Jack, Memphis
Pharr, Robert W., Memphis
Pharr, Samuel S., Memphis
Phelan, Eugene J., Memphis
Phillips, Clarence W., Shelbyville
Phillips, Harry, Nashville
Phillips, James N., Knoxville
Phillips, James O., Jr., Rogersville
Picard, Milton C., Jr., Memphis
Pierce, Clifford D., Memphis
Pierce, Dyle L., Jr., Memphis
Pierotti, Harry C., Memphis
Pierotti, Leonard D., Memphis
Piper, Wilbur W., Knoxville
Pittman, Alfred B., Jr., Memphis
Pitts, William H., Nashville
Pollard, H. O., Knoxville
Polston, Felix E., Nashville
Pool, George F., Mrs., Longview, Texas
Pope, Byron, Knoxville
Pope, Henry L., Jackson
Pope, James P., Knoxville
Pope, Lewis S., Nashville
Pope, W. Curtis, Memphis
Pope, W. Curtis, Jr., Memphis
Porch, D. Scott, Jr., Waverly
Porter, Dudley, Jr., Chattanooga
Porter, James M., Springfield
Porter, John S., Memphis
Porter, R. H., Clarksville
Posert, H. P., Memphis
Posner, Marvin, Memphis
Post, Elizabeth R., Mrs., Nashville
Poston, Howard R., Kingsport
Potts, Ramsay D., Jr., Washington, D. C.
Powell, Ferdinand, Jr., Johnson City
Powell, Rivers L., Mrs., Memphis
Powers, Benjamin R., Knoxville
Powers, John Y., Jackson
Prater, Raymond A., Chattanooga
Pressgrove, A. L., Jr., Memphis
Prewitt, Alan M., Jr., Bolivar
Prewitt, Thomas R., Memphis
Price, Edwin A., Jr., Nashville
Price, Fred S., Sevierville
Price, O'Brien, Springfield
Price, R. Winston, Cocoa, Fla.
Price, Thomas R., Memphis
Price, Walter L., Johnson City
Prince, Roland, Oak Ridge
Pritchard, Howard W., Memphis
Pritchett, John A., Nashville
Privette, Ivan T., Knoxville
Proctor, Tom H., Jr., Nashville
Puett, Fred, Athens
Pulliam, Arthur C., Nashville

Q

Qualls, J. Frank, Harriman
Queener, M. E., Columbia
Quick, W. Edward, Memphis

R

Rader, Charles E., Knoxville
Radin, Ralph M., Memphis
Ragan, Hughie, Jackson
Rains, William J., Atlanta, Ga.
Rainwater, C. S., Dandridge
Rainwater, C .S., Jr., Dandridge
Ramsey, B. J., Jr., Jefferson City
Rando, Louis V., Memphis
Randolph, George, Memphis
Raper, C. J., Murfreesboro
Rassas, Waldo E., Clarksville
Ratcliff, Harold R., Memphis
Ratner, Frank E., North Hollywood, Calif.
Raulston, Jackson C., Kingsport
Raulston, Sam P., Jasper
Raulston, Sam R., Jasper
Ray, Jeter S., Nashville
Rayner, Kenneth, Memphis
Rayson, Edwin H., Jr., Knoxville
Ready, Frank J., Washington, D. C.
Reagan, James B., Jamestown
Reams, Hugh E., Kingsport
Rebman, A. F., III, Chattanooga
Reddy, J. H., Chattanooga
Redmond, J. B., Jr., Crossville
Reece, B. Carroll, Johnson City
Reece, Lem L., Jonesboro
Reed, Joseph L., Morristown
Regan, John M., Memphis
Reid, Lyle, Brownsville
Reingold, Arvin H., Chattanooga
Reiniche, H. Terry, Johnson City
Reviere, Herman L., Memphis
Reynolds, Frank P., Nashville
Reynolds, Mercer, Jr., Chattanooga
Rexford, Chester C., Atlanta, Ga.
Rhem, Thomas C., Memphis
Rice, Milton P., Nashville
Rice, Russell, Jackson
Rich, Herbert R., Nashville
Rich, Ira H., Centerville
Richards, Latta, Dyersburg
Richardson, James C., Nashville
Richardson, John M., Clarksville
Richardson, Robert L., Jr., Franklin
Richardson, W. Allen, Columbia
Richey, Joseph W., Wickliffe, Ky.
Rickey, Albert C., Memphis
Ridenour, Billy R., Sweetwater
Ridenour, C. C., Chattanooga
Ridenour, J. Carson, Clinton
Ridley, Granville S., Murfreesboro
Riley, Albert G., Memphis
Riley, Noel H., Ridgely
Riner, Hallie K., Miss, Elizabethton
Rippy, Chester D., Nashville
Ritter ,Virginia M., Mrs., Nashville
Roark, Hugh W., McKenzie
Roberts, Abe L., Memphis
Roberts, Charles, S., Kingston
Roberts, Hillard M., Livingston
Roberts, Joseph B., Chattanooga
Robertson, James D., Chattanooga
Robertson, John C., Memphis
Robertson, R. C., Tullahoma
Robertson, Robert L., Jr., Tullahoma
Robinson, John E., Memphis
Robinson, Mac E., Nashville
Robinson, Solon L., Pikeville
Robinson, Thomas L., Memphis
Robinson, W. Harris, Chattanooga
Robinson, Walter M., Jr., Nashville

Roddy, Joe A., Chattanooga
Rodgers, William C., Memphis
Rogoski, Joseph R., Knoxville
Rolston, Charles F., Chattanooga
Rond, Charles A., Memphis
Roper, William T., Jacksonville, Fla.
Rosenberg, Jo Ann, Miss, New York, N. Y.
Rosenbush, Mervin M., Memphis
Rosenfield, William B., Memphis
Rosengarten, Jerome, Memphis
Rosier, D. H., Jr., Maryville
Roskin, Ben L., Nashville
Ross, E. W., Jr., Savannah
Ross, James B., Columbia
Ross, John J., Savannah
Ross, M. S., Nashville
Rotchild, Walter W., Jr., Memphis
Rothermel, Walter C., Oak Ridge
Rowlett. George C., Martin
Rowntree, J. A., Knoxville
Rubenstein, Samuel, Memphis
Rubert, Harry P., Memphis
Rucker, John R., Murfreesboro
Rucks, Edward L., Memphis
Ruleman, Wilbur C., Jr., Memphis
Runyon, Charles V., Clarksville
Russell, Edward P., Memphis
Russell, Eugene, Nashville
Russell, William H., Memphis
Rust, Littell, Nashville
Rutherford, Charles H., Jr., Nashville
Rutherford, David C., Nashville
Rutstein, Leonard D., Memphis
Ryan, Richard J., Memphis

S

Sabella, Anthony J., Memphis
Sabine, Harry G., Crossville
Saindon, Phillip C., Nashville
Sanders, Clifford E., Kingsport
Sanders, Edward K., Franklin
Sanders, Paul H., Nashville
Sanderson, James T., Memphis
Sandidge, John C., Nashville
Sandidge, Kent, III, Nashville
Sanford, John W., Ripley
Sanford, William V., Jr., Nashville
Saulpaw, Karl D., Jr., Knoxville
Saulsberry, Alfred W., LaFollette
Saunders, James P., Jr., Washington, D. C.
Savage, Woodson J., Jr., Bolivar
Sayford, Alan N., Nashville
Sayle, Raymond H., Memphis
Saylor, Walter E., Johnson City
Schaeffer, James F., Memphis
Schlater, Thomas W., Nashville
Schneider, Anne H., Mrs., Jackson
Schneider, Harry, Memphis
Schneider, Julius G., Nashville
Schneider, Victor F., Jackson
Schram, W. L., Nashville
Schulman, I. R., Nashville
Scott, John R., Chattanooga
Scott, Roy M., Memphis
Scott, Roy M., Jr., Memphis
Scruggs, H. C., Clinton
Scruggs, Harry U., Memphis
Scruggs, Roy A., Chattanooga
Seay, Daniel E., Lebanon
Seddon, Edward, Murfreesboro
Seidman, P. K., Memphis
Seligman, Harold, Nashville
Sellers, Nancy S., Mrs., Murfreesboro
Sellers, William T., Murfreesboro
Senter, Harry L., Bristol
Senter, James D., Jr., Humboldt
Sewell, F. C., Memphis
Sexton, Maxwell, Oneida
Sexton, Roy D., New York, N. Y.
Seymour, Arthur G., Knoxville
Seymour, Charles M., Knoxville
Seymour, Sam H., Chattanooga
Shankman, Aaron, Memphis
Shanks, Guy W., Knoxville
Shannon, John, Harriman
Sharp, William E., Jr., Orangeburg, S. C.
Sharpe, Beulah D., Mrs., Nashville
Shea, Arthur J., Memphis
Shea, John T., Memphis
Shelton, Hugh T., Columbia
Shelton, Hugh T., Jr., Columbia
Shepherd, J. H., Memphis
Sherman, Charles R., Memphis
Sherrill, William M., Chattanooga
Sherwood, Paul J., Johnson City
Shields, David W., Jr., Manchester
Shields, David W., III, Manchester
Shields, William H., Maryville
Shinn, Garland H., Hattiesburg, Miss.
Shoaf, William A., Covington
Shoffner, Allen D., Shelbyville
Shofner, John C., Shelbyville
Short, Hunter B., Nashville
Short, Keith, Jackson
Shuff, George, Ripley
Shull, J. Malcolm, Elizabethton
Shumacker, Ralph, Chattanooga
Sidwell, W. Grady, Celina
Silver, Malcolm G., Memphis
Silvestri, James, West New York, N. J.
Simmonds, J. R., Johnson City
Simmons, Sherwin P., Tampa, Fla.
Simpson, Hugh C., Knoxville
Sims, Cecil, Nashville
Sims, J. G., Nashville
Sims, Wilson, Nashville
Sisco, William M., Knoxville
Sisk, Leonard, Nashville
Skaggs, William C., Knoxville
Sloan, A. F., South Pittsburg
Sloan, E. R., Madisonville
Sloan, O. T., Madisonville
Sloan, W. H., Savannah
Slovis, Norbert J., Knoxville
Smartt, John M., Knoxville
Smith, Alden D., Nashville
Smith, Alexander P., Covington
Smith, Cyril J., Houston, Texas
Smith, Edward P. A., Memphis
Smith, Ernest F., Kingsport
Smith, Eulyse M., Memphis
Smith, Ewing E., Murfreesboro
Smith, Ewing, Jr., Murfreesboro
Smith, Horace L., Jr., Chattanooga
Smith, Howell C., Jr., Clarksville
Smith, James A., Nashville
Smith, James P., Memphis
Smith, John H., Livingston
Smith, John L., Nashville
Smith, Keller, Knoxville
Smith, M. V., Mrs., Memphis
Smith, Richard W., Memphis
Smith, Robert B., Savannah
Smith, Roy B., Nashville
Smith, Thad D., Gatlinburg
Smith, Thomas O. H., Nashville
Smith, Thomas O. H., Jr., North Chicago, Ill.
Smith, W. Corry, Chattanooga
Smith, Willard E., Henderson
Smoot, Shelby W., Kingsport
Sneed, Dewitt T., Jr., Chattanooga
Snepp, Charles D., Knoxville
Snipes, B. B., Johnson City
Snodgrass, David H., Sparta
Snodgrass, E. H., Crossville
Snodgrass, Jonas L., Crossville
Snodgrass, Stan T., Nashville
Snow, Marvin E., Cookeville
Snyder, William L., Knoxville
Somervill, Charles E., Memphis
Sorrick, Paul W., Jr., Chattanooga
Southern, Donald B., Knoxville
Southern, Martin, Knoxville
Sowards, Hugh L., Jr., Coral Gables, Fla.
Spain, Harrison M., Jr., Memphis
Spears, L. N., Chattanooga
Spears, W. D., Chattanooga

Speck, B. F., Livingston
Speer, Clayton W., Nashville
Sperry, Lawrence, Nashville
Spragins, Robert H., Jackson
Spragins, Sidney W., Jackson
Spragins, T. Lamar, Jackson
Sprouse, John D., Springfield
Stair, Richard, Knoxville
Stansberry, Roy N., Knoxville
Stanton, Hugh, Memphis
Starbuck, John D., Chattanooga
Steele, Allen M., Nashville
Steele, Thomas Wardlaw, Nashville
Stegall, Whitney, Murfreesboro
Steinberg, Leon, Knoxville
Stephenson, Claude B., Centerville
Stephenson, Jay G., Nashville
Sternberger, Herbert D., Brownsville
Steuterman, Harry J., Memphis
Stevens, R. W., Fayetteville
Steward, Bob G., Memphis
Stewart, A. Tom, Nashville
Stewardt, H. Francis, Nashville
Stewart, L. F., Winchester
Stewart, T. L., Winchester
Stinson, W. David, Jr., Memphis
Stivers, John R., Memphis
Stockell, Albert W., Nashville
Stokes, Carl N., Memphis
Stone, Harold B., Knoxville
Stone, J. Homer, Memphis
Stone, Steven C., Chattanooga
Stophel, John C., Chattanooga
Storie, Will R., Jamestown
Stout, Annie M., Miss, Memphis
Stout, Conrad D., New York, N. Y.
Strang, Francis T., Chattanooga
Strauch, Irving M., Memphis
Strauch, Morris L., Memphis
Strauss, Amelia C., Mrs., Knoxville
Strauss, Harry, Knoxville
Strawbridge, Allen J., Dresden
Stuart, Hardwick, Cleveland
Stuart, Ray, Dickson
Sturdivant, Robert W., Nashville
Sugg, William C., Fayetteville
Sullivan, J. W., Jr., Knoxville
Summers, Dennis W., Jr., Nashville
Summers, James C., Nashville
Summers, Paul R., Somerville
Summitt, Robert M., Chattanooga
Sutton, Barrett, Nashville
Swafford, Carl A., Chattanooga
Swafford, Charles P., Dayton
Swafford, Howard G., South Pittsburg
Swafford, Hoyt V., Crossville
Swafford, Paul A., Jasper
Swan, Nelson, Johnson City
Swann, Henry F., Dandridge
Swidler, Joseph C., Knoxville
Swiggart, James M., Nashville
Swiggart, W. H., Nashville
Switgall, Julius, Johnson City

T

Tabb, Benjamin Z., Chattanooga
Taber, Albert W., Chattanooga
Tait, James M., Jr., Memphis
Taliaferro, J. Lewis, Memphis
Tanner, Andrew D., Nashville
Tanner, Leonard R., Chattanooga
Tant, Melville, Memphis
Tapp, Hugh A., Knoxville
Tarpley, Bayard, Shelbyville
Tate, Oscar M., Jr., Knoxville
Tate, S. Shepherd, Memphis
Tatum, Lloyd, Henderson
Taylor, Alfred W., Johnson City
Taylor, Calvin N., Knoxville
Taylor, Charles R., Memphis
Taylor, Earnest R., Morristown
Taylor, H. Frank, Nashville
Taylor, Hillsman, Memphis
Taylor, Hubert R., Knoxville
Taylor, James J., Memphis
Taylor, Jerome G., Knoxville
Taylor, Jimmie L., Huntingdon
Taylor, John B., Chattanooga
Taylor, Lowell W., Memphis
Taylor, Lloyd E., Maryville
Taylor, Robert C., Nashville
Taylor, Robert L., Memphis
Taylor, Robert L., Nashville
Taylor, Robert P., Copperhill
Taylor, Tom J., Athens
Tedder, J. Ralph, Rockwood
Templeton, Harry C., Winchester
Templeton, Jerome, Knoxville
Templeton, John D., Shelbyville
Templeton, William P., Henderson
Terry, Charles R., Morristown
Testerman, Daniel H., Knoxville
Testerman, John W., Knoxville
Tharpe, James M., Memphis
Thomas, Al H., Memphis
Thomas, D. Kelly, Maryville
Thomas, George C., Jr., Dresden
Thomas, John A., Knoxville
Thomas, Rebecca, Miss, Nashville
Thomas, Robert S., Ripley
Thomas, W. Neil, Jr., Chattanooga
Thomason, Joe C., Knoxville
Thomason, John J., Memphis
Thomasson, William C., Chattanooga
Thompson, David E., Philadelphia
Thompson, Earl, Nashville
Thompson, John A., Rogersville
Thompson, John T., Memphis
Thompson, L. G., Winchester
Thomson, Thomas W., Knoxville
Thrasher, Wilkes T., Jr., Chattanooga
Threlkeld, James E., Memphis
Tillman, Robert A., Memphis
Timberlake, Joe F., Jr., Chattanooga
Tindell, Charles K., Knoxville
Tipps, Maynard, Tullahoma
Tipton, Albert C., Elizabethton
Tipton, Jere T., Chattanooga
Tipton, John H., Covington
Tipton, Will C., Covington
Todd, Andrew L., Jr., Murfreesboro
Todd, John H., Memphis
Todd, John R., Kingsport
Todd, William S., Kingsport
Toler, Claude C., Paris
Tollett, Carlisle S., Crossville
Tollett, E. G., Crossville
Tollett, James R., Crossville
Tomlin, Aubrey L., Little Rock, Ark.
Tomlin, Hewitt P., Jr., Jackson
Tomlin, Troy W., Somerville
Tomlinson, Pride, Jr., Columbia
Tonsman, John, Memphis
Townsend, Buford A., Sevierville
Townsend, Edwin C., Parsons
Townsend, Mahlon L., Knoxville
Trabue, Charles C., Jr., Nashville
Tramell, Herman K., Jr., Jellico
Traughber, James K., Jr., Greenbrier
Traughber, J. Thomas, Nashville
Trautman, Herman L., Nashville
Travis, J. E., Nashville
Travis, John A., Nashville
Treadway, Edwin L., Jr., Johnson City
Trenchi, Peter, Jr., Tullahoma
Trent, Warren T., Knoxville
Trotter, Clarence R., Knoxville
Troutman, Conrad E., Jr., LaFollette
Tual, Blanchard S., Memphis
Tuck, James R., Nashville
Tucker, David F., Jr., Elizabethton
Tucker, Dewitt, Erwin
Tucker, John R., Memphis
Tucker, Mark W., Crossville
Tucker, Richard L., Memphis
Tulev, C. W., Nashville
Tunnell, W. Lawrence, Oak Ridge
Turley, Thomas F., Jr., Memphis

Turnblazer, William J., Jellico
Turner, Cooper, Jr., Memphis
Turner, Edward Myer, Carthage
Turner, Elizabeth A., Miss. Memphis
Turner, James F., Chattanooga
Turner, Robert F., Jamestown
Turner, W. H., Carthage
Tweed, William W., Greeneville
Tyler, Gaines A., Jr., Knoxville
Tyne, George H., Nashville

U

Udelsohn, Robert A., Memphis
Uhlian, John L., Jr., Nashville
Underwood, James M., Clinton
Underwood, Shirley B., Mrs., Johnson City
Upchurch, Cornell P., Pikeville
Utley, Robert V., Medina

V

Vaden, Howard C., Nashville
Vail, Samuel E., Binghamton, N. Y.
Valaske, M. Thomas, Reading, Pa.
Valentine, Gay W., Knoxville
Valentine, John J., Memphis
Valley, Raymond O., Memphis
Van Cleave, James W., Chattanooga
Van den Bosch, John, Jr., Jackson
Van Derveer, Joe, Chattanooga
Van Dyke, James W., Paris
Van Oss, Murine H., Mrs., Memphis
Vaughan, Lemuel G., Ramer
Vaughn, Elmer B., Memphis
Venable, Nelson, Knoxville
Vesser, Hubert H., Knoxville
Vineyard, Jesse M., Memphis
Vineyard, Ralph E., Knoxville
Von der Lanken, Carl, Levittown, N. Y.
Vorder Bruegge, Vincent W., Memphis

W

Wade, Barbara B., Miss, Memphis
Wade, D. R., Jr., Pulaski
Wade, Henry G., Lewisburg
Wade, John W., Nashville
Wade, William J., Nashville
Waggoner, Marinell R., Mrs. Maryville
Wagner, Curtis L., Jr., Arlington, Va.,
Wagner, Joseph C., Chattanooga
Waldauer, Abe D., Memphis
Waldrop, Homer H., Jackson
Walker, Alvy D., Jr., Dyersburg
Walker, Clay, Morristown
Walker, Crissim H., Lebanon
Walker, J. B., Jr., Centerville
Walker, Joe H., Jr., Ripley
Walker, Robert B., Atlanta, Ga.
Walker, Robert K., Chattanooga
Walker, Sam P., Memphis
Wall, Carter B., Knoxville
Wall, Ramsay, Memphis
Wall, Smith, Nashville
Wall, Thomas P., Jr., Nashville
Wallace, John L., Lewisburg
Wallace, Lewis E., Fountain City
Waller, William, Nashville
Waller, William, Jr., Nashville
Walsh, Bailey, Washington, D. C.
Walsh, Edmond J., Nashville
Walsh, William M., Memphis
Walt, Charles A., Memphis
Walt, John D., Memphis
Walter, H. Calvin, Knoxville
Walton, William B., Memphis
Ward, Robert H., Kingston
Warden, Goodloe, Jr., Manchester
Warfield, Charles H., Nashville
Waring, Roane, Memphis
Waring, Roane, Jr., Memphis
Warmath, J. Frank, Humboldt
Warner, Harold C., Knoxville
Warner, Robert J., Jr., Nashville
Warren, Mary E., Miss, Memphis
Washington, Joe C., Athens
Wassick, Andrew A., Chattanooga
Waterhouse, James F., Chattanooga
Watkins, George C., Ripley
Watkins, E. E., Loudon
Watkins, James P., Jr., Loudon
Watkins, Lowe, Nashville
Watkins, Thomas G., Nashville
Watson, Charles L., Memphis
Watson, J. B., Jr., Nashville
Watson, James W., Memphis
Watson, Katherine, Miss, Memphis
Watson, Manly A., Chattanooga
Watters, Curtis R., Lewisburg
Weakley, Ewell T., Dyersburg
Weakley, Melvin T., Dyersburg
Weatherford, Heiskell, Jr., Memphis
Weaver, Donald, Jackson
Weaver, Maurice M., Chattanooga
Webb, Guy L., Knoxville
Webb, James S., Sewart AFB, Tenn.
Webb, King, Dresden
Weber, William E., Jr., Kingsport
Webster, George D., Washington, D. C.
Weeks, Ben O., Memphis
Weeks, William R., Chattanooga
Weill, Harry, Chattanooga
Weimar, Homer B., Nashville
Weinstein, A. E., Memphis
Welch, O. C., Chattanooga
Welch, William E., San Francisco, Calif.
Weldon, William K., Memphis
Weller, James A., Johnson City
Wellford, Donald R., Memphis
Wellford, Harry W., Memphis
Wells, Alex W., Chattanooga
Wells, Buford E., Jr., Memphis
Wells, L. Garland,, Kingsport
Wells, O. W., Memphis
West, Ben, Nashville
West, Clyde P., Memphis
West, John L., Oneida
West, W. K., Jr., Memphis
West, Wilson N., Nashville
Westenberger, H. Keith, Nashville
Westerberg, G. E., Cleveland
Whalley, John D., Nashville
Wheat, J. Robert, Chattanooga
Wheeler, John L., Chattanooga
Wheless, J. F., Chattanooga
White, Edward C., Nashville
White, Frank L., Memphis
White, J. B., Dickson
White, J. Olin, Nashville
White, J. Paul, Union City
White, Jack P., Nashville
White, Joseph R., Jr., Nashville
White, Weldon B., Nashville
Whitlow, Glenn H., Selmer
Wicker, William H., Knoxville
Wilbur, John H., Memphis
Wiley, Dayton G., San Antonio, Texas
Wilkerson, W. A., Chattanooga
Wilkes, Carlton N., Memphis
Wilkinson, John T., Jr., Memphis
Wilkinson, Margaret, Miss, Memphis
Williams, Albert, Nashville
Williams, Auvergne, Memphis
Williams, Auvergne, Jr., Cincinnati, O.
Williams, Berry C., Sr., Fayetteville
Williams, Bill J., Fort Myers, Fla.
Williams, Christopher H., Jr., Memphis
Williams, Ernest B., Jr., Memphis
Williams Ernest B., III, Memphis
Williams, Fred M., Chattanooga
Williams, H. Barton, Jackson
Williams, Henry N., Dickson
Williams, Joe V., Jr., Chattanooga
Williams, John L., McKenzie
Williams, Knox, Etowah
Williams, Lon T., Knoxville
Williams, Nell I., Mrs., Etowah
Williams, Silas, Jr., Chattanooga

Williams, William H., Memphis
Williams, W. Thomas, Memphis
Williamson, Ben W., Jr., Knoxville
Williamson, E. L., Memphis
Willis, William R., Jr., San Francisco, Calif.
Wilson, Frank W., Oak Ridge
Wilson, Fred P., Memphis
Wilson, Harold E., Shreveport, La.
Wilson, Howard E., Kingsport
Wilson, Jack, Nashville
Wilson, Marvin A., Florence, Ala.
Wilson, Max C., Kingsport
Wilson, Roy J., Winchester
Wilson, Shields, Chattanooga
Wilson, W. C., Knoxville
Wilson, William C., Nashville
Wimberly, Harold, Knoxville
Winchester, James R., Germantown
Winchester, Lee, Memphis
Winchester, R. Lee, Jr., Memphis
Winick, Ben R., Knoxville
Winkelman, James A., Dallas, Texas
Winningham, Pierce, Jr., Jackson
Winningham, Richard H., Chattanooga
Winston, Frank, Bristol
Wisecarver, J. Brice, Jefferson City
Witt, Howard S., Kingsport
Witt, James C., Madisonville
Witt, Raymond B., Jr., Chattanooga
Witt, R., Beecher, Madisonville
Woerner, Victor, Rochester, N. Y.
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Wright, Joe H., Mrs., Sweetwater
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Wulff, Albert V. R., Jr., Oak Ridge
Wyatt, James R., Nashville
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Wynn, Philip A., Sevierville
Wynn, Thad M., Jr., Sevierville

Y

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Yerger, Campbell, Memphis
Yokley, E. C., Nashville
Yost, George W., Springfield
Young, Lindsay, Knoxville
Young, Percy C., Memphis
Young, Rebecca, Mrs., Memphis
Young, Robert S., Jr., Knoxville
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Z

Zicarelli, Mitchell Van, Nashville
Ziegler, C. T., Athens

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TENNESSEE LAW REVIEW

Volume 25 WINTER 1958 Number 2

THE EIGHTEENTH ANNUAL INSTITUTE

INTRODUCTORY REMARKS*

Distinguished Guests, Fellow Members of the Bar, Representatives of the Railroad and Insurance Industries, Ladies and Gentlemen:

It is a great privilege to welcome you to our Eighteenth Annual Law Institute for practicing lawyers. We recall with pleasure the visits which many of you have made to our previous institutes. We have been looking forward with keen anticipation to your return this year. You have done something for us by taking the time and trouble, and incurring the expense of coming here. This audience is the kind of comeback that we understand and appreciate. We are aware that you are here with a set and a serious purpose. We hope that all of you will attend all three sessions today, and when you leave this building tonight you will feel that our planning committee succeeded in providing lawyers interested in railroad litigation with worthwhile help, guidance and entertainment.

To the lawyers of America, as to no other profession, is committed the safeguarding of the principles of even-handed justice as between man and man, and as between man the individual and man vested with governmental power. There is no field of human endeavor where there is a greater need of even-handed justice than there is between the railroads and the government, and between the railroads and the dead and wounded casualties emanating from railroad operations. Our program has been arranged on the theory that the best way of making progress, where conflicting interests and sharply divided issues are involved, is to have those issues freely and publicly discussed by experienced and skillful lawyers who are representatives of adverse interests.

We have here today on the various panels a topflight array of railroad defense lawyers: Joe Allen, Pennsylvania Railroad's stellar trial attorney; Josh Groce, distinguished for his handling of the Missouri Pacific, M-K-T, and Pullman Company tort litigation; and J. M. Terry, well-known to many in this audience as Louisville & Nashville's star claims attorney.

*Address delivered at the opening of the Railroad Tort Liability Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

For the plaintiff's presentation we are proud to have on the program one of the nation's best known lawyers in the field of railroad litigation, Francis H. Hare of Birmingham. Mr. Hare will be assisted in the presentation of the interests of plaintiffs by a brilliant young attorney, Truman Hobbs, of the Montgomery Bar. To Mr. Hobbs we owe a vote of special thanks. He agreed to appear on this program with Mr. Hare with only a few days notice, replacing a scheduled speaker who is unexpectedly engaged in a trial today. Mr. Hobbs was a law clerk for United States Supreme Court Justice Black in 1949 and 1950, a formative period when landmark F.E.L.A. cases were coming before the Supreme Court and that Court's present position in regard to the function of a jury in F.E.L.A. cases was beginning to take definite shape. We hope today that Truman Hobbs will give us an insight into the F.E.L.A. cases handed down by the Supreme Court during the past term, wherein we have witnessed an almost unprecedented number of vigorous dissenting opinions.

The chief objective of our planning committee was to procure for this audience demonstrative evidence as to how some of the most distinguished lawyers in America are currently handling railroad litigation. We hope that before the day is over this audience will feel that the planning committee succeeded in accomplishing this undertaking in a workmanlike manner.

We also especially wish to express our gratitude to The Honorable Charles G. Morgan of Memphis, President of the Tennessee Bar Association, to the Honorable Lon P. MacFarland of Columbia, President-Elect of our fine State Bar Association, and to the Honorable Warren W. Kennerly, President of the Knoxville Bar Association, who are serving as Coordinators of the Morning, Afternoon and Evening Sessions of the Institute; to our distinguished Moderators, Harvey Broome, Taylor H. Cox, Frank Creekmore, Stuart F. Dye, Clyde Key, and John R. Rowntree, all of the Knoxville Bar; and to our eminent local panel participants, Frank Bratton of the Athens Bar, William E. Badgett, Frank Montgomery and William P. O'Neil of the Knoxville Bar. We wish to extend our particular thanks also to the members of the Law Institute Planning Committee composed of representatives of the Knoxville Bar Association: Arthur D. Byrne, Richard R. Russell, and William C. Wilson; and, from the College of Law: Professors Elvin E. Overton, Harold C. Warner, and Martin J. Feerick, Director of the Institute and Editor of the Proceedings.

William H. Wicker
Dean, College of Law

LIABILITY ASPECTS OF NON-F.E.L.A. LITIGATION*

PANEL: FRANCIS H. HARE, of the Birmingham Bar
WILLIAM P. O'NEIL, of the Knoxville Bar
JOSH H. GROCE, of the San Antonio Bar
J. M. TERRY, of the Louisville Bar
FRANK MONTGOMERY, of the Knoxville Bar
MODERATOR: TAYLOR H. COX, of the Knoxville Bar

MODERATOR TAYLOR H. COX: Ladies and Gentlemen, as you will note from the program and from the statement of President Kennerly, this first section is devoted to the liability aspects of the non-F.E.L.A. cases and we are extremely fortunate in having the lawyers that we have on this panel to discuss the liability aspects of this type of litigation.

Beginning on your extreme right is a member of the Knoxville Bar, one of the outstanding plaintiff's lawyers in this entire area, William P. O'Neil. On Mr. O'Neil's right, is Francis H. Hare. Mr. Hare is senior partner of the firm of Hare, Wynn and Newell of Birmingham, Alabama. He is an eminent trial lawyer in the field of railroad litigation, a Fellow of the American Bar Foundation, and a member of the International Academy of Trial Lawyers. He served as President of the Alabama Bar Association in 1949-1950, and as President of the Birmingham Bar in 1942-43. He is a Past President of the Alabama Plaintiffs' Lawyers Association in 1954, and is a NACCA editor in railroad law. Mr. Hare and Mr. O'Neil are on the plaintiff's side of this discussion.

To represent the railroads' viewpoints, we have Mr. Josh H. Groce. Mr. Groce is a member of the firm of Eskridge, Groce & Hebdon, of San Antonio, Texas. He is trial counsel for the Missouri Pacific Lines, the Missouri-Kansas-Texas Railroad Company and for many large insurance companies. He is a Fellow of the American College of Trial Lawyers, and a member of the San Antonio, the Texas State, and the American Bar Associations. Mr. Groce is also Vice-Chairman of the Committee on Trial Tactics of the American Bar Association, Insurance Section, Vice-President of the National Association of Railroad Trial Counsel, and was Chairman of the Committee on Federal Rules of Civil Procedure of the International Association of Insurance Counsel in 1956. In addition, he is currently serving as Southwestern Regional

* Panel Discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

Editor of the *Insurance Counsel Journal,* and Vice-President of the Law-Science Foundation of America.

Next, Mr. James M. Terry. Mr. Terry, a graduate of the University of Kentucky Law School, is General Claims Attorney for the Louisville & Nashville Railroad and Legal Editor of the National Association of Railroad Trial Counsel *Bulletin.* Having been associated with the Louisville & Nashville Railroad for many years, Mr. Terry needs no lengthy introduction, for he is really no stranger to Tennessee lawyers.

Next is Mr. Frank Montgomery, a member of the Knoxville Bar Association. He has been a member of the Bar of Tennessee for quite a long while, and in the opinion of the members of the Bar, he is one of the outstanding defense counsel in this entire area.

Now, ladies and gentlemen, inasmuch as the plaintiff usually has the opening in starting litigation and in presenting his case, I think it proper that we call on Mr. O'Neil first, who will discuss the Tennessee law and statutes relating to motorists and to railroads. In view of the fact that the roads of this country are being filled to overflowing with automobiles by the various automobile manufacturers, this particular subject will be of increasing interest to the members of the bar, not only here but over the entire country.

MR. WILLIAM P. O'NEIL: In considering these railroad tort liability cases I feel that, in baseball parlance, the hitters ought to stay ahead of the pitchers, and that when the defense overwhelms the offense the results are pretty disastrous, particularly to the plaintiffs and the plaintiffs' attorneys. Now, fortunately for these in Tennessee, the offense is really favored by the Tennessee statutes and by the Tennessee common law. We have statutes in Tennessee that other states do not have. Francis Hare, my associate for the plaintiff, tells me that they have a similar statute such as our Railroad Precautions Act or Lookout Statute in Alabama; but they do not have anything similar to our Section 4. The Tennessee plaintiff's railroad lawyer has at his fingertips the Statutory Precautions Act,[1] with which I think all of you are familiar.

1. TENN. CODE ANN. § 65-1208 (1956).

65-1208. Accidents—Precautions to prevent—Crossing signals—Whistle or bell—Lookout—Lights.—In order to prevent accidents upon railroads, the following precautions shall be observed:

(1) The overseers of every public road crossed by a railroad shall place at each crossing a sign, marked as provided by § 65-1105; and the county court shall appropriate money to defray the expenses of said signs; and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing, unless it is so designated.

(2) On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one-fourth (¼) of a mile from the crossing, and at short intervals till the train has passed the crossing.

(3) On approaching a city or town, the bell or whistle shall be sounded when

Subsection 1 of that Act, as you know, provides that "every crossing in Tennessee shall be marked by a sign designated by the Tennessee Railroad and Public Utilities Commission." Now, under Section 1 of the Act it is also provided that unless a crossing is designated, Subsection 2 does not apply.

Subsection 2 of the Act requires that, on approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one quarter of a mile from the crossing and at short intervals until the train has passed the crossing. I am glad of the opportunity to discuss this particular problem in public, because the old Railroad and Public Utilities Commission back in 1921 designated the type of sign at a railroad crossing. The designation is what is commonly known as the "cross-buck" sign, and it has to be two white painted boards in an X form with the words "railroad crossing" on both sides, "railroad" on one board and "crossing" on the other. For some reason this sign has disappeared from the crossings throughout Tennessee, and the plaintiffs and the members of the public do not have this protection afforded by Subsection 2 of the statute. In most cases, unless you have this statutorily designated sign, the railroad locomotive operator or engineer does not have to use this precaution of using the whistle or sounding the bell. However, I feel that there should be some uniformity in regard to marking the public crossings in Tennessee, and I think that it is a problem that we all should consider, and undertake to remedy this situation which in my mind emasculates Section 2.

Regardless of the fact that the crossing is not marked, still there is a common law obligation to sound a warning at railroad crossings, and the practitioner, in filing his declaration in the state court or complaint in the federal court, should always rely upon this statutory duty on the part of the railroad company because most of these crossings, at least in East Tennessee, are dangerous crossings. There was a fairly recent

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the train is at the distance of one (1) mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits.

(4) Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

(5) It shall be unlawful for any person operating a railroad to use road engines without having same equipped with an electric light placed on the rear of the engine, tank, or tender, which light shall be a bull's eye lense of not less than four (4) inches in diameter with a bulb of not less than sixty (60) watts power, so that such road engine can be operated with safety when backing and said light so placed shall be burning while any such engine may be used in any backing movement. Such lights shall be operated at night; and any person violating any of these provisions shall be fined the sum of not less than twenty-five dollars ($25.00), and not more than one hundred dollars ($100), for each offense.

case, *Jones v. L. & N. Railroad Company*,[2] in which the court held that the railroad was liable for negligence at common law although it was found that plaintiff's truck appeared as an obstruction on the track so suddenly that the railroad did not have time to comply with the provisions of Subsection 4 of our precautionary statute. Consequently, even though the vehicle and the train met in a tie at the crossing, still there would be this common law duty to give a warning even if the crossing was not marked as designated by the Commission, and the jury could find in favor of the plaintiff if the railroad violated this duty.

In addition to Subsection 1, which, as I say is not used very much, the reason that I want to get Subsection 2 back in circulation is that upon violation of that section, the railroad's liability is absolute under our statute. It does not matter whether the sounding of the whistle or the bell would have prevented the accident or not; if you show that they did not do it and an accident ensues, then the plaintiff would be entitled to recover.

I think all of us are familiar with Subsection 4, which says that the railroad shall keep the engineer, fireman, or some other person on the locomotive always on the lookout ahead and when any person, animal, or other obstruction appears on the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent the accident. That not only applies at crossings, but also applies to trespassers on the tracks. There are many cases in our books where people have either fallen asleep or gotten intoxicated and lain down on the tracks to commune with nature and were run over by a train and their representative recovered because of the failure to keep a lookout ahead, or to do these other things that are set out in Subsection 4. Under this section the liability of the railroad is absolute. That is the most important section, in my opinion, in this Statutory Precautions Act.

Incidentally, under the Statutory Precautions Act, as you all know, even if the trespasser, invitee, or person on the track is contributorily negligent, which he certainly would be if he got drunk and lay down on the track, this contributory negligence does not bar the recovery. And that is the reason why this Subsection 1 should be put into operative effect again rather than rely upon the common law duty of railroads at crossings, because where only the common-law duty prevails, contributory negligence could bar the recovery.

We have some other mighty fine statutes in Tennessee which help the plaintiffs' lawyers confound the railroad companies, particularly in

2. 192 Tenn. 570, 241 S.W.2d 572 (1951).

reference to the crossings. Tennessee Code Annotated, Section 65-633 provides that "the line or track of the road shall be so constructed as not to interfere with the convenient travel of the public along the highways . . . and so as to allow vehicles conveniently and safely to pass over or under the line or track . . . . " That is a pretty broad statute. And, in addition to that, we have Code Section 65-1101 which says "all persons, or corporations, owning or operating a railroad in the state, are required to make and furnish good and sufficient crossings on the public highways crossed by them, and keep same in lawful repair at their own expense." That is another mighty good provision in the Code, because most of these tracks, particularly out in the country areas where I operate quite a bit, are worn out and old.

Then we have another good provision, Code § 65-1103, that requires grading the track at level ten feet on either side of the track and in between. Whenever an accident occurs at a crossing, I usually get a civil engineer and a photographer and go out there and I can show that the track is not graded at a level on either side and that it is rough and bumpy in between. Of course, you must have some causal connection between the rough crossing and the occurrence of the accident, but that causal connection usually is fairly frequent – a man might stall his motor on the track or his attention might be diverted by a bumpy crossing, or many other reasons why that might be a proximate cause of the accident. In addition to that, we have in most of our cities and towns ordinances as to speed of trains and ordinances with regard to grade crossings.

There is one other thing I want to comment on before I take up the entire time of the panel – keeping these crossings in repair. In Tennessee under the statute it is said that this does not apply within the limits of any city or incorporated town. Mr. Doughty, who is a plaintiffs' trial lawyer *par excellence,* just handed me an opinion by Judge McAmis in a Court of Appeals case in which Judge McAmis held that although that is the statute, yet the common law duty of railroads to keep their crossings in repair within the limits of incorporated cities or towns is not abrogated by these statutes, Code Sections 65-1101-2-3 and 4; the common law duty still prevails.[3] So, gentlemen, there are many ways that you can take a shot at the railroad companies. And, as my late partner, Judge Jennings, used to say, you can take a shot at them like the country boy shot the partridge – you can just shoot him on the wing, in the neck, and in other parts of the anatomy. Just shoot them all over.

3. Southern Railway Co. v. Maples, 296 S.W.2d 870 (Tenn. 1956). The Court of Appeals opinion by Judge McAmis is quoted from in the Tennessee Supreme Court opinion by Justice Neil denying certiorari.

MODERATOR COX: Now that Mr. O'Neil has discussed the statutes of Tennessee, and particularly the crossing statute which is, so many times, a thorn in the flesh of the railroad lawyer in attempting to defend in the litigations, we will hear from Mr. Frank Montgomery, who represents one of the big railroads in this section. Maybe he can give the railroad lawyers some ray of hope after hearing what Mr. O'Neil has said with reference to the statutory requirements of the railroads.

MR. FRANK MONTGOMERY: Too much of what Mr. O'Neil has said is true, entirely too much. I do not know whether or not it is apropos, but I recall hearing a noted surgeon addressing some young medical students on the sinus bone. He said, "Gentlemen, the sinus bone—" He said, "Well, _ _ _ _ the sinus bone!" We railroad lawyers feel this way about these railroad statutes, especially these crossing statutes, and we think that they should be repealed. There is not much consolation about these railroad statutes, but there is a little bit. I agree with almost everything Mr. O'Neil said, but I take issue with him in regard to this *Jones*[4] case as having overruled the *Graves*[5] case. I do not so agree. It was said in the *Graves* case and reaffirmed in the later *Noah*[6] case that the statute covers and controls the duty with reference to signals whether the crossing is what is called a dangerous crossing or not. It covers *all* crossings. And if that crossing is not so designated by the plain terms of the statute, there remains no duty whatever on the part of the railroad to give signals at a crossing unless it is so marked. There was some unfortunate phraseology in that *Jones* case which, I think, is a dictum and was unnecessary to a decision of the case. In the *Jones* case, the wig-wag signal was not working, and I have never known a railroad in Tennessee to escape liability when that was the case. While, as you may have gathered from my remarks, I must lean somewhat toward the railroads, I do think that when the railroads put a watchman there, whether he is a mechanical watchman or a human watchman, and when either one of them beckons to the public to cross, and in response to that the public does start across and is killed, that the railroad should be held liable. Now, that was in the *Jones* case. And to have thrown anything else in there, after cutting the big hole for the cat to go through, was like cutting another small one for the kitten. It was not necessary to put anything else in there at all in that case. There is nothing in that case that says that well-known *Graves* case and the well-known *Noah* case have in any way been repealed or modified. There is that much consolation, in my opinion, with reference to the statutes, where the accident is not at a marked crossing.

4. Jones v. Louisville & Nashville Railroad, 192 Tenn. 570, 241 S.W.2d 572 (1951).
5. Graves v. Illinois Central Railroad, 126 Tenn. 148, 148 S.W. 239 (1912).
6. Southern Railway Co. v. Noah, 180 Tenn. 532, 176 S.W.2d 826 (1944).

I think it is the law of Tennessee, and should be the law as long as we have these statutes, that impossibilities are not required of anybody, and that includes railroads. If the obstruction appears on the railroad track, even at a duly marked crossing, if it appears on the track too close for the engineer to comply with the statute, there is no liability and should be no liability. If the motorist is going to try to make a race out of it, if he concludes that he can beat the train across and it results in a tie, there should be no liability, in my opinion. Also, in that connection, there is another penny's worth of consolation there for the railroads. When a motorist is approaching the crossing, going at a moderate rate of speed, the engineer is entitled to conclude that he will stop rather than pull right on up onto the crossing. Some of them do that, though. And also in that connection, I think that this federal case, *Louisville & Nashville Railroad v. Tucker,* has said it was the duty of the engineer to look in a fan-like manner to his right and to his left; not only at the track but at the approaches thereto.[7] That was not good Tennessee law at the time it was pronounced. It was later corrected on petition to rehear[8] and that entire section of the original opinion was stricken. The law now is as it had always been ever since the time of Judge Cooper, that railroad engineers have a duty to look at the track and that part of it that is close enough to be the track where the object would be struck, as the phrase goes "within the sweep" of the train.[9] When the engineer has done that, he has fulfilled his duty. In the *Tucker* case, however, they held the railroad anyhow, but we did have the consolation of having that erroneous part of the opinion stricken.

I believe that is about all, except that I do devoutly hope and pray that this drastic statute that was made back there at the time where they could put the engineer in the penitentiary for the way he operated the train will be repealed; it is just a little bit better than that so far as the railroad is concerned. It is too harsh, too drastic, it is illogical and should be repealed. In nearly all laws and all statutes except this one there must be some connection between the violation and the injury. In this case there need be no connection whatever, and I therefore think it is very unjust, as well as very inconvenient.

MODERATOR COX: Mr. Hare, with your vast experience as trial lawyer, would you give us some of your experience and your knowledge with reference to the trial tactics involved in trying these motorist crossing cases?

7. 211 F.2d 325; *mod. and reh. den.*, 215 F.2d 227 (6th Cir. 1954).
8. 215 F.2d 227 (6th Cir. 1954)
9. Louisville, Nashville & Great Southern Railroad v. Reidmond, 79 Tenn. 205 (1883).

MR. FRANCIS H. HARE: Yes, Sir, I will be glad to make a few comments. We have a statute in Alabama[10] corresponding to that part of your statute up to but not including Section 4. We require the railroad to blow the whistle and ring the bell at crossings, and to continue to blow the whistle and ring the bell while passing the crossing. We add to this that, if a person is killed or injured at such a crossing, the burden of proof shifts to the defendant to acquit itself of negligence and to prove that it did blow the whistle and ring the bell and that it was free from negligence. So our statute not only duplicates yours, but goes one step beyond it down through the signal portion.[11] But as to your Subsection 4 about keeping a lookout, Alabama puts the entire burden of the lookout on the motorist, saying that the railroad train for some clumsy reason has to stay on the track and cannot dodge, and that motorists have to look out for it.

Under our common law and in a statutory construction that we have in Alabama, we require any negligence to be the proximate cause of the injury. Contributory negligence is a complete defense in Alabama and not in mitigation; therefore, the ordinary case for the driver of an automobile at a crossing is considered a desperate or forlorn hope for the plaintiff unless he can show subsequent negligence. Now, the last clear chance in Alabama, or as we call it, the subsequent negligence doctrine, is not satisfied by the proof that the defendant ought to have seen the position of the plaintiff as being one in peril; you have to show that the defendant did see it. And that almost always must come from the lips of the engineer or the fireman himself. He has to admit almost that he saw the plaintiff, and then, of course, somebody else must say what the plaintiff's position was at that time, that he was in a position from which the jury could infer that he was in imminent danger of bodily harm from the collision by the fact – for instance, that he was apparently oblivious of the train's approach, or that he kept right on going without slowing down or swerving without any indication of seeing the train. If the engineer or fireman admits seeing him, then the jury could say that anybody in his right mind who saw the plaintiff coming on like that should have assumed that he was in danger. Now the question will come: Why in the world would a fireman or an engineer admit that he saw a man in peril? Well, he is in a little bit of a fix there because if you ask him if he was looking where he was going, he either must say that he was or he was not. And if he is running a great big train without looking where he is going, that looks sort of bad. On the other hand, if he was looking where he was going and the plaintiff was out there where he could see him, then he is deemed to have

10. ALA. CODE, Tit. 48 § 170-173.
11. *Ibid.*

seen him. He is charged with having seen him, just in the same way that if a plaintiff says he stopped, looked and listened in Alabama and the train was a hundred or so feet away, he was bound to have seen him though he may say he did not.[12]

That brings me to the last part of what I would say here about our crossings cases, and that is under the "last clear chance" or the subsequent negligence proposition, we frequently have a personnel problem. The railroad frequently kills our witnesses or gives them retrograde amnesia, and we are unable to do anything to their witnesses, because the fireman and engineer are away up high behind a kind of a Sherman tank type of apparatus in a locomotive, and we rarely are lucky enough to kill the railroad's witnesses. I notice on your program a Tennessee case, *Tucker v. L & N. Railroad.*[13] We also had an Alabama case, *Tucker v. L. & N. Railroad*[14], in which Mr. Tucker, driving a pick-up truck, was badly injured at a crossing. There was a crossing sign; it was his duty to stop, look and listen. Had he stopped, looked and listened, he would have been bound to see the train, and we had to go along on the theory that he was guilty of contributory negligence as a matter of law. That put upon us the burden to prove that the railroad was guilty of subsequent negligence. Mr. Tucker had retrograde amnesia and did not recall anything since before he left home that morning. That was not just a convenient way of keeping him from having to lie about it; he had it all right. We put on the fireman as our first witness and excluded the engineer from the courtroom. We then put on the engineer and excluded the fireman from the courtroom, in order that the engineer could acquit himself by blaming it on the fireman and the fireman acquit himself by blaming the engineer. And the particular questions which do that, and will do it unless you try to do it to the same lawyer twice, are these: You put on the fireman and say, "Were you looking where you were going?" And he will say, "Yes." "And did you tell the engineer, or did you warn him with reasonable diligence as soon as you saw the plaintiff out there?" "Oh, yes, I did that," or, "I told that fellow a quarter of a mile away that there was a car coming on the track." Then you put on the engineer and say, "Did you make every effort known to man to stop that engine as soon as he told you?" "Yes, I did, but he didn't tell me until I was ten feet away from him." So the engineer has proved that the fireman was very negligent, knowing all about the man in danger and not saying anything about it. And the fireman has proved that the engineer was guilty of negligence for knowing it for a quarter of a mile and then not putting on the brakes until

12. Central of Ga. Ry. Co. v. Lee, 227 Ala. 661, 150 So. 840 (1933).
13. 211 F.2d 325; *mod. and reh. den.*, 215 F.2d 227 (6th Cir. 1954).
14. Louisville & Nashville Railroad v. Tucker, 262 Ala. 570, 80 So. 2d 288 (1955).

he got good and ready. The only thing the defendant could do there was to say it was against the weight of the evidence, that nobody would be that big a fool as that fireman and engineer each said the other was. That covers what I wish to say at this point.

MODERATOR COX: Mr. Terry, you probably have had more actual experience and contact with railroad litigation and railroad claims than any other attorney here. Is there any particular phase of this discussion that you would like to take up for us now?

MR. J. M. TERRY: Well, I know of no other state in the Union that has anything comparable to that Tennesseee requirement of keeping a lookout at all times. We often say in Louisville that you owe more duty to a trespasser on a trestle in Tennessee than you do to a motorist on a crossing in Kentucky, or, for that matter, in nearly any other state. Now, when you think about the protection that a trespasser is given here, it just seems, frankly, to be unfair. Any corporation that is saddled with a liability from which it could not possibly protect itself is put at a competitive disadvantage, which in turn makes the rates of everything go up. In practically all states now, it is the duty of the motorist to look and to listen and he will not be heard to say that he looked and did not see, or that he listened and did not hear. I know of no state, other than Tennessee, that has a situation like you have here, where, if you have a crossing marked in a certain way, if the railroad fails to sound that signal, there is automatic liability. That is almost like a Safety Appliance Act case, where, if you do not have certain protections on a boxcar, there may be automatic liability regardless of negligence.

MODERATOR COX: Mr. Groce, as I said at the beginning, this country is being filled with automobiles and this type of legislation probably will gain interest, particularly from the attorneys all over this country. I would ask you if you would discuss with us some legislation that is being proposed throughout the country in connection with the operation of automobiles, particularly with reference to railroads and railroad crossings?

MR. JOSH H. GROCE: The modern trend, as exemplified by the Uniform Vehicle Code which is a very lengthy statute but has been passed in many, many states, one of which is Texas,[15] contains the following:

> Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within

15. TEXAS STAT., Art. 6701d § 86 (Vernon, 1948). Ed. Note: A similar statute was enacted in Tennessee in 1955, TENN. CODE ANN. §59-845 (1956), with the added paragraph:

> No person shall drive any vehicle through, around or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed.

fifty feet but not less than fifteen feet from the nearest rail of such railroad [and that means the rail on which the train is traveling; if you have multiple tracks, that has been construed to mean the rail upon which the train is traveling] and shall not proceed until he can do so safely, when:

(a) A clearly visible electrical or mechanical signal device gives warning of the immediate approach or passage of a train;

(b) A crossing gate is lowered, or when a human flagman gives or continues to give a signal of the approach or passage of a train.

(c) A railroad engine approaching within approximately fifteen hundred feet of said highway crossing emits a signal audible from such distance, and such engine by reason of its speed or nearness to such crossing is an immediate hazard.

(d) An approaching train is plainly visible and is in hazardous proximity to such crossing.

This statute was passed in Texas about ten years ago. This type of statute has teeth in it, as far as grade crossings are concerned. I still agree with Justice Holmes in the famous *Goodman v. B. & O. Railroad*[16] when he said, as Mr. Hare pointed out a short time ago, after all the railroad cannot dodge, the motorist can; the primary obligation of protecting against these grade crossing accidents should be on the person who is best able to avoid them, and that is the motorist. This statute places the burden where it properly should be. Of course, in Texas we do have the requirement that the whistle be blown at eighty rods. Why they should go back into ancient history to pick out that measure of distance I do not know, but in Texas the statute requires the whistle to be blown at eighty rods, and this is similar to the Alabama statute. We do not have the shifting of the burden of proof, either. So, actually, in Texas, as far as a driver is concerned, the only possibility that the plaintiff has is to come in under the last clear chance doctrine or the discovered peril doctrine, or the subsequent negligence doctrine that Mr. Hare was talking about.

I had a case recently where the driver of a gasoline truck drove up directly in front of a moving train. The train struck it, and the fireman, the engineer, and the head brakeman were killed. (Mr. Hare said we never kill our witnesses, but every one of those was killed.) It did some $350,000 damages to the lading, to rolling stock, and to the track of the railroad. And it killed the driver of the gasoline truck. The insurance company for the truck paid $75,000 to settle the three claims for death (which was very reasonable as I see it — $25,000 apiece. They made good settlements.) They had only $5,000 of property damage; the insurance company, of course, tendered that to the railroad, and the

16. Baltimore & Ohio Railroad Co. v. Goodman, 275 U.S. 66 (1927).

corporation paid the equivalent of its entire capital stock to the railroad for damages that it had caused to the equipment of the railroad. Then, lo and behold, the widow of the truck driver brought suit against the railroad, admitting negligence, but claiming discovered peril! The driver had a widow with four children, I believe – Exhibits A, B, C, D, and E – there were the five of them sitting in the courtroom. It was not an easy case. We in Texas do have the doctrine of discovered peril, but the peril must be discovered and must be realized in time to be able to avoid the accident, and at a time when the plaintiff himself will not be able to extricate himself from that danger. We tried the case and the jury did very sensibly hold that the railroad employees did discover the peril, they tried to put on their brakes, but the discovery did not take place in time to avoid the accident with the means at their command.

MODERATOR COX: Mr. Groce, as I recall, this Uniform Vehicle Code was enacted in about thirty states, including Tennessee. Could you tell us whether it is being proposed in other states?

MR. GROCE: The only knowledge that I have on that is that when this statute was first passed in Texas I had such a case for a railroad and the statute had not been construed by any Texas court. When the legislature passes a statute which has been adopted in other states and it has been construed in other states, it is presumed that the legislature passed that statute with the construction that had been placed on it by the other states. So I inquired of one of my legislators as to what other states had passed it, and he gave me a list of seven at that time. They were Michigan, Kansas, Mississippi, Iowa, Washington, Ohio, and Maryland. I went to the laws of these other states and I found the construction of this statute very favorable to the railroads and was able in that way to get a favorable construction in Texas. We have recently had a decision by our Supreme Court that takes some of the teeth out of this. The case is *McFerrin v. Missouri-Kansas-Texas Railroad.*[17] In that case, believe it or not, the motorist, a trainman on the Santa Fe, proceeded to ride parallel with the M. K. T. Railroad tracks and then turned abruptly to the right and crossed the railroad tracks directly in front of a train approaching from his rear. There was the usual tie at the crossing. His widow brought suit and got a jury verdict for $58,750. But the case went on up to the higher court, and the Supreme Court said that the railroad had pleaded there only that the driver did not stop as required by this statute, and they had put on the fireman to prove that he was looking right at the man and that the man did not stop. But, with no other testimony whatsoever and no shade of suspicion cast on that fireman's testimony, the Supreme Court of Texas

17. Missouri-Kansas-Texas Railroad v. McFerrin, 291 S.W.2d 931 (Tex. Sup. 1956).

held that since he was an employee of the railroad he was an interested witness and that his testimony could be disregarded by the jury, and the jury could find that he did stop. But they reversed it on the grounds that evidence had been admitted as to this man's habit of stopping at that particular crossing. Of course, we can get around that by pleading in the alternative that if he did stop, then he did not follow the remainder of the statute which says, "shall not proceed until he can do so safely." So, we will plead in the alternative that he did not stop, or if he did stop, then he proceeded when he could not do so with safety. Much to my surprise, while that case was still pending the Judge of the Supreme Court who wrote the opinion in that *McFerrin* case proceeded to write a law review article for the *Texas Law Review*[18] with minute instructions to the plaintiff's attorneys as to how to make out a case against a railroad under such circumstances, which I thought was somewhat inappropriate.

And, speaking of grade crossings, I call to your attention the fact that the article on Tennessee railroad crossings contained in 23 *Tennessee Law Review* 865 (1955) was devoted to the original opinion in your *Tucker* case reported in 211 F.2d 325 (1954). Don't be misled by the statements that are made in this article concerning the rule as stated in the earlier *Tucker v. Louisville & Nashville Railroad* opinion, because that opinion was wrong. As indicated on your printed Institute program, the *Tucker* case opinion was later modified and that portion with which the law review article was concerned was stricken from the original opinion on motion for rehearing, as reported in 215 F.2d 227 (6th Cir. 1954).

MR. O'NEIL: With regard to the requirement under the Uniform Vehicle Code[19] that the motorist bring his vehicle to a stop, this statute really favors the motorist since it is part of the Act that none of the provisions shall be construed as abridging, or in anyway affecting the common law right of recovery of litigants in damage suits, and the Legislature intended to confine the application of the Act in common law actions to its penal force, and to exclude the inference of negligence per se. Neither can the failure to stop be set up as a defense to excuse the railroad from its imperative duty to observe the statutory precautions. However, it is the duty of the driver of a vehicle attempting to cross railroad tracks to see and hear what can be seen and heard, and he is bound by what he would see and hear, and he cannot, of course, rely entirely upon the operation of signals and the proper performance

18. Calvert, *Special Issues Under Article* 6701*d, Section* 86 (*d*) *of the Texas Civil Statutes,* 34 TEX. L. REV. 971 (1956).
19. TENN. CODE ANN. § 59-845 (1956).

of duty by watchmen on the crossing, but he must seek to safeguard his own safety and use faculties of an ordinary prudent man.

In all of these cases, however, the due care of the motorist should be left with the jury to measure rather than a determination by the court, which would take the issue away from the jury.

As I have said, it is not negligence per se to fail to stop at the railroad crossing in most cases; however, it would be negligence per se to fail to look or listen.

Regarding the look-out ahead requirement of Subsection 4, if the obstruction could be seen by looking across the bowstring of a curve in the track, the courts have held that the railway company is not required to look across the intervening space to the farther end of the curve and thereby withdraw the lookout from the track immediately ahead of the engine. This seems to me to be an improper application of the statute and confines the look-out ahead to the area immediately in front of the engine and does not require the railway to look as far as can be seen along its tracks. This would only apply on a curving track and not on a straight line of road. Certainly, we know as a matter of common knowledge and common sense that, in driving automobiles, if we can look across a curve and see an approaching automobile, we do take notice of it and take precautions accordingly. However, this old rule with regard to look-out around curves still is in effect according to the very recent case of *Page v. Tennessee Central Railway Company.*[20].

MODERATOR COX: Mr. Terry, we have devoted practically all of our time to the discussion of the motorist and crossing accidents, and claims of that kind. There are other suggestions in the program. Is there any particular phase that you would discuss for us now?

MR. TERRY: There is one thing that has been of considerable interest to me in the last few years and that is the development of the law concerning trespassing children. I have noticed that if you try a case involving a young child under twelve years of age, you do it at your peril. You may win some of them but if you are a defendant – and I am getting even beyond just railroad law now – the courts are going far afield to protect them. Recently in Kentucky, we had a case which undoubtedly has all of the sympathy elements you could have. There was a valid attempt to settle the case (it was not an L. & N. case). It involved a child about three years of age who was in the custody of his grandparents while his parents worked. The house was adjacent to a railroad yard within a distance of 200 feet. There was a street in front of the house that led down to the railroad. There was no crossing; it

20. 305 S.W.2d 263 (Tenn. App. 1956).

was a dead-end street, but there was nothing there to particularly prevent anyone from getting onto the railroad. There was a block to keep cars out, but not a fence. Apparently the child was not watched very closely, and it wandered away from its grandparents a sufficient length of time to go that distance, following a dog. It followed the dog over into the freight yards and was struck by a freight car which was being moved in the usual course of business. Now, as you probably know, they do not ride every car in a freight yard to a complete stop. If one is going in a certain track and there is no reason to anticipate that anyone is in there, there is no need for the switchman to ride it all the way. This car was just being kicked into a track where it was to roll down to other cars and stop. The little child got in front of that car. He lost an arm and a leg. Now, right there is the crux of the case. Of course, if the child had been killed in Kentucky, and I think in most states, the courts would hold that there was imputed negligence there; that the parents, being negligent themselves, or at least as their agents were negligent in caring for the child, they could not recover. But, when you injure a small child, who obviously could not be guilty of contributory negligence, you come down to the question of whether or not there was any negligence on the part of the railroad to support recovery. The Court of Appeals of Kentucky held that a railroad yard in a populous community where there were houses all around it and easy access to it, was something in the nature of a dangerous commodity, like an explosive. And they used the word "explosive" too. There was a duty on the part of the railroad to fence or otherwise protect that dangerous, explosive area from a trespassing child. Now, that is going pretty far. Of course, as I think I have said already, the sympathy angle in that case is what makes it so hard to decide. There are more and more of these cases involving trespassing children, where if there is any chance at all, you are going to go to the jury. They tried this particular case in Kentucky and it went to the jury and I think you all know pretty well what happened.

MODERATOR COX: Have you anything to tell us, Mr. Terry, on the transportation of dangerous material? Do you have any experience in that thing?

MR. TERRY: No, with this exception, and this is just in the discussion stage; I do not know the answer to this at all. In the Atomic Age, many things are being transported by railroads and other means of transportation. The question of the liability or who could stand the potential liability if some such material actually exploded as did the nitrate at Texas City, Texas, is an interesting one. The danger there, I think, is that there is no corporation, no matter how wealthy, that could even ap-

proximate the assets which would be necessary to cover such a liability. We have often discussed this, and it looks like it is going to be a field for legislation to protect carriers in such cases.

MODERATOR COX: We are running pretty close to our time. I would like now to just open the panel for any particular idea that has come to your mind during the discussion that you would like to discuss.

MR. O'NEIL: Mr. Cox, I would like to spring to the defense of our Statutory Precautions Act. Of course, I understand these gentlemen on the other side, including perhaps the Moderator, represent railroad companies. But it would be a tragic thing if our Statutory Precautions Act were repealed or changed or modified in any way. It is a philosophy that we have lived with for over a hundred years and railroad lawyers have been crying about it, but nobody gets rich out of railroad crossing cases or trespasser cases. It is just barely meat and bread money and I would say that we ought to leave the statutes as they are.

MR. HARE: I enjoyed the discussion of the multiple track rule; we have had a decision of this sort in Alabama that you would have to stop 15 feet short of the track, meaning the track upon which the train was running, and if you have a series of tracks, where, in order to stop 15 feet off a certain track you would have to stop in the middle of another track with a train coming toward you — well, they do not make you do that in Alabama.

MODERATOR COX: I believe that our time is just about up. I want on behalf of the University of Tennessee Law College and the Knoxville Bar Association to express our appreciation of your time and the fine discussion that we have had of this particular subject.

COVERAGE UNDER F.E.L.A. AND THE SAFETY APPLIANCE ACTS*

PANEL: TRUMAN HOBBS, *of the Montgomery Bar*
JOSEPH P. ALLEN, *of the New York Bar*
MODERATOR: CLYDE W. KEY, *of the Knoxville Bar*

CO-ORDINATOR WARREN W. KENNERLY: Somebody commented on the fact that we had two plaintiffs' attorneys and three defendants' on the last panel and a railroad attorney as moderator there, and now we have another one here on this panel. But from what I know about it, you had better have a little better odds than that if you are going to have any chance on behalf of the railroad in these cases, and I think Professor Feerick had a pretty good idea on that when he set up this program.

We have as moderator this time a gentleman who has a lot more to be said in his favor than just being a railroad attorney. As Division Counsel of the Southern Railway, he knows this subject from A to Z; he is a past President of the Knoxville Bar Association and a past President of the Tennessee Bar Association. Mr. Clyde Key will moderate the present session.

MODERATOR CLYDE W. KEY: In view of the fact that the subject of this discussion is calculated to generate considerable heat, the Arrangements Committee has insisted that I assume a perilous position between these two distinguished panelists. I have reluctantly consented to do so. On my left is Mr. Truman Hobbs of Montgomery, Alabama. He is an alumnus of the University of North Carolina; an honor graduate of Yale University School of Law. In 1949-50 he served as Law Clerk to Mr. Justice Black of the Supreme Court. I can personally testify that the name, Hobbs, has for many years been an outstanding name in the legal profession in Alabama. This young man's father gave me considerable trouble in the federal courts in Alabama about thirty years ago. Mr. Hobbs will speak from the plaintiff's standpoint.

On my right is Mr. Joseph P. Allen of New York City. He is associated with the law firm that for more than fifty years has been trial counsel in New York City for the Pennsylvania Railroad and for several large insurance companies. He is the trial lawyer for that firm. He insists that he has not been a member of that firm for the fifty years, however. He is presently on the Executive Committee of the National Association of Railway Trial Counsel, which is a nationwide organiza-

* Panel discussion at the Eighteenth Annual Law Institute of the University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

tion that has as its motive and purpose the impossible task of teaching us railroad lawyers how to win lawsuits.

The subject of this panel is twofold. First, the Federal Employers' Liability Act,[1] and secondly, the associated act, the Safety Appliance and Boiler Inspection Act.[2] The present F.E.L.A., or Federal Employers' Liability Act, was enacted in 1908, and provided in substance that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages for negligent injuries to employees while employed by such carrier in such commerce. In 1939, the Act was amended to define covered employees in this language: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way, directly or closely and substantially, affect such commerce as above set forth, shall . . . be considered as being employed by such carrier in such commerce . . . ."

In June 1956, the Supreme Court decided two cases which point up this discussion. The first was *Reed v. Pennsylvania Railroad*,[3] with which Mr. Allen is unfortunately very familiar. The Court held that a file clerk employed in an office building was so subject to the hazards of interstate commerce of the railroad industry that she was covered by the Act. On the same date, the case of *Southern Pacific v. Gileo*[4] was decided; there the Court held that an employee of a railroad who was engaged in a shop manufacturing car wheels that might or might not someday be used in interstate commerce was covered by the Act.

Now these panelists will no doubt discuss: How far have we gone? Can the court go any further? Is there any employee of an interstate railroad who is not covered and, if so, under what circumstances?

With those introductory remarks I will call now on counsel for the plaintiff.

MR. TRUMAN HOBBS: I ask the indulgence of the panel for a few minutes to talk to you about the background of this F.E.L.A. statute before we get into the 1956 and 1957 decisions. I think that the other members of the panel and the moderator would agree that some background is essential to an understanding of these decisions.

In a case which was decided when I was a law clerk on the United States Supreme Court, *Wilkerson v. McCarthy*,[5] Justice Douglas stated in his concurring opinion:

> The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms,

1. 45 U.S.C.A. § 51 *et seq.*
2. 45 U.S.C.A. § 1 *et seq.*
3. 351 U.S. 502 (1956).
4. 351 U.S. 493 (1956).
5. 336 U.S. 53 (1949).

> and lives which it consumed in its operations . . . . The purpose of the Act was to change that strict rule of liability, to lift from employees the "prodigious burden" of personal injuries which that system had placed upon them . . . .[6]

Now I am sure this statement sounds to the railroad lawyers like some sort of heresy. It is comforting to know that almost the same sort of language was used by President Taft, later Chief Justice Taft, when he was President of the United States. I do not believe that even the railroad lawyers would regard Chief Justice Taft as a Bolshevik. He stated, "I sincerely hope that the Act will pass [referring to the F.E.L.A.]. I deem it one of the great steps of progress. The old rules of liability under the common law were adapted to a different age and condition." So I think that it is fair to state that at the time the F.E.L.A. was passed, it was expected that it would give a broader coverage to workingmen than had heretofore existed under the rules of the common law. I think it was expected that the "strict liability" (quoting President Taft) would be relaxed in F.E.L.A. cases.

Justice Black stated in the *Tiller* case[7] along this same line that "we hold that every vestige of the doctrine of the assumption of risk was obliterated from the law by the 1939 amendment, nor did it leave open the identical defense for the master by changing its name to non-negligent."[8] And the opinion goes on to refer to the "human overhead" which is an inevitable part of the cost to the railroad business, and that this human overhead cost, by the F.E.L.A., is expected to be borne by the railroads. The Court in effect has said that no woman would let her husband or her son take the dangerous job of railroading if, when he went to the back car of a railroad train in the cold and darkness, he had to take with him his own witnesses or a notary public in case he was killed or injured. This points out the difficulty of applying the strict common law rule of proximate cause and the like to the injured or killed employee who frequently is working alone out of sight of anyone and where, if the bar be available, the evidence leaves the case in some sort of balance, or with the possibility of speculation that proximate cause or some other legal concept bars him from any recovery.

In this connection as to the development of the F.E.L.A., I would call your attention to the excellent article in *Law and Contemporary Problems*,[9] which discusses a decade of progress under the F.E.L.A. This makes clear how F.E.L.A. and the Safety Appliance Act were stub-

6. 336 U.S. 53, 68 (1949).
7. Tiller v. Atlantic Coast Line Railroad (first appeal) 318 U.S. 54, 58 (1943): (second appeal) 323 U.S. 574 (1945).
8. 318 U.S. 54, 58 (1943).
9. De Parcq, *Decade of Progress Under Federal Employers' Liability Act*, 18 LAW AND CONT. PROB. 258 (1953).

bornly resisted by the railroads for years. President Harrison three times called on Congress to pass the type of legislation which ultimately it did pass. In these words he stated, "It is a reproach to our civilization that any class of American workingmen should in pursuit of a necessary and useful vocation be subjected to a peril of life and limb as great as that of a soldier in time of war."

In 1888 the odds against a brakeman dying a natural death were 1 in 5. The average life expectancy of a railroad switchman at that time, according to the Interstate Commerce Commission,[10] was seven years. This was the terrible toll that was being exacted of railroad employees in the perilous pursuit of railroading. And that was the evil that F.E.L.A. and the Safety Appliance Act were designed to meet. Since the railroads had so stubbornly resisted the passage of this Act, it is no wonder that they stubbornly resisted its liberal interpretation by the courts, and it is no wonder that in many instances trial judges with corporate backgrounds gave these Acts a more restricted scope than we think Congress intended, in view of the fine phrases that were stated at the time by the Presidents who called for their enactment and by the legislators who did enact them.

Just one or two brief references to the type of thing that some of the courts indulged in to cut down the scope of F.E.L.A. and Safety Appliance Act. Francis Hare reminded me of a case he had in the Fifth Circuit where an employee was injured repairing a trestle, which was being used for the passage of trains in the daily use of the railroad. The Fifth Circuit back some thirty years ago denied him any recovery because they held that his work was static rather than dynamic, and that static work, even though in railroading and on the main line of the railroad, was not covered by the Act.

Again, in the 1948 term when I was a law clerk on the United States Supreme Court, a case came up from the Supreme Court of Utah where a railroad train was going down the track and suddenly, without any warning to anybody, the train came to a sudden stop right out in the open country because the fluid in the brakes had leaked out and the brakes had suddenly locked.[11] An employee was coming along on a hand-car behind the train. Apparently he was looking to his rear at a block signal and his car plowed into the stopped train. The Supreme Court of Utah held that this was not an area for the scope of the Safety Appliance Act, although it admitted that the Safety Appliance Act required efficient brakes on trains. The Supreme Court of Utah based its

10. See INTERSTATE COMMERCE COMM., ANNUAL REPORTS.
11. Coray v. Southern Pacific Co., 335 U.S. 520 (1949), *reversing* 185 P. 2d 963 (Utah, 1947).

decision, in part, in this language: "The leak in the triple valve caused the train to stop, because as a safety device it was designed to do just that." In other words, you could not say that the brakes were not operating efficiently, they were operating too efficiently; and therefore, the Safety Appliance Act did not apply. A unanimous United States Supreme Court reversed the Utah Supreme Court in that case, holding that this sort of casuistry as between static and dynamic work, as between the safety appliance device that worked too efficiently, was not to be indulged in any further.

In conclusion of this part of my statement, I think probably the greatest good that has come about from the F.E.L.A. and the Safety Appliance Act has not been the large recoveries which have come to injured workingmen, although they are certainly balm to the soul of the plaintiff's lawyer and afford great protection to the injured working man or his widow. The greatest fruit that has come from the F.E.L.A. statute and the Safety Appliance Act statute is shown by these simple statistics, without contending that these Acts are the sole cause of these statistics. In 1907, there were 4,534 railroad men killed in railroad work. That was the year before the Act was passed. There were 87,644 injured railroad men. In 1950, with many more men in railroad work, there were 392 killed and 22,000 injured.[12] That reduction, I think, is the greatest good that has come about from the F.E.L.A. and the Safety Appliance Act. All of us can be proud of the record of the railroads under these Acts, however stubbornly they resisted these Acts at the time that they were passed.

MR. JOSEPH P. ALLEN: Now the reference to 1898 and 1900 concerning a brakeman who rides the rear car in the dark is applicable certainly in 1900. To bring it up to date, I would like somebody from the plaintiff's side to explain *Ringhiser v. Chesapeake & Ohio Ry.*[13] That is the case of the fellow who, to answer the call of nature, went into a gondola car, the circumstances of the act being such that he tried to secure for himself the utmost privacy, purposely avoiding witnesses, and, I assume, a notary public. No one saw him, the train was moved, the lading shifted, and the man was injured. With respect to the man riding in the back of the car in the darkness who was injured because of the negligence of the railroad, I have no problem. But it seems to me that the holding of the Supreme Court of the United States in the *Ringhiser* case, to say the least, encourages unsanitary conditions. We will come to *Ringhiser* later in the program.

Philosophically and sociologically, we could talk for weeks as to what

12. See INTERSTATE COMMERCE COMM., ANNUAL REPORTS.
13. 354 U.S. 901 (1957).

the advantages or disadvantages of the Federal Employer's Liability Act are as opposed to some other system of compensation for the injured workman. Certainly today very few people would oppose the principle that a workingman injured on the job should be compensated. It becomes a question then, perhaps, of reasonable compensation and the conflicting methods of enforcing the injured employee's rights, workmen's compensation on the one hand and federal employers' liability on the other. I do not suggest in any way that there should not be some form of recovery. However, we are trained lawyers, and we have here a statute which was enacted by Congress. For whatever reason it was enacted, we are not here today to challenge its wisdom. It chose to make the standard of recovery negligence and not absolute liability. You will see in opinions today that the Supreme Court is on guard to protect against the so-called whittling away of the benefits granted by Congress. The history of the Act and its interpretation show that the Supreme Court, differently constituted when the Act was first employed, gave it a strict interpretation. If there is any whittling away, it has been done by the Supreme Court at the expense of basic rules of negligence, which are supposed to be the standard of liability. Whether that is right or wrong is something a differently constituted Court may decide in the future, but two cases for discussion today, among other things, highlight the situation and show how the Court resolves the basic problem of statutory interpretation of this Act. I refer to the *Reed* case and the *Jackson* case.

Miss Reed was a worker in an office building in Philadelphia, Pennsylvania. Her job was a file clerk. She took tracings from a filing cabinet and gave them to a messenger, who took them to a blueprint shop and the blueprints were prepared and sent out to various parts of the Pennsylvania Railroad Company's lines. The Court in the *Reed* case took the words "in furtherance of interstate commerce" and gave them a literal meaning; it gave them, as the dissent pointed out, a lexicographical or dictionary meaning. Before I came down here, I talked to one of the top management of the railroad and I said, "Can you tell me of any person who does not further the interstate commerce aspects of the railroad?" His reply was not too gratifying. He looked at me for a moment, then he said, "Yes, the lawyers."

The *Reed* case says that Miss Reed was in interstate commerce. And the question posed here is: How far does that go? Certainly the railroads do not hire anyone who does not further interstate commerce—if the words are used in this literal sense. They do not hire somebody, other than the lawyers as the top management pointed out, who will hinder interstate commerce. Assume with me for the moment that I go

to Washington to represent the railroad in an application for a rate increase, and as my assistant I take with me one of the house counsel from Philadelphia who is employed by the Pennsylvania Railroad Company. We are sitting down in the Interstate Commerce Commission chambers and he leans back in his chair just as I walk by, and I negligently knock him over. Now, under the rationale of the *Reed* case, conceivably he has a cause of action under the Federal Employers' Liability Act. Does he have a cause of action under the Safety Appliance Act? That is not as funny as it sounds, because in the *Reed* case, where the accident was caused by a window being blown in during a storm which knocked over several buildings, the pleadings contained an allegation of a violation of the Safety Appliance Act. In the recent *Jackson* case,[14] there was a violation of the Safety Appliance Act alleged; and the Court abandoned a literal plain meaning interpretation of the statute to look at the legislative history. There is an express exception in the statute concerning whether or not power brakes or certain other safety appliances had to be incorporated in certain cars. The statute, by its express terms, does not apply to trains composed of four-wheel cars. The Court, however, in the *Jackson* case went behind the statute and looked at the legislative history, and the legislative history, they said, showed that four-wheel cars meant only four-wheel *coal* cars. So the Court would not apply it in this case even though the car involved was a four-wheel car, because it was not a coal car; it was a hand car.

Compare that with what the Court did in the *Reed* case. The legislative history in the *Reed* case showed that the 1939 amendment to the Federal Employers' Liability Act was meant to eliminate a distinction which had developed in the law that the employee had to establish that at the moment he was injured he was actually engaged in interstate commerce. That was so stated by the counsel for the Brotherhood who was most active in getting this amendment enacted; they wanted to eliminate the moment of injury, because a brakeman sometimes did work in interstate commerce during one part of the day and later in the same day he did work in intrastate commerce. The legislative history showed that it was not intended to enlarge the class of people covered, that what the F.E.L.A. was getting at was in line with what Mr. Hobbs has mentioned, the hazardous elements of transportation for the people who actually ran the trains, the people who were down in the yards and on the tracks, the people who were exposed to intrinsically dangerous conditions by the nature of their work. But the Court in the *Reed* case applied it to office workers, ignoring the legislative history. Yet in the *Jackson* case, the Court ignored the plain language of the statute, ex-

14. Baltimore & Ohio Ry. v. Jackson, 353 U.S. 325 (1957).

cepting trains composed of four-wheel cars, and applied the legislative history.

Mr. Hobbs has had a case similar to the *Jackson* case. I think this would probably be a good point to discuss that *Shields* case.[15]

MR. HOBBS: Well, the *Shields* case was the forerunner, I suppose, of one of the cases mentioned on your program, *Baltimore & Ohio Ry. v. Jackson.*[16] It was the forerunner in this respect: That, until the *Shields* case came down, I think at least all the railroads felt that the only appliances that came within the Safety Appliance Act were those which were specifically standardized by the Interstate Commerce Commission. In both the *Jackson* case and the *Shields* case, the Supreme Court of the United States said, "No, that is not enough."

In the *Shields* case I represented an employee of a consignee who went out to unload a tank car. He stepped up on the dome running board, which is the board right around the dome where you go up to release the valve to let the oil come out. The board was rotten and he fell to the ground and was seriously injured. The railroad argued before the Supreme Court that: (1) the board from which he fell was not a running board; and (2) even if it was a running board, since it had not been standardized by the I. C. C., there was no obligation on the railroad to keep that running board safe. The Safety Appliance Act says running boards shall be secure; and there is also a section which says the I. C. C. shall standardize appliances. Well, in the argument of the case before the Supreme Court of the United States, Justice Black asked a clinching question of the general counsel for the Atlantic Coast Line. He asked: "I understand that you are arguing that this is not a running board. But assume that this is a running board, and Congress has said that running boards shall be secure. Do you think that the failure of the I. C. C. to standardize this appliance can detract from the command of Congress that the running board be secure?" Well, I was glad that I did not have to attempt to answer that question. That, too, is one of the questions in *Jackson.* The I. C. C. had not standardized the type of cars that were involved in the collision there, and the contention was that the handcar did not have to have a brake, and that the motorcar did not have to have a power brake, because they had never been standardized by the Interstate Commerce Commission. But, I cannot understand how, when Congress said you must have a brake on all cars, the I. C. C., by failing to standardize the type of brake, can take away from that command any more than it can take away from the command of Congress that a running board be secure.

15. Shields v. Atlantic Coast Line R. Co., 350 U.S. 318 (1956).
16. 353 U.S. 325 (1957).

It was interesting I think, in the *Shields* case that the railroad had labeled this board a "running board" on its repair order, and it had called it a running board seven times in its answers to our interrogatories. But after receiving the answers to interrogatories and amending our complaint to add a count under the Safety Appliance Act, the railroad never again voluntarily called the running board a running board. From then on it was a "dome step board", it was a "platform", it was everything under the sun but what everybody in the railroad industry was calling a running board prior to that time. Justice Warren asked counsel for the Atlantic Coast Line about the answers to interrogatories calling it a running board and the repair order calling it a running board, whereas the counsel was now so insistent that it was no such thing. Counsel for the Coast Line replied, "Well, of course we did call it a running board in our answer to interrogatories, but that was because Mr. Hobbs in his interrogatories called it a running board 17 times and we just fell into his phraseology."

MR. ALLEN: I will make a deal with you: I will call a running board a running board if you will call a four-wheel car a four-wheel car.

MR. HOBBS: Well, you know, that is the superficial fairness that you always meet from the railroads' attorneys.

MR. ALLEN: It seems to me that it is practically a basic rule of law that when a statute is enacted and an administrative agency is charged with the regulation or any part of the enforcement of that statute, the agency holdings and findings are going to be given great weight. There is a parallel attack on this rule, not only in railroad cases, but for example, in the famous *du Pont - General Motors*[17] anti-trust suit, where Section 7 of the Clayton Act which was involved there had never been held, for 40 years of administrative interpretation, to apply to a vertical acquisition. As Mr. Justice Burton in dissent pointed out, this section now becomes a sleeping giant and applies to an acquisition made by du Pont in good faith some forty years ago. The I.C.C. and the language of the statute say that the Safety Appliance provisions shall not apply to four-wheel cars. In the *Jackson* case the I.C.C. submitted an amicus curiae brief in which they said that if you put power brakes on these four-wheel cars, these gasoline motor driven cars, the minute the person operating that car applies the brakes, he will catapult the whole crew up into space. Now understand, this is just an ordinary hand-car, a maintenance-of-the-way car. The car is so light that it can be lifted off the tracks by hand, by four people. The I.C.C. said in its brief that, if you put power brakes on this type of hand-car, it is going to make it more dangerous. But the Supreme Court ignored the I.C.C. and, based

17. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

on the legislative history, held that the exception applied only to coal cars. As Professor Handler has said with respect to the *du Pont* case, perhaps the *Reed* and *Jackson* opinions may be "good for a single passage only."[18]

MR. HOBBS: Well, I think in the *Baltimore & Ohio Ry. v. Jackson* case there really was not any question but that the four-wheel car referred to coal cars and logging cars. Even the dissenters, if I read the dissent correctly, did not argue with the Supreme Court on that point. I would point out, however, that there was absolutely no precedent for any holding other than that rendered by the Supreme Court of the United States in that case. The Supreme Court of Florida had ruled unanimously as late as 1955 that the same type track motor car as was involved in the *Jackson* case came within the terms of the Act.[19] The Second Circuit had held substantially the same thing in a case involving a hand-car.[20] So although there was not a lot of precedent, there was at least one federal court of appeals and the supreme court of one state that agreed with this decision by the Supreme Court of the United States in the *Jackson* case.

MR. ALLEN: Well, I concede that if you read the legislative history, you will find some justification for the holding that the four-wheel cars referred to in the Act were coal cars. But if you read the legislative history of the 1939 amendment, using the same reasoning, you have to come to the conclusion that it was never meant to cover clerical workers as in *Reed*. I say the Court uses one statutory interpretation in one instance, and to get the same result, it turns around and uses a different statutory interpretation, ignoring its precedent or its prior interpretation. It is like a broken field runner: "Give me the ball, I know where I am going. Don't worry how I get there." What it does is distort the common law concept of negligence. That word is still in the statute. If the word "negligence" were removed from the statute, perhaps no one would argue that the Supreme Court could then construe the Act, as in the words of Judge Major of the Sixth Circuit, as a workmen's compensation statute. The Supreme Court denies it is doing it; it denies that it is a workmen's compensation statute.

The railroads have won one case in the Supreme Court in about five years, I think. That is an interesting recent case, the *Herdman*[21] case. It involved a truck stalled on the track and the train engineer put the brakes of the train in emergency and an employee in the rear car

18. 12 ASS'N BAR, CITY OF NEW YORK, RECORD 415 (1957).
19. Martin v. Johnston, 79 So. 2d 419 (Fla. 1955).
20. Hoffman v. New York, N.H. & H.R. Co. 74 F. 2d 227 (1934).
21. Herdman v. Pennsylvania Railroad Co., 352 U.S. 518 (1957).

was hurled to the ground and sustained injuries. A verdict in favor of the plaintiff was set aside, and it went to the Supreme Court of the United States. I forget the lineup, but it was amazing, because it came down the same day that the *Rogers*[22] case and the *Ferguson*[23] case, the ice cream scoop case, came down. The Court held that there was no negligence despite the fact that was an admitted sudden stop. In my opinion, one of the reasons that the railroad won that case is that the Supreme Court was faced with something of a dilemma: If they held for the plaintiff, would they not in effect be saying that if a railroad engineer sees something on the right-of-way, he must run it down if a sudden stop imperils the rest of the crew? That is the only way I can explain the case, and it is the only victory for the railroads in the Supreme Court of the United States in about five years.

MR. HOBBS: I think that a partial answer to the few victories that the railroads have won in the Supreme Court is that the plaintiff's lawyers do a better job of screening the cases they take up there than the railroads do. I think that we can probably agree that under the *Reed* case everybody in the railroad industry is probably covered with the possible exception of Mr. Allen, and we will see what we can do to extend it to him.

I think we can also agree that under a common sense reading of the statute which says "everyone who furthers interstate commerce is covered" the *Reed* opinion is correct. I have read Mr. Justice Frankfurter's dissent and there is certainly considerable merit in it, when he goes into the legislative history of the Act to show that what was intended by the 1939 amendment was the extinction of the "moment of injury rule" which was working such horrible results. There is some poetic justice in the situation where the railroad lawyers created an unnatural obstruction to justice and then when Congress rectified it, they swept not only that obstruction away but a lot more along with it. I cannot get too concerned that Congress' language was broad enough to cover all railroad employees. It does cover those in new construction now, which the railroad says never was intended, as well as clerical employees. Justice Frankfurter says that the *Reed* case is going to bring much uncertainty into the law. Now in all sincerity, I think that one thing we can say for *Reed* is: it is going to bring considerably more certainty into the law, and the certainty is that all railroad employees are covered by the F.E.L.A., because if a clerical worker who handles blueprints is furthering interstate commerce, it is difficult to see how

22. Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957).
23. Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957).

anyone is not. We could probably agree that we have that much certainty in the law now.

MR. ALLEN: I think I would agree that, if you read the majority, certainly everybody is included in the words "in furtherance of interstate commerce." I think that the dissent points out that there may be case-to-case adjudication; or these cases may be good "for only a single passage." We do not know what will happen if that occurs. I think you might be interested to know some of the additional attempts to extend the scope of the Federal Employer's Liability. The Honorable Herbert Zelenko, a Congressman from New York and well-known to many of you here, has introduced a bill which provides that F.E.L.A. coverage would apply to commercial air lines personnel. Also there is a bill in committee which considers placing under Federal Employers' Liability coverage employees who work on industry trackage; for example, in a plant such as General Electric which might have some trackage connecting the railroad siding with their plant. There is an interesting case on that. Certiorari has been sought in Supreme Court this term in the case of *Kelly v. Pennsylvania Railroad Co.*[24] Kelly was employed by General Electric. It is not clear as to what his duties were, but apparently he was more or less a maintenance man who collected debris around the plant. General Electric has at least two switching engines and some twenty-one cars by which they load the material that they are sending out on the railroad, and also by which they receive material into their plant. Kelly originally sued General Electric and tried to hold that General Electric was a common carrier by railroad and subject to the F.E.L.A. The lower court in that case dismissed the complaint, saying that General Electric was not a common carrier by railroad.[25] This was affirmed on appeal. Then Kelly sued the Pennsylvania Railroad. The argument of the plaintiff's attorneys was that General Electric was an agent of the Pennsylvania Railroad, which admittedly is a common carrier by railroad engaged in interstate commerce; and Kelly, working for General Electric, ipso facto worked for the Pennsylvania Railroad. The judgment in the District Court in favor of Kelly was reversed by the Third Circuit and a petition for certiorari was filed October 3, 1957.[26] That is some indication of what some people allege the scope of the Act is or should be, and the attempted expansion of it into these sidetracks or these industry trackage plants, and also into the commercial air lines, and in some maritime fields.

MR. KEY: There is one question about the *Jackson* case that I

24. 245 F. 2d 408 (3d Cir. 1957).
25. Kelly v. General Electric Co., 110 F. Supp. 4 (D.C. Pa.); *aff'd per curiam*, 204 F. 2d 692 (3d Cir.); *cert. den.*, 346 U.S. 886 (1953).
26. Certiorari denied, Dec. 9, 1957. 78S. Ct. 265 (1958).

would like for one or both of you gentlemen to answer if you can. The Safety Appliance Act says in plain English it applies to all trains, locomotives, tenders, cars and similar vehicles, except four-wheel cars, etc. Now, in the *Jackson* case the Supreme Court said that this handcar that had had the handlebars removed and a small motor put on it, was not a locomotive. It held that when that handcar was coupled to this four-wheel car, then that handcar became a locomotive and the two became a train. Now, when did that metamorphosis take place and what caused it to occur?

MR. HOBBS: I think what the Supreme Court said there was that when these two cars were coupled together the motor car became a car used for a "locomotive purpose." There was evidence that the motor car could have stopped within a distance of some ten feet if it had not had this four-wheel car connected on behind it, but with the four-wheel car connected on behind, the motor car took some forty or fifty feet to stop. So, obviously, the two cars coupled together made for a more dangerous condition than the one car traveling alone. And the Supreme Court in its opinion said that they were not passing on the question of whether the two cars operating independently would come within the scope of the coverage of the Act, but that when they were coupled together and the first car was used for locomotive purposes, then it had to have the protection of the braking that was required for locomotive cars. And, as I pointed out, the decision in every court which had considered a similar question admittedly stated there were not many such cases but all of them had reached the same result.

MR. ALLEN: The only thing I can say with respect to this question is this. Here these cars are separated, these are handcars which could be lifted from the tracks by hand; how they could become a train is a mystery to me. And, as the Interstate Commerece Commission pointed out in its brief, to equip these cars with power brakes would be more dangerous than to allow them to run the way they are. In addition to this, there are certain sections of the Safety Appliance Act requiring hand-holds, grab-irons, etc., which you could not possibly put on these cars as on regular cars. I think this is an example of the Supreme Court ignoring the literal language of the Act to reach a result which I cannot help but feel they deemed, right or wrong, to be sociologically desirable, sociologically necessary, in the interpretation of this Act.

MR. HOBBS: I think this further note would be of interest to some who do not handle too many F.E.L.A. cases. The Safety Appliance Act extends to persons other than railroad employees. In the case of *Fairport v. Meredith*,[27] the Supreme Court of the United States held that it even

27. Fairport, P. & E. R. Co. v. Meredith, 292 U.S. 589 (1934).

extended to passengers in an automobile who were injured at a railroad crossing. In terms of the liberal interpretation that Justice Sutherland put on that Act, I might point out that the Safety Appliance Act in its title specifically states that it is an Act designed for the protection of railroad employees and travelers on the railroads. Notwithstanding, I think Justice Sutherland correctly ruled that the command is an absolute command that a railroad have safety appliances where so indicated in the Safety Appliance Act and that the coverage and its protections extend to any person who is in a position of peril from the fact that those appliances do not work. So it is possible that the Safety Appliance Act could come into play in a case involving no more than a crossing accident, if the crossing accident was caused in part by, for example, faulty train brakes.

MR. ALLEN: I would say one other thing with respect to the coverage of the Federal Employers' Liability Act. In *O'Rourke v. Pennsylvania Railroad Company*[28] a railroad brakeman was injured on board a barge. He took a train or a group of freight cars onto a barge which was in the navigable waters of the United States, and was injured while on the barge. The plaintiff brought an action under the Federal Employers' Liability Act and we advanced as an affirmative defense that the plaintiff's sole and exclusive remedy was that provided by the Longshoremen and Harbor Workers' Compensation Act. We were successful in the Supreme Court of the United States by a 5 to 4 vote. The majority pointed out that the plaintiff was injured on the navigable waters of the United States and the Compensation Act was his sole remedy. The dissent stated that they would treat the man in law what he was in life and in fact: a railroad worker. An interesting point in that case was that the plaintiff was injured on the water, so the Court and the dissent pointed out that if a train crew, riding over the navigable waters of the United States, were injured on a bridge, under the majority opinion, they would not be railroaders, they would be longshoremen and harbor workers. The majority rejected the function of his duties, that is that he was a railroader, that he had nothing to do with maritime activities. The *Reed* case, however, emphasizes the scope of the plaintiff's duties.

MR. KEY: Gentlemen, I certainly appreciate your being here and I want to call to the attention of you ladies and gentlemen the fact that these two gentlemen will appear again this afternoon on other panels. You can see from the way in which they have handled themselves thus far that their further discussions will be just as interesting and enlightening.

28. 344 U.S. 334 (1953).

LEGAL ETHICS IN F.E.L.A. LITIGATION*

PANEL: JOSEPH P. ALLEN, *of the New York Bar*
FRANK CREEKMORE, *of the Knoxville Bar*
FRANCIS H. HARE, *of the Birmingham Bar*
MODERATOR: LON P. MACFARLAND, *Columbia, Tennessee, Bar*

MODERATOR MACFARLAND: Many of you here have expressed your interest and concern about the legal ethics of certain practices in the field of F.E.L.A. litigation, so we have arranged this special panel presentation dealing with practices engaged in by certain lawyers in other states.

It is unfortunately true that Tennessee lawyers do not have as much opportunity as they should have to select the forum in F.E.L.A. cases. From my personal observations and because of some work that the American Bar Association has done, it is quite apparent to me that a disgraceful situation has arisen. I speak particularly of runners soliciting F.E.L.A. litigation. Recently we had an experience in Columbia, Tennessee, where several of these suits were brought. A runner representing a Chicago attorney came down and solicited not only one but three cases in one visit. I am glad to say he was not completely successful; but it was not because he should not get an "E" for effort.

I do not know how many of you have read the article in the *Saturday Evening Post,* "How An Ambulance Chaser Works,"[1] but it is unfortunately true that much of that article is correct. Statistics will show that many cases arising in Tennessee end up, not in Tennessee, but in Chicago or St. Louis. A similar situation exists in other states. On behalf of the lawyers of Tennessee and the Tennessee Bar Association, I want to say to you that your State Bar Association is interesting itself in this matter. We were taught to believe in the laws of gravity. We know that in Tennessee water does not run uphill, and I will say to you that a lot of these cases do not go to Chicago and St. Louis without undue puffing and solicitation. I know that the Knoxville Bar Association has been concerned with this for some time; in the past the Association sponsored the Jennings Bill.[2] At this time I would like to call on Mr. Frank Creekmore of the Knoxville Bar for his comment

* Panel discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

1. 229 SAT. EVE. POST 19 (Mar. 23, 1957).

2. H.R. 1639, 80th Cong. 2d Sess. (1948). The bill died in committee.

in this connection. Mr. Creekmore has had considerable experience with this matter.

FRANK CREEKMORE: In Tennessee, all of the cases against railroad companies are going to St. Louis and Chicago. Mr. Jack Doughty, while President of the Knoxville Bar Association, appointed a committee to investigate what was happening, as there had not been an F.E.L.A. case tried in Knox County in ten years. This investigation was extensive and on occasion we had from fifteen to eighteen members working over a territory of 100 to 125 miles from Knoxville. From this investigation it was found that runners working through different railroad unions and out of the office of attorneys in East St. Louis and Chicago were visiting injured people, soliciting cases on a percentage basis in a most vicious manner. The investigation revealed that if a man was killed while working for a railway company, the runners would send flowers to the funeral with their professional card attached, and on occasions go to the home the day of the funeral and solicit the accident for a St. Louis or Illinois attorney, would buy the children candy and clothes and things of that nature, and on numerous occasions would take the complaining parties at their (the runners') expense, to St. Louis or Chicago, where they would have them examined by a battery of doctors and show them clippings as to where large judgments had been obtained and things of that nature, and on occasions keep them in St. Louis or Chicago and pay them so much a month to live on. Of course, this was all deducted from any recovery. On one occasion they transported a claimant to St. Louis and maintained this claimant in St. Louis for more than six months, paying all expenses. This was done, of course, to keep the claimant under control.

We also found in this investigation that if an injured person hired a local lawyer, the runners continued to solicit the cases up until the trial time. As result of all this information, a bill for an injunction was filed against these runners in the Chancery Court of Knox County, Tennessee, and the matter was heard before the trial court and appealed to the court of appeals of this state. The court of appeals in the case of *Doughty v. Grills*[3] held that such tactics were illegal and sustained the injunction.

One matter we investigated was the injury of a man who went to Chicago along with his wife to make a final settlement of an injury, which was a substantial injury, and during the period of litigation the attorneys in Chicago had been paying the plaintiff expense money. The case was settled for approximately $14,000, and that evening the plain-

3. Doughty v. Grills, 37 Tenn. App. 63, 260 S.W. 2d 379 (1952); 23 TENN. L. R. 230 (1954).

tiff dropped dead from a heart attack. The widow returned to Knoxville with practically no funds, and during the course of investigation, after she had given us a statement, she received a call from the attorney who handled the matter. She was provided with an airplane ticket and made the trip to see the attorneys. Upon her return she announced that she received plenty of money and would not make any further statement.

The situation as to runners in Tennessee and this area in general is bad; however, the railroads are not without fault in these matters. Their local claims agents fail in many cases to properly evaluate an injury; as a result of this, many litigants go to other jurisdictions.

MODERATOR MACFARLAND: I bring this situation up because I think there is something that the Tennessee Bar can do about it and I think there is something that individual lawyers can do about it. I think that all too frequently in this type of situation when a lawyer is employed and he gets one of these notes directed by a St. Louis or a Chicago attorney, he just backs out of the case. I propose that we do not do that, that we make a full investigation of these cases. I believe that we can stop some of this disgraceful conduct.

FRANCIS H. HARE: I see before me in this audience several hundred lawyers and law students attending a Seminar on the Federal Employee's Liability cases. The first item of importance is a question of whether or not you will ever be employed as an attorney to handle one of these cases. For the defense, there is no problem. If a railroad employs you to represent them, you have occasion to study the specialized legal problems involved.

The important problem involves the representation of the plaintiffs in these cases. They are good cases; 90% of them are won by the plaintiff. They support the biggest verdicts that are recovered anywhere. If you are employed by a man with his leg cut off in a F.E.L.A. case, you can borrow money on it. You ought to recover $50,000.00 to $100,000.00

I now address myself to the question: Is employment in these serious and lucrative cases governed by the same rules as other law business, and if not, is there any reason why about a dozen firms in the entire nation should be given a virtual monopoly in handling this practice?

There are, in fact, two great reasons why these cases do not go in a natural manner to the local lawyers. In the first place, they are solicited on a national scale by ambulance chasers for lawyers who claim that in their cities they can secure huge verdicts. This is just plain piracy and their is no room for dispute as to whether it is right or wrong.

The second factor is more complicated. For example, one of the railroad unions, representing one group of railroad employees, has a legal aid plan under which injured railroad men or the widows of men killed on the railroad are referred to some sixteen law firms strategically located over the United States. Those law firms then handle the cases on an agreed contingent fee basis. The plan is more particularly described for those who are interested in the proceedings in the Supreme Court of Illinois now pending before the Honorable Charles H. Thompson as Special Commissioner. You will be particularly interested in the following history and background on that subject.

On June 8, 1946, the Knoxville Bar Association adopted a resolution condemning this solicitation by the Legal Aid Department as unethical and improper, and appointed a committee to institute legal proceedings to enjoin such practices. The injunction proceeding, cited as *Doughty v. Grills,* was just discussed by Mr. Creekmore. In this case, you will recall, the Tennessee Court of Appeals declared it to be the law of Tennessee that the practice described in that record was illegal.

The next page of the record is the publication in Duke University Law School's *Law and Contemporary Problems* of an article was written by Mr. Melvin L. Griffith,[4] listed as being associated with Edward B. Henslee, General Counsel of the Brotherhood of Railroad Trainmen. On page 175 of that article Mr. Griffith makes a vigorous attack upon the position of your Tennessee Bar Association. He says that the local bar associations "came to believe that they had a vested interest in any case under the Act in which the cause of action arose in their territory." He speaks of your resolution and the legal proceedings to implement it as a "sordid procedure," describing it as false, and as leaving no question as to the real reason behind it. Mr. Griffith concludes the pertinent paragraph with the paraphrased quotation: "Oh, Legal Ethics! What travesties are committed in thy name."

Mr. Griffith defends the legal aid plan on the basis that it has established a standard as to fees and treatment of claimants and educated them as to their rights. But he still says that:

> Regional counsel do not have a monopoly of these Liability Act claims. Many able, experienced and honest lawyers throughout the nation by reason of established reputation are employed by injured men and their next of kin.

If it be a fact that the agents of the legal aid plan do not manage to monopolize *all* of the cases for the lawyers who hold contracts with the union, that is beside the point. The question remains whether or

4. Griffith, *Vindication of a National Public Policy under the Federal Employers' Liability Act,* 18 LAW & CONTEMP. PROB. 160 (1953).

not it is lawful and ethical to solicit most, or indeed any, of the cases and whether an exception to the general rule is created by the circumstances that the union has seen fit to set up as a legal aid plan and to designate certain counsel as regional counsel.

Still adhering to the record in an effort to eschew personalities, the next official chapter is the proceeding in the Supreme Court of Illinois which is styled: *In The Matter Of An Investigation As To The Practices Of The Brotherhood of Railroad Trainmen And So On,* numbered N.R. 751, and assigned to the Honorable Charles H. Thompson, Special Commissioner. I shall refer first to the "Background Of The Proceeding" as taken from the brief of the American Bar Association, Amicus Curiae:

> The Philadelphia Bar Association, acting on a local complaint, interrogated Edward B. Henslee, Jr., an attorney practicing in Chicago, Illinois, as to alleged solicitation of the personal injury claim of a railway worker who lived in Pennsylvania. Mr. Henslee, Jr., admitted the conduct but claimed that it "permitted by Illinois law." The Philadelphia Association then sent the matter to the Chicago Bar Association.
>
> [There] the Respondents filed their Answer . . . the net effect of which was to claim that their activities were justified because conducted only with regard to members of a particular railroad labor union, the Brotherhood of Railroad Trainmen.
>
> In 1955, Mr. Henslee, Sr., filed a Motion and a Petition with the Supreme Court, in the name of the Brotherhood. The Motion admitted that the respondent attorneys solicited Brotherhood members to retain them and asked for a declaratory judgment or ruling that such conduct was, as a matter of law, not unprofessional or illegal . . . .
>
> The Court denied the Motion in June, 1956. At the same time the Court entered its unprecedented Order of June 15, 1956, appointing a Special Commissioner to make an investigation of "the condition arising from the practices of the Brotherhood in employing lawyers to render service to its members in personal injury cases and the practices of individual lawyers in those cases."
>
> . . . . The hearings were not public and no public notice thereof was given . . . . The American Bar Association petitioned the Commissioner for leave to intervene at the hearings. The petition was denied but leave was given to the Association to file a Brief as amicus curiae.[5]

5. Ed. Note: The Commissioner, acting for the Supreme Court of Illinois, declined to receive amicus curiae briefs or evidence from members of the bar to the effect that solicitation activities were not confined to members of this union, but in practice extended to railroad men generally belonging to other unions, or none. See also Note 13, *infra.*

As stated, the Court closed the door to proof from the bar generally as to these conditions which it was purporting to investigate. The A.B.A. Brief continues:

> The Brotherhood's theory of the case is set forth in "Statement of Issues and Contention of the Brotherhood of Railroad Trainmen" filed in this proceeding in July, 1956, and in "Verified Statement of Fiscal Relations Between the Brotherhood and Regional Counsel" filed with the Supreme Court in December, 1955." (p. 7 A.B.A.'s brief)
>
> [The Brotherhood] states that it "appoints" one "Regional Counsel" in each of sixteen "Regions" throughout the United States. It "recommends" these attorneys, and these alone, to its membership for the handling of their personal injury claims against railroads. It "assists" the Regional Counsel by requiring members to report their injuries to the attorneys; by requiring local lodge officers to call on the injured man and to repeat to him the "recommendation" that he employ the attorneys; and by requiring every one concerned to send reports to a central clearing house in Cleveland, Ohio, called the "Legal Aid Office." Having established this framework, the Brotherhood has left it up to the attorneys to run the system and to finance it. The attorneys agree with the Brotherhood that they will handle all cases on a 25% contingent fee basis, netting 75% of any recovery to the claimant. The attorneys pay the local lodge officers for their time and expenses in contacting the injured worker, plus a a gratuity for each case brought in. The attorneys subsidize the injured person to a free trip to and from the attorney's office for the initial interview. If additional moneys are needed for medical and living expenses, the attorneys make a "loan" of the necessary funds, which "loan" is repaid in the event of a recovery, but not otherwise. The attorneys bear the cost of maintaining the clearing-house in Cleveland, or the "Legal Aid Office" as it is called.

The theory of the American Bar Association differs from that advanced by the Brotherhood both on the facts and the law:

> The American Bar Association views the Brotherhood system as one which, however organized, amounts to the unauthorized practice of law by a lay organization. Moreover, even if it were possible for the Brotherhood to furnish legal assistance to its members, the Brotherhood system has never been operated for that purpose. There is no "Legal Aid Department" in any real sense, but rather a Brotherhood-endorsed system for channeling its members' personal injury cases to sixteen sets of attorneys throughout the United States. The attorneys, for their part, have knowingly supervised and financed the actual running of one of the most extensive systems ever devised for the solicitation of cases. The American Bar Association contends that the Brotherhood's version of the facts is inaccurate in three substantial respects:

> First, the Brotherhood calls the system its "Legal Aid Department." Actually the system operates solely to induce Brotherhood members to retain certain selected attorneys to prosecute personal injury claims against railroads. It has nothing to do with any other type of case. It has nothing to do with "legal aid" as the term is generally understood.
>
> Second, the Brotherhood says it has a "system of Regional Counsel." Actually, it has selected only one attorney or firm of attorneys in each of sixteen areas. The areas are principally related, not to states, but to railroads. Any Brotherhood member injured on any one railroad, therefore, is advised to go to the one attorney selected by the Brotherhood for that railroad.
>
> Third, the Brotherhood states that the entire operation is a union operation. Actually, the Brotherhood has merely established the general framework. The attorneys pay all the expenses and in fact operate the system.

We quote once more from the American Bar Brief on p. 9:

> The Association contends that, even aside from clear issues of unauthorized practice of law and violations of the Canons of Ethics, the Brotherhood system results either in the granting of a virtual monopoly to certain attorneys (who happen, for whatever reason, to be selected as Regional Counsel), or in the authorizing of unlimited solicitation of clients by all attorneys. Neither of these alternatives is consistent with the traditions of of the legal profession.

The outcome of this proceeding in Illinois is unpredictable. The opinion of the Supreme Court of Illinois reversing the disbarment of a Chicago lawyer[6] is widely interpreted as indicating a lenient disposition toward solicitation.

The California Supreme Court[7] held that the Brotherhood-designated attorneys were guilty of solicitation and unprofessional conduct for their part in the plan.

The practice is criticized in *Jackson v. Santa Fe Railway Co.*,[8] decided by the Tenth Circuit Court of Appeals in 1956. In addition to the Tennessee injunction, an injunction against such conduct was issued in North Carolina in 1948, and injunction proceedings are pending in Iowa, Washington and Nebraska (Exhibit 33, Tr. 361, and Exhibit 36 in the Illinois proceeding).

A fair presentation of the problem would require the citation of Drinker's *Legal Ethics*:[9]

> It is not believed that the Canon will prevent the labor unions from finding lawyers to advise their members. The

6. *In re* Heirich, 110 Ill. 2d 357, 140 N.E. 2d 825 (1957).
7. Hildebrand v. State Bar of California, 36 Cal. 2d 504, 225 P. 2d 508 (1950).
8. 235 F. 2d 390 (10th Cir. 1956).
9. DRINKER, LEGAL ETHICS 167 (1953).

whole modern tendency is in favor of such arrangements, including particularly employer and cooperative health services, the principles of which, if applied to legal services would materially lower and spread the total cost to the lower income groups. The real argument against their approval by the bar is believed to be loss of income to the lawyers and concentration of service in hands of fewer lawyers. These features do not commend the profession to the public.

In this connection several court decisions have involved the propriety of a lawyer's acting as regional counsel in a Legal Aid Department set up in 1930 by the Brotherhood of Railroad Trainmen throughout the country to enable their members to get the full benefit of the Federal Employers' Liability Act without being subjected to ambulance-chasing attorneys or activities of claim adjusters. The regional counsel dealt with the members personally but charged them less than the usual contingent fees, such charges providing the cost of running the department. While the members were not obliged to retain them, they were strongly and continuously urged to do so. In an Illinois case, where the railroad had settled direct with the employee after notice of his statutory lien, the court said that the railroad's defense that the plaintiff's employment had been obtained by solicitation and fee splitting was "unworthy of the able lawyers who made it." (Ryan v. Penna. Ry., 268 Ill. App., 364, 373 [1932].) In two other cases (In re O'Neill, 5 F. Supp. 465, 467 [1933]; Hildebrand v. State Bar of California, 36 Cal. 2d 504 [1950]) however, involving the discipline of the lawyers, they were censured by the court for for participating in the plan, their employment being "channeled" by the Brotherhood "contrary to professional standards." In the California case there were strong dissents by Justice Carter and Traynor, in which it was said that the plan "in no way lowers the dignity of the profession," being "nothing more than a proper joining of forces for the accomplishment of a proper legal objective of mutual protection . . . . Thus we do not have a case where the purpose, motive and result is stirring up or exciting litigation . . . . The essential object of the instant plan is not to obtain clients for an attorney. It is to enable the organization to assist its membership in a matter of vital concern to them."

However, Canon 35 of the American Bar Association concludes with these words:

> A lawyer may accept employment from any organization such as an association, club, or trade organization, to render legal services in any matter in which the organization as an entity is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

Speaking of these words, Mr. Drinker[10] says:

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10. DRINKER, LEGAL ETHICS 162 (1953).

> . . . the lawyer's relation to his client should be personal, his responsibility to him direct, and not subject to the control or exploitation of any lay intermediary intervening between them. Consequences of such intervention, in addition to interference with the lawyer's intimate personal relation to his client, are the tendency to commercialize the profession, and promotion of the unauthorized practice of the law on the part of the organization by providing legal services and advice for its employees and members.

Canon 35 was adopted by the American Bar Association in 1928, adopting much of the language of Opinion 8 rendered in 1925, which said in part:

> The essential dignity of the profession forbids a lawyer to solicit business or to exploit his professional services. It follows that he cannot properly enter into any relations with another to have done for him that which he cannot properly do for himself.

In an exhaustive comment on "The Regulation of Advertising" contained in the *Columbia Law Review*[11] for November 1956, we found the following observation:

> It is also improper for an attorney to be retained by an organization which advertises that it provides legal services to its members. [The following cases were cited supporting this statement: See American Bar Ass'n, Canons of Professional Ethics Canon 30 (1954), making such affiliation improper. This prohibition has been applied in Hildebrand v. State Bar, 36 Cal. 2d 504, 225 P. 2d 508 (1950) (railway brotherhood); State v. Kaufmann, 202 Iowa 157, 209 N.W. 417 (1926) (trade exchange); In re Gill, 104 Wash. 160, 176 Pac. 11 (1918) (merchants protection association).]

That concludes the outline of the official record proceedings with which I am familiar. I prefaced my remarks with the statement that I thought such an outline would be preferable to a statement of my personal opinion. However, as a matter of courage and duty, I will not dodge the question. I think the practice is wrong and I am opposed to it. I think it is not necessary for its avowed purpose of protecting the men's rights. It will probably deprive nearly every man in this audience of any opportunity to handle any of this important litigation for the plaintiff. I respectfully differ with Mr. Drinker's text at his footnote 38, quoted *supra,* because I think it is a legitimate criticism of the practice that it takes these clients from the lawyers whom they would naturally and normally employ. The practice opens the door to abuse by giving a layman the right and a financial inducement to go out and solicit damage suits for a certain law firm. The plan trusts the discretion of such a layman, working for a "gratuity," to limit his

11. 56 COL. L. REV. 1019, 1069 (1956).

solicitation to members of the specific union, even granting that the arrangement is proper as to members of the union.

In fairness, I will add that the attorneys selected by the union in my state are good lawyers and hònorable men. They cannot be expected to forego this lucrative arrangement unless the controversy regarding its legality and propriety is settled. The prospects of a solution in the Illinois Court are not promising.

There is one thing I can say without hesitation. The Supreme Court of Illinois in reversing the *Heirich* case emphasized the fact that the evidence had been largely procured by the Association of American Railroads. Therefore, you might get the idea that this controversy is voted along strictly party lines and that the defendants are against the solicitation either by the contract lawyers or by those who solicit without any color of right, and that the plaintiffs' lawyers are more or less in favor of the practice. That is not true; most of the leaders of the bar for the plaintiff do not like this legal aid. They emphatically also have no patience with the assembly line ambulance chasers from the big cities who send representatives with brochures and testimonials to solicit the amputation cases and the death cases in all parts of the country.[12]

Certainly the good lawyers of this country know that it is no ticket to prosperity for the railroad man to look for a lawyer far from his own home. I am talking about the frank ambulance chasers. I tell you that for this reason — I don't know that you are going to break up this if the attitude upon it is that it is evil but efficient and profitable. People can stand the evil part of it if it works well for them. But when a man goes away from home to one of these places he doesn't always gain by it. He runs into plenty of trouble. This business of saying that you can go to Chicago or Kansas City and that the lawyers there have a license to print money is not true and it has not proved true with my own people. There were a couple of cases against the Southern Railroad where the plaintiffs never got a Birmingham lawyer. The first lawyer they got took them to Kansas City. I got a telephone call one night about midnight and one of the claimants said: "Mr. Hare, these fellows got us to come up here [naming a Midwest city] and they have offered us, before paying the lawyers, a little less than the railroad offered us at the beginning. We said 'We will not take it,' and they say 'We will have to take it.' Then they took us in front of a man in a hotel room whom they called 'the settlement judge' who said that if we don't take it he is going to dismiss the law suit. Is that a fact?"

12. BELLI, READY FOR THE PLAINTIFF, 174 - 176 (1956).

Well, of course, that was not a fact. The fundamental fallacy is that there is larceny in their hearts, and these claimants, just as men who smuggle something through the customs or try to buy something wholesale, think that if they have violated this Code of Ethics of the lawyers and secured a crook on their side, they would gain a great advantage. Of course, they found out what most people learn who deal with a crook — that the crook will rob them, too, and not just the railroad. So, these people came home and got a lawyer in Birmingham.

The railroad acted all right about it and the law suits were dismissed without prejudice at that time and both were settled on reasonable terms.

There was another case of a man who was injured working on the L&N. He employed a Birmingham lawyer who associated me because I try a few of these cases. A little later the plaintiff sent for me and said, "No hard feelings, but you are fired. I have hired this fellow in some distant place and he has sold me on the proposition that under no circumstances should I let this case be tried in such a low verdict center as Birmingham."

Well, the man filed it in the federal court in that distant place and under the doctrine of forum non conveniens then obtaining (before U.S.C.A. Title 27, Sec. 1404-A), it was transferred to Birmingham. Then this fellow offered me the case for a part of the fee and I wouldn't take it. They got a good man and he tried it and got less than $20,000.00. The L&N Railroad man in Birmingham has never told me officially that they would have offered $50,000.00 in settlement but it was the general feeling that they would have paid the man about $50,000.00 in the beginning.

In conclusion, I will say that the practice of solicitation of these cases, whether legal or illegal, has resulted in my State in the fact that not more than two or three lawyers out of several thousand good lawyers in the State, ever have the opportunity to represent the plaintiff in a F.E.L.A. suit. They do not even teach the Act in the Law School at the University of Alabama. They not only do not have Seminars like this one; they do not even teach it in the Law School. I do not think that is a healthy atmosphere. And, as I have said elsewhere, it destroys the fine relationship that makes a client select a lawyer because he knows him and trusts him.

MR. ALLEN: I would like to say, with respect to what Mr. MacFarland and Mr. Hare have said, that this is a matter which cannot be decided along plaintiff and defendant lines. It seems to me that this is a matter which reflects upon the integrity and the ethics of the entire Bar Association, and that groups such as this should get together to

make sure that the highest standards are maintained in our profession. Some interesting statistics have been compiled by the Association of American Railroads, showing the high percentage of F.E.L.A. cases which are concentrated in the largest cities of the country and in comparatively few law firms.[13]

I don't think that the brand of justice dispensed in New York or Chicago is any different from the brand of justice dispensed in rural parts of the country, so to speak. As a practical matter, for many years high verdicts were returned in metropolitan areas for a number of reasons. But an interesting practical thing which has happened recently is that there have been some resoundingly high verdicts in districts which previously had low verdicts. I do not think that this represents a change in the attitudes of jurors throughout the country as much as it does an increase in the efficiency of local lawyers. As Mr. Hare points out, not many attorneys in Alabama today are familiar with this type of litigation. One excellent thing which N.A.C.C.A. has done is to spread the gospel of how to try injury lawsuits throughout the country. I think the result has been that the efficiency of lawyers outside metropolitan areas, where they have not had the opportunity to try an F.E.L.A. case or a heavy personal injury case, has been increased. They're getting much better. Certainly, at least, on several railroads that I know of in some rural districts, where verdicts were amazingly low – sometimes unjustifiably low – the verdicts have become increasingly larger. A lot of people in those districts didn't know about the F.E.L.A. They know about it now; they can try a lawsuit just as well as anybody in any metropolitan area and the results are showing it.

MR. MACFARLAND: Thank you very much, Gentlemen. The Tennessee State Bar Association is interested in this problem; it is a very serious one and one that cannot be justified on any known basis. Apparently, the construction of a "convenient forum" is that it is convenient for a few lawyers.

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13. According to 6 A.B.A. Coordinator No. 4 p. 4 (April 1, 1958): "The nation's largest railroad union, the Brotherhood of Railroad Trainmen, was ordered by the Illinois Supreme Court to abandon its 'legal aid department' which handled personal injury suits of its members through appointed regional counsel. The brotherhood had sought a declaratory judgment approving the plan. It was opposed in briefs filed by the Chicago, Ill., and American Bar Associations.

"In its ruling handed down March 20 the court held that the legal aid department contravened traditional state control of law practice. However, the court said substitute procedures could correct this and ordered that they be established not later than July 1, 1959. The court suggested that the legal aid department be financed by assessments against all of the brotherhood members—rather than by the regional counsel—and that the union hire staff investigators rather than to have the cases brought in by 'runners' for the appointed regional counsel."

THE TRIAL FORUM IN F.E.L.A. LITIGATION*

PANEL: FRANCIS H. HARE, *of the Birmingham Bar*
JOSEPH P. ALLEN, *of the New York Bar*
MODERATOR: STUART F. DYE, *of the Knoxville Bar*

MODERATOR DYE: Let us engage in some rash assumptions and presume that one of these good F.E.L.A. cases is not going to escape and that it will remain in Tennessee. With that in mind, I am going to ask Mr. Hare to tell us where he would file the law suit; how he would file it; and to give us the general considerations in that regard. But before he speaks I should like to call your attention to a provision of the F.E.L.A., namely, 45 U.S.C.A. § 56, dealing with venue, reading as follows: "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." Now if you will compare that with the general venue statute, 28 U.S.C.A. § 1391, you will observe that a great deal of latitude is indulged in by the plaintiff, in the F.E.L.A. cases. With that in mind, Mr. Hare, we will proceed.

MR. HARE: In Birmingham, we would have our choice between the United States district court or the state court. We would go in the state court for the plaintiff because the jurors give bigger verdicts there. The state jurors are drawn from the metropolitan area surrounding Birmingham. They work in the steel mills. They earn substantial weekly wages. A disability to one of them for life would represent a loss of a hundred and fifty thousand to two hundred thousand dollars in earnings and they can understand that sort of proposition. The federal jurors are drawn from a wider area of the state and think in terms of lower sums of money. We can generally get a verdict in the federal court, but it's smaller. But you nearly always get a verdict in one of these F.E.L.A. cases, anyway, because if the man is killed in his post of duty it is generally the experience of the plaintiff that he gets a verdict. So the answer to the first question is, in my town you would go into the state court. I realize I am talking to some law students as well as to practicing lawyers. The practicing lawyers would already know, and the young fledging would soon find out, whether the jury in your state court or in the federal court was dominantly more favorable to the plaintiff; that would be a very serious element.

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* Panel discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

The next thing we would determine is whether or not you need the assistance of the federal rules of discovery. That sometimes takes us to the federal court in ordinary litigation, but there is not a lot to discover in one of these cases. The man knows how badly he was hurt; his fellow employees generally say it could have been they who had a leg cut off instead of he. The witness is not some stranger in a truck that hit your client; the witness is the man who went to work with your client that morning. The plaintiff does not have a great deal to discover. In short, I have not found that the need for discovery in the federal court over-balances the advantage of having a liberal juror, whether that be in the one court or the other. So I do not think discovery helps a whole lot or is needed a great deal.

Then in our state court we do not have, and no state court has, this 28 U.S.C.A. § 1404-a. That is a federal thing, so you're not going to be transferred from a state court to somewhere else in the United States in the interest of justice under the federal statute. The Act says if you go into a state court you can not be removed to the federal court. Now there are states, however, that have a *forum non conveniens* rule. Alabama does not recognize it. If I file a lawsuit in Birmingham in the state court, that is where the case is going to be tried. The lawyers for the defendant do not even try to remove it. They did one time in the past few years test the matter and take it to our supreme court and ask them to hold that the doctrine of *forum non conveniens* should be applied in Alabama. They haven't held *yes;* they either haven't held at all or they held *no,* because they are not removing the cases. They are not transferring them; the doctrine is not being currently recognized in my state and I don't think it will be. So another advantage of my state court—and I will have to use one with which I am familiar as an illustration—is that you know where you are going to try your case and you know it will not be transferred. Now along in the southern part of the state, in the rural areas where verdicts are small, if the plaintiff wants to, he can bring the case to Birmingham and get the verdicts that are given by those jurors.

I have never met a lawyer in the State of Alabama who ever tried a Federal Employers' Liability case in any section of the state unless he was associated with the law firm which handles the union legal aid for these people. Fortunately, I managed to get a few of these cases. In one amputation case I got a good-sized verdict and now I am supposed to be an amputation lawyer. Sometimes I get an amputation case on that basis. The particular F.E.L.A. forum in Alabama is generally Birmingham and the particular forums in other states are generally the headquarters of the law firm that has the union contract. So you

can see that the selection of a forum has some geographical considerations. I realize that in Chicago a man can get a great big verdict and I realize that in Birmingham, Alabama, the biggest verdict we ever got was $92,000. I know of a $420,000 verdict in Chicago that was cut to 60% of that amount — I don't know whether it was paid; it was Jim Dooley's verdict; but they get big money up there. I know that in Florida, defendants have paid over $200,000. Now that is a geographical consideration.

What if a man came to me and said, "Of my own voluntary will and accord, without being solicited, I would like to go to Chicago and hire Jim Dooley. I'm willing to wait three years for my case to come up because I want a chance to get one of those big verdicts." I could not honestly tell him anything except: "All right, Sir, if you're willing to wait that long, you may get more money there and you sure will have a good lawyer." I would have to answer that question that he might get more money that way on the long wait. But I would want any man, in deciding on geographical considerations, not to commit his trust to the hands of some stranger or fellow who came and asked for the case.

I would tell the plaintiff that he could get a case tried in Birmingham in a year; I would tell him that in your state he would get it tried in whatever period of time your cases have to wait. If he were considering legitimately whether he wanted to go to some place where he could get venue on account of a larger verdict, he ought to know how congested the calendar there is. I think that is a matter for the plaintiff to decide—whether he can and will wait that long.

While the plaintiff is waiting several years we frequently have this problem. I cannot answer it, but I will state it. Consider the man who had been working and making what a railroad man makes — five or six or seven thousand dollars a year—who received a disabling injury, who was out of work a year, and is now faced with the proposition of waiting three years for trial. In the first place, he is going to get awfully hungry. In the second place, the loan sharks and the mortgage people are likely to get hold of him. In the third place, he is going to ask his lawyer to advance him several thousand dollars to eat on while that case is coming up. Now there are two considerations about that. The first is a sordid consideration—the lawyer may not ever get his money back. The second is an ethical consideration. The American Bar Association last year said that it thought that it was unethical for a lawyer to advance money to a client. I do not see why. I think that reflects the idea that you are not to encourage litigation. But it is rather like those minority opinions of the Supreme Court of the United States, which I think

are the minority opinions instead of the majority. They have said you are not supposed to do it, so that's an objection to it. There are a couple of decisions in Illinois that say it is perfectly all right if you promise the man you will lend him money if he will hire you. But after you have gotten him and he is about to make an improvident settlement and you want to lend him a couple of thousand dollars so he can last out until his case comes up, that is all right. That sounds to me like it is all right. But, as I say, what would your state say about it? You could not afford to fool with it unless you knew that you were safe.

MODERATOR DYE: Mr. Allen, would you like to comment on Mr. Hare's analysis of these problems in the choice of forum and the possible implications thereof? We would like particularly to hear more about *Norwood v. Kirkpatrick*.[1]

MR. ALLEN: *Norwood v. Kirkpatrick* was a case in which there were three plaintiffs involved, and the accident had occurred in South Carolina. If you read the opinion of the United States Supreme Court you will see that two of the men resided in Washington and one resided in Philadelphia and the suit which was the subject matter of the appeal came from the district court of Pennsylvania, in Philadelphia. The dissent states that to transfer these cases would be a great injustice and would create great hardship because the Philadelphia resident is now being made to travel to South Carolina from his home town and the Washington residents are being forced to travel just as far or farther to South Carolina as compared to a trial in Philadelphia. They state that this may affect their ability to effectively prosecute the action. What the Supreme Court opinion does not mention—and I think it is interesting in view of this discussion we have had now—is that all three of those plaintiffs had engaged, at one time or another three different sets of attorneys. First, they had engaged a law firm in New York City, but, for some reason which is not disclosed in the record, the New York firm withdrew as counsel. They then retained attorneys in Chicago, and, at least in two of the instances, the attorneys in Chicago instituted suit. At the same time that there was a suit pending in Philadelphia, there were two suits pending in Chicago. The district court had that before it, and I can not help but feel that it gave some weight to that fact in transferring these cases to South Carolina from Washington or Philadelphia or Washington to South Carolina. Now that does not appear in the opinion of the Supreme Court, but I think it is an instance of what we are talking about here today. That is, it is not only forum shopping, but the plaintiff himself is shopping for attorneys. He is matching one attorney against another, and I think that is an unfor-

1. 349 U.S. 29 (1955).

tunate situation. I think that cases that belong in Knoxville should stay in Knoxville. As the court has said in considering the doctrine of *forum non conveniens,* it is a burden upon the judges and upon the jurors to try a case in a jurisdiction where it does not belong. There are a very few law firms who handle most of these F.E.L.A. suits throughout the country. A study by the Association of American Railroads reveals that during the period from September 1, 1952 to March 31, 1955, 60% of all F.E.L.A. claims against all American railroads were handled by only 15 law firms and one law firm alone accounted for one-seventh of all claims. During the last nine months of 1955, three law firms received 30% of the total amount paid on F.E.L.A. claims in the entire country.[2]

MODERATOR DYE: Mr. Hare, I believe you have somthing further to say, do you not?

MR. HARE: Yes, about one thing he mentioned, about the Knoxville cases belonging in Knoxville; that a very few law firms have eighty to ninety per cent of these cases. But the man who has a few lawsuits representing people with whom he has a personal relationship who are his clients represents them in far more professional capacity than the man with an impersonal assembly line somewhere in a northern metropolis, to whom that plaintiff is a number in a file drawer. A doctor and a lawyer are much alike in that respect. I think a man is well off with a lawyer who knows him, if possible a lawyer who lives in his home town—a man who knows something about his veracity, in the first place, who knows in the second place, something or other about his personality, whether the man's personality or way of life has been changed. The whole fine relationship that makes the lawyer a sort of minister of justice is lost when the thing is utterly commercialized on an assembly line basis and one man in a distant town handles literally hundreds of cases for people who have no personal identity so far as he is concerned. That may be an intangible, but I'd rather have the outcome of my business in the hands of a man who cares something about whether I win or lose, and who may have to look at my wife or my son or my brother two weeks from now and tell them how my lawsuit is getting along.

MR. ALLEN: I might say, in that respect, that the leadership for this sort of thing must necessarily come from a group such as we have here and from other bar associations throughout the country. Since reference has been made to the Jennings Bill,[3] I might point out that there is a bill presently pending in committee, introduced by Congressman Zelenko of New York, which would make inapplicable 28 U. S. C. A.

2. See 2 ASS'N AM. RAILROADS, CHRONICLE 1 (Sept. 1956) for an analysis of these statistics.
3. H.R. 1639, 80th Cong. 2d Sess. (1948). The bill died in committee.

§ 1404-a to Federal Employers' Liability Act cases. I think the tenor of the bill is that it will permit venue to be founded in any jurisdiction where a railroad has tracks. That, I think, is broader than it has ever been. It was in committee and I think it will be reported out at the next session of Congress.

MODERATOR DYE: Thank you, sir. Let's proceed with the discussion on the subject of problems of venue and transfer. You will notice from your programs that the 1955 United States Supreme Court case of *Norwood v. Kirkpatrick* has furnished the basis of this discussion thus far. You have heard a reference to 28 U.S.C.A. § 1404-a entitled "Change of Venue," and reading as follows: "For the convenience of parties and witnesses, in the interest of justice a district court may transfer any civil action to any other district or division where it might have been brought." In connecton with this discussion, I think probably you would like to hear some further comments from Mr. Allen on the subject of the old doctrine of *forum non conveniens,* and also an interpretation of this statute which I have just read to you.

MR. ALLEN: The effect of *Norwood v. Kirkpatrick* is to state that § 1404-a is not restricted by the doctrine of *forum non conveniens.* If it were, then in the *Norwood* case, for example, the plaintiff being a resident of Philadelphia, that would probably be the most important factor which the court would consider and they would have retained jurisdiction, at least in that instance. Now of course, the Zelenko Bill which I mentioned is designed to eliminate that. There was support in earlier cases, *Ex parte Collett*[4] was one of them, which said that 1404-a was a codification of *forum non conveniens.* However, the *Norwood* case seems to dispel that and permits a more liberal interpretation.

One of the most important factors that I have found judges considering in granting a transfer of a case much more than they used to, is the condition of their calendars. At one point, for example, in the United States District Court for the Southern District of New York, the calendars were four years behind. Through a new system and through a very hard-working bench and the cooperation of the attorneys, it is now possible to have a lawsuit tried within approximately eight months—and that would be eight months after the injury, as happened to a case which I tried last year, providing lawyers are expeditious in completing their inspection and discovery. When you bring a case into the Southern District of New York now, one of the considerations to which they give more weight than they used to is the fact that this calendar is now up to date. If this case does not belong in New York, and it is there merely

4. 337 U.S. 55 (1949).

because of the possibility that you may get a higher verdict, the court is not going to retain it; they are going to transfer it. So we have been having more success in transferring cases back to jurisdictions where most, if not all, of the witnesses reside and where the the plaintiff resides and where the accident happened.

MR. HARE: Well, if any of you gentlemen are noting any citations for use, I would call your attention to the report of the *Norwood* case, as contained in 99 Lawyers Edition on page 799. There is a valuable annotation which deals with the question of when and how to apply Section 1404-a. *Norwood v. Kirkpatrick* says it is not a codification of *forum non conveniens,* leaving the question, "What is it?" If it is not *forum non conveniens,* then under what criteria will the court transfer the case to another jurisdiction? That, it does not answer, except that the judge who transferred it, in the particular case, said he would not have transferred it if he felt that it was governed by *forum non conveniens.* But he thought this was more liberal in view of the fact that it had abolished the old aspect of *forum non conveniens.* If the man brought the case, say in Tennessee, and then the statute ran, and then they transferred it somewhere else, he would be out of court. And that would have been a cruel thing. The man would have lost his right to a trial. So, Section 1404-a abolished that and the judge said that, since it abolished that harsh aspect of it, he felt like it would be more liberal, easier for him to transfer it — which, I judge, sounds all right, but he did not say what the criteria are. So in 99 Lawyers Edition, page 799, there begins an annotation on the subject: *Construction and Application of Forum Non Conveniens Provision of the New Judicial Code.* Those who represent the defendant would be interested in the fact that you have to act promptly, and delay may waive it. What is there for the plaintiff? If it has been transferred to another jurisdiction, can you make a motion under Section 1404 (a)? Say it was filed in Tennessee and they transferred it to South Carolina — can the plaintiff's lawyer in South Carolina make a motion under Section 1404 (a), in the interest of justice to transfer it back to Tennessee, or to transfer it to Alabama or Chicago, or somewhere else? Apparently, it contemplates but one decision of that question. That problem was decided in a case cited in the 99 Lawyers' Edition 799 annotation where a case was transferred to Florida under § 1404 (a). They tried it twice and in each case got a mistrial. The judge just transferred it or remanded it back where it came from, and said in the interest of justice these people were not getting anywhere. They had had two mistrials; they were just treading water. He was reversed, saying that the thing contemplated only one such determination, or else the case might be like *The Flying Dutchman;*

it would just go all over the country.

In the *Ohio State Law Journal* for Autumn of 1956 is an excellent symposium on F.E.L.A. In point here is an article by Arnold Elkind, entitled "Which Court?"[5] which is the red-eyed law on this subject. Mr. Elkind is a partner of the firm of Zelenko and Elkind in New York City and is well-known to many of you here. Elkind answers the obvious question as he sees it. If you're not going to decide on the basis of transferring it from one court to another on the basis of *forum non conveniens,* then what is the test?

Elkind sets up the following criteria: (a) The place of residence of the plaintiff. You're going to find that these are pretty near the same things that we were taught to inquire about under *forum non conveniens.* I don't see any everlasting difference except that it's a little easier to transfer it. (b) The location of the defendant's claim office. (c) The location of the defendant's main office. (d) The convenience of witnesses under the following four categories: 1) Whether they can be brought to the forum by the defendant without cost on pass over the railroad. 2) Whether the testimony of such witness is critically relevant. 3) Whether or not this testimony is disputed. 4) Where the question is not so much a matter of liability as it is of injury or disability, it is a matter of considerable importance. Where is the hospital where the man was treated, and where are the doctors? (e) The level of jury verdicts in the proposed transferee district. I will come back to that in a moment. Finally, (f) the docket condition. The answer to that, I think, is logical. You would not transfer it from a place that is pretty well caught up on its docket to a place that is vastly behind. But of course, if a judge had worked like everything and got his docket in good shape as a matter of housekeeping, he'd say, "Don't pile that stuff on me just because you're behind." So I think that generally you come to the same kind of a proposition involved in (e), the level of jury verdicts. Now, what level of jury verdicts? If the place where you are going to transfer it gives liberal verdicts, would you transfer it there in order to get a liberal verdict, or would the defendant say you want to go there to get an exorbitant verdict? I think a whole lot depends on the personality of the judge and whether or not he wants to get the case off his docket.

Now, finally, the main intelligent suggestion in this law review article by Elkind, and the main meat and the main sense in it, is this: Somebody has made a motion to transfer a case. Suppose you get one of those cases and you file it. Then somebody comes along with a

5. Elkind, *Which Court?* 17 OHIO ST. L. J. 361 (1956).

motion, ethically and within the law, to transfer it where you can not handle it. Very often a man thinks very highly of a trial, and he comes down and tries it himself and prepares it very carefully. But he thinks of the motion as a matter of less dignity and significance, and maybe he sends a boy to do a man's work on this motion. If you have a lawsuit worth $150,000 here, and it isn't going to be worth but $50,000 there, then there is a great deal more consequence in what happens to the motion to transfer — it is an anti-climax when you go to try the lawsuit. Therefore the motion under 28 U.S.C.A. § 1404 (a) should not be considered a skirmish, it should be considered the battle. And a man ought to prepare for that thing with the same deliberation and the same care as he would prepare for trial. Be prepared to show that it would be a great inconvenience to your man to go somewhere else. If the fellow gives a list of witnesses who live in Pinehurst, South Carolina or if he has a bunch of witnesses somewhere else, be prepared to say, "I admit that that's not in any dispute." You can admit most anything if you represent the plaintiff. Get the dispute out of it. When you have a motion under Section 1404 (a) do not regard it as a skirmish, consider it for what it is — a very serious thing on which the outcome of your case may depend. Go yourself and prepare it with the same care that you would for trial.

MODERATOR DYE: This concludes our discussion. May we express our appreciation to you gentlemen for being with us.

TRIAL TACTICS IN F.E.L.A. CASES*

PANEL: FRANCIS H. HARE, *of the Birmingham Bar*
TRUMAN HOBBS, *of the Montgomery Bar*
J. M. TERRY, *of the Louisville Bar*
JOSH H. GROCE, *of the San Antonio Bar*

MODERATOR: FRANK CREEKMORE, *of the Knoxville Bar*

MODERATOR CREEKMORE: The subject for discussion is *Sufficiency of the Evidence* and the panel is: Mr. Hare of the Birmingham Bar, Mr. Hobbs of the Montgomery Bar, Mr. Terry of the Louisville Bar and Mr. Groce of the San Antonio Bar. Mr. Groce will start the discussion.

JOSH H. GROCE: The first case to be discussed is *Rogers v. Missouri Pacific Railroad Company,* my good client.[1] It was on February 25th of this year that the Supreme Court decided three F.E.L.A. cases and one Jones Act[2] case, which is exactly the same thing as the F.E.L.A., so you can just forget any distinctions between them. The Jones Act applies the F.E.L.A. to shipping. In three of these four decisions,[3] the court held for the plaintiff and enlarged what we say was the theory of recovery on the part of the plaintiff.

In the *Rogers* case the plaintiff was a section laborer who was standing near a track, waiting for a train to pass. The train fanned the burning grass and weeds which had been purposely ignited by the gang, and in stepping back out of the way of the flames Rogers fell and was injured. The court held the railroad liable, stating: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[4]

In the *Webb* case[5] the plaintiff was a brakeman who fell on a partially covered cinder, about the size of his fist, imbedded in the roadbed. Liability was imposed for the railroad's failure to screen any large clinkers. Now, in view of the many miles of ballast on the rail-

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* Panel discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

1. 352 U.S. 500 (1957).
2. 41 STAT. 1007, 46 U.S.C. §688.
3. Rogers v. Missouri Pacific R. R. Co., 352 U.S. 500 (1957); Webb v. Illinois Central Ry., 352 U.S. 512 (1957); and Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957).
4. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506 (1957).
5. Webb v. Illinois Central Ry., 352 U.S. 512 (1957).

road, this is rather alarming – this principle of the railroad having to screen all of its roadbed for large clinkers.

In *Ferguson v. Moore-McCormack Lines*[6] the plaintiff seaman cut off a couple of fingers while removing ice cream from a container with a knife. The ice cream was so hard that his ordinary scoop would not operate so he used a big carving knife kept nearby that was never intended for use for that purpose. While he was digging at the ice cream his hand slipped and he cut off two fingers. The Court held that the carrier's negligence in not furnishing him a scoop that would operate in hard-frozen ice cream was sufficient to establish liability.

Now in all three cases, Justices Harlan, Whittaker and Burton dissented. Justice Frankfurter likewise dissented on the ground that the writ had been improvidently granted.[7]

The fourth of the decisions handed down that day was the *Herdman* decision.[8] There the court denied recovery because the plaintiff, who was injured when the train made an emergency stop for an automobile, relied on *res ipsa loquitur* rather than on specific acts of negligence, and because in his testimony the plaintiff admitted that emergency stops were quite common. He was denied recovery in that case but that does not give the defendants much solace. With that background, I will turn the discussion over to some of my colleagues here.

FRANCIS H. HARE: The *Rogers* case[9] is a decision which, I think, everyone would have expected. I do not believe there is anything revolutionary, or particularly new, in the *Rogers* case. There is some language which pushes back the frontiers, perhaps, just a little bit. But I think any lawyer here would have predicted that the Court would have held that Rogers could recover.

MR. GROCE: Speak for yourself, John.

MR. HARE: He would not have liked it, but he would not have bet you twenty dollars to the contrary. Rogers was burning weeds by the side of the railroad track, and they told him that whenever a train came by to stop burning weeds and look at the train for hot-boxes. He did, and when he did the suction from the train fanned the flames up and he retreated hastily and fell from a culvert and was hurt.

There have been cases on the facts a whole lot closer to liability without fault than running from a fire. But here are one or two things that you find in the opinion that are in the thinking and in the vocabulary of lawyers and judges that are worth noting. Justice Brennan

6. 352 U.S. 521 (1957).
7. 352 U.S. 524 (1957).
8. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).
9. Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957).

wrote this Rogers opinion for the plaintiff. Everybody was wondering what President Eisenhower's four new judges were going to do. I was in the audience when Mr. Allen was talking on the previous panel and I had intended to ask him if he cared, occupying the position of responsibility that he does, to sort of guess how those judges were going to jump. I never get to the Supreme Court; I have gotten three or four postcards which read, "Certiorari denied"—this profound opinion is all I ever got out of Washington, except a bill for my income tax.

You could take all of these cases put together and say of them that they announced the general proposition that has already been announced: that if it is a matter of fact and if the jury has found for the plaintiff, it is pretty near going to stick. To say that there is not any factual basis for it is to say that twelve men under oath looked right straight at something and claimed they saw it – and it wasn't there.

Now in this *Rogers* opinion by Justice Brennan we interpret the foregoing to mean that the Missouri court found as a matter of law that the petitioner's conduct was the sole cause of his mishap. Now mark that, "was the sole cause of his mishap." Of course that does not mean anything, except that there was no negligence. Therefore they need not have said anything about it being the sole cause; why didn't they just go on and say that there wasn't any negligence. Sometimes a man says just as hard as he can that there wasn't any negligence and nobody will listen to him. So then he turns around and says, "Well, all right then, I'll put it this way. Your negligence was the sole cause of the mishap." The idea is that the offensive is better than the defensive – but it is illogical. The question remains, was there any fact upon which, with reason, it could be stated that negligence could be found. I have, over more years than I want to admit, heard resourceful and ingenious advocates for the defendant, when they weren't getting anywhere denying negligence, attempt to take the offensive and say, "Well all right then, your negligence was the sole cause of the mishap." And I find that familiar friend of many years cropping up in Justice Brennan's opinion, only to be struck down; this I am glad to see.

This is the same old rule that was announced in *Wilkerson v. McCarthy*[10] and *Lavender v. Kurn*[11] coming out with a little more chromium on the grille and in the 1958 model, but it's the same thing. Justice Brennan says "under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest . . . ."[12] Now that stream-

10. 336 U.S. 53 (1949).
11. 327 U.S. 645 (1946).
12. Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506 (1957).

lines it a little; "even the slightest" are words that you can roll off your tongue. These are good words for the plaintiff; that's meaningful; that's sound judicial philosophy.

Now here is another way in which Justice Brennan has stated the proposition: "The decisions of this Court, after the 1939 amendments, teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."[13] That is a way of saying that if a man gets hurt on the railroad, generally it is somebody's fault. I am glad that is the majority opinion, that's what I will say about that. He says, "Special and important reasons for the grant of certiorari are certainly present when lower federal and state courts persistently deprive litigants of their rights to a jury determination."[14] Ever since the early cases in "the decade of progress," as DeParcq[15] calls it, under this Act, Justice Frankfurter has been raising the devil with the Court for granting certiorari at all, for two reasons. 1) He says they are wrong; there is not any question for the jury. 2) He says that even if you are not wrong about it, you are not supposed to grant certiorari to re-examine facts; you have juries to examine facts; you have the district judge to examine them next; you have the court of appeals to examine facts. Here are just a few old men in Washington entrusted with all the problems and all the jurisprudence of this country, and you are using about fifty million dollars worth of brains on this Court to decide one fact after another in these Federal Employer's Liability cases. He just says as a matter of principle, you grant certiorari too often, even if you are right. When it gets here and you examine the thing, what you are doing is second-guessing the jury or trial judge and the court of appeals. We are not hired to do all that work because in the interest of the country we have more important things to do. In general, Justice Frankfurter says that nearly every time. You've got to respect Justice Frankfurter's view of the matter. Now Justice Brennan is saying to Justice Frankfurter: "Special and important reasons for the granting of certiorari in these cases are certainly present when lower federal courts and state courts persistently deprive litigants of their right to a jury determination."[16] I think Justice Brennan is speaking for the majority of the Court throughout the whole period: that Congress passed this thing; they abolished the fellow servant rule; they abolished

13. *Id.* at 510.
14. *Ibid.*
15. DeParcq, *Decade of Progress Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROB. 257 (1953).
16. Rogers v. Missouri Pacific R.R. Co., 352 U.S., 500, 510 (1957).

contributory negligence as a plea in bar; they abolished assumption of risk; then they passed the 1939 amendment and said you do not have to be in interstate commerce at the time of the act. Justice Black said: "This Act was passed to confer benefits and not to deny them." They say the majority of the Court considers that they are not abusing the power of certiorari if these lower federal courts or the state courts are openly defying the Congress in that matter.

I have made the *Rogers* case the sounding board for most of what I have to say. I'll say why I think Mr. Herdman[17] lost his lawsuit. These defense gentlemen gave as their reason that if the Court had found for Herdman they'd have been saying it was O.K. to run over the other people in the car. I don't think it's quite that bad. The man relied on *res ipsa loquitur*: The instrumentality is in the hands of the defendant and the accident would not have occurred in the presence of due care. So the railroad lawyer or somebody asked Mr. Herdman, "What? Do you mean to tell me that this sudden stop, which caused you to fall, would not have occurred but for somebody's negligence?" He nearly read it out of the book to him! And the man answered, in effect: "We got to expect them or think about them. That happens all the time and it doesn't mean that anybody's not doing their duty." That fellow just talked himself out of a verdict; all they had to do was believe him and he lost. I think that's what happened to Mr. Herdman.

TRUMAN HOBBS: Coming up here from Birmingham, Mr. Hare and I were commenting on Frankfurter's position with respect to the Supreme Court's granting certiorari in this type of case. Justice Frankfurter believes very conscientiously, and has stated it dozens of times, that this is not the type of case that the Supreme Court should be occupying itself with. These are purely factual questions and the law is well settled, so why keep bringing them back? I asked Francis if he saw any parallel between what Frankfurter is saying in this type of case and in the confession cases. Certainly the law is well settled in this country that a coerced confession is void and is not anything that can be used to convict a man. But those cases keep coming up with even more frequency, I think, than F.E.L.A. cases. I know we have had two or three from Montgomery County that have gone up there and have been reversed in the last two years – one from my home town of Selma. They go up there all the time and the only question the Court and Justice Frankfurter are considering in those cases, and he has written numerous times in that type case, is the factual issue; whether the confession was coerced. So I ask, "Isn't it a fact that in these confession cases which the Supreme Court is considering so frequently, that the

17. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).

Court is also considering primarily factual questions?" They are doing the same thing in the F.E.L.A. cases and I think that there is good reason to bring them up, as Justice Brennan points out, where federal courts and state courts are ignoring the prior decisions of the Supreme Court in this field. Eventually maybe even our friends on the other side will learn that the Court means what it says when it says, "Do not disturb these jury verdicts."

MR. HARE: Anyone acquainted with this subject would have in mind these three things: In the first place, this is a negligence action. The court always necessarily charges the jury that you have to prove negligence. Now the Act nowhere defines negligence in an F.E.L.A. case as being any less wrong than the negligence necessary in an automobile case. It does mention causation, in whole or in part, . . . and courts have said that the amount of evidence necessary to show it is very little. But Justice Frankfurter, I think, is correct in his dissenting opinion in the *Rogers, Webb, Ferguson,* and *Herdman* cases in saying that negligence under the F.E.L.A. is not some esoteric thing, different from any other negligence, but in candor and perhaps in ignorance, I can not see the difference.

You ought to also have in mind, in appraising Justice Frankfurter's dissents, that he very frankly believes that they ought to change it to a matter of compensation. He has said so repeatedly. He believes that Congress ought to repeal this thing and turn it into a compensation law. In this last dissenting opinion in a footnote he says: ". . . an archaic system, I might add, that encourages pursuit of big verdicts in individual cases, a preoccupation that has attained the dignity of full documentation over sensational methods by which a jury's feelings may be exploited." He is just against it and thinks there ought to be a workmen's compensation law.

JAMES M. TERRY: My disagreement on this set of cases, if you will let me go from the *Rogers* case to the *Webb* case just for a minute since they are all together, is this: The Court in effect holds that it is negligence to have a clinker on your railroad. If you did not screen the material, identify the clinker, and take it away, it is negligence. Let us consider what we should do as a railroad. Are we going to pave the right of way? Take the situation of the L & N from Cincinnati to New Orleans. One could hardly get this distance entirely paved before it would crack. Are you going to then say that, even though you removed all the clinkers and you paved the right of way, you were negligent because you used paving and that paving eventually cracked? You would still be liable. Now to be negligent it would look as if there would be a duty that you could perform. Under the *Webb* case you

could not possibly perform the duty of making the right of way safe.

The same thing applies in the *Ferguson* case, which involved a knife being used in lieu of an ice cream scoop. The minute you get to the proposition that if the tool you furnish proves to be unsafe you must furnish another one you just get back into the same rat race. You can not perform that duty, because whatever you do furnish is wrong—you are always second-guessed.

The *Ferguson* opinion contains the following:

> Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases, could conclude that petitioner had been furnished no safe tool to perform his task. It was not necessary that respondent be in a position to foresee the exact chain of circumstances which actually led to the accident. The jury was instructed that it might consider whether respondent could have anticipated that a knife would be used to get out the ice cream. On this record, fair-minded men could conclude that respondent should have foreseen that petitioner might be *tempted* to use a knife to perform his task with dispatch, since no adequate implement was furnished him.

Now getting back to the basic proposition: if you have a duty and there is no way to adequately perform that duty it looks to me like it is just absolute liability.

MR. GROCE: Well my pet peeve with the *Rogers* case is the language that they use in determining this question of causation. Now, mind you, the F.E.L.A. provides that the railroad should be liable for injuries resulting, in whole or in part, from the negligence of the railroad. Now, let us take that *in whole or in part* first. We have, and always have had, the doctrine of *sole* proximate cause and the doctrine of *a* proximate cause. That's merely saying that it doesn't have to be the sole proximate cause, when you say in whole or in part. At the time the F.E.L.A. was enacted, the term *resulting from* had been held by any number of courts to be synonomous with *proximately caused by.* I think any lawyer will agree with that. But now let us see what the Supreme Court has said is the test on this question of proximate cause. They say the test is whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit, getting completely away from the common law doctrine of proximate cause.

I'm reminded of the little skit I learned in kindergarten: "For want of a nail a shoe was lost, for want of a shoe the horse was lost, for want of a horse the rider was lost, for want of a rider the message was lost, for want of the message the battle was lost, and for want of the battle

the kingdom was lost." I suppose that if the railroad had been the blacksmith who shoed that horse—the railroad under the F.E.L.A. case, under the decision here now—would be held liable for the loss of the nation, which of course is an absurd thing.

The courts have gotten away from the proximate cause and even the Supreme Court, in the case of *Coray v. Southern Pacific R.R.*[18] which was mentioned this morning, used the term *proximate cause.* But here now they are getting away from it and saying, ". . . whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." It was Mr. Justice Jackson, I believe – I've forgotten in what opinion he used it – who said that Congress has stacked the cards against the railroad. Well what sort of country is this that we live in that any litigant can have the cards stacked against him? But I say it is the Supreme Court of the United States that is dealing that deck of cards that is stacked and that they are putting words into Congress' mouth that Congress never intended and the *Missouri Pacific v. Rogers* case is one instance of this.

The next case on the agenda here is that of *Lavender v. Kurn*[19] with reference to inferences. Now in *Lavender v. Kurn* the plantiff's decedent was charged with the duty of throwing a switch to let the train in on a siding. He was found dead some few feet from that switch from a blow to the head of a small, round object. It was claimed by the plaintiff to have been the mail hook, on the side of the mail car, that had swung out. In that case, in spite of mathematical calculations which showed this to be an impossibility, in spite of photographs that showed it was an impossibility, in spite of testimony that immediately thereafter the mail car had been inspected and that the hook was not hanging out, the Court said, "There being a reasonable basis in the record for inferring that the hook struck Haney . . ."; the Supreme Court of Missouri would be reversed because the Supreme Court of Missouri had held that there was absolutely no evidence in the record.

Now there is an interesting sidelight in that case, also. Hearsay testimony was improperly admitted in the trial of that case. In other words, one of the witnesses said that somebody came up to him right afterward and said something about how this accident had occurred. The Supreme Court of Missouri likewise held that that testimony was improperly admitted. But, believe it or not, the Supreme Court of the United States said that it was immaterial that hearsay evidence was admitted because there was some other evidence that would support the verdict. Now I cannot imagine any court doing that but they reversed

18. 335 U.S. 520 (1949).
19. 327 U.S. 645 (1946).

and remanded it to the Supreme Court of Missouri. The Supreme Court of Missouri, instead of rendering judgment on the verdict, reversed and remanded on the ground of the admission of this testimony. The Supreme Court then had to deny certiorari, which it did, because it was not a final judgment. The decision of the Supreme Court of Missouri, in reversing and remanding for this improper testimony, did not constitute a final judgment so that the Supreme Court did not have jurisdiction.

That *Lavender* case goes far beyond the bounds of reason in the two instances: (1) Mathematical impossibility, photographs that show it could not have happened in this way; (2) Testimony — unimpeached testimony — was that the car was examined immediately thereafter. Yet the Supreme Court said, "there being a reasonable basis in the record . . . ." It does not point out what that reasonable basis is; it just says that there being a reasonable basis in the record for inferring that the hook struck Haney, the Supreme Court of Missouri would be reversed.

MR. TERRY: Well I just want to add one thing. I think a "reasonable basis" in that case is anything that might be called a theory. Just anything as long as you could say, "Well, it could have happened this way," is in that case considered to be a "reasonable basis." I think it took an inference on an inference on an inference to get there.

MR. HOBBS: I'd like to make just one comment on this *Lavender v. Kurn*[20] case. We find Chief Justice Stone and Mr. Justice Frankfurter concurring in the result in that case and only one justice dissenting. Now I do not claim that all the wisdom in the world is on the side of the plaintiff in these cases, or even with the judges who vote with the plaintiff, but I do not believe all the ignorance is invested in the seven justices who decided with the plaintiff in this case, and my distinguished opponents over there have all the wisdom on their side when they're outnumbered on the score of seven to one.

I'm not going to detail all the evidence in that case except to say you cannot assert that it was proved to be a mathematical certainty that it couldn't happen — seven justices didn't feel it was proved to a mathematical certainty. For whatever it's worth, I could not see any mathematical certainty; twelve men on the jury could not see it to a mathematical certainty; I think that if my friends will read the case again they will have to admit that it wasn't proved to a mathematical certainty.

Now I will possibly concede that under the law of Alabama, as I understand the traditional negligence case down there, the plaintiff in

20. *Ibid.*

Lavender v. Kurn would have had a difficult time retaining his verdict because there was very little probative evidence to support the jury's verdict. Two theories were advanced for the way this man was killed. One was that the mail hook struck him in the back of the head; the other was that some one loose in the railroad yards had killed him. There was very little evidence to support either theory. Nobody had seen anybody hanging around there killing people that night, but that was the railroad's theory which they say, by reason of their having advanced it, compelled a result in favor of the railroad.

I think it is very illuminating that, when Mr. Groce and Mr. Terry discuss this case and the others that they have discussed, both of them have referred to the result as: ". . . the court held the railroad liable." Well you gentlemen are lawyers and you know that that just isn't so. The Supreme Court does not hold anybody liable. The Supreme Court affirmed a jury verdict which held the railroad liable. That is the point in this whole picture which I think the railroad attorneys completely overlook: Twelve men, wherever the case is tried, have held that the railroad was liable. It does not even follow that if I were on the jury, or if one of the justices were on that jury, we would have reached the same conclusion. But the Supreme Court does say that these matters are to be decided by a jury except in the extraordinary case, and I suppose the *Herdman* case[21] was the type to which they had reference. It was very interesting that Justice Murphy, who wrote the opinion in *Lavender v. Kurn*,[22] tried to answer the objection that everything was left to conjecture and speculation. He pointed out: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."[23] So you don't stop all thought by suggesting that the jury's verdict rests somewhat in speculation. If there had been blood on the back of the hook, I don't believe that even the gentlemen of the opposition would contend that the jury might not have found that that was the thing that killed him—but there still would have been speculation there.

The question in each case is: Was it a reasonable speculation? I have already conceded, perhaps, too much when I say that under the law of Alabama and the traditional rulings of the Alabama Supreme Court the facts of *Lavender v. Kurn* would probably not have been

21. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).
22. 327 U.S. 645 (1946).
23. *Id.*, at 653

allowed to go to a jury and a jury's verdict would have been set aside. But the defendants would have you believe, that this is a clear case of speculation and that speculation answers it. But I think the Supreme Court's approach is correct . . . that in each case you look and analyze and see: Is this so improbable; was this so fantastic that a jury verdict should not have been allowed? And I think the Supreme Court is aware, again, of what was stated in a prior decision, that you do not have to have a notary and two witnesses when a railroad man is struck down in the dark, which is what happened here, in order for him to recover. It went to the jury in this case, and although I will again say I do not think it would have done so in Alabama, I don't think it's bad law.

MR. HARE: In the *Lavender* case, there is an announcement of law that in my state is revolutionary. We say in Alabama over and over again, that if a thing is left to speculation and conjecture you can not recover. You have to either prove it or be able to infer it in a rational manner in one link of causation. In the *Lavender* case, the Court answers the criticism that it called for speculation and conjecture and says: "Whenever facts are in dispute a measure of speculation and conjecture is required. Only when there is a complete absence of probative facts does reversible error appear." That's *Lavender v. Kurn.*

Finally, in Alabama we have what we call the *scintilla rule* in the state court. If there's any evidence at all—a scintilla—it can go to the jury. I would think, again in candor, that they are in the federal court in other matters saying that they don't have the scintilla rule—you have to have a substantial amount of evidence. This looks like they might have a way of splitting the scintilla in these cases in determining how much evidence is necessary.

MR. GROCE: Our scintilla rule in Texas is different from yours. Our scintilla rule in Texas is that if there is only a scintilla of evidence, they are not entitled to go to the jury. There must be more than a scintilla. That's the case of *Joske v. Irvine,*[24] a very famous case in Texas.

MR. TERRY: The scintilla rule in Kentucky was abolished specifically in *Nugent v. Nugent's Ex'r.*[25] You have to have more than a scintilla.

Then there is one other fact in the *Lavender v. Kurn* case that I think ought to be brought in here. I think it is stated in the opinion that the man's pocketbook was not on his person, but was found at a somewhat later time a rather considerable distance away, on top of a fence and the money was gone. There is some argument that it must

24. 91 Tex. 574, 44 S.W. 1059 (1898).
25. 281 Kent. 263, 135 S.W. 2d 877 (1940).

not have been robbery because he did not ordinarily carry very much money, but I do not know how anyone knocking a man on the head could look in his pocketbook first to see whether it would be profitable to rob him or not.

MR. HARE: They've asked me to comment on *Jesionowski v. Boston & Maine R.R.*[26] I think its principal significance is in connection with the *Herdman* case,[27] where *res ipsa loquitur* was not allowed to support the plaintiff's verdict. I will say that to that extent. The other comment about it is that in *Jesionowski* the plaintiff was allowed to recover on the *res ipsa loquitur* doctrine, although there was a derailment which resulted in the injury, and the derailment occurred at a switch with which the plaintiff had had some connection in handling. The defendant said that that took it out of the orbit of *res ipsa loquitur* because the instrumentality was not in the exclusive hands of the defendant, which is the generally enunciated rule.

The gist of the *Jesionowski* opinion decisive of that question is in this language: "We cannot agree. *Res ipsa loquitur,* thus applied, would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact and in this case the jury's right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are federal questions."[28]

In effect the Supreme Court said, "All right, so the plaintiff had something to do with the instrumentality and the defendant did not have exclusive control of it, but the jury believes that the plaintiff's part in it was not productive of causing anything. The jury has negatived the influence of anything that the plaintiff did and therefore, in logical result, it is in the same posture as if the plaintiff did not have anything to do with it and that it was in the exclusive control of the defendant." On that basis the Court said that the jury was entitled to find for the plaintiff.

MR. GROCE: In the *Jesionowski* case, there were two theories. It was a derailment. Now the plaintiff was charged with the duty of throwing the switch to let the cars come in on the siding. Some forty feet down the track was a frog, over which the plaintiff had absolutely no control whatsoever. The railroad contended that it was the improper throwing

26. 329 U.S. 452 (1947).
27. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).
28. Jesionowski v. Boston & Maine R.R., 329 U.S. 452, 457 (1947).

of the switch that caused this derailment and the injuries to the plaintiff. The plaintiff contended that the throwing of the switch was in all things proper and that actually it was the frog that was the cause of the accident.

Now, believe it or not, I am going to say that I can not find too much wrong with this decision. In Texas where we submit cases on special issues, we would first submit the special issue: Was the instrumentality which caused the accident under the sole control and custody of the defendant? And if it was, then answer whether it was a case in which *res ipsa loquitur* applied.

I think that the plaintiff was entitled to a submission of the doctrine of *res ipsa loquitur* if he can show that the instrumentality which caused the accident was not under his control, but was under the control of the defendant, as it was in this instance. He succeeded in showing in this instance that actually, or perhaps the jury so found, that it was the frog that caused the derailment and not the negligent throwing of the switch. This was a general verdict, of course, so you don't know exactly what the jury did find and the judge did charge on the doctrine of *res ipsa loquitur*. I assume that he charged properly that if the instrumentality which caused the catastrophe was under the sole control of the defendant, then they can infer negligence therefrom; and that the general finding by the jury did apply *res ipsa loquitur* and found in effect that the accident was not the result of the throwing of the switch.

MR. TERRY: I am in entire agreement with that. Once you line up those two theories and decide the first issue, that the throwing of the switch did not cause the accident, I have not any argument at all about applying *res ipsa loquitur* from there on in. I do not think this an unusual case at all.

MR. GROCE: I just came through St. Louis the day before yesterday and settled one for $75,000 — at least I got authority to settle it for $75,000 — where *res ipsa loquitur* applied. It was a derailment caused by a faulty track. A conductor was riding in the caboose of a freight train that was going about forty-five miles per hour when the whole freight train derailed and he was bounced around terrifically. I wrote the general counsel and said, "*Res ipsa loquitur* applies in this case and we cannot explain what caused this derailment. We think it was the heavy rain that caused the track to settle directly under the train while the train was in motion, but even that won't excuse us under *res ipsa loquitur*. We're going to be held. This is a case of liability." *Res ipsa loquitur* has its proper place in railroad law. I don't think there's any question about it.

MR. TERRY: I can say that in all my experience on the L. & N., anytime we have a derailment we don't waste much time figuring about liability. We get out and start settling cases.

MR. GROCE: We now come to what has been called the unsanitary case. That's the *Ringhiser* case.[29] I think the dissenting opinion gives the facts of that case as sanitarily as might be given, quoting the opinion of District Judge Cecil:

> On October 7th, 1950, Boyd R. Ringhiser, the plaintiff herein, arose in the afternoon, made preparation to report for duty at 4:45 p.m., had a bowel movement, made a mental calculation and thereby set in motion a chain of events which created a result both unusual and tragic.
>
> The sequence of these events is as follows: The plaintiff's bowel movement was unsatisfactory. "This won't do," said he to himself (statement made by plaintiff at the trial but ordered stricken); he took a dose of salts and washed it down with sweet cider; he got in his car and drove to Parson's Yard, the switching yard of the defendant, and had a bowel movement at the roundhouse. He then got on his engine and maneuvered it to track twelve, where it was coupled onto a train scheduled for the Walridge Yard at Toledo. While sitting in his engine waiting for his air brake test, he had an urgent call of nature—and "had to go quick." He dismounted from his locomotive cab to go to a toilet a short distance west. A long train of empties passed between him and the object of his immediate attention. He could not wait for this train to pass and went to No. 8 switch track and climbed into a low-sided gondola car to answer his call of nature. While thus engaged, a yard crew switched two cars into No. 8 switch track. These cars came in contact with the car ahead of plaintiff's car and it likewise came in contact with plaintiff's car. The gondola car in which plaintiff had taken his position was loaded with steel plates and when the cars made contact the plates shifted, caught plaintiff's right leg and crushed it so that, a few days later it had to be amputated.[30]

On that state of facts the jury brought in a verdict against the railroad for $40,000; that verdict was reversed by the Court of Appeals,[31] and when it got to the Supreme Court here is all that the Supreme Court had to say on it: "Per curiam. The petition for certiorari is granted. The judgment is reversed and the cause is remanded. The trial judge set aside the jury verdict for the petitioner because, *inter alia*, it was held that the respondent 'had no duty to anticipate that a car was being used for such a purpose.' There was evidence, however, as the trial court found, that to respondent's knowledge, employees used gondola cars for the purpose. In that circumstance there were probative

29. Ringhiser v. Chesapeake & Ohio Ry., 354 U.S. 901 (1957).
30. *Id.*, 904.
31. Ringhiser v. Chesapeake & Ohio Ry., 241 F. 2d 416 (6th Cir. 1956).

facts from which the jury could find that the respondent was, or should have been, aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did."[32]

One of the interesting things in that case is that Justice Clark got over on the dissenting side. We also had a dissent by Harlan and Whittaker; and Justice Frankfurter dissented, as usual, on the granting of certiorari. So you might say that it's another one of those five to four decisions. And I might say, as Justice Clark pointed out in his dissent,[33] that although the majority opinion says: "There was evidence, however, as the trial court found, that to respondent's knowledge employees used gondola cars for the purpose . . . ," that is only technically true since they only used empty gondola cars for that purpose and that is in evidence. The plaintiff himself testified that if he had known that that car was loaded he would not have used it for that purpose. Loaded cars were never used for that purpose. That is how far afield the Supreme Court can go.

MR. TERRY: I agree with Josh Groce *in toto*. I just can't see any defense to this case, any way you take it. I'd like to hear my friends to the left here defend it.

MR. HOBBS: Well you were candid with us on *Jesionowski*.[34] I think it is time for some candor from our side. I would say that there is very little to explain *Ringhiser* unless the Supreme Court meant that it is not going to disturb jury verdicts. I would not wish to defend this case in terms of traditional notions of negligence or proximate cause.. This seems to be the furthest extension of defendant's liability in any of the cases. Perhaps it does mean that any time the jury gives a verdict for the plaintiff it is going to stand unless as the plaintiff did in *Herdman*,[35] he talks himself out of court.

MR. TERRY: Could I interpose this one thing? I do not think it should have any effect here, but I call your attention to the injury. This man lost a leg and he will never be able to work again; that should not turn a case but I do think it had an effect on it.

MR. HARE: The *Dice* case is the next one before us here, *Dice v. Akron, Canton & Youngstown R.R.*[36] That is the release case, tried in Ohio. It comes under the general category of the cases in which local practices have, in the opinion of the Court, been used to defeat federal rights. Without getting ahead of myself, I want to list the other cases we have on this program. A case of special verdicts which are supposed

32. Ringhiser v. Chesapeake & Ohio Ry., 354 U.S. 901 (1957).
33. *Ibid.*
34. Jesionowski v. Boston & Maine R.R., 329 U.S. 452 (1947).
35. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).
36. 342 U.S. 359 (1952).

to be inconsistent with the general verdict.[37] Then there was this decision in Georgia,[38] the first one of the *"clinker cases,"* where the plaintiff lost his lawsuit in Georgia because under the pleading they said that if what he said were true he had not set out a cause of action. And there are other instances where, according to the local practice the state court says a man had lost his lawsuit, but the Supreme Court admonished that a man cannot be divested of a federal right by using local practices which are inconsistent with it.

Now in particular, in the *Dice* case the man had signed a release. He contended that the release was invalid because the contents had been misrepresented to him and it was inadequate and he did not know what it meant. The court of that state said that the validity of releases was to be determined under Ohio law by the judge and not by the jury. The judge determined that since this man was negligent in failing to read the release he could not complain of the release after he signed it and that it would be valid and that he did not have any lawsuit.

This is one I think everybody would have assumed that the Supreme Court would not let stand, because they have never let a local practice divest the plaintiff of his rights under the federal law. So they reinstated the man's verdict and that was that, holding that the validity of the release in an F.E.L.A. case must be determined like any other question in those cases under the federal procedure and under the federal practice.

My closing remark about the *Dice* case is this. I didn't see it argued in there but it perhaps might have been. Negligence on the part of the plaintiff in getting himself hurt would not have defeated a recovery; it would have been ironical for negligence in not reading a release to have defeated his recovery. The Supreme Court would have been in a rather strange position if they had said that out there on the ground in full possession of his faculties when the accident was happening he might have been negligent and still have recovered, his negligence only diminishing his recovery; whereas when he is laid up in the hospital and groggy any little negligence in not reading the release would have been more effective in constituting a defense for the railroad than negligence in bringing on the very accident itself. But that isn't stated as the reason for the *Dice* case. When the Supreme Court had determined that the validity of the release was determined by the federal law, they could not let the state practice defeat it. That's what I see in the *Dice* case.

MR. HOBBS: I think that's a sound decision and to me it would have been an abominable result to have permitted the Ohio court to deny this man compensation in this type of case because in the words

37. Arnold v. Panhandle & Santa Fe R.R., 353 U.S. 360 (1957).
38. Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

of Justice Black, who wrote the opinion, "In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud."[39] That does not seem to me to be good law in Ohio, Alabama or anywhere else and where the Supreme Court has said repeatedly that the determination of the rights under the F.E.L.A. are federal rights, I am very glad to see that they did not let that sort of situation creep into the federal law.

MR. GROCE: Well I think it's another instance of hard cases making bad law. To be a little bit more specific, the settlement in that case was for $924.63, which seems to me to be probably the exact figure of the lost time that that man had up to the date of the settlement. Upon the trial to the jury they brought a verdict in for $25,000. That was how badly the man was hurt and that was a good many years ago because this was decided in 1952, so the accident was probably some four years before that. So you can see that the injuries were pretty severe in that particular case.

Now, under the Ohio practice at that time there was the division between law and equity. In equity matters, of course, it was well understood that you did not have a jury to pass upon matters of equity. In order to set aside the release you had to have this equitable action. For some strange reason or other the trial judge submitted the question of the validity of the release to the jury in the general charge. Then, after the jury had set aside the release, the trial judge, discharging his prerogatives which he should never have submitted to the jury, as I see it, gave validity to the release himself because that was an equitable province. Now the Supreme Court comes along and says that they are not going to allow state procedure to deprive an employee of federal rights.

I may be getting a little ahead of myself in a discussion of *Arnold v. Panhandle & Santa Fe R.R.*,[40] which comes in the next hour and which is under our Texas practice. In the case of *Minneapolis & St. Louis R.R. v. Bombolis*,[41] it was held that state procedure would be applied in all F.E.L.A. cases. That is a decision by the Supreme Court that had never been overruled and the Supreme Court didn't undertake to overrule it in the *Dice* case. And that was what the dissent in that case was based upon. It was that the *Bombolis* case was still the law. Mind you, it is the plaintiff who chooses the forum; if he wants to go into the federal court he can go into the federal court, but if he voluntarily goes into the state court I say that he submits himself to the state procedures and until *Bombolis* is overruled that decision is wrong.

39. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952).
40. 353 U.S. 360 (1957).
41. 241 U.S. 211 (1916).

SCOPE OF APPELLATE REVIEW IN F.E.L.A. CASES*

PANEL: TRUMAN HOBBS, *of the Montgomery Bar*
JOSH H. GROCE, *of the San Antonio Bar*
MODERATOR: HARVEY BROOME, *of the Knoxville Bar*

MODERATOR BROOME: The speakers this afternoon are Mr. Hobbs and Mr. Groce, who have been presented to you on earlier panels. A number of the cases that are on the program here have been discussed from many angles previously and they may not be discussed with the same detail that we might otherwise have gone into initially on this Panel. The first case that we will discuss is the *Arnold* case,[1] which gets into the effect of certain Supreme Court rulings upon state practice. I'll ask Mr. Groce to start with that case.

MR. GROCE: I think it is rather appropriate that I should start with this case since it was a Texas case and involved Texas procedure. The plaintiff in the *Arnold* case was a car inspector. They brought in those two cars and spotted them on the track and the evidence showed that he could have inspected those cars at any time that he wanted to. But he chose a time to inspect them while there was a mail truck backed up on the platform, which was not used for pedestrian purposes at all. It was used there only as a passageway for employees and for this mail truck, which, incidentally, in order to get out, had to back out. The plaintiff testified that he knew that that mail truck was there, that he knew it had to back out and that he could have inspected the cars at any other time. While the mail truck was backing out it ran over and injured the plaintiff. The passageway there was in perfect condition and there was no contention that it was not in perfect condition.

We in Texas, as Jerome Frank said, submit our cases in the ideal manner for a jury trial. We pioneered in the special issue practice. In other words, in Texas we submit only questions of fact to a jury. In this instance, the plaintiff had pleaded that the railroad was guilty of negligence in failing to furnish him a reasonably safe place to work, and he had gone further and alleged that it failed to warn him of the truck in the immediate vicinity where he was working, that it maintained no flagman or person to protect him while performing his duties for the railroad; that it failed to furnish and maintain a blue flag for

* Panel discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

1. Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360 (1957).

him; that the railroad was negligent in that it permitted said truck to be operated in a careless and negligent manner in the vicinity where the plaintiff was working; that it was negligent in allowing said truck to be driven on the area normally used as a walkway and failed to keep a proper lookout for the plaintiff.

Under the Texas practice it was error for the trial judge to submit a general issue, such as: Was the defendant negligent in failing to furnish a reasonably safe place to work? Where specific acts are pleaded you are not entitled to have a submission of a general act. Also just exactly as in the federal procedure, if the general finding is in conflict with the specific finding, the specific finding must prevail.[2]

The jury in the *Arnold* case, for some reason or other, answered the easy issue of course, the general issue, against the railroad—that it had not furnished him a safe place to work. But it acquitted the railroad of every other act—of every specific act of negligence that was charged against the defendant, and found that the plaintiff himself was guilty of negligence in failing to keep a proper lookout for his own safety. But they found that the plaintiff had suffered damages in the amount of $18,000. The trial judge in that case was not quite up on F.E.L.A. and he adopted the position that the railroad was an insuror of the safety of its employee. Now I cannot say that I blame that trial judge very much, from the way the Supreme Court has been giving lip service to this doctrine of negligence. But that is probably the basis for the trial judge submitting that first issue to the jury.

It went up to the Texas Court of Civil Appeals, our intermediate appellate court, and that court held, in construing the verdict of the jury and rendering judgment for the defendant, that the specific controlled over the general and there was no other ground upon which the defendant could have been negligent in failing to furnish him a reasonably safe place to work.[3] Therefore, the railroad was entitled to judgment on the verdict which acquitted it of all specific acts of negligence. The Supreme Court of Texas refused the application for the writ of error, which in effect left undisturbed, and, to some extent at least, placed the stamp of approval of the Supreme Court of Texas on the action of the Court of Civil Appeals.

That case went to the Supreme Court of the United States and, that Court, Justices Warren, Douglas, Clark, Black and Brennan, being the majority, stated: "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing

2. FED. R. CIV. P. 49 (b).
3. 283 S.W. 2d 303 (1955).

the petitioner's injury." Then the Court cites the *Rogers* case[4] and the other cases we have been discussing here earlier today. And the Court says further, "The jury's general verdict, that the respondent negligently contributed to petitioner's injury, has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties. The special issues claimed to be in conflict with this finding concern alleged negligence only in the operation and presence of the truck on this passageway." Now the Court does not point out what other fact could have been employer negligence in that case and we have a rule in Texas that if you do not ask for the submission of an issue, that issue is waived. Those were the only issues that were submitted by the plantiff.

Of course, Justice Frankfurter again dissented on the ground that he would dismiss the writ as being improvidently granted: that the Supreme Court, in this particular class of cases, was violating the fundamental principles of the Supreme Court in undertaking to see justice done according to their standards in individual cases, and that that is not the function of the Supreme Court of the United States. Justices Harlan, Burton and Whittaker dissented and called attention to the fact that this was a case in which the Court was now undertaking to overrule state practices.

You will recall my preceding discussion of the *Dice* case,[5] the Ohio case where the equity rule prevailed and where the question of the validity of the release was a question for the decision of the court. Here in the *Arnold* case was a question of Texas practice and the Supreme Court apparently has said that we in Texas are going to have to formulate some other system for the trial. We can't use our system which has been described as being the ideal system of jury submissions; we can't submit under our rules that the specific controls over the general —and, mind you that is the same as in the federal court. You have a general submission in the federal court and you likewise have special submissions in the federal court and even though the jury finds for the plaintiff on the general issue, if the answers to the special issues in the federal court are to the contrary, the special issues control. And that is exactly what it is in Texas.

The significance of that case is that they are, in effect, overruling the case that I referred to earlier, the *Bombolis* case[6] which held that state procedure would be applied in F.E.L.A. cases. But apparently the

4. Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957).
5. Dice v. Akron, Canton & Y. R. Co., 342 U.S. 359 (1952).
6. Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 (1916).

Supreme Court is telling us how we're going to have to try these cases down in Texas. The plaintiff, as I said before, is the one who has the choice of forum – he had his right to go into the federal court if he wanted to, but he chose to go into the state court. We say he should be satisfied with our state practice and that the Supreme Court ought to be satisfied with our state practice, rather than require us to formulate a different method of practice for F.E.L.A. cases in the state court.

There is one consolation that I see. On October 21, 1957, the United States Supreme Court handed down two more of these *per curiam* opinions. One was *Gibson v. Thompson*,[7] where the Supreme Court of Texas unanimously held that there was absolutely no evidence of negligence in the construction of the Settegast Railroad yards in Houston.[8] The yards were practically brand new; they were in the very best of condition. But if the *Webb* case[9] had been in the books at the time when the Supreme Court of Texas passed on this one, I don't suppose that court could have done much else but let the jury verdict stand; but the *Webb* case was not in the books. The plaintiff, Gibson, claimed that he slipped on a rock about the size of his fist, caught his foot under the rail and fell, sustaining very severe injuries. The Supreme Court of Texas held that there was not even a scintilla of evidence of negligence in that case. The United States Supreme Court, *per curiam,* said: "The petition for certiorari is granted, and the judgment of the Supreme Court of Texas is reversed and the case is remanded. We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."[10] Mr. Justice Frankfurter again was of the view that the writ of certiorari was improvidently granted.

At the same time the second of the cases to which I referred, the *Palermo*[11] case, suffered a similar fate. There the employee, a longshoreman, having two routes open to him, one a safe route on the starboard side of the deck and the other, on the port side, a dangerous route, elected to choose the dangerous route to perform his duties. The Court of Appeals for the Second Circuit reversed and remanded that case. The Supreme Court, at the same time that it reversed the *Gibson* case, held, in *Palermo v. Luckenbach, per curiam*: "The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed and the case is remanded. We hold that the trial court did not commit

7. 78 S. Ct. 2 (1957).
8. 298 S.W. 2d 97 (Tex. 1957), *reversing* 290 S.W. 2d 305 (Tex. Civ. App. 1956).
9. Webb v. Illinois Central R.R.. 352 U.S. 512 (1957).
10. Gibson v. Thompson, 78 S. Ct. 2, 3 (1957).
11. Palermo v. Luckenbach S.S. Co., 78 S. Ct. 1 (1957), *reversing* 246 F. 2d 557 (2d Cir. 1957).

reversible error in refusing to charge respondent's request No. 12. The petitioner's alleged choice of a more dangerous route did not, under the proofs, operate to bar recovery as a matter of law. The jury was properly instructed that the petitioner's negligence, if any, was to be considered in mitigation of damages under the rule applicable in actions for personal injuries arising from maritime torts."[12] Justice Frankfurter again was of the view that the writ of certiorari was improvidently granted.

Here is the ray of hope that I speak of, from the defendant's standpoint. In *Gibson v. Thompson,* and in *Palermo v. Luckenbach S.S. Co.,* the memorandum of Mr. Justice Harlan, with whom Mr. Justice Burton and Mr. Justice Whittaker joined, stated: "For reasons elaborated by Mr. Justice Frankfurter at the last Term, 352 U.S. 521, 524 . . . I think that certiorari should have been denied. However, I continue in the view, expressed at the last Term, 352 U.S. 559 . . . that once certiorari has been granted in such cases, we disbelievers, consistent with the Court's certiorari procedure, should consider them on their merits. Further, much as I disagree, 352 U.S. 559, 562-564 . . . with the reasoning and philosophy of the Rogers case, which strips the historic role of the judge in a jury trial of all meaningful significance, I feel presently bound to bow to it. Applying Rogers to the present cases I am forced to concur in the judgments of reversal in Nos. 142 [*Gibson* case] and 350 [*Palermo* case]."[13]

It looks to me like if we have just one more Act of God on that Supreme Court . . . we have four now . . . if one more Act of God takes place and we get a new man on the Court, that that phrase *presently bound* means that what has previously gone on is not going to be the law any more.

MR. HOBBS: I certainly enjoyed that enlightening discussion. I don't want to talk much about the Texas procedure in these cases. I am reminded particularly in reference to Texas procedure of the admonition the mother whale gave to the baby whale: "Remember son, they can't harpoon you unless you're spouting." I don't want to get too far off in deep water with respect to Texas procedure.

It was interesting, again, to hear the reference that the state court judge made a mistake down there in Texas and thought that the F.E.L.A. cases made the railroad an insuror. I don't know what success you lawyers here in Tennessee have with juries. I will be modest but I am being honest at the same time when I tell you that I don't have 100% success with the juries. I would like nothing better than for my distinguished friend over here to come into my county and talk about

12. Palermo v. Luckenbach S.S. Co., 78 S. Ct. 1, 2 (1957).
13. *Ibid.*

the matter being nothing but an insurance law and that he didn't want to argue the question of liability. They just haven't reached that state of advanced thinking in my county yet and it will be a blessed day for the plaintiff's attorney when it comes about. I don't look for it in my lifetime, however. As long as juries decide the question of liability and decide it for the defendant at times and for the plaintiff at other times, we don't have any system of insurance under the F.E.L.A.

I was also interested in the comment that Jerome Frank has described the system in Texas of these special verdicts as being, "the ideal system of jury submission." When I was in law school Judge Frank was a professor of mine. He was a distinguished professor and a distinguished jurist, but there's one fact that was not mentioned about Jerome Frank: he does not believe in the jury system. He's written books on the subject. He simply does not believe in the jury system. So when he finds the system in Texas of special verdicts ideal and that system runs into conflict with what the Supreme Court has said about the issues having to be submitted to a jury and that the Seventh Amendment is involved, etc., I am not too surprised.

I also notice in this *Panhandle* case[14] that there is an admission here that the Texas judge erred in submitting to the jury the general question of negligence when there had been these special findings that there wasn't any negligence. Well, if that be the case, it seems to me that either the railroad lawyer or the judge is trying to have his cake both ways; he wanted to reinforce his decision by submitting the general issue to the jury and, when it turned out wrong, he started screaming that it wasn't right. If the judge had kept the issue of general negligence from the jury, there certainly would have been nothing on which the Supreme Court could have rendered the decision that it did. Perhaps the proper response to the *Panhandle* case is just to say that it is an aberrational one and acknowledge that Texas juries, like Alabama juries, sometimes make mistakes. I do not think you can draw too broad principles of law from the *Panhandle* case.

It is also significant that in the *Panhandle* case the *per curiam* opinion indicates that all the bases on which negligence could have been predicated were not submitted to the jury. It then does go further and says that local trial practice procedures are not going to be allowed to detract from the protections that have been afforded to the employees under F.E.L.A. Whether it was grounded on both of those facts or whether it was grounded merely on the local practice, I am not sure. I know that there was a case from Georgia, *Brown v. Western Ry. of*

14. Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360 (1957).

Alabama,[15] in which under Georgia practice the complaint didn't state a cause of action. I am sure that somebody, not Judge Frank but somebody else, would testify that Georgia has the ideal system of pleading; but that didn't make any difference. The United States Supreme Court said that, despite what your local practice is on this score, we are not going to let that detract from a federal right. Now if the *Panhandle* case is wrong, all I say is that there is a body of opinion extending back for many years which strikes at local practice detracting from the right of trial by jury.

MR. GROCE: Well, how do you explain *Bombolis*?[16]

MR. HOBBS: Well the Supreme Court tried to explain *Bombolis* in the *Dice*[17] case. They said that *Bombolis* held that local practice could deny someone a jury trial altogether.

MR. GROCE: No, the *Bombolis* case just specifically held that state practices were to be followed in F.E.L.A. cases and the Supreme Court has never specifically overruled the *Bombolis* case.

MR. HOBBS: That is correct. In the *Dice* case they considered it and restricted it in that instance to say that it couldn't do what was being attempted to be done with the release in that case. I don't think even the dissent mentions the *Bombolis* case in the *Panhandle*[18] situation, as being apropos, so of course I don't know what the majority would have said about the *Bombolis* case in the *Panhandle* case if it had been argued to them. . .

MR. GROCE: It was! I have the briefs here.

MR. HOBBS: . . . or if it had been presented to the majority by the dissent in the context where the majority would have felt obliged to respond to it. I would just like to say this again about these cases: I don't think we're letting any cat out of the bag when we say that apparently the Supreme Court in an unbroken line of decisions, at least since 1948, has been saying that in F.E.L.A. cases the verdict of the jury should not be set aside. Now that was what was done in the *Panhandle* case,[19] or was attempted, and the Supreme Court said "No"; that's what was done in the *Rogers* case,[20] in the *Webb* case,[21] in all of these cases.

And as for the suggestion, even though made in the spirit of levity, that the Supreme Court Justices no longer desire to attach their names

15. 338 U.S. 294 (1949).
16. Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916).
17. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952).
18. Arnold v. Panhandle & Santa Fe R. Co., 353 U.S. 360 (1957).
19. *Ibid.*
20. Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957).
21. Webb v. Illinois Central R.R., 352 U.S. 512 (1957).

to their opinions, therefore they write these *per curiam* opinions, I would really like to ask what more the Supreme Court can say on this subject than has already been said? The true reason for a *per curiam* opinion, as everyone familiar with the Supreme Court practice knows, is that when an opinion becomes nothing more than repetitious, instead of detailing all the facts and setting the whole thing out and restating everything that has been said in a dozen different opinions, they write a *per curiam*.

That is what was done in the *Panhandle* case, and I submit that for the sake of the bar there is no sense, as far as my enlightenment is concerned, in further detailing that when a jury renders a verdict on an F.E.L.A. case it is going to stand unless there's some such situation as the *Herdman* case,[22] where the plaintiff talks himself out of court. And with all deference to everyone here, I think you would agree that there is not much point in having the Supreme Court repeat again what it has already said so many times.

I would agree with you that apparently there are five justices on the Supreme Court who feel most strongly that these cases should go to the jury. There are four who will evaluate each case—I'm including Justice Frankfurter in that group and that's possibly an error—there are apparently four who will evaluate each case and of certain of the cases will say that it should not go to the jury. As long as these five are still on the Court I do not see any point in their doing any more than rendering the *per curiam* opinions that they have been rendering.

MR. GROCE: With reference to the procedural error of submitting that case—there was perfectly good objection, as I say, to submitting the general issue. The verdict in that case was only $18,000; this being an F.E.L.A. case, the plaintiff must have had nothing but an infected hangnail or something like that. But, even so, the attorneys in that case, under the direction of the general counsel, did not assign any error that would cause a reversal and remand. They merely assigned error on appeal that would require reversal and rendition or affirmance. In the Southwestern Reporter advance sheets for October 22, 1957 you will find the *per curiam* opinion of the Texas Court of Civil Appeals[23] in that case: "On this day came on to be heard and considered the opinion of the Supreme Court of the United States in this cause there on appeal and published in 353 U.S. 360 . . . reversing and remanding with instructions the judgment of this Court as reported by an opinion by this Court in said cause in 283 S.W. 2d 303, and after setting the

22. Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957).
23. Panhandle & Santa Fe R. Co. v. Arnold, 305 S.W. 2d 207 (Tex. Civ. App. 1957).

matter for hearing and having heard the same we do hereby and in accordance with our interpretation of the majority opinion of the Supreme Court of the United States reverse our former position in the matter and affirm the judgment of the trial court awarding H. D. Arnold the sum of $18,000, together with all costs. It is so ordered."[24]

Now that case could have been reversed and remanded had they had an assignment, just as the case that I spoke of this afternoon where they reversed the Supreme Court of Missouri and where there was improper evidence introduced. We could have gotten it in this case but the railroad much preferred to take the chance on the $18,000 than to have a new trial with the plaintiff's lawyers now having been educated fully as to just what was necessary for him to prove.

MR. HOBBS: I see that there are two other questions here on the program. I do not know whether we're ready to move to that or not. I think that it is interesting to speculate on what the Supreme Court had in mind in this case of *Neese v. Southern Ry.*[25] when, again in a *per curiam* opinion, they reversed the court of appeals. They had invited the counsel in that case to argue the question of whether an appellate court had the right to reverse a case because the damages were excessive. This was a death action and the jury awarded a verdict of $60,000 for the death of an unmarried 22-year-old man. The trial court ordered a remittitur and the verdict was reduced to $50,000. It then went to the court of appeals and the court of appeals said that even with the remittitur the amount was still so excessive as to be "monstrous" and unsupportable by any evidence in the case, and it reversed and remanded it for another trial. The Supreme Court invited argument on the question of whether the court of appeals in any case under F.E.L.A., I assume, has the authority to set a verdict aside because of the excessiveness of the verdict. But all the *per curiam* opinion says with respect to that is: "We reverse the judgment of the Court of Appeals . . . without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground the verdict was excessive." They said they did that because they found some support in the record for the verdict as reduced by the trial court and they therefore affirmed the trial court's action. It would be interesting to hear some comment as to what they had in mind on that.

MR. GROCE: Well, that goes back to a statement in the *Affolder* case[27] that immediately precedes this one on the agenda there. In the

24. *Ibid.*
25. 350 U.S. 77 (1955).
26. Neese v. Southern Ry., 350 U.S. 77 (1955).
27. Affolder v. New York, C. & St. L. Ry., 339 U.S. 96 (1950).

Affolder case the question of the excessiveness of the verdict was before the Supreme Court of the United States. It was contended that the Supreme Court of the United States denied any power of reversal on the grounds of excessiveness. The only thing that the Supreme Court of the United States said with reference to that was: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."[28]

Prior to that time most of the courts of appeals had held that they had no jurisdiction, apparently under the Seventh Amendment of the Constitution, to reverse the case for excessiveness. But with the coming of this decision in *Affolder,* where the Supreme Court says that the judgment is not monstrous in the circumstances of the case, that became a clear statement to the courts of appeals that if it wasn't just only excessive or mildly excessive, but monstrous, then the courts of appeals would have jurisdiction to reverse. And the courts of appeals did start reversing; instead of using the word *excessive* they used the word *monstrous.*

The best history that you can get on the question of the power of the appellate court to reverse a case because of excessiveness is found not in an F.E.L.A. case but in the case of *Sunray Oil Corp. v. Allbritton.*[29] That was a case in which a terrific verdict was rendered in the federal court in Houston and it was appealed to the Fifth Circuit Court of Appeals in New Orleans. That court sat *en banc;* there were only six judges on the court. One of them was ill and so did not participate but the other five did participate. The majority opinion written by Judge Hutcheson held, following the lead of the *Affolder* case, that the verdict in that case was not monstrous and therefore the judgment was affirmed. Strangely, they did require a remittitur of the workmen's compensation subrogation. The compensation insuror had tried to hide behind the skirts of the plaintiff in not letting in the evidence that he had already collected his compensation. The compensation carrier was not a party to that suit, and the court did require that the $13,000 workmen's compensation and expenses that had been paid be knocked out. In a dissenting opinion in which two of the judges joined they go into this constitutional question and they point out that the first case that held that the appellate courts could not reverse a case for excessiveness was that of *Parsons v. Bedford.*[30] They point out that that was not based upon the Seventh Amendment to the United States Constitution, be-

28. Affolder v. N.Y., C. & St. L. R. Co., 339 U.S. 96, 101 (1950).
29. 187 F. 2d 475, 188 F. 2d 752 (5th Cir. 1951), *cert. den.* 342 U.S. 828 (1951).
30. 3 Peters 433 (U.S. 1830).

cause the Seventh Amendment to the Constitution prohibits re-examination on appeal of any fact tried by a jury only other "than according to the rules of common law." The dissent then goes on to quote from Blackstone and others to show that, under the rules of common law at the time the Seventh Amendment was passed in 1791, the judges on appeal did have full power to reverse for excessiveness; that when the Constitution said ". . . other than according to the rules of common law . . ." that meant that they did have the power to reverse for excessiveness. The dissent then points out that it was the Judiciary Act of 1789 which prevented a re-examination into the question of excessiveness on appeal; and that on September 1, 1948 when the new judiciary code was passed by the Congress the Judiciary Code of 1789 was repealed.

So this lip service that courts give to the Seventh Amendment as prohibiting a re-examination into the question of excessiveness is historically without foundation; the Seventh Amendment did not prohibit it because under the common law the courts had that power. It was the Judiciary Act of 1789 that prevented it and that has now been repealed. That is the constitutional question that the Supreme Court of the United States did not pass on, and would not pass on, in the *Neese* case. They did refuse certiorari in *Sunray v. Allbritton,* but refusal of certiorari does not place a stamp of approval on the court of appeals' opinions; I'm sure of that.

MR. HOBBS: The only thing I would add is with reference to the *Affolder* case, where Justice Clark said that they would not reverse because in the opinion of the Court the verdict was not monstrous. Now I've already indicated that some of the things that the Supreme Court has said with respect to negligence, etc. might not be the law under our Alabama trial practice. However, Justice Clark's reference to not setting aside the verdict unless it is monstrous does not shock any rule of law that we know in Alabama. I am just looking at an F.E.L.A. case from the Supreme Court of Alabama back in 1947 which precedes the *Affolder* decision. The Supreme Court of Alabama there said: We do not set aside verdicts of juries in cases of this character "unless the amount is so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality or corruption on the part of the jury."[31] So I do not think that there is anything new that has been added to our law in Alabama, or to the federal concepts that they are not going to set verdicts aside just because they would think that it was higher than it ought to be. The use of the word *monstrous* is no stronger than the use of the words of the supreme court justice of Alabama in this case where

31. Alabama Great Southern Ry. v. Baum, 249 Ala. 442, 449, 31 S. 2d 366, 372 (1947).

he says that he's not going to set it aside unless it is so excessive as to be indicative of prejudice, passion, partiality or corruption.

MR. GROCE: I suppose that we Texans are supposed to be accustomed to "monstrous" things, but frankly, I cannot stomach this *Neese* decision. The deceased was unmarried and living with his parents who were aged 47 and 60. His contributions to them had only been $30 to $40 a month except that shortly before his death he had increased his contributions to $75.00 a month.

It can be seen that the expected contributions to these parents were an infinitesimal part of the $50,000 awarded and it would seem to me that this award was "monstrous" and that the action of the Court of Appeals was correct in reversing. What "support in the record" there is for a judgment of $50,000 under these circumstances I cannot see, but that is what the Supreme Court said.

CO-ORDINATOR LON MACFARLAND: Thank you very much, gentlemen, for your excellent contribution. I was interested in the discussion of the function of the jury and I'm sure that the other members who attended the London convention of the A.B.A. observed with me the much more limited use and almost elimination of juries in damage suits there. That was the impression that I got from discussion with our English brothers. I do not know that I agree with that but that definitely appears to be the situation in England.

DAMAGES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT*

PANEL: TRUMAN HOBBS, *of the Montgomery Bar*
J. M. TERRY, *of the Louisville Bar*
JOSEPH P. ALLEN, *of the New York Bar*
FRANCIS H. HARE, *of the Birmingham Bar*
WILLIAM E. BADGETT, *of the Knoxville Bar*
FRANK BRATTON, *of the Athens Bar*

MODERATOR: FOSTER D. ARNETT, *of the Knoxville Bar*

MODERATOR FOSTER D. ARNETT: Our panel this evening is composed of four distinguished visitors from out-of-state, and two distinguished Tennessee lawyers. You have already been introduced to the outstanding lawyers who are out-of-state guests of the Institute. I think we would be remiss, however, if we did not introduce you, although it is not necessary, to our two Tennessee lawyers who are participating.

William E. Badgett of the Knoxville Bar is appearing for the plaintiff's point of view. He is a Knoxville lawyer; a former United States District Attorney for the Eastern District of Tennessee; a former editor of the *Tennessee Law Review;* a former member of the Lower House of the General Assembly of Tennessee; and a trial counsel for the City of Knoxville. Mr. Badgett has had a long and active career at the Knoxville bar.

The other member of the Tennessee Bar who will participate in the proceedings this evening is Frank Bratton of Athens, Tennessee. Mr. Bratton attended the University of Tennessee and the University of the South. He graduated from Cumberland Law School, and began the practice of law at Madisonville, Tennessee. He has, since 1950, been practicing in Athens, Tennessee. He is a former Vice-President of the Bar Association of Tennessee; a Fellow in the American College of Trial Lawyers; an Assistant Division Counsel of the Southern Railway Company, and Assistant District Attorney for the L. & N. Railroad Company. He enjoys a very active and profitable practice in Athens, Tennessee.

Our subjects for presentation on this Panel involve the weighing of intangibles in personal injury actions and in death actions under the F.E.L.A.; a discussion of working life expectancy versus life expectancy; a discussion of variations from the mortality tables including elements

* Panel discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

of the damages to which the plaintiff usually insists he is entitled; appellate review as to damages, including an appraisal of the case of *Affolder v. N. Y., C. & St. L. R. Co.*[1]

Mr. Badgett, will you give us your impression of the subject tonight from the plaintiff's viewpoint?

MR. WILLIAM E. BADGETT: The thing that intrigues me most about this subject of damages is the question of contributory negligence. The F.E.L.A. provides that contributory negligence will not bar recovery but will only mitigate the damages, but in my experience I have always found that the railroads, in effect, plead contributory negligence as an absolute defense. I have never seen it set up yet, in actuality, as mitigating damages. I have moved in several cases that the defense be stricken and the courts have held that it can stand because it goes to mitigate damages. The jury, being laymen and not understanding the law, when the proof comes in that the employee is guilty of contributory negligence, usually finds for the railroad.

Prior to 1939, when this Act was amended, you had the doctrine of assumed risk which barred recovery. Prior to 1939, you also had a contributory negligence doctrine which mitigated damages. Congress saw fit to repeal the doctrine of assumed risk and also to repeal the fellow servant rule, but still left the contributory negligence doctrine as it was, allowing it to mitigate damages. In my opinion, when the defense pleads that the employee was guilty of contributory negligence, they never say that that mitigates the damages, they just say that the employee was guilty of contributory negligence; and as a practical matter to 12 laymen on a jury, it is the same as barring recovery. I found that happens in many cases, and I think that if Congress intended that the doctrine of assumed risk and the fellow servant rule, and all that, should be barred, I do not see why they should not have gone further and barred the doctrine of contributory negligence.

Under the Act, if you have no dependents, the railroad is not liable for anything—they do not have to pay anybody anything; to me it seems that the Act was intended as a workmen's compensation act. And in this state under the Workmen's Compensation Act, contributory negligence does not bar.

MODERATOR ARNETT: Mr. Bratton, as a railroad attorney, what is your reaction with respect to this subject?

MR. FRANK BRATTON: Unfortunately, I have not enjoyed the same experience that Mr. Badgett has in having the jury find that contributory negligence is a complete bar to recovery. I have a confession to

1. 339 U.S. 96 (1950).

make to you here tonight—I have never won one of these cases—I suppose there will be a time and place for all things. But for all practical purposes the Federal Employers' Liability Act has now resolved itself into a workmen's compensation act without any limit upon the recovery. Now, if Mr. Badgett would go further along the way and say we will have a limit to the amount of recovery and we will fix a certain amount for a permanent and total disability and a fixed amount for a death, of course he might have something.

Here we are now, without any defense at all, except contributory negligence. If you strike that, of course you will go back to the proposition where you will have liability without fault. Certainly a man should account for his own acts; if he is going to go out and step in front of a moving train, or attempt to arrest the movement of a boxcar when he does not have to do it, he should answer for that. As I say, to my knowledge personally, I know of no case where recovery has been barred on account of contributory negligence. The charge in every instance clearly sets out that contributory negligence will be considered in mitigation of damages, which is more or less on a comparative negligence basis. If you take the defense of contributory negligence away, you have clearly and simply a workman's compensation act. I believe that most people would agree with me, certainly the attorneys for the railroads will, that plaintiffs do not have to prove negligence any more; all they have to do is to prove that they were on the payroll and that they got hurt.

MODERATOR ARNETT: Mr. Truman Hobbs of the Montgomery Bar, you have been making some notes. Would you, Sir, care to express yourself?

MR. TRUMAN HOBBS: Well, I think that my experience would be somewhere in between what the two gentlemen have indicated their experience has been. I do think that juries take into consideration the rule of contributory negligence. I do not believe that anyone on this panel would seriously say that they think, other things being equal, that the plaintiff has as good a case in terms of just damages where he has himself been guilty of some obvious negligence that can be paraded before the jury. The plaintiff cannot get as much steam in his case as he otherwise would. You have to acknowledge that that is going to be the situation, that there is going to be some reduction in those damages but it has not seemingly been the experience with F.E.L.A. cases, statistics-wise, that contributory negligence has knocked out any preponderant number of cases.

MODERATOR ARNETT: Mr. Terry, what do you have to say with regard to this subject?

MR. J. M. TERRY: The plaintiff's idea of the value to the defendant of the defense of contributory negligence to me is rather amazing as a practical proposition. If the negligence of the plaintiff is slight, I do not think it is worth anything in the evaluation of the case, defense-wise. Now, if it amounts to about 50 per cent of the negligence, I might be able to cut a verdict 10 per cent, or possibly 20 per cent, but as a practical matter, I think that is all it is worth to the defendant.

MODERATOR ARNETT: Do you agree with the other gentlemen, Mr. Joseph Allen of the New York Bar?

MR. JOSEPH P. ALLEN: I would like to comment on one thing which Mr. Badgett mentioned, and that is that if there are no dependents there is no recovery under the Act. I can't see any valid objection to limiting recovery to dependents but I think that this is purely academic. Mr. Terry and I have been discussing the matter and we came to the conclusion, aided by the statistics mentioned on an earlier panel, that the most prolific and the most fertile worker in America is the railroad worker. One plaintiff's attorney has been unkind enough to tell me that railroads kill nothing but the highest type of persons with the largest families. I always try a case to a crowded courtroom, not spectators but the family of the plaintiff.

With respect to contributory negligence, it is our practice to plead two affirmative defenses if the facts justify it: (1) That the negligence of the plaintiff was the sole and proximate cause of the accident and that no negligence on the part of the defendant contributed to its happening; and (2) that if the accident occurred as the plaintiff states in his complaint, he at least contributed to his injuries. That, of course, is the law. If the plaintiff causes the accident 100 per cent, and there is no negligence on the part of the railroad, the defendant is entitled to the verdict.

As a practical matter I find juries adopt their own rules of comparative negligence. In New York State we do not have comparative negligence, but the juries, nevertheless, use it even in non-F.E.L.A. cases. The judge will charge them that if the plaintiff is negligent and his negligence, no matter how slight, contributed to the accident, he cannot recover. But it has been our experience that juries often ignore that instruction from the court, and if they find that both parties have been negligent they will reduce the verdict on the unarticulated theory of comparative negligence.

MODERATOR ARNETT: Mr. Francis Hare of the Birmingham Bar, what say you, Sir?

MR. FRANCIS H. HARE: I believe you gentlemen have covered the

salient aspects of the question. I do say that there is one time when you get the amount reviewed, and that is by the trial judge, and I think that if contributory negligence is frequently urged, there is a reason to cut the verdict.

MR. ALLEN: The reverse of the situation is where a verdict has been returned in a sum which is lower than what the plaintiff has been seeking, and we have had this experience where the plaintiff's attorney has moved to set aside the verdict as inadequate. If you will read the *Wilkerson* case[2] it says that the question of negligence was for the jury, and so was the question of contributory negligence. In a case I had in New York there was a verdict of $5,000. The wage loss was approximately $17,000 and there was an allegation of permanent injury. Well, my argument to the trial court and to the appellate court was that the jury, under the instructions of the court, in applying the comparative negligence doctrine could have found the man's damages to be $100,000, and they could have then found that he was 95 per cent contributorily negligent. I got exactly nowhere. We had a new trial.

MR. HARE: I want to say I think you are correct about that, and I think your verdict should have stayed $5,000.

MODERATOR ARNETT: This question of contributory negligence gets us into another feature of the topic we are to discuss, that of intangibles in measuring damages. Under the rulings, the jury—of laymen now, mind you—is supposed to evaluate percentagewise the degree of contributory negligence of the employee and the degree of negligence of the employer, and from that formula evaluate what the employee is entitled to. If that is not getting into the realm of intangibles and conjecture, I do not know what other term to use.

MR. ALLEN: Well, no more intangible than negligence. As Justice Black has said, negligence cannot be defined, it cannot be measured like an acre of ground. Is not the same thing true of contributory negligence? Is that not all that we want, to let the case go to the jury on both issues? If the jury is the boss, let them decide both issues.

I would like to take issue with a statement made before about the fixation of some of the Supreme Court Justices on the role of the jury as supreme. I would like to take some of the statements of the Supreme Court in railroad cases in which apparently the jury is supreme and compare them with the statement of Mr. Justice Black in the alleged communist conspiracy case in California. In the latter case Mr. Justice Black states that no juror can be expected to plow his way through the jungle of a verbiage which constitutes the government's proof in this

2. Wilkerson v. McCarthy, 336 U.S. 53 (1949).

type of case. If that be true, some judicial control is called for. I think that this is all that railroad lawyers want in their cases. If jurors cannot follow the maze of economic, political and social facts in communist conspiracy cases is it not fair to state that sometimes they cannot follow a maze of facts involving a complicated personal injury case where there is a sharp issue on the facts and medical proof and when their natural sympathies are all with the injured person? I think that the jury may be more capable of deciding whether or not a given set of facts, no matter how complicated they may be, constitutes a conspiracy against our government, than they are concerning something which is completely foreign to them—the field of medicine. The only thing railroads want is to have the court exercise the same restraints and the same caution in their cases as is done in the *Smith Act* cases. We certainly do not advocate abandonment of the jury system – what we urge is a return to the constitutionally guaranteed rights of a trial by jury and judge.

MR. BADGETT: I will go with you on that if you will agree to do away with remittitur.

MR. ALLEN: As a fellow once said to me when I was in engineering school when I asked him what he thought of the faculty abandoning the honor system. He replied, "It doesn't make any difference to me, I never used it anyway." My experience is the same with remittitur.

MR. BRATTON: Going back to Mr. Badgett's first statement, the chances of the plaintiff moving the court to set aside the verdict because the verdict is inadequate is so remote that it would never happen; well hardly ever—I think Mr. Allen said it did happen to him one time. But ordinarily the verdict is against the defendant for an appreciable amount. If you follow Mr. Badgett's theory on through, he wants to let the jury say whether or not the railroad is negligent in failing to furnish a safe place in which to work, but he does not want them to decide the amount of the damages that the plaintiff is to recover, by simply saying there is no such thing as contributory negligence, irrespective of the fact that the plaintiff himself was probably fifty-fifty negligent with the railroad.

MR. BADGETT: That brings up another question which I believe should be noted here. You do not have the doctrine of contributory negligence where there is a violation of the Safety Appliance Act. The railroad cannot plead contributory negligence where an act of Congress has been passed providing for the safety of an employee. If you have a violation of that Act, contributory negligence does not enter the picture. Well, why would Congress make a distinction between that safety appliance negligence and ordinary negligence of the defendant? I do not see any reason for it.

MR. BRATTON: Well, it is one thing to say that you shall furnish a man a safe place to work and another thing to say that your couplings on the cars shall be in perfect condition.

MR. BADGETT: Well, in this *Affolder* case,[3] which will be discussed later, the employee was engaged in lining up a bunch of cars; he had about twenty-four cars lined up and was coupling them together when one of the couplings failed and the train started moving off. He put three or four more cars in there and then the section that had not coupled started moving off, so he ran to stop it and lost a leg. The defense of the railroad was that they had complied with the Safety Appliance Act by having automatic couplings, but the Supreme Court held that the question was not whether they had supplied the automatic couplings but whether or not the couplings worked on that particular occasion.

MR. BRATTON: That is right, and that violation was negligence per se, and consequently the railroad company was absolutely liable. But going further, in that case the jury awarded a verdict of $95,000, mind you, for the loss of a leg. The trial judge cut the verdict to $80,000 and that was affirmed by the Supreme Court after a Court of Appeals reversal.

MODERATOR ARNETT: Mr. Hare, do you not think that perhaps the answer is to have a list of scheduled injuries with the values prescribed by statute for each specific injury, so much for death, so much for a leg, so much for an arm?

MR. HARE: Are you serious?

MODERATOR ARNETT: Would that not help you to get a more adequate award?

MR. HARE: I thought he was the Moderator! Which side is he on? No, Sir, I think that would be shocking and horrible.

MODERATOR ARNETT: Mr. Hare, let us hear your views about death actions.

MR. HARE: In the first place, when you have a death action you ask how old the man is, then you figure his life expectancy, and if you want to get technical about it you start talking about what table of mortality you are going to use. There is the old American Experience Table which was drawn up and all of its insurance companies could get rich, back in the days when the average life of an American was 10 or 15 years less than it is now. That is the one most everyone uses, and that gives the railroad a well-deserved and much needed margin which they ought to have, I guess. But some people go to the more modern tables

3. Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950).

which are based upon the actual life expectancy of selected risks, that is to say people in fine health, and able to pass the medical examination. So the best table you can get is more than fair to the railroad.

After you get that figured out, you consider how much of the man's earnings he contributed to the support of the dependents who are bringing the lawsuit. Say you have here a man killed who left a widow and that is all. And you pass the lawsuit to accommodate the defendant's lawyer a time or two, and your widow dies on you. Then you are in a terrible fix, because her life expectancy is what it was – she is dead. I did that last year, and I am going to be awfully accommodating about anything else except a death case with my widow unless I have somebody bound she is going to live out her period.

But, anyway, you figure how much of the man's earnings he contributed to his wife. Now that is the source of where you can give somebody some skilled representation on how much the husband gives the wife. The ideal way, the *DeParcq* method,[4] is for the widow to testify that the husband gave her everything he made, and then she would give him a sandwich or a box of crackers or something to go to work with, or that he would wash cars in the afternoon and pick up a little something to live on. You can say that he gave her nearly everything he made because, really, most men do.

The defendant favors work life expectancy over life expectancy tables. Here the man is going to live to seventy-two. But who works until he is seventy-two? Well, the Supreme Court does!

MODERATOR ARNETT: Mr. Hare, do you think it is fair to use the tables of mortality for a deceased railroad worker when the railroad business is hazardous and you cannot expect him to live to the normal life expectancy of a man engaged in another occupation?

MR. HARE: Well, Sir, here is the way we do: we put the figures up and then put a plus column and a minus column. We very frankly and candidly say take off something for work expectancy, because a man is not going to work on the railroad on up until his dying day. Then we say put some back on there because of the fact that by collective bargaining and the American incentive proposition of raises and promotions, in twenty years he would no doubt have been making as much more than that as would be subtracted for four per cent interest of work expectancy, and to be fair about it, we cancelled the plus against the minus. That is the way we worked that out.

MODERATOR ARNETT: Mr. Terry, how do you reconcile "plus" and "minus"?

4. DeParcq & Wright, *Damages Under the Federal Employers' Liability Act*, 17 OHIO ST. L. J. 430 (1956).

MR. TERRY: Well, now I can show you how Mr. Hare puts up a plus and minus. First he puts up a plus, then he puts up a minus, then he decides the minus is not necessary. Another thing, Mr. Hare, railroad widows do not die, they remarry after settlement.

MR. HARE: Well, now that is true. The law is: they can do that, and it does not take off anything. I have had a hundred of them ask me if it is all right, or do they have to live in sin.

MODERATOR ARNETT: Mr. Hare, what was your answer?

MR. HARE: It depends on their age and the appearance of the widow. Let me answer your last question about the special hazards of the railroad industry. In all seriousness, the railroad attorneys say: "We killed you at the age of 32, if you had worked anywhere else you would have lived to be 65. We write a discount because inevitably we would have killed you anyhow by the time you got to be 60." I do not go along with that.

MR. HOBBS: Two of the subjects that have been touched on here are quite interesting: that is, what about the working life expectancy against life expectancy, and what about the hazards of railroading as being a subject to reduce the damages. I have never had a defendant's attorney blunder into making those arguments, and I think that is what it would be, a blunder. I do not think a plaintiff would want anything better than to have the defendant's attorney say, "Now, wait a minute. You are not entitled to $5.00 a day from now until you are aged seventy, which is your life expectancy; you are only entitled to $5.00 a day from now until you are aged 65, which is the time when you are going to stop working." That is still probably about $130,000 on your damages chart. I would just be big about the thing and settle for the lower figure that he is recommending there. And the same thing goes as to hazards of the railroad industry. I cannot really imagine an experienced defendant's lawyer for the railroad setting that one up. I do not think I could demolish him quite the way Mr. Hare has here, but I would make an effort at it.

MODERATOR ARNETT: Mr. Allen, I believe you have some new and revolutionary tables that have been developed for use with respect to working life expectancy and life expectancy. Will you tell us about them?

MR. ALLEN: Well, there is a set of work expectancy as opposed to life expectancy tables which one of the government agencies has drawn up.[5] Also there are two actuaries in Chicago who have made a similar study with respect to railroad workers.[6] The net result is approximately

5. United States Department of Labor, Bureau of Labor Statistics, Division of Manpower and Unemployment Statistics.
6. Smith & Griffin, *Work Life Expectancy as a Measure of Damages,* TRANS. IN THE SOC. OF ACTUARIES (January, 1953).

6 to 10 years difference. In other words, if your life expectancy in the hypothetical case we are going to discuss later would be 34 years, your work expectancy might be six to eight years lower. Now, as Mr. Hare and Mr. Hobbs pointed out, I agree that there is danger to any defendant's lawyer who would attempt to take credit because his client killed the plaintiff in the blossom of his life, so to speak. In a lawsuit there are many things which are best left unsaid. That is just as true of course, in F.E.L.A. cases as it is in any other case. As a practical matter, we find that a permanent and total disability always occurs to the dullest of men—a fellow who cannot earn his living any other way than the way he was doing it: he has to earn his living by using his hands; the result is complete economic ruination. On the other hand, let that same fellow unfortunately be killed, and he turns into a genius overnight. He was making $5,000, but as you have in the hypothetical case on the program, he was going to night school to study engineering and had an extra job week-ends as a musician and he was definitely on his way to a great career in three or four different fields.

There are intangible things, of course. Take a young widow of 25 to 28 years of age – no matter what you say and no matter what the other side says, the jury will not loose sight of the possibility of remarriage. Sometimes a plaintiff's attorney overplays it: five years after the death, the widow comes in dressed in black. Those things are just contrary to the juror's average experience and I think to that extent they take that into consideration. The same psychological principles apply in railroad litigation as in general litigation.

MR. HARE: If any lawyer in the audience wants a case that rejects the work expectancy theory, I cite you to *Rouse v. New York, C. & St. L. R. Co.*;[7] and if anybody wants one that upholds the work expectancy theory, there is *Wetherbee v. Elgin, Joliet & Eastern Ry. Co.*[8] which cites *Avance v. Thompson.*[9] So I think that the law is in a formative state until some higher court settles it one way or the other, and I think that actually it is sort of like this comparative contributory negligence; no matter what the judge says, the jury is going to consider that they know perfectly well that the man is not going to work up until past seventy. Or, it would do no good to tell them if they are not. I mean they would have then made up their minds they are going to go as hard as they can. But that is a known fact, and some of the cases say of it that it is a matter of such common knowledge that it is unnecessary to put it in an instruction. And that is about what these cases say.

7. 349 Ill. App. 139, 110 N.E. 2d 266 (1953).
8. 191 F. 2d 302 (7th Cir. 1951).
9. 387 Ill. 77, 55 N.E. 2d 57 (1944).

MR. BADGETT: Your work expectancy tables do not take into account all elements of damages. These cases have held, where a husband died, that one element of damages to be considerd by the jury is the supervision and the education and the training that the husband would have given to the children had he lived. That has been decided as an element of damages in these cases. Well, now as an analogy to that, if you use strictly the work expectancy table, you leave out the proposition, where the man is dead, that the wife would have had his companionship, consortium, and such as that, for the remainder of his life although he were not able to work for the railroad. So, I do not think the work expectancy table should be considered at all.

MODERATOR ARNETT: Mr. Terry, what is your point of view?

MR. TERRY: Well unless the man was pretty well advanced in years, I would not take a chance with that work expectancy table at all. I would let it alone. If I were a plaintiff, I would never use them, and it is very dangerous for a defendant railroad to use them.

MR. BRATTON: This recalls to my mind a lawyer who used an actuary, and the jury went out and came in with the exact amount—I think it was $130,000—that the actuary found it would take to produce this income. Well then he screamed about it, and I said, "Well, you let them put the actuary on." And he said, "No, *I* put the actuary on." So I think that Mr. Terry's observation to the effect that, unless the man is well advanced in age, so far as the defendant is concerned it would be well to lay off of this work expectancy table. The jury gets the idea that you are willing to settle on that amount shown by the table irrespective of the contributory negligence which might mitigate your damages.

MR. BADGETT: If you knew that we had a violation of the Safety Appliance Act, if you use the work expectancy table, it is just a matter of arithmetic, is it not, as to how much the verdict should be?

MR. ALLEN: A lot of plaintiffs' and defendants' lawyers that I know do not use them at all. If the plaintiff gets an actuary on the stand, the defendant's lawyer can start to interrogate him with respect to 3 per cent, 4 per cent, 5 per cent returns on investment; 3 per cent in savings bonds, some states have 3½ per cent; income tax free bonds; A.T. & T. gives 6 per cent; and filling stations can be bought for such-and-such an amount and they return such-and-such per cent. I think that a plaintiff runs into some danger there. I think that, as a matter of fact, in the last four or five death actions that I have tried, there has been no actuarial testimony and there has been no reference to work expectancy. I recall one non-jury case in the Southern District of New

York,[10] in which the work expectancy was used. In a jury case which I had before the same court, however, I copied the exact words out of this earlier opinion and requested the court to so charge the jury. The charge was refused since there was no proof of work expectancy in the case and the court would not take judicial notice of its prior opinion.

MR. HARE: In *Starck v. Chicago & Northwestern Ry.*[11] a railroad man who was killed made $5,000 a year. The testimony was that he spent $50 a month on himself, giving the rest to his wife and the verdict was sustained on that basis by the court. And, in a case in Alabama before Judge Dan Thomas, under the Federal Tort Claims Act, the testimony was that the dead man gave his wife 87½ per cent of his net income, but the judge used the theory that he divided it fifty per cent with her and made up a verdict or a judgment on a 4 per cent investment.

Now where you have an old man and are trying to get a respectable judgment for the plaintiff and the statistics do not amount to anything much, and where the defendant says, "Well, I will pay you on almost any of those theories," and you still have not the amount that you think it is worth to kill a human being, you then come to the proposition that my friend Mr. Badgett here stated, that you are entitled to recover or contend for it and not be disciplined or censored by the court; and the jury may and probably will give it to you. The services of the husband around the home are painting the building, and mowing the lawn, and rendering services of financial value to the family. Here is a widow. What would it cost her to get an able-bodied man to be a yard man, or to attend to the hundred-and-one things? The idea is that a man is fit for something after all during the hours that he stays at home, as well as the eight hours a day that he sells to the railroad for $5,000 a year.

MODERATOR ARNETT: Mr. Hare, this question: these damages recovered under the F.E.L.A. are not subject to income tax, are they?

MR. HARE: No, they are not.

MODERATOR ARNETT: Well, should it not be proper for defense counsel to argue that proposition to the jury?

MR. HARE: In my state, no; I think in the majority of the states, the answer is, no. The courts feel that that is between the man and the government, and that the railroad is not entitled to tax him. That is what it would be doing. If the United States Government is not going to take 20 per cent or 25 per cent of it, why give it to the railroad?

MODERATOR ARNETT: You think jurors consider this matter in arriving at a verdict?

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10. Dixon v. United States, 120 F. Supp. 747 (S.D. N.Y., 1954).
11. 4 Ill. 2d 616, 123 N.E. 2d 826 (1954).

MR. HARE: They do, sometimes; sometimes they do not. I have settled a case where the plaintiff at first did not want to take the amount offered and the convincing thing was that this was not subject to tax, that it was all take-home money.

MR. BADGETT: There is one thing, Mr. Moderator, that has not yet been discussed in our topic and that is the quotation there from the *Affolder* case where the court held, "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."[12] Mr. Bratton mentioned that the jury gave $95,000 and there was a remittitur to $80,000, and the Court of Appeals reversed it and the Supreme Court reinstated the verdict. Well, in analyzing the case, Justice Clark wrote the opinion and he cited a case of 1886, which is based solely on exemplary or punitive damages.[13] So that figure of $80,000 enters into that proposition. It was not a compensatory verdict for the loss of a leg, but also included punitive or exemplary damages.

MODERATOR ARNETT: Mr. Hobbs, how do you feel with respect to that quotation from the Supreme Court and its implications insofar as the F.E.L.A. is concerned?

MR. HOBBS: I think the force of it has been overrated. I do not think it makes any change in existing law. It is discussed in an article by DeParcq,[14] in which he says that the matter of the excessiveness of the damages was not even argued in the original brief filed in the court and that the railroad made some references to damages being excessive in a reply brief. It seems logical to Mr. DeParcq, and it does to me, that if the Supreme Court was intending to change the rule of damages they would have done it with more discussion than there was in that case. In Alabama we have had a rule for a long time with respect to damages, and unless the verdict is so excessive that it shows passion, corruption, or partiality on the part of the jury, they will not set it aside. Now, I do not think Justice Clark's statement is as strong as that from the standpoint of the defendant. And, after all, what is *"monstrous"?* I am sure to the defendant's lawyer all of the verdicts that go up there are monstrous, and I am sure to the plaintiff's lawyer there never has been a monstrous verdict. So, as a yardstick or for any other purpose, I cannot see that the *Affolder* case says very much.

MR. BADGETT: Well, let me ask you, did you read the case Justice Clark cited? He made a simple statement, as you said, and cited this

12. Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96, 101 (1952).
13. Barry v. Edmunds, 116 U.S. 550 (1886).
14. DeParcq & Wright, *Damages Under the Federal Employers' Liability Act,* 17 OHIO ST. L. J. 430 (1956).

1886 case, *Barry v. Edmunds.*[15] It deals solely with a situation involving a failure to pay property taxes in Virginia. Barry offered to pay it off in coupons from Virginia bonds plus some cash but Edmunds, the County Treasurer, refused to accept it, and levied upon and seized his horse. And he had to pay in money then instead of the bonds for the taking of the horse. So he sued in court, and the taxes only amounted to less than $100, but the jury gave him $500. That was back when the federal court had jurisdiction of $500 in diversity cases.

MR. HOBBS: I agree, the case appears quite inapplicable.

MR. BADGETT: It is apparent to me that if his citation meant anything, apparently what he meant was that the $80,000 was not only to compensate but to punish the railroad for its violation of a Safety Applicance Act.

MR. TERRY: We discussed this quite at length on another panel this afternoon also, and I think we would be willing to pass on.

MR. HARE: Here in my hand is a comment in this damages under the F.E.L.A. by Bill DeParcq and Charles Wright which is the best article in existence from the standpoint of the plaintiff that I know of.[16] He says here, what Truman Hobbs has just stated, that the court was not intending to set up a landmark decision, and decide even the profound constitutional question under the Seventh Amendment as to whether a man's right to a trial by jury was about to be adjudicated and that the test was going to be whether or not it was monstrous. If Justice Clark meant anything that momentous, it would not have been done by the casual phrase without the citation of authority, to which I agree.

DeParcq makes another provocative suggestion. Perhaps by reversing in *Affolder*[17] and in the *Neese* case,[18] the Supreme Court hoped to cut down on appellate interference with damage awards. This is in my mind; there is a good deal of agitation, led by Frankfurter, to turn the whole thing into a compensation law. There is at Harvard and elsewhere considerable movement for liability without fault. There is a feeling in everybody's mind that industry can bear so much. I think the Supreme Court has not yet come to the point where they are willing to say, or feel that they have reached an agreement where they can say that the Seventh Amendment giving a man the right to trial by a jury does not embody in it immunity from having the Court of Appeals

15. 116 U.S. 550 (1886).
16. DeParcq & Wright, *Damages Under the Federal Employers' Liability Act,* 17 OHIO ST. L. J. 430 (1956).
17. Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950).
18. Neese v. Southern Ry., 350 U.S. 77 (1955).

strike down or reduce a verdict which the trial judge has let stand. They are not ready to say no. But I do not think they are ready to say yes either, because I do not think they want to throw overboard the last life preserver that they may need after a while. Suppose some jury, some place, at some time, should give a verdict for $750,000 for a broken arm, and suppose some trial judge should fail to catch it and lets it go up, and suppose the Supreme Court of the United States had committed itself to the proposition that it just did not have the constitutional authority to do anything about a verdict that any reasonable man would say is wholly preposterous. What would happen? First, the people would lose confidence in the Supreme Court. Second, we would have maybe great emphasis given to liability without fault. Third, we would have great emphasis given to the whole thing turning into a compensation law. In my humble opinion, without having read anything in any brief or decision to that effect, I do not believe that the Supreme Court of the United States is ready to say "the sky is the limit and we cannot do anything about it, even if it is put up to us in an extreme and absurd provision." I do not believe they will ever say that.

MR. ALLEN: I just cannot accept the theory that the Supreme Court says the sky is the limit. The district court has to exercise its discretion, and if you will read the *N.A.C.C.A. Law Journal* you will find out that in most instances they do.

MODERATOR ARNETT: Gentlemen of the Panel, we are most indebted to you for your enlightening and entertaining discussion. We are most appreciative to Mr. Hare, to Mr. Hobbs, Mr. Badgett, Mr. Bratton, Mr. Terry and Mr. Allen. We thank you very much, and hope that you can soon be with us again here in Knoxville.

DOLLARS-AND-SENSE APPRAISAL IN F.E.L.A. CASES*

PANEL: FRANCIS H. HARE, *of the Birmingham Bar*
JOSH H. GROCE, *of the San Antonio Bar*
MODERATOR: JOHN A. ROWNTREE, *of the Knoxville Bar*

MODERATOR ROWNTREE: Tonight we have an analysis of the facts of the hypothetical case, *Rambler v. Transcoast Ry.* The personal injuries are set forth in the medical reports in your mimeographed materials. These are hard, cold facts, very tragic, but somewhat lifeless and technical. It is the job of the lawyer to analyze the personal injuries and the circumstances of the case so that the court or the jury can give a judgment that is commensurate with the damages.

First, we will have an analysis from the viewpoint of the plaintiff by Mr. Hare.

MR. HARE: We have now come to the portion of the program which I had hoped to reach and in which I had hoped and now intend to try to offer to you such contribution as I may be able to offer. A lawyer would be doing his client a disservice if he were gifted with the wit of Will Rogers and could engage in the repartee of Chauncey Depew in the trial of a lawsuit, because he would have the jury laughing, and the defendant laughing likewise when the verdict came in. He should be perfectly sober and serious because he is dealing with death or disability, either of which is a very serious proposition.

Now I am about to attempt to analyze these admitted injuries in terms of money, and the first thing I want to do is to call attention to the paradox that exists in all the books that I have ever seen or read prior to the past five or ten years. You take *Corpus Juris, American Jurisprudence,* or any work on torts you ever read, and when you answer the first question, whether the plaintiff is entitled to recover or not, you exhaust the scholarship of centuries, the pleading, the statutory construction. All the legal scholarship that goes into that is profound and minute and the judge has a lot to say about liability in his charge to the jury.

We are talking now about F.E.L.A. cases which, realistically speaking, 90 per cent of the time result in a verdict for the plaintiff. Here we have the spectacle of a man going to court with a case that he is pretty sure he is going to win, and the paramount question in it is the amount of the recovery, and yet all the legal scholarship that is employed in the

* Panel discussion at the Eighteenth Annual Law Institute of The University of Tennessee College of Law and the Knoxville Bar Association, held at Knoxville, November 8, 1957.

trial of that lawsuit is on the almost undisputed question of liability. Then, when you get down to the real question, the really litigated question of the amount, most judges merely say in substance: "There is no yardstick by which you can measure pain and suffering, there is no yardstick by which you can measure unliquidated damages, and I leave the matter, gentlemen of the jury, to your common experience and sound judgment." Well, that is nothing; that offers no quide. I have seen jurors throw their hands up and say that nobody has told them how to do that which they earnestly desire to do, which is to measure out justice as intelligently as they can. For instance, if I asked you the value of a house on the other side of Knoxville, you would get a good real estate man and he would go and study the taxes and the income and the replacement value, and the like, and give you an idea about what the house is worth.

It is forbidden in any jurisdiction where I have ever tried a case to introduce evidence before the jury of what other juries have brought in in similar cases. That ought to be the law, because the cases are different. Yet the Supreme Court, when it looks at a verdict, wants to be told what other courts or that same Court, have affirmed in similar cases. They want all the help they can get. The point to which I am now addressing myself is the paradox of the trial of a lawsuit: that a jury without any particular experience in finding the amount of damages in that sort of case is left without guidance. The chances are one-hundred-to-one that when you get a jury in an amputation case, they have never before decided the damages in that type of case. Obviously, the chances are one-hundred-to-one they have no experience to guide them and their common sense will not do it with amputees; secondly, they are without any evidence, except as to the liquidated damages, and the degree and extent of the disability, and what the man earned. Yet if you had a condemnation case, where land is condemned for a highway, you would have a half dozen real estate men saying the land condemned is worth so much money. And no business man would determine the price of stock without having had expert astute evidence on the question of the value concerned.

Up until the past five or ten years it has been a glorified guessing game for the jury to decide what it is worth to cut a man's leg off or to otherwise injure him. But since that time a science and a true advance in the science of litigation, the science of the trial of a lawsuit, has come into being, such as the use of a table written on a blackboard or on a placard. But the plaintiffs' lawyers have cheapened it by putting absurd amounts on it and by using it when it did not need to be used. And the defendants' lawyers have taken advantage of that

foolishness, as they should do, and have ridiculed the astronomical sums that the plaintiff puts on the blackboard. When it is subjected either to abuse by the plaintiff or ridicule by the defendant, it loses some of its value. But properly used, it is as great an advance in the decision of what a case is worth as the advance between treating pneumonia with penicillin and treating it with a hot water bottle, or whatever they used in the old days.

Now here in our hypothetical case involving Mr. Rambler, we have a man with certain injuries. Let us consider them for a moment consecutively and then in the aggregate. He was unconscious for 14 hours. Well, in the trial of the case a neurosurgeon will have said that the amount of brain damage is roughly in proportion to the period of unconsciousness and that if a man has been unconscious 14 hours, he will very likely have permanent and severe brain injury. That is not all by itself; I do not offer it as a rule of thumb. But the doctor will have said that if the man is out 14 hours, he has very probably had a lasting injury to his brain, as we find hereafter, categorically speaking. Bear in mind that it is not a light illustration that the championship of the world changes in a boxing match when a man is out 10 seconds. Fourteen hours then means that a man has had a terrible blow to his head; he was hospitalized for 32 days and unable to resume even light duty work until one month ago, seven months after the accident. Well, that is some measure of the degree of his injury. We will come back to it. He also had several scalp lacerations which did not amount to anything. He alleges cerebral concussion — well, that is a matter of degree; everybody knows that cerebral concussion can be anything, from being momentarily dazed to a very severe injury. But he had hemorrhaging which left such permanent brain damage that now and in the future he will be unable to do anything but the most elementary, unskilled work, because of the impairment of both mental and physical functions. Well, I need not say to you that a lawyer does not get a case like that more than once or twice in a lifetime; if you have a man with injuries where both mental and physical functions are that gravely impaired he usually dies. To have a man who has survived and who is here requiring something to sustain his life indefinitely, with injuries that grave, is worth ten cases of a man being killed.

Here we have also brain stem involvement which may result in paralysis, blindness or sudden death. Well, let us evaluate that word *may;* it does not say which *will* result in paralysis, blindness or sudden death, but it says *may*. In my state, if the doctor says it is possible that this *may* result, the court will charge the jury that you cannot include anything in the verdict for a mere possibility. If he says it is

probable, then you can.

MR. GROCE: That is the way it is in Texas.

MR. HARE: I understand that in New York they say *with reasonable medical certainty.* But it generally adds up to the same thing. But *may result* is a phrase with which I am not sufficiently familiar to know whether it means *probable.* But it is in evidence or it would not be here in this hypothetical case. So I would argue for the plaintiff, and in settlement or evaluation I would know that I could argue, and the jury would consider, that if it *may* result in paralysis, blindness or sudden death, somebody must have the benefit of the doubt, either the innocent plaintiff who did not do it or the defendant who inflicted the injury upon him. And to the jury, I should think, I would say "Well, twenty years from now how would you feel if you had omitted payment for paralysis, blindness or sudden death, and saw this man on a street corner blind and paralyzed? Or, if upon the contrary, how would you feel about the thing if you had included something for it and found that he had not suffered paralysis or blindness? Would you get down on your knees and thank God that he had recovered, or would you not be distressed about it particularly?" So, the plaintiff, I think, would get the benefit of that proposition on that much evidence. All this is of course subject to what I said, that if the doctor on cross-examination did not say it was probable or reasonably certain, it would be out of the case. And I have treated it as in the case because it is here in the evidence.

According to the hypothetical, discs were removed from the back at L4 and L5, of which I would say only that we are about to have an accumulation of injuries such that the law of diminishing returns is bound to apply. You can only get disabled, or you can be killed, and that is about all you can get. You can be disabled completely and utterly to the point where you cannot work any more and where life is a burden to you. While the further injury is a grievous complication of the condition you suffered, you cannot as a practical matter keep piling on damages and liability in the way of money because the jury in the end is going to say, "Well, after all, the man is disabled and there is a maximum." The plaintiff here is really loaded with injuries. He also has a fracture to L1, an impingement of the spinal cord root, compression at L3, creating progressive paralysis (probable), atrophy and shortening of one leg. The injury also resulted in aggravating pre-existing rheumatoid arthritis of the spine. We have fibrosis of neck muscles with 20 per cent limitation of neck movement, 60 per cent loss of hearing and smell, alleged loss of the libido, and traumatic neurosis. These injuries, I think, have been added here deliberately

by the draftsman of the hypothetical to see whether or not the plaintiff would make a monkey out of himself and keep adding another $100,000 as he went along for every one of these injuries to where you would have a total out of sight, or whether a man would have a grasp of reality enough to say, "Well, what have we here? We have a maximum recovery that this jury will give any man." And then you could start just adding one injury after another but it could not add to the total even though there is no statutory maximum and despite the fact that Jim Dooley got $750,000 in a case in Chicago.

There is another thing here in the hypothetical and that is pain. Throughout this description there are a multitude of things that have happened to this man which are going to result in pain. A serious injury is worth much more than a death—anybody knows that. You cannot give the money to the dead person, you have to give it to his dependents, and he is not there looking at you. But in my judgment an injury can be so bad that a jury will give less for it than they would for a somewhat less injury. My reason for saying that is this: you talk about a human vegetable. I heard a case where the doctor gave that exact description, and the defendant's lawyer astutely drew out that this meant that the plaintiff did not realize her predicament. She did not know her suffering; her mind was gone and she could not realize and appreciate her suffering, which approaches a parallel to the proposition of a complete and general anaesthesia or twilight sleep. Recall the adage: "Vice is a monster of so frightful mien as to be hated needs but to be seen, yet seen too oft, familiar with her face, we first endure, then pity, then embrace."[1] You look at injury after injury until finally you just say, "Well, good gracious alive, nobody can feel all those things." But here in this hypothetical is a perfectly designed schedule of injury: this boy here is conscious, he is sane, he knows he is hurting, he can do elementary unskilled work, and yet he can hurt, his back can hurt. He has traumatic neurosis which is a thing for which I have never seen an adequate recovery and for which we await a more enlightened and educated period on the part of the general public to give an adequate recovery, because when a woman comes to court with a traumatic neurosis they say she is just nervous and if she would just get hold of herself she would be all right, and if a man comes to court with this condition, they say he is not courageous, he is whining. They just will not pay you for nervous, emotional or neurotic conditions, and nothing is more miserable, nothing is more difficult to diagnose, and nothing is more difficult to cure.

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1. POPE, ESSAY ON MAN, Epistle ii, line 217.

There are two advertisements of national life insurance companies which I have clipped and put in my files. In one of them a woman is talking to her doctor. She says, "But doctor he isn't himself any more. Since he had this accident he has never been himself." And it goes on to say that it is as if you had dropped a fine watch; you can put it back together but it never again runs like it should. An automobile has been in a wreck; you have it fixed, but it is still a wrecked car. A man has traumatic neurosis, you make x-rays but there is nothing objective. How do you know he is not faking? In my humble opinion I used to believe that a jury would give you what traumatic neurosis is worth. I no longer believe that. I am not skillful enough to make a jury understand that traumatic neurosis means utter misery. The only juror who would give an adequate award for this state is someone who has gone to a madhouse or an asylum where some relative is and see the utter despair of those people who, in the living death of the insane, suffer a million times more than somebody with both legs cut off. But I cannot sell it to a jury. I freely confess to you that a traumatic neurosis is a dime a dozen before the juries where I have tried cases. They will take a broken leg, they will take something they can see and understand, but not traumatic neurosis.

Now I will go to the blackboard here as quickly as I can and try to evaluate these injuries with that background. When we get to this stage of the case we are, of course, in the argument. Belli of California says in his book he is allowed to do this in California in his opening statement; we are not in Alabama—we must wait for the argument of the case at the conclusion of the evidence. When we get to this stage, we get a blackboard and, in order to avoid the lost time of writing on the blackboard, we sometimes use a placard upon which it has already been printed.

I would like to say that the important thing about this chart I am making is to divide it up from the time of the injury up to the day of the trial as your first proposition, because you can prove that absolutely; it has already happened, and then from there on in the future, those things which are reasonably probable. Then to break down the elements of recovery, I briefly simplify what Belli and some others use as categories. They say "humiliation and embarrassment." I think that the average human being is more quick to see and with sympathy to feel the pain of a broken leg than to feel the shame of embarrassment. I think it would take people of great culture and refinement to put themselves in a position of somebody who is humiliated, but they do not have as much trouble putting themselves in the position of somebody who is disabled and cannot earn money and who hurts. So I omit

such things as "humiliation and embarrassment" except in passing.

Now regarding this "loss of the sex drive," which is present in the hypothetical – I have put down nothing about it. I have had cases where people have had such an injury—young men. I live in what we call the "Bible Belt" down in Alabama. The people are Baptists or Methodists and they are modest, and somehow or other when a man gets up and talks about that kind of thing when he has other severe injuries, they seem to think you are straining to have something to talk about, or else they say "We knew that. You don't have to draw back the curtain of privacy which we have drawn over that sort of thing. Leave it to us. We know about that." So I do not discuss it with the jury unless the doctor mentions it and then I just say, "Oh, yes, doctor, the jury knows what you are talking about, let's go on to the other matters." Now that may be a little bit old-fashioned, but after all I am not on the jury—the jury is old-fashioned and they are the ones that decide the lawsuit.

So, the medical expense up to date in this hypothetical case is $4,500 and it was paid by the railroad. So in my diagram I put $4,500 with an asterisk and under that I put "Not claimed" because it has already been paid by the defendant. Why put it there at all? For two reasons. Because in the future there is going to be more medical expense and it is some measure of that factor that there has been $4,500 so far and they have paid it. After this lawsuit they are not bound to pay it. The second reason is that it is some measure of the degree and extent of the injury, that it took $4,500 in seven months, which is $600 or $700 a month, to treat this man.

MR. GROCE: Francis, has it not been your experience in all of your railroad F.E.L.A. cases that the employee is a member of the employees' hospital association of the railroad, and that actually all medical expenses from which deductions are made and that all of the hospital and medical expenses are actually borne by the employees' hospital association to which the railroad has contributed almost 100% in injury cases?

MR. HARE: Yes, generally.

MR. GROCE: And do you find anything in the F.E.L.A. that permits a recovery of medical expenses?

MR. HARE: Well, generally the man has not paid it. He is asked if he has paid it and he says he has not, and we let it go. And we have not explored much into who did pay it. The railroad said, "We took care of it in St. Vincent's Hospital" and the man had not received a bill and so we just do not argue about it anymore.

MR. GROCE: I have never briefed the point fully but I had one occasion in which the question came up and I gave it a rather hurried look, and I checked under the F.E.L.A. statute[2] and came to the conclusion that there was a serious question as to the liability of the railroad under the F.E.L.A. for medical. I am merely throwing that out as a question that you should look up before you undertook to stick your neck out on such a situation.

MR. HARE: I would accept that, for as a state of my knowledge of the matter I would have to accept that. I am unable to differ with it. I think you could put up an argument about it, but when you have things that this man has — as my expressive friend says, "When you have a big hole in the door for the cat, you do not need a little hole for the kitten."

Now his salary for three months is $3,000. He also had some side earnings according to the text here of $900 a year, and we will prorate that at $675 to date.

Now, pain at the hospital, and pain and suffering since he left the hospital, physical and mental handicap, these things have to be introduced in my humble opinion to a jury in two ways. I am like these people in the automobile factories with a clay model of next year's model and they put it together roughly while everybody is looking at it, and if there is too much clay here you take off a little, or you put on a little bit in another place. We are thinking together. I say that these are unliquidated damages. I do not get the figures which I am about to use here out of the Code of Tennessee, I do not get them out of *Corpus Juris,* I cannot find them in the *Bible,* nor in *Shakespeare.* But I get them the best place I can find them. And I tell you where I got them. They are big, they are very big, they are impressively large. I tell you where I got them. You are free to differ from me. If you say they are too little, put some on here; if you say they are too big, take some off. But it is incumbent upon me not to stultify myself by putting ridiculous figures there so that I forfeit the confidence of the jury as I go along and they will say, "Well that fellow must think that he can talk me into anything." And then your lawsuit is in bad shape.

Now we come to the proposition of what you think of pain. I deny the statement of the judge that there is no yardstick; there is absolutely a yardstick. There is no yardstick that I can bring here by saying what another jury has given in another case, but there are other affairs of life in which the human being has had to put pain in one side of the scale and money in the other side of the scale and weigh them. Now

2. 45 U.S.C.A. §51, n.1560.

the ordinary trial before a jury concludes without any evidence being offered on it and without any argument being offered on it. I say to you that as you would search the legislative history to understand what a statute means, I invite you to search their philosophy, the history of your country and its public policy and the ordinary affairs of life to determine by your own ingenuity, with some suggestions I will make to you, those occasions in which pain has been put in one side of a scale and money in the other side of a scale until they balance, and see what you have arrived at. Well, the first thing is this: In the old days when you took out a man's kidney stones, there was no anaesthetic. Half the people died before the date for the operation, with fright and horror. It was a terrible thing. You read these old books about when they cut for the stone. A surgeon had to be fast. The patient was tied down to the table. It was horrible. Today we have anaesthetists. The anaesthetist says to me, "Hare, for $50 I can keep you from suffering pain for an hour." Am I going to bargain with him? I say, "Fifty dollars is a bargain, I will give you your $50. I may never pay the doctor, but I will get the $50 for you, because it is certainly worth more than $50 to relieve me of pain for an hour." Now, we have a start. Are we still saying there is no yardstick? Or are we beginning to crystallize, the beginning of a yardstick? I go to the dentist and I say to him, "I want a tooth pulled." And he says, "This is going to hurt. I can give you a little shot that will keep you from hurting for 15 minutes. It will cost you $3.00." You can ask 100 dentists and they will tell you that they never had a man say, "No, it isn't worth it to me. I am an old railroad lawyer, and to hurt for 15 minutes is not worth $3.00." I have never heard anything like that.

Well, you are introducing the jury now to a new concept so far as I know. The jury is thinking about something they had never thought of before. It is as if somebody before that had been asking them to catch smoke in a butterfly net; it was that intangible. But now they begin to say, "Well, there are times in human experience when a man, a business man or any other average man, has had to do this." You never got a case in your life but what you could find one like it in the library. If you have one where someone tripped up on an egg beater and jumped out of the window, you can find another case where some fellow in South Dakota tripped up on an egg beater and jumped out of the window. If you will look hard enough you will find out a dozen times where, in the experience of mankind, someone has had to put pain in one hand and money in the other to get some measurement of it. I will give you a couple more and then pass on. I know a lady at home whose child has arthritis. The pain has been

endured now to my knowledge for 12 years. Her suffering has been terrific. They found a medicine that they could give her once a day to stop that child's pain. It costs about $10 a day, we will say for the sake of this argument. Now, if somebody says to me that $10 a day is too much for pain and suffering and would on that basis go to this mother and say "Look, young woman, $10 a day is too much for pain and suffering. Tomorrow after breakfast tell your little daughter, 'Now, Honey, you are going to have to suffer today. We will put the $10 in the piggy bank and leave it there and in a few years we are going to buy you some common stock in the L. & N. Railroad with it.' " Do you think that mother is going to sit there and watch that child suffer? Beginning at 8:00 o'clock, will it be 8:10 or 8:15 before she says, "My God, I cannot stand it. Take the medicine." And there again you have been putting $10 in the one hand and weighing it against pain. I do not want it to sound plausible, I just want you to ask yourself whether you would do it or not. Had that mother been putting the $10 in one hand against suffering in the other? $10 a day!

A man goes into a bank with a gun and he points it at a teller and he says, "Your money or your life." What are the bank president's instructions? "Give him your money; you cannot replace your life." Give him a half million dollars, give him a million dollars, give him whatever you have because life is more precious than money. Or, say I have all the money I own in the world buried in the ground in my back yard, and someone gets me and starts torturing me and sticking splinters under my fingernails to make me tell where my money is. I have it put up to me: "Hare, is suffering like this for an hour worth $50,000?" I never have heard of a man who did not tell.

Well, so I say to you that the courtroom is the only place where I have ever heard it denied that freedom from pain was worth large sums of money, and that the presence of pain, if you are going to compensate it, is worth $10 a day after you get out of the hospital and $100 a day in the hospital. Now I am going to put those amounts up on the chart now. If I had put those figures up to start with, without asking you to think about it first, you would have said, "Well, this is Melvin Belli of California talking, or some other of those NACCA fellows, and that is fantastic—" (*Fantastic* is one word they use, and *astronomical* is another; I have heard them used so much that I can pronounce them myself now). But, when you think about it, it is neither fantastic nor astronomical, because when you consider that people are willing to pay $50 for an anaesthetic for one hour and $3 for the tooth for 15 minutes, then $10 a day for pain and suffering is not bad at all.

This man was in the hospital for 32 days, so, at $100 a day, we will

put up here $3,200. We also had 32 weeks elapsing since that time; at $10 per day, this will amount to $2,240.

Now as to the physical handicap and mental handicap, I will explain my reasoning on these in a minute but at the present I am putting them up at $3,400 for each. I add these figures up and get, as of this time, eight months after the injury that the man, if he died today, would be entitled to $12,600.

Now, remember that this man, according to the testimony in the case, was 24 years of age. Being only 24 years of age you have, in addition to the other extremely vulnerable parts of this case for the defendant, a young man with a life expectancy of approximately 40 years (additional). We say he was making $5,000 a year, so in 40 years he would have made $200,000. Now I am not saying: give him this. I am putting up here for the present what he would have earned: $200,000. I can say to the jury: "Now, gentlemen of the jury, let me read back to you the testimony about this: 'He will be unable to do anything but the most elementary unskilled work because of impairment of his mental and physical functions, and he "may" become paralyzed and he "may" be blind.' For all practical purposes, the salvage of what he can earn does not amount to anything." Then what comes off the $200,000; why do you not get the entire $200,000? The present value of it under the law (under our actuary tables adopted by our legislature), or what the present value of $200,000 is at such percentage of interest as the jury thinks a reasonable investor could get on this money: 3 per cent, 4 per cent, perhaps more. Some people argue for less. The average man, if confronted with the proposition of borrowing money is used to paying 6 to 8 per cent; the average man confronted with the task of getting safe investments, finds it difficult to get over 4 per cent. The jury has to reconcile those figures. It must be reduced to its present value. Now I say, on the other hand, that it is just as realistic to say that this young man, 24 years of age, 20 years from now (and he could have lived 40 more years) should have advanced in life, or else this is not America. If a man has no incentive at all, if the only word we can give him is that twenty years from now he would still be doing whatever manual labor or menial work he was doing (by the way, he makes nearly as much as a college professor, so I had better not say too much about menial labor) he would be making $5,000. But in twenty years he ought to do better for himself than that, plus the diminished purchasing power of a dollar, if it goes in line with that. You can get this information from the Department of Commerce. The 1942 dollar compared to the 1957 may be worth 51 cents. Well, in 40 years from now, or 20 years from now, whatever you take off at 4

per cent, I say that the defendant is very lucky if all you do is cancel the decreased value of the dollar against the proposition of what he would have been making at the increased rate of his earnings.

Now we come to the physical pain, mental suffering, threatened blindness and threatened paralysis. Now, gentlemen, here is a thing that I have had jurors tell me they considered logical. It is to me; I am an advocate. You cannot represent one side for 30 years and be impartial. I am an advocate. But I am going to put this up for that point to show my reasoning on it.

I have drawn a circle and divided it into three equal parts, to represent the day of 24 hours: 8 hours of work, 8 hours of sleep, and 8 hours of a man's life which represents the time he spends with his family, the time he spends in recreation, the time that he *lives* in the ordinary sense of the word. He has already found out what the 8 hours of his day is worth during which he worked; by actual transaction he sold that 8 hours of his day to the railroad for $5,000 a year, or $200,000. For the 8 hours that he did sleep, for the sake of the argument and not to press or be in any danger of being called unfair we will say he sleeps as well as a well man; we ask nothing for that part of his day. But what is the value of the 8 hours of his day during which he used to fish, hunt, walk or play with his children—but he is not crippled just 8 hours a day, he is crippled 24 hours a day; he is not crippled just 5 days a week, he is crippled 7 days a week. He gets no holidays from these painful and disabling injuries on Thanksgiving and Christmas, on Saturdays and Sundays, or on Washington's Birthday; he is still suffering, 365 days a year. But we ask nothing for that. Would it be fair to go to your law library and get either a decision of the Internal Revenue Department or a decision anywhere else, that the best evidence of the value of anything is what somebody has paid for it or something just like that? I say to the jury: "He has sold those 8 hours a day to the railroad, he sold them for $5,000 a year or $200,000 in the future, and I maintain in behalf of this man that it is a measure of your humanity, it is a measure of your unselfishness, it is a measure of the depth of your soul and the trueness of your altruism whether or not you are willing to agree with this man that he ought not to give to the railroad a present of that other 8 hours of his life without expecting compensation for it. To be a little commercial about it, if he worked those 8 hours he would get double time for it, or at least time and a half for it, if he worked those 8 hours on Sundays. Well, why, when he turns around and devotes it to his wife and children or to fishing or hunting, or to whatever it is that is in accord with the behest that 'a man does not live by bread alone,' why is it not worth $200,000 to him?"

Remember now, this calculation is just in the rough. You add these items up and in all mathematical accuracy, in all financial accuracy, and in all fairness to the man himself, it will take $412,600.00 to pay this man back with money taking the place of the life, the health and earning capacity that has been taken away from him, with something for his pain and suffering. And you see in that future I am saying during those 8 hours each day he is not only disabled but is suffering. It would take $412,600.00.

Now, is that my evaluation? No. What have I not taken into consideration? Well, I am not taking into consideration this that I cannot tell a jury, but for pain and suffering of 10 hours $40,000.00 has been affirmed. "I am not one to say that terrific pain inflicted on a seaman for 10 hours is not worth $40,000.00 — when a jury of free men and women calmly, deliberately and carefully have so decided."[3]

There is another case cited here by DeParcq[4] where they gave $35,000.00 for a matter of 6 days of pain and suffering. That sort of thing has happened. I am putting it at a very moderate amount. But the jury cannot be told that; the jury cannot be told about the $400,000.00 that Jim Dooley turned down and got $750,000.00 on trying the case. I am not, for settlement purposes, going to bet that I can walk out on your golf course where the record is 69 and bet my client's life that the first time I play it I can shoot it in 62. I am not that vain and I am not that ridiculous. So, when I set my value I say to myself: What is the most money a jury in this community or this section has ever given? This man is grievously hurt but he is not the first man that has been grievously hurt; other people have been dismembered or killed. I ask questions about that, or if I am trying a case in my home town I know what they have given. So, for settlement purposes here, under the facts of the hypothetical and in this community, before I begin to negotiate with my man I have to come down to $250,000.00.

MODERATOR ROWNTREE: Thank you very much, Mr. Hare. Mr. Groce will give an analysis of the facts for the defendant. The plaintiff has taken 55 minutes, which leaves the defendant 5 minutes.

MR. GROCE: That is just about the right proportion when it comes to the talking about damages in connection with this hypothetical case. I will make just one observation. It will be noted that in the mimeographed hypothetical it is stated, as to the plaintiff: "He is married; his wife is 22 and has two children, 2 years and 1 year old." In my

3. Naylor v. Isthmian S.S. Co., 94 F. Supp. 422, 424 (S. D. N. Y. 1950).
4. DeParcq & Wright, *Damages under the Federal Employers' Liability Act*, 17 OHIO ST. L. J. 430, 453 (1956).

friend, Bill DeParcq's article[5] just referred to by Mr. Hare, he has a very interesting comment and he cites several cases to the effect that in F.E.L.A. cases where the suit is one for personal injuries as distinguished from a death action, the fact that the plaintiff is married and has a family is not even admissible in evidence and under the authorities cited by DeParcq the mere stating of certain facts contained in this script to the jury would reverse the case.

MR. HARE: Please accept my apologies. I am accustomed to being stopped by the court when my time is up. I am profoundly sorry that I used Mr. Groce's time as well as my own.

MODERATOR ROWNTREE: Mr. Hare, please do not apologize. I think that was very informative and interesting, perhaps some of the most interesting information we got today. We appreciate it. The defendant's viewpoint will be presented in full measure, I am sure, by Mr. Groce, in the Settlement Negotiation Demonstration which will follow immediately.[6]

5. *Ibid.*

6. A demonstration of the progress of an actual settlement negotiation of the hypothetical *Rambler* case was presented by Mr. Hare and Mr. Hobbs for the plaintiff, and Mr. Groce, Mr. Terry and Mr. Allen for the defendant railroad. For purposes of the demonstration, the highest jury verdict to date in the hypothetical forum was assumed to be $110,000. It is interesting to note that, despite the serious injuries involved, there was only $900 difference between the settlement figure finally reached by the Panel and the average settlement figure reached in an audience-participation written ballot taken prior to the Panel Negotiation. The audience settlement figure remained top-secret until the Panel had reached its final agreement.

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COMMENTS

TAXATION: WORTHLESS SECURITY LOSSES

I. INTRODUCTION

The intricacies of modern business and the uncanny ability of the taxpayer to ferret out the "loopholes" in the tax laws brought about the current unwieldy compilation called the Internal Revenue Code. Despite decades of revision, there still remain many Code provisions with no practical meaning. To be listed in this category is Code § 165 (g) of the Internal Revenue Code of 1954[1] pertaining to the deductibility of losses arising from worthless securities. This particular section has been the subject of considerable litigation which will be reviewed in this Comment.

II. THE CODE PROVISIONS

The general rule pertaining to worthless securities, as laid down by the Code, is this: Where any security which is a capital asset becomes worthless during the taxable year, a deductible tax loss results as though a sale or exchange of that security had taken place on the last day of the taxable year. It is also clear that losses arising from a security becoming worthless are capital losses; therefore, the taxpayer may only utilize the capital losses to offset capital gains which he had realized in the current year, with any excess being an offset against ordinary income, in an amount not to exceed $1000 in any year.[2] Under current Code provisions any excess after the $1000 offset against ordinary income may be carried forward for a period up to five years.[3]

Let us first consider the scope of the word "security." *Security* as used in Code § 165 (g) is defined to include (1) a share of stock in a corporation; (2) a right to subscribe for or to receive a share of stock in a corporation; or (3) a bond, debenture, note, or certificate or other evidence of indebtedness issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form. Consequently, it appears that all corporate stocks, stock rights, bonds, or certificates of indebtedness, would fall within the scope of this Section so long as they are held as a capital asset.

1. Similar in most respects to § 23 (g), paragraphs 2, 3 and 4 of the 1939 Internal Revenue Code.
2. 26 U.S.C.A. § 1211. This Section further limits corporation to set off capital losses against capital gains only.
3. 26 U.S.C.A. § 1212.

Perhaps the most significant of the exceptions to the general rule dealing with losses of worthless securities above stated is the rule pertaining to affiliated corporations.[4] Any domestic corporation which has stock in an affiliated corporation need not treat the affiliated corporation's stock as a capital asset for the purpose of Code § 165 (g). A corporation may be recognized as "affiliated" only if:

(a) at least 95 percent of each class of its stock is owned directly by the taxpayer, and

(b) more than 90 percent of the aggregate of its gross receipts for all taxable years has been from sources other than royalties, rents (except rents derived from rental properties to employees of the corporation in the ordinary course of its operating business), dividends, interest (except interest received on deferred purchase price of operating assets sold), annuities and gains from sales or exchanges of stocks and securities.[5]

A parent corporation, however, is not permitted to obtain a sufficient amount of the subsidiary's stock to qualify as an affiliate, merely for the purpose of converting a capital loss into an ordinary loss.[6]

From the "90% of gross receipts" limitation it would appear that the legislative intent was to prohibit holding companies from being affiliated corporations and thus restrict ordinary losses from worthless stock to affiliated operating companies. The courts, however, have not so interpreted this provision. In *Commissioner v. Adam, Meldrum & Anderson Co.,* a bank was excluded from being an affiliated corporation because more than 10% of its gross income was derived from interest.[7] Similarly in *Schuykill Transit Co. v. Rothensis,* the narrow sense of the Code was rejected:

> There is some merit to the taxpayer's contention. Nevertheless, it seems to us that in this age of extended business and the many forms under which it is conducted, when the term rents appears in the Internal Revenue Code, it is to be interpreted in its broader sense unless the contrary clearly appears.[8]

Thus it would appear that a definition in an extremely broad sense is the interpretation given to the wording, "royalties, rents, dividends, interest, etc. . . . ," of the Code. So what at first blush may seem to

4. Several other exceptions to the general rule are dealt with in various other Code provisions. See 26 U.S.C.A. § 582 for special rule pertaining to banks; and 26 U.S.C.A. § 471 for special rule pertaining to dealers in securities.
5. 26 U.S.C.A. § 165 (g) (3).
6. Hunter Mfg. Corp. v. Commissioner, 21 T.C. 424 (1954).
7. 215 F. 2d 163 (2d. Cir. 1954). Prior to 1954 this qualification upon affiliated corporations read: "90 percent of the aggregate of its gross income . . ."; this was changed to: "90 percent of . . . gross receipts" in 1954 Code.
8. Schuykill Transit Co. v. Rothensis, 115 F. Supp. 594 (D.C. Pa. 1954).

be a boon to the parent corporation, is found upon more careful examination to be useful only in a restricted area.

III. When Is Loss Deductible?

While worthless security losses were at one time deductible in the year ascertained,[9] case law and Treasury regulations since 1919 have clearly held that losses from worthless stock are deductible only in the year sustained. Thus, a distinction can be drawn between these losses and losses incurred from bad debts, which are deductible in the year they are ascertained to be worthless and charged off.[10] The circuit court of appeals in *Bartlett v. Commissioner*[11] emphasized this distinction:

> The law applicable to deductions for worthless stock stands out in clear relief when it is viewed against the background of the law pertaining to deductions for bad debts.[12]

Another distinction can be recognized in comparing the rule as specified for worthless security deductions and the normal rule used to establish losses on stock. Under the normal rule, losses resulting from the fluctuation in market value are not "sustained" by the taxpayer until a sale or other disposition of the security.[13] But since a sale of the security is not necessary to establish worthlessness, it would seem logical to contend that partial worthlessness, a decline in market value, could be deducted under Code § 165 (g). Case law has held differently.[14] Herein lies a further differentiation between the worthless security deduction and the bad debt deduction.[15]

As previously stated, in allowing a deduction for worthless securities a sale is not a prerequisite. In fact the courts have many times looked beyond sales for nominal amounts and held them as attempts by the taxpayer to manipulate his income tax, as is indicated in the words of Judge Learned Hand in *DeLoss v. Commissioner*.[16]

> However, while the security remains in esse and its value may fluctuate, it is well settled that only by a sale can gain or loss be established . . . . Nevertheless, we think it inapplicable when the security can no longer fluctuate in value, because its

9. Article 144, Regulations 45 (rev. 1919).
10. See 26 U.S.C.A. § 166.
11. Bartlett v. Commissioner, 114 F. 2d 634 (4th Cir. 1940).
12. *Ibid.*, at page 638.
13. 26 U.S.C.A. 165 (b).
14. Harry C. Howard, 20 B.T.A. 207 (1930); Crocker First National Bank of San Francisco, 26 B.T.A. 1078 (1932); Coyle v. Commissioner, 142 F.2d 580 (7th Cir. 1944); First National Bank of Minneapolis v. U.S., 58 F. Supp. 425 (D.C. Minn. 1944).
15. See 26 U.S.C.A. § 166 (2).
16. DeLoss v. Commissioner, 28 F.2d 803 (2d Cir. 1928).

> value has become extinct. In such cases a sale is necessarily fictitious . . . . To extend the usual doctrine so far would serve only to allow a taxpayer to manipulate his loss . . . . Although it is, of course, true that anyone is entitled to spread his losses as best he can in order to reduce his taxes, in interpreting the law we are not to assume that a system based upon yearly gains and losses was so contrived as to admit deviations in principle which must always operate to the taxpayer's advantage.[17]

It can be seen, therefore, that sales for nominal amounts, nominal when compared to the original cost, might be scrutinized by the Commissioner and held as manipulations. In determining what amounts will be nominal and what amounts will constitute arms-length transactions, a question of fact is raised. In one case the per share amount of the sale, which was very nominal, was overlooked by the court when the total sales price was a sizeable sum, even though only a small percentage of the original cost, and the sale was allowed to fix the loss.[18] But many cases reflect an unsympathetic judicial attitude towards the taxpayer's attempts to fix a loss by a sale where there is evidence of worthlessness.[19]

IV. Burden of Proof

The deduction for worthless securities is a matter of legislative grace; in order to justify the deduction the taxpayer must establish that his deduction meets the requirements of the Code. Prior to 1938 this burden of proof was further encumbered by the fact that there was no specific provision for losses due to worthless securities in the federal income tax law. Consequently, to qualify for a deduction the taxpayer had to show that the stock investment was a business transaction or was entered into for profit reasons. The incorporating of a specific deduction for worthless securities into the law in 1938 omitted this requirement and since that time this has not been an issue between the taxpayer and the Commissioner. But, even with the express authorization of the Code, the burden of proof in worthless security deductions is so onerous that the existence of a presumption in favor of the Commissioner's ruling is obvious. The courts have expressed this presumption by saying:

> It is axiomatic that any determination by the Commissioner in any tax case is presumed to be correct. So well established

17. *Ibid.*, p. 804, 805.
18. G. E. Employees Securities v. Manning, 137 F.2d 637 (3d Cir. 1943).
19. Gowen v. Commissioner, 65 F.2d 923 (6th Cir. 1933); Woodward v. U.S., 106 F. Supp. 14 (D.C. Ia., 1952); Harry Kayser, 27 B.T.A. 816 (1933); Leigh Carroll, 20 B.T.A. 1029 (1930); Jessie S. Meachem, 22 B.T.A. 1091 (1931); First National Bank of Minneapolis v. U.S., 58 F. Supp. 425 (D.C. Minn., 1944).

> is this principle that the citation of authorities and decisions of court would be academic.[20]

With the Commissioner's ruling being prima facie correct from the outset, what can the taxpayer do to rebut? The theoretical answer offered by one court is:

> . . . such presumption only places upon the taxpayer the burden of first going forward with the evidence. If and when the taxpayer introduces any evidence that the Commissioner's determination is in error, this presumption is no longer of probative force and effect, and the issue then will be decided upon the preponderance of the evidence. . . .[21]

From this language the taxpayer's burden appears to have been lightened, but upon closer consideration of several cases, a conflict arises, as is illustrated by the following judicial observation:

> In seeking a deduction the taxpayer has a burden greater than merely proving the commissioner wrong; he must establish the essential facts from which a correct determination can be made. . . .[22]

From such phraseology, one may readily conclude that the taxpayer must prove to the fact-finding body the essential facts pertaining to the security in question. Thus the question arises as to whether or not the Commissioner's prima facie case has the weight of evidence or may be repelled by a mere going forward. The burden of proof not only perplexes the taxpayer at the trial level but also on appeal where it is difficult to overthrow, as illustrated by *Boehm v. Commissioner,* wherein the Supreme Court observed:

> But the question of whether particular corporate stock did or did not become worthless during a given taxable year is purely a question of fact to be determined by . . . the basic fact-finding and inference-making body. The circumstances that the facts in a particular case may be stipulated or undisputed does not make the issue any less factual in nature . . . . And an appellate court is limited . . . to a consideration of whether the decision . . is in accordance with the law. If it is . . . it is immaterial that different inferences and conclusions might fairly be drawn from the undisputed facts.[23]

Further, indiscriminate proof by the taxpayer has proved fatal in the many cases where the court used the taxpayer's own admissions to hold

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20. Woodward v. U.S., 106 F. Supp. 14 (N.D. Ia., 1952) quoting from Gazette Publishing Co. v. Self, 103 F. Supp. 779, at 783 (D.C. Ark., 1952).
21. *Ibid.*
22. Mahler v. Commissioner, 119 F.2d 869, 870 (2d Cir. 1941).
23. Boehm v. Commissioner, 326 U.S. 287 (1945).

in favor of the Commissioner.[24] Consequently, the taxpayer must weigh carefully all the facts and select only the most decisive and material elements, omitting the extraneous for fear of proving too much.

V. What Constitutes Worthlessness

Having considered the generalities of the taxpayer's burden of proof, what must the taxpayer demonstrate specifically in order to prove worthlessness of a security? A plethora of answers can be found in the case-law. In fact probably as many expressions of worthlessness can be found as there are worthless security situations. Depending upon the facts of each case and the vocabulary of the learned justices, these expressions have ranged from economic factors such as:

> Until it is clearly shown that there is no probability that any portion of the investment will ever be recovered, no deductible loss under the statute has been sustained.[25]

and:

> To secure a deduction, the statute requires an actual loss be sustained. An actual loss is not sustained unless when the entire transaction is concluded the taxpayer is poorer to the extent of the loss claimed; in other words, he has much less than before.[26]

to expressions dealing with the taxpayer's state of mind, such as:

> The taxpayer need not establish that there is no possibility of an eventual recoupment. The law doesn't require the taxpayer to be an incorrigible optimist.[27]

and:

> Finding of worthlessness cannot fairly be made by an examination only of taxpayer's belief and actions. All pertinent facts and circumstances must be open to consideration regardless of their objective or subjective nature.[28]

Irrespective of the many definitions which may be quoted, there is one common thread woven into every worthless security case. Impliedly, it is the pinpointing of a particular fact or set of facts in a particular fiscal period; expressly, it is an "identifiable event." This "identifiable event" has been defined as "an incident or occurrence that points to or indicates a loss . . . an evidence of a loss. The evidence need not, how-

24. See Taylor v. Commissioner, 117 F.2d 189 (7th Cir. 1941); Goldberg v. Commissioner, 100 F.2d 601 (7th Cir. 1939); Rand v. Commissioner, 116 F.2d 929 (8th Cir. 1941); John J. Flynn, 35 B.T.A. 1064 (1937); John C. Brown, 27 B.T.A. 1176 (1933); Royal Parking Co. v. Lucas, 38 F.2d 180 (9th Cir. 1930).
25. William E. Metzger, 21 B.T.A. 1271, 1272 (1930).
26. Shoenburg v. Commissioner, 77 F.2d 446, 449 (8th Cir. 1935).
27. U.S. v. S.S. White Dental, 274 U.S. 398 (1927).
28. Boehm v. Commissioner, 326 U.S. 287 (1945). This quotation is the origination of the "practical test" in the worthless security loss litigation.

ever, consist of stereotypic plan or scope. It may vary according to circumstances and conditions."[29] Unfortunately, definitions are usually impractical when they come to be applied.

When dealing with events or incidents which demonstrate loss, the occasions where utter destruction is indicated by one event or series of events in one fiscal period are infrequent. To the contrary, in modern business a countless number of events occurring over many years will usually indicate a valueless security. Thus the taxpayer, faced with the problem of going forward against a prima facie assertion of the Commissioner, must select the proper fiscal period and establish the identifiable event in that period.[30]

Some of the more common identifiable events are:

A. Insolvency

Basically the underlying condition for establishing worthlessness of a security is insolvency.[31] In fact, there are a number of cases which hold that insolvency alone constitutes an identifiable event.[32] However, in the situations where insolvency was sufficient, the insolvency was usually the result of a sudden discovery, e.g., an investigation brought about by the suicide of the head of a corporation,[33] or a re-evaluation of asset accounts which reveals that the assets are overvalued or worthless.[34] Thus, insolvency was not the actual identifiable event since an insolvent condition had probably existed prior to the fiscal period in which the insolvency was discovered; but in reality the identifiable event was the cause for discovery of a hidden insolvent condition.

Generally, the knowledge of an insolvent condition exists for several fiscal periods prior to discontinuation of the business. Therefore, insolvency is a mere link in the chain of events leading to ultimate worthlessness; and the courts have so recognized the condition in requiring additional factors to establish loss, such as operational losses, bankruptcy, liquidation, and many others.

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29. Bartlett v. Commissioner, 114 F.2d 634, 638 (4th Cir. 1940).
30. *Supra,* Note 25.
31. Summit Drilling Corp. v. Commissioner, 160 F.2d 703 (10th Cir. 1947).
32. See Mahler v. Commissioner, 119 F.2d 869 (2d Cir. 1941); J. Harvey Ladew, 22 B.T.A. 443 (1931); Gimbel v. Rothensis, 24 F. Supp. 117 (N.D. Pa., 1938); Lacy v. U.S., 207 F.2d 252 (3d Cir. 1954); Ansley v. Commissioner, 217 F.2d 252 (3d Cir. 1954); Monmouth Plumbing Supply Co., Inc. v. U.S., 4 F. Supp. 349 (D.C. Fla., 1933); Henry M. Jones, 4 B.T.A. 1286 (1926). For a more complete listing see PRENTICE-HALL FED. TAXES, INCOME TAX, paragraph 13,571 (1958).
33. Marks v. U.S., 102 Ct. Cl. 508 (1944); Minnie K. Young, 123 F.2d 597 (2d Cir. 1941); John B. Marsh, 38 B.T.A. 878 (1938).
34. Floyd E. Poston, 17 B.T.A. 921 (1929); Henry M. Jones, 4 B.T.A. 1286 (1926); Mahler v. Commissioner, 119 F.2d 869 (2d Cir. 1941).

B. Bankruptcy

Bankruptcy alone is usually not held sufficient to be an identifiable event,[35] but, when coupled with other facts, some cases have held that it tends to prove worthlessness.[36] Where an insolvent condition existed, a petition in bankruptcy filed and the decision reached to terminate have been held an identifiable event.[37] Similarly, where bankruptcy existed and the corporation's assets were sold for less than the liabilities in the same fiscal period, bankruptcy has been held an identifiable event.[38]

C. Receivership

Again the courts have held that one fact alone, e.g., receivership, is not an identifiable event.[39] Combined with other factors such as insolvency and the purpose of the receivership being to terminate the business,[40] receivership will usually be held an identifiable event. But there are isolated cases which have held receivership coupled with such facts as a court order to shut down the business,[41] the constituting of a creditor's committee to manage a corporation's business,[42] or the transfer of a corporation's property to a liquidating trustee,[43] insufficient to constitute worthlessness.

D. Liquidation

Liquidation is an all-inclusive word and it is plain that mere liquidation for the purpose of ceasing business operations would not be an identifiable event. Conversely, where the business is liquidated for an amount less than creditor's claims,[44] then liquidation would be an

35. Jarvis v. Heiner, 38 F.2d 361 (3d Cir. 1930); Lyon v. U.S., 5 F. Supp. 138 (Ct. Cl. 1933); Peter Doelger Brewing Co., 22 B.T.A. 1176 (1931); William E. Metzger, 21 B.T.A. 1271 (1931); Oscar K. Eysenbach, 10 B.T.A. 716 (1928).
36. Real Estate Trust Co. of Philadelphia v. U. S., 20 F. Supp. 20 (E.D. Pa., 1937); Sacks v. Commissioner, 66 F.2d 308 (4th Cir. 1933); Pine Ridge Coal Co., 23 B.T.A. 489 (1931).
37. Lambert v. Commissioner, 62 F.2d 661 (10th Cir. 1939); Jeffrey v. Commissioner, 62 F.2d 661 (6th Cir. 1933); Ralph Perkins, 41 B.T.A. 1225 (1941); John B. Marsh, 38 B.T.A. 878 (1938); Marks v. U.S., 58 F. Supp. 182 (Ct. Cl. 1944).
38. Real Estate Trust Co. of Philadelphia v. U.S., 20 F. Supp. 20 (D.C. Pa., 1937); O. H. Himelick, 32 B.T.A. 792 (1935); Edward J. Cornish, 22 B.T.A. 474 (1931).
39. Lyon v. U.S., 5 F. Supp. 138 (Ct. Cl. 1933); Edward C. Lawson, 42 B.T.A. 1103 (1940).
40. Fitzhugh v. Nashville Trust Co., 30 A.F.T.R. 1643 (D.C. Tenn., 1942); Sherrill v. Adkins, 29 A.F.T.R. 1316 (D.C. Ark., 1940); Weintraub v. U.S., 26 A.F.T.R. 1183 (D.C. Pa, 1939); Hobby v. Commissioner, 97 F.2d (5th Cir. 1938).
41. P. J. Quealy, 6 B.T.A. 419 (1927).
42. J. Harvey Ladew, 22 B.T.A. 443 (1931).
43. Reese Blizzard, 16 B.T.A. 242 (1929).
44. Milman, Inc. v. Commissioner, 114 F.2d 95 (2d Cir. 1940); Gould Securities Co., Inc. v. U.S., 96 F.2d 780 (2d Cir. 1938); far a complete listing see PRENTICE-HALL FED. TAXES, INCOME TAX, para. 13,582 (1958).

identifiable event. In reality, liquidation does not properly fit within the term *identifiable event,* since liquidation of the corporation would fix a loss, partial or total, under normal rules pertaining to sales of capital assets without referring to Code § 165 (g).[45] But there is a distinction between liquidation as actually having taken place and the mere decision to liquidate, the latter being deductible only under Code § 165 (g).[46]

A discussion of identifiable events could extend ad infinitum, for in each factual situation there are distinguishing elements. So it is with losses caused by worthless securities.

Brief mention should be made, however, of the inconsistencies of decisions which involve the same security but different security holders. Not infrequently decisions have been reached which, in effect, hold that the identical security became worthless in one year for one security holder and in another year for a different security holder. This is discussed in *General Electric Employees Securities v. Manning,*[47] where the court said:

> These cases highlight the fact that the Commissioner has taken wholly inconsistent positions on this very stock. . . . Likewise the decisions of the Board and the courts in these cases appear to be in hopeless conflict. They may readily be reconciled, however, if it is remembered that in each case the question . . . was whether the taxpayer had met the burden of proving that the loss was in fact sustained in the year in which the taxable deduction was claimed. Therefore in each case the decision was dependent upon the amount and character of proof introduced by the particular taxpayer.

But such a statement is placing an onerous burden on the shoulders of the taxpayer, since the Commissioner is prima facie correct and the taxpayer is groping in the maze of financial events surrounding his claim in an effort to prove his loss. No doubt many equitable solutions could be offered, but why cannot the theory of collateral estoppel or res judicata apply? In litigating the worthlessness of different blocks of the same stock, are not the stockholders in privity with each other through the corporation? If so, then certainly in separate litigations

45. 26 U.S.C.A. 1001 *et. seq.*

46. For cases which have held the decision to liquidate or the start of liquidation as an identifiable event see: Hobby v. Commissioner, 97 F.2d 731 (5th Cir. 1938); Gowen v. Commissioner, 65 F.2d 923 (6th Cir. 1933), *cert. den.* 290 U.S. 687; DeLoss v. Commissioner, 28 F.2d 803 (2d Cir. 1928), *cert. den.* 279 U.S. 840; Hanna v. Routzahn, 16 F. Supp. 28 (N.D. Ohio, 1936). Other cases have required actual liquidation completed; see Benjamin v. Commissioner, 70 F.2d 719 (2d Cir. 1934); Burnett v. Imperial Elevator Co., 66 F.2d 643 (8th Cir. 1933); McManus v. Eaton, 7 F. Supp. 380 (D.C. Conn., 1934).

47. See also Woodward v. U.S., 106 F. Supp. (D.C. Ia., 1952).

between stockholder *A* of corporation *X* and the Commissioner, the determination in *A's* case should be binding on the Commissioner and *B* in *B's* case.

VI. Potential Value

One further problem—"potential value"—remains to plague the taxpayer; this he must successfully hurdle or lose his case. This phrase has been introduced into the area of worthless security losses to classify those underlying elements of value which may or may not exist in a particular security.

As previously stated, the events which lead to a worthless security loss usually span several years; consequently, the Commissioner is quite likely to assert that the security in question became worthless in a year prior to the year in which the taxpayer is claiming the loss. Therefore, in order to rebut the Commissioner's assertion, the taxpayer must show "potential value" in the security either at the close of the preceding year or beginning of the current year. In addition, the taxpayer must show that the security in question carried no "potential value" beyond the year in which it is claimed as a loss. Thus the problem of "potential value" arises for the taxpayer in a two-fold manner, one positive and one negative. If the Commissioner asserts the security became worthless in a prior year, the taxpayer must show "potential value" beyond that year; if the Commissioner asserts the security became worthless in a subsequent year, the taxpayer must show that no "potential value" existed beyond the year in which the loss was claimed.

Courts have found "potential value" indicated in continued business operations,[48] in sound plans for reorganization,[49] in saleability of the security on the market for more than a nominal amount,[50] in reasonable belief by the management or security holders that business would succeed, and in many other factors.

VII. Conclusion

From this consideration of some of the legislative and judicial preventive measures, it can be seen that the taxpayer's attempted deduction

48. G. E. Employees Securities Corp. v. Manning, 137 F.2d 637 (3d Cir. 1943); Rassieur v. Commissioner, 129 F.2d 820 (8th Cir. 1942); Burnett v. Imperial Elevator Co., 66 F.2d 643 (8th Cir. 1933); Charles W. Deeds, 14 B.T.A. 1140 (1930), *aff'd* 47 F.2d 695 (6th Cir. 1931); Snow v. Marcelle, 90 F. Supp. 37 (D.C. N.Y., 1950), *aff'd* 185 F.2d 676 (2d Cir. 1950); Fairbanks, Morse & Co. v. Harrison, 63 F. Supp. 495 (D.C. Ill., 1945).
49. Edward T. Lawson, 42 B.T.A. 1130 (1940).
50. Julian M. Livingston, 46 B.T.A. 538 (1942); George H. Horning, 35 B.T.A. 897 (1937); Montgomery v. U.S., 23 F. Supp. 130 (Ct. Cl. 1938); Franklin Pioneer Co. v. Glenn, 61 F. Supp. 422 (D.C. Ky., 1942); Trowbridge v. U.S., 32 F. Supp. 852 (D.C. Conn., 1938).

for a loss from a worthless security is fraught with difficulties. Not only must he contend with the prima facie correctness of the Commissioner's position, as is the normal rule in tax matters, but in addition he has to hurdle such other esoteric factors as nominal sales, identifiable events, and potential value. Thus, with worthlessness being essentially a question of fact, and the facts so complex that any two equally qualified men might disagree as to the correct decision, any form of a presumption could logically succeed in swaying the outcome of litigation. Consequently, it follows that a rule of reasonableness should be applied in the administration of Internal Revenue Code § 165 (g). Without reasonableness the taxpayer is, in effect, deprived of his right to litigate the question since the Commissioner merely asserts a contrary stand and the taxpayer disagrees at the peril of not establishing the facts which prove worthlessness. Reasonableness could be allowed without damaging the government's position since under the present Code a seven-year statute of limitations applies.[51] In fact, a great deal of time and effort could be saved by avoiding the maxim of worthless security deductions. This has been well-stated by Judge Augustus Hand:

> In cases like this the taxpayer is at times in a very difficult position in determining in what year to claim a loss. The only sage practice, we think, is to claim a loss for the earliest year when it may possibly be allowed and to renew the claim in subsequent years if there is any reasonable chance of its being applicable to the income for those years.[52]

So it can be seen that worthless security losses are largely a game of chance when the deduction is approached realistically by the taxpayer. Theoretically, there still exist the admonitions of the many court decisions which lay down the following prerequisites: (1) establish a potential value in the security at the end of the preceding year or beginning of the tax year in question; (2) demonstrate an identifiable event which caused worthlessness to fall within the taxable year the loss is claimed; and (3) show that the security in question had no potential value beyond the taxable year in which the loss was claimed.

The solution to the taxpayer's problem lies in the administration of Code § 165 (g), for without an approach of reasonableness a great amount of time and effort could be expended in attempting to prove worthlessness while neither the taxpayer nor the Commissioner actually knows what facts to seek.

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51. 26 U.S.C.A. 6511 (d).
52. Young v. Commissioner, 123 F.2d 597, 600 (2d Cir., 1941).

THE BILL OF EXCEPTIONS IN TENNESSEE

The most casual perusal of the decisions of the appellate courts of Tennessee will reveal the multiple problems arising from the misuse of the bill of exceptions. Many of the errors which confronted the courts during the first half of the last century are recurring today. The purpose of this study is to point out some of the major principles and pitfalls which have been stressed repeatedly by the courts regarding this instrument. The principal topics to be discussed in the order of their presentation are: Function of the Bill; Contents; Authentication; Time for Filing; Exhibits; Responsibility for Preparation; and the Wayside Bill of Exceptions.

I. Function of the Bill of Exceptions

In order to lay a proper foundation for understanding the bill of exceptions, the first inquiry will be directed to the matters concerning the nature and function of the bill—what it is and what it does. An early case presents the law as it still is today: "The office of the bill of exceptions is to put in permanent form and bring into the record that which transpires during the trial of a cause, and which is no part of the record proper."[1] By the *record proper* the court refers to what will hereafter be called the *technical record.* Theoretically, the proposition is a simple one: that which is not a part of the technical record must be brought up for review by the bill of exceptions. The bill of exceptions, then, must contain everything that is to be reviewed not already embodied in the technical record. The next logical step is a determination of what is contained in the technical record.

The courts frequently use the term *record* in a dual sense: sometimes the reference is to the technical record only; at other times the word is used to embrace the entire record as presented on appeal. Generally, there is little difficulty in determining which meaning is applicable when the reference is taken in its context. On occasion, however, the phrase *technical record* is used, and a definition of this term was given by the Tennessee Court of Appeals in *Powell v. Barnard,* when it said, "The technical record is made up and consists only of process, pleadings, minute entries, verdict, judgment, and bonds."[2] A recent decision from the Tennessee Supreme Court cites the half-cen-

1. Darden v. Williams, 100 Tenn. 414, 415, 103 S.W. 669 (1898).
2. Powell v. Barnard, 20 Tenn. App. 31, 34, 95 S.W.2d 57 (1936). See also Hayes & Chunn v. E. C. Holland, 11 Tenn. App. 490 (1930); Fiske v. Grider, 171 Tenn. 565, 106 S.W.2d 553 (1937), where the pauper's oath was held to be a substitute for the bond, and should be made a part of the record proper on appeal to the supreme court.

tury-old *Duane* case[3] with approval, indicating that the process, pleadings, minute entries, verdict, and judgment are matters properly constituting a percent record in the absence of a bill of exceptions.[4] The prayer and granting of an appeal must be entered upon the minutes, and when this is done, they are in the record.[5] Since the minute entries are by definition a part of the technical record, it seems clear that the prayer and granting of an appeal are a part of the technical record when so entered.

In considering the contents of the technical record, attention should be called to several statutes which provide for the inclusion of certain matters in the record for review without the use of a bill of exceptions. Tennessee Code Annotated § 27-104 provides that depositions are included in the record in equity causes taken up by writ of error or appeal in the nature of writ of error, along with the exhibits introduced at trial, the cause being reviewed as if brought up by appeal. The same provision is made for suits at law, with the express statement that they need not be included in the bill of exceptions, but will be reviewed and examined along with all the other evidence.

Exceptions to evidence taken on deposition, in either chancery or circuit court, sustained or overruled, need not be included in the bill of exceptions, if the rulings of the court, the exceptions, and excluded evidence are set out in the body of the deposition and properly authenticated by the court.[6] With reference to excluded documents, depositions, or exhibits to depositions, or any other papers excluded in part or as a whole, a special statutory provision is made which seems to be applicable only to the chancery court. Where the action of the court on the parts or the whole documents, depositions and other papers is duly noted thereon by the chancellor, these items will constitute a part of the record and need not be embodied in a separate bill of exceptions. This is not true where the testimony is oral.[7]

All bonds and recognizances taken according to law in the appellate courts, or in the trial courts, in the progress of a cause, form a part of the record.[8] Also, written findings of fact made by the chancellor, and

3. Duane & Co. v. Richardson, 106 Tenn. 80, 81, 59 S.W. 135 (1900).
4. Johnson v. Johnson, 185 Tenn. 400, 405, 206 S.W.2d 400 (1947). Here the court used the unqualified term "record" to refer to the technical record.
5. State for Benefit and Use of Lawrence County v. Hobbs, 194 Tenn. 323, 329, 250 S.W.2d 549 (1951).
6. TENN. CODE ANN. § 27-105 (1956). Leach v. Pratt, 30 Tenn. App. 330, 205 S.W.2d 970 (1947).
7. TENN. CODE ANN. § 27-106 (1956). For comment on this and related statutes see, Baugh, *Changes in Procedure Under the Proposed Supplement to the* 1932 *Code of Tennessee,* 21 TENN. L. REV. 589, 590-591 (1951).
8. TENN. CODE ANN. § 27-107 (1956).

filed, become part of the record except in cases tried on oral testimony.[9] Non-injury cases tried in a court of record, whether equity or law, according to the forms of chancery or the forms of law, where jurisdiction to review is in the court of appeals and the supreme court will be reviewed as on simple appeal, but where the case is tried on oral evidence a bill of exceptions must be filed.[10] Finally, the Code deals with a situation where the bill of exceptions is not filed in time, in which event if counsel for the appellant upon notice shall file a statement in writing to the effect that the appeal is not taken for purposes of delay and that he intends to file assignments of error directed at alleged reversible error contained in the technical record, then such statement shall be included in and made a part of the transcript of the record on appeal.[11]

As far as the writer has been able to determine, these are the only matters specified by the courts and the legislature as constituting the technical record. And, as will be indicated below, the appellate courts adhere closely to these prescribed limits.

Oral testimony, exhibits and other matters not specifically covered by the above statutes are not included in those items which have been listed by the courts as constituting the technical record. It is obvious that the crucial issues of an appeal often will not be found in the technical record. The function of the bill of exceptions is to bring all these matters before the court on appeal. Where no bill of exemptions is perfected, the court has no authority to go beyond the record for purposes of determining the merits of an appeal or considerations of the evidence, but will look to the technical record only.[12]

The importance of the bill's function is magnified in light of the presumptions that are raised in its absence. The court of appeals has said that where there is no bill of exceptions, the reviewing court will presume that the charge of the trial judge covered the law of the case and was correct.[13] Both the court of appeals and the supreme court have recently held that *conclusive* presumptions arise in the absence

9. TENN. CODE ANN. § 27-113 (1956). Findlay v. Monroe, 196 Tenn. 690, 270 S.W.2d 325 (1953). Oral findings cannot be incorporated into the decree, Freeman v. Freeman, 197 Tenn. 75, 270 S.W.2d 364 (1954).
10. TENN. CODE ANN. § 27-303 (1956); Atlas Powder Company v. Leister, 197 Tenn. 491, 274 S.W.2d 364 (1954). Blazer v. James, 38 Tenn. App. 616, 277 S.W.2d 453 (1954).
11. TENN. CODE ANN. § 27-318 (1956).
12. O'Brien v. State, 193 Tenn. 361, 364, 246 S.W.2d 45 (1952); Wilson v. State, 197 Tenn. 17, 270 S.W.2d 340 (1953); Rutledge v. Rutledge, 293 S.W.2d 21 (Tenn. App. 1954) State *ex rel.* Jones v. Terry, 194 Tenn. 568, 253 S.W.2d 753 (1952); Spivey v. Reasoner, 191 Tenn. 350, 352, 233 S.W.2d 555 (1950).
13. Shelton v. Hickman, 26 Tenn. App. 344, 347, 172 S.W. 2d 9 (1943).

of the bill. Without a bill, a conclusive presumption arises that the evidence supported the verdict.[14] The same is true of the chancellor's findings and decrees when there is no bill.[15] The vital role of the bill of exceptions is obvious. The basic propositions respecting its office are relatively simple, yet from the above recent citations it is apparent that practitioners are still attempting, without a bill of exceptions, to introduce matters for review which can be brought up only by this device.

II. Contents of the Bill of Exceptions

Having determined the exact contents of the technical record and that all other matters must be embraced within the bill of exceptions, it would be of benefit to consider some of the individual items which are included in the bill. The following list is not exhaustive, but contains some of the matters which the courts have specifically declared must be brought up on appeal by the bill (discounting the exceptions discussed *supra*):

1. Excluded evidence.[16]
2. Trial judge's charge to the jury.[17]
3. Special requests.[18]
4. Certified copy of a judgment allegedly proving conviction of a witness.[19]
5. Testimony on a former hearing (unless incorporated into the hearing on the second appeal).[20]
6. Exhibits.[21]
7. Evidence of misconduct of a juror.[22]
8. Trial judge's alleged error in refusing a continuance.[23]
9. Prosecuting attorney's alleged misconduct in arguments to the jury.[24]

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14. Rose v. Third Nat. Bank, 27 Tenn. App. 553, 573, 183 S.W.2d 1 (1944).
15. Spivey v. Reasoner, 191 Tenn. 350, 233 S.W.2d 555 (1950).
16. Nelson and Hatton v. State of Tennessee, 292 S.W.2d 727 (Tenn. 1956); Writ of certiorari dismissed for want of a properly presented federal question, 78 S. Ct. 327 (1958).
17. Ricketts v. State, 192 Tenn. 649, 241 S.W.2d 604 (1950); Cantrell v. State, 190 Tenn. 64, 227 S.W.2d 772 (1949). In the latter case, the court held that where the entire charge as given was not in the bill of exceptions, assignments of error undertaking to assail the charge and refusal to grant special requests would not be considered on appeal. The charge and special requests must be included in the bill.
18. Gordon's Transports, Inc. v. Bailey, 294 S.W.2d 313 (Tenn. App. 1956); Koehn v. Hooper, 193 Tenn. 417, 246 S.W.2d 68 (1951).
19. May v. State, 192 Tenn. 53, 237 S.W.2d 550 (1950).
20. Williamson v. State, 194 Tenn. 341, 250 S.W.2d 556 (1952).
21. Note 19, *supra*.
22. Bass v. State, 191 Tenn. 259, 231 S.W.2d 707 (1949).
23. Rushing v. State, 196 Tenn. 515, 268 S.W.2d 563 (1953).
24. *Ibid.*

10. Plea in abatement stricken from the record by the trial judge.[25]
11. Evidence with reference to selection of a juror.[26]
12. Any fact or circumstance which may have influenced the trial judge in pronouncing judgment.[27]
13. Complainant's admissions in open court.[28]
14. A note, though introduced in evidence at the trial, where oyer was not demanded.[29]
15. Oral testimony.[30]
16. Search warrant.[31]

The courts repeatedly state that if these and other matters not a part of the technical record are not in a bill of exceptions then they are not before the court for any purpose.

In addition to the above specified items there are two areas that must be included in the bill of exceptions, both of which deserve special consideration. The first concerns the proceedings and evidence offered on the hearing of the motion for a new trial. The motion itself becomes a part of the record for review without either being spread on the minutes or incorporated in the bill of exceptions. According to the Code:

> Whenever a motion for a new trial shall appear to have been filed or acted upon in the trial court, said motion for new trial shall become a part of the record without the necessity of spreading the same on the minutes or incorporation in the bill of exceptions.[32]

However, the motion itself is only a pleading[33] and therefore cannot be looked to as establishing facts that it alleges.[34] Thus, where there was no evidence in the motion for a new trial to support the allegation that unsworn officers were substituted for sworn officers to guard the jury

25. Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1947); see also Motors Ins. Corp. v. Lipford, 194 Tenn. 216, 250 S.W.2d 79 (1951), where the court said that if the technical record disclosed that the plea in abatement was overruled for insufficiency as a matter of law, then an assignment of error based upon such action could be considered in the supreme court without a bill of exceptions.
26. Long v. State, 187 Tenn. 139, 213 S.W.2d 37 (1947).
27. Arkansas Fuel Oil Co. v. Tanner, 195 Tenn. 553, 260 S.W.2d 286 (1952).
28. Robichaud v. Smith, 33 Tenn. App. 651, 232 S.W.2d 576 (1949). In the absence of a bill of exceptions to the chancellor's unconditional statement, in a decree dismissing a bill, as to complainant's admissions in open court, the court of appeals must take such statement as correct on review of the decree.
29. Van Pelt v. P. and L. Federal Credit Union, 39 Tenn. App. 363, 282 S.W.2d 794 (1955). If oyer had been demanded, the note would have become part of the record.
30. Miller v. Fentress Coal and Coke Co., 190 Tenn. 670, 231 S.W.2d 343 (1949).
31. Alley v. Schoolfield, 195 Tenn. 541, 260 S.W.2d 281 (1952).
32. TENN. CODE ANN. § 27-112 (1956).
33. Hargrove v. State, 199 Tenn. 25, 281 S.W.2d 692 (1955).
34. *Ibid.*

in a homicide prosecution, the supreme court could not consider the allegation.[35] Assignments of Error in counsel's argument, appearing only in such motion and not in the bill of exceptions, cannot be considered.[36] Special requests incorporated in the motion for a new trial but not in the bill of exceptions are not before the court.[37] Also, affidavits supporting defendant's motion on the grounds of newly discovered evidence could not be considered where not in the bill of exceptions.[38]

The second area deserving a more detailed explanation relates to the often repeated statement that the bill of exceptions must contain all the evidence. This requirement is of such serious import that the bill of exceptions will be stricken where the record affirmatively discloses that it (the bill) did not contain all the evidence.[39]. Regardless of which party makes the bill, it must contain all the evidence of both the parties.[40] As long ago as 1890 the court qualified what it meant by all the evidence. In that year the Tennessee Supreme Court said that the bill of exceptions should not contain a full report of the evidence in all its details, but only such facts as are material with reference to the questions to be made in that court – this prescription is now embodied in the rules of the supreme court.[41] Of course, evidence cannot be selected for inclusion in the bill in such a manner as would prejudice the defendant-in-error:

> Whenever possible and practicable, the party appealing from a judgment of a Circuit Court may bring up one or more issues and may tender a bill of exceptions covering this one issue only. But this can be done only when the issues are separate and distinct and when all the evidence bearing on the controverted issue can be and is set forth, and when this issue can be determined in the Appellate Court without disturbing the other

35. *Ibid.*

36. *Ibid.*

37. *Ibid;* Gordon's Transports, Inc. v. Bailey, 294 S.W.2d 313 (Tenn. App. 1956).

38. Driscoll v. State, 191 Tenn. 186, 232 S.W.2d 28 (1949), and Johnson v. State, 296 S.W.2d 832 (Tenn. 1956).

39. Note 4 *supra.*

40. Waller v. Skelton, 186 Tenn. 433, 211 S.W.2d 445 (1947).

41. Glass v. Bennett, 89 Tenn. 478, 14 S.W. 1085 (1891). "Counsel are required in all cases, when practicable, to abridge the records to be certified on appeal, or an appeal in the nature of a writ of error, to this court, by stipulation; eliminating all pleadings, testimony, orders, and other parts of the record, which do not bear upon or affect the rights of the parties and the questions to be here determined." Rules of the Supreme Court of the State of Tennessee, Effective August 31, 1948, 185 Tenn. 859, Rule 1. "Bills of Exceptions.—Counsel in the preparation of a bill of exceptions in the trial court, in all cases, shall omit therefrom all that is immaterial or which is no longer controverted, or does not bear upon any ground assigned in the trial court for a new trial," *Ibid.,* Rule 2.

> issues and without prejudicing the rights of the defendant in error with respect thereto.[42]

In the previously mentioned cases where the bill of exceptions was stricken on the grounds that it did not contain all the evidence, this was done because all the evidence on the point at issue was not presented, or only one party's evidence was included, or because other factual situations of similar significance were involved.

III. Authentication of the Bill of Exceptions

The authentication of the bill of exceptions is an important function, concerning which the courts insist upon the most stringent adherence to the letter of the law. The appellate court wants to be certain that the judge who tried the case examines all of the matters to be brought up for review while the case is still fresh in his mind, and that those things included in the bill conform with what actually transpired during the trial of the cause. Settlement of the bill of exceptions is regarded by the courts as a "high judicial function" which can be performed only by the judge who tried the case. Each part of the bill must be examined and authenticated by the judge, and the form of his authentication must show that it covers all separate parts as well as the whole of the bill.[43] When the bill is thus properly authenticated, it becomes a part of the record for the appeal.[44]

Once the time for filing the bill of exceptions has expired, the law of Tennessee is like the law of the Medes and the Persians. If a part of the bill has not been authenticated by the trial judge, there will be no change. If some document or exhibit has been omitted due to an oversight or mistake on the part of counsel, stenographer, clerk or even the trial judge, that document can never become a part of the record for appeal if it has not been authenticated by the trial judge within the time allowed. The record on appeal cannot be varied, added to, or explained by a statement or certificate of the trial judge, or of the stenographer who took the evidence on the trial, or of the clerk who made the record.[45]

The trial judge, and the trial judge alone, must authenticate the bill within the time allowed. The courts will not permit the clerk or anyone other than the trial judge to say what is or is not a part of the bill, or

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42. Atlas Insurance Company v. Allen, 2 Tenn. Civ. App. 479 (1912).
43. Anderson v. Sharp, 195 Tenn. 274, 259 S.W.2d 521 (1953).
44. Tenn. Code Ann. § 27-109 (1956).
45. Burkett v. Burkett, 193 Tenn. 165, 245 S.W.2d 185 (1951); Anderson v. Sanderson, 25 Tenn. App. 425, 158 S.W.2d 374 (1941); Freeman v. Freeman, Note 9, *supra.*

whether or not the bill was properly authenticated.[46] When the trial judge refuses to sign the bill within the time allowed, the only remedy is to apply to the supreme court for mandamus.[47] A case involving this point arose when the trial judge refused to sign the bill, saying to counsel that time did not make any difference. When the time for authentication had passed, the judge did sign the bill, but the court said that bill could not be considered even though counsel was without fault as to the delay; counsel should have applied for mandamus.[48] In emphasizing the fact that no one but the trial judge can authenticate the bill, the court of appeals has said that a writing will never become a bill of exceptions until it is signed by the judge who tried the case.[49] The writing is a nullity unless so signed.[50]

One recurring pitfall which should be avoided is the "skeleton" bill of exceptions. Where there is such a bill, and the clerk is merely directed to copy into the bill depositions and exhibits which have not been properly identified and authenticated by the trial judge, the bill is ineffective to make these a part of the bill of exceptions.[51] It should be noted that a bill of exceptions need not be contained in one single document. The bill can be in several parts, but each part must be properly authenticated.[52] This point will be discussed in more detail in the consideration of exhibits.

IV. Time For Filing The Bill of Exceptions

Closely related in importance to the authentication of the bill is the time within which the bill must be signed by the trial judge and filed in the lower court. The bill cannot be properly perfected for appeal unless it is both signed and filed in the trial court within the time prescribed by statute:

> **Time for filing bill.**—In all cases tried in the circuit, criminal, county, chancery, or any other court of record, either party may file a bill of exceptions or wayside bill of exceptions either

46. Alley v. Schoolfield, 195 Tenn. 541, 260 S.W.2d 281 (1952). Sweeney v. Carter, 24 Tenn. App. 6, 137 S.W.2d 892 (1939). The identification of a request for instruction in the form *"identified, Dews, Judge"*, without date and without anything to indicate that request was intended to be an exhibit to or part of the bill was insufficient to make it a part of the bill. This case could now conceivably fall under the recent statute, Tenn. Code Ann. § 27-110 (1956).
47. Green v. State, 187 Tenn. 545, 216 S.W.2d 305 (1948).
48. *Ibid.*
49. Central Produce Co. v. General Cab Co. of Nashville, Inc., 23 Tenn. App. 209, 129 S.W.2d 1117 (1939).
50. Merriman v. Coca Cola Bottling Co. of McMinnville, 17 Tenn. App. 433, 68 S.W.2d 149 (1934); Allison v. State, 189 Tenn. 67, 222 S.W.2d 366 (1949).
51. Note 43, *supra.*
52. Fuson v. Cantrell, 25 Tenn. App. 608, 166 S.W.2d 405 (1942).

> within or after the expiration of the term without any special order of court, provided the bill of exceptions or wayside bill of exceptions is approved by the court and filed within thirty (30) days from the entry of the order or action of the court which occasioned the filing of said bills of exceptions. The judge or chancellor may within the aforesaid thirty (30) day period, either within or after the expiration of the term, extend the time for filing said bills of exceptions for not exceeding an additional sixty (60) days. The maximum period of ninety (90) days shall be computed, in case of a bill of exceptions, from the date of final judgment, and in the case of a wayside bill of exceptions, from the date of the action which occasioned the taking of such wayside bill of exceptions. The period of pendency of any motion or other matter, having the effect of suspending such final judgment or action, shall be excluded in the computation of the period.[53]

This statute requiring the bill to be signed and filed within the time allowed by order of court is mandatory.[54] When the time has expired, the trial judge is without jurisdiction to incorporate any additional matter into the bill.[55] Where the bill of exceptions is perfected after the time allowed, it has been held that the court cannot go beyond the technical record,[56] since such a bill is not a part of the record and cannot be looked to for any purpose.[57]

The Code provides that the time allowed for the perfecting of the bill of exceptions shall be computed from the date of "final judgment." A decree is not final when an accounting or sale or partition is ordered, but, "it is well settled that an appeal as a matter of right lies only from a judgment which is final as to the *party appealing;* also, the rule is general that a judgment is not final which settles the case as to a part only of the defendants."[58] A final judgment has been defined as one which, "decides and disposes of the whole merits of the case."[59]

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53. TENN. CODE ANN. § 27-111 (1956).

54. McLaughlin v. Broyles, 36 Tenn. App. 391, 255 S.W.2d 1020 (1952).

55. Alley v. Schoolfield, 195 Tenn. 541, 260 S.W.2d 281 (1952).

56. Note 12, *supra.*

57. *Ibid.;* Suggs v. State, 195 Tenn. 170, 258 S.W.2d 747 (1953); Duboise v. State, 290 S.W.2d 646 (Tenn. 1956); Barger v. State of Tennessee, 198 Tenn. 367, 280 S.W.2d 911 (1955).

58. Wattenbarger v. Tullock, 197 Tenn. 279, 286, 271 S.W.2d 628 (1953), which held that the fact that the suit was dismissed as to one party did not make the decree final as to the complainants.

59. Bruce v. Anz,' 173 Tenn. 50, 53, 114 S.W.2d 789 (1938); Houser v. Haven, 187 Tenn. 583, 585, 216 S.W.2d 320 (1948). The latter case held that the discretionary authority given by TENN. CODE § 9038, now TENN. CODE ANN. § 27-305 (1956), to circuit or chancery court allowing appeal from interlocutory judgments did not govern actions in tort, but was limited to equity cases. Bernard v. Walker, 186 Tenn. 617, 212 S.W.2d 600 (1948).

The ending of the trial term is no longer a limitation on the allowance of time for the preparation of the bill.[60] The trial judge has authority to extend the time for filing the bill by order entered within thirty days from the entry of the original judgment, regardless of whether the order of extension is entered during the trial term or term subsequent.[61]

Under the statute, the trial judge may allow an extension of time up to sixty days, making a maximum period of ninety days in which the bill may be filed. Any extensions allowed by the judge, however, must be granted within the first thirty-day period.[62] Any extension granted after the expiration of the first thirty days is coram non judice and void.[63] This particular issue frequently confronts the court, and each time the language of the court is clear.

A final word about extensions should be added respecting the maximum time allowed. When the trial judge allows sixty days for the filing of the bill does this mean that the party has the original thirty plus sixty days making a total of ninety, or does the party have a maximum of only sixty days? The supreme court has held that where the chancellor allowed sixty days for the bill, this period was inclusive of the thirty day statutory period, and did not mean that sixty additional days had been granted, making a total of ninety.[64]

The courts have held, with rare exceptions,[65] that the bill must affirmatively show on its face that it was authenticated by the signature of the trial judge within the time allowed by law and the court.[66]. In *Burkett v. Burkett*,[67] the supreme court had before it a bill which had

60. Bernard v. Walker, et al, note 59, *supra.*
61. Note 12, *supra.*
62. *Supra,* Note 12, O'Brien v. State, where a total of sixty days was allowed. Fifty-four days later, another fifteen days were allowed. The court held that the trial judge had no authority to grant an extension of time after the thirty day statutory period had elapsed.
63. Suggs v. State, Note 57 *supra,* where the judge allowed a total of sixty days. The court said that the trial judge could grant no further extensions in the last thirty days—he must allow all extensions within the first thirty. In Duboise v. State, Note 57, *supra,* the court held it to be "absolutely necessary" that the statutorily permissible extension beyond the thirty days from the overruling of the motion for a new trial be entered within this period. Parish v. Yeiser, 298 S.W.2d 556 (Tenn. App. 1955). Anderson v. State, 195 Tenn. 155, 258 S.W.2d 741 (1952). After the thirty days had elapsed, a *nunc pro tunc* was "wholly ineffective" to grant an extension of time for filing the bill.
64. Brittian v. Brittian, 197 Tenn. 225, 270 S.W.2d 648 (1953).
65. "In the recent case of Moore v. Chadwick, 170 Tenn. 223, 94 S.W.2d 49, the bill of exceptions was held sufficient, although the date on which it was signed by the judge did not appear, because the record as a whole showed that his signature was affixed within the time allowed." Central Produce Co. v. General Cab Co., 23 Tenn. App. 209, 129 S.W.2d 117 (1939). Trussell v. Trussell, 37 Tenn. App. 635, 636-637, 268 S.W.2d 120 (1953).
66. Trussell v. Trussell, Note 65, *supra.*
67. 193 Tenn. 165, 245 S.W.2d 185 (1951).

been signed by the trial judge, but there was nothing on the face of the bill to indicate that the signing had been in time. There was, however, an affirmative showing on the face of the bill that it had been *filed* within the time allowed, but the court held that this was not an affirmative showing that the trial judge had signed the bill within that time.[68] However, legislation in 1955 added the following provision to the Code:[69]

> Where any bills of exception or wayside bills of exception including exhibits to either, bear the authentication of the trial judge or chancellor and have been filed with the clerk of the trial court within the time allowed, it shall be presumed that same were authenticated by the trial judge or chancellor prior to the filing thereof.

The Tennessee Supreme Court applied this statutory presumption in a recent case and considered the bill of exceptions, even though the transcript had not been authenticated as a true and correct copy and the signature of the trial judge was not dated.[70]

As a precautionary step in determining how much time is available for the preparation of the bill of exceptions, the rules of the local courts should be consulted. In the Circuit Courts of Knox County, for example, "All bills of exception shall be presented to opposing counsel for their approval and must be presented to the trial judge for his approval not less than five days before the expiration of the time allowed for filing the same."[71] Thus in Knox County if sixty days is allowed, the appealing party has only fifty-five days in which to prepare the bill, secure the approval of opposing counsel, and present it to the trial judge for authentication.

V. Exhibits to the Bill of Exceptions

In dealing with exhibits, it should be noted at the outset that a bill of exceptions need not be contained in one single document.[72] Parts of the bill may be in the form of exhibits, or in more than one document, provided each part is properly authenticated by the signature of the trial judge and ordered to be made part of the bill.[73] An additional requirement is that the judge be presented with and that he examine all of such parts when they are signed; and any papers to be copied must be marked as exhibits so that there will be no mistakes. This cannot

68. *Ibid.*, p. 167.
69. Tenn. Code Ann. § 27-110, (1956); Tenn. Pub. Acts, 1955, Ch. 263, Sec. 1.
70. Simmons v. State of Tennessee, 198 Tenn. 587, 589-590, 281 S.W.2d 487 (1955).
71. Rules of Practice, Circuit Courts, Knox County, Tennessee, Rule IX.
72. Fuson v. Cantrell, 25 Tenn. App. 608, 166 S.W.2d 405 (1942).
73. *Ibid.*

be left to the clerk of the court.[74] Exhibits attached to the bill but not authenticated are not part of the bill of exceptions.[75] Each exhibit must be authenticated within the time allowed for perfecting the bill.[76]

An improper procedure in handling exhibits may be fatal to the entire bill. In *Adams v. Winnett,* the bill of exceptions was declared to be imperfect and was stricken on motion where maps and exhibits to evidence sent up with the record on appeal were not authenticated by the chancellor.[77] Another case held that the bill without its exhibits did not contain all the evidence, hence the assignment that the decree was not sustained by the evidence was not allowed and the conclusive presumption arose that the chancellor's decree was supported by the evidence.[78]

Technicalities arise on occasion which work no prejudice to the inclusion of exhibits in the bill. Thus, in a recent case, the bill and exhibits were approved by the trial judge on the same date. The exhibits, however, though they were marked filed by the clerk during the trial, were not marked filed as a part of the bill of exceptions. The court held that under Tenn. Code Ann. § 27-104 it was not necessary that the exhibits be refiled.[79]

In considering the question of exhibits another warning should be given respecting skeleton bills of exceptions. If exhibits are sought to be made a part of the bill by mere reference to them within the bill, such effort is ineffectual and the trial court has no authority to identify such exhibits after the expiration of the time allowed for filing the bill.[80] In conjunction with this point it should be remembered that in addition to being authenticated, each exhibit must be filed in the lower court.[81]

VI. Responsibility for Preparing the Bill of Exceptions

The appealing party has the duty of preparing the bill of exceptions. In a case which involved a bill that was, "in such confusion and so incomplete, that an intelligent review of the questions involved is very difficult without referring to documents dehors the record,"[82] the court observed that "it was the sole duty of the Appellant to prepare and

74. Cosmopolitan Life Insurance Company v. Woodward, 7 Tenn. App. 394 (1928); Sweeney v. Carter, Note 46, *supra.*
75. Brodie v. Miller, 24 Tenn. App. 316, 143 S.W.2d 1042 (1940).
76. Gordon's Transports, Inc. v. Bailey, 294 S.W.2d 313 (Tenn. App. 1956).
77. 25 Tenn. App. 276, 156 S.W.2d 353 (1941).
78. Rose v. Brown, 176 Tenn. 429, 143 S.W.2d 303 (1940).
79. Thurmer v. Southern Railway Co., 293 S.W.2d 600, 601 (Tenn. App. 1956). Tenn. Code Ann. § 27-104 (1956).
80. Anderson v. Sharp, 195 Tenn. 274, 259 S.W.2d 521 (1953).
81. Southern Insurance Company v. Anderson, 130 Tenn. 482, 172 S.W. 318 (1914).
82. Davis v. Boyd, 192 Tenn. 409, 410, 241 S.W.2d 510 (1950).

present the record in proper form."[83] This duty extends to the preparation of the whole of the bill, since it would be dangerous to permit the plaintiff-in-error to designate only the evidence he wants before the court on appeal.[84]

One case involved an appellant who left certain matters relative to the preparation of the bill up to the attorney-general. The court held that the attorney-general was not the agent of the appellant; that since the preparation of the bill was not a part of his official duties, the appellant was responsible for perfecting the bill and hence the bill was lost to the appeal.[85] The party seeking a review carries the sole duty of preparing the bill, including securing approval by opposing counsel, signing by the trial judge, and timely filing with the clerk of the trial court.[86] If the appealing party fails in any of these particulars, his bill will not be considered on review, and he will not be permitted to have a new trial on the grounds that he has been deprived of an appeal. Thus in a recent Tennessee Supreme Court opinion, the following observation is found:

> "It cannot be said that a defendant may elect to appeal his case after a conviction and then by his own negligence or oversight cause an imperfection in his choice of appeals, and thereby profit from his own errors or mistakes by seeking a new trial or by causing a delay in the execution of a sentence."[87]

VII. The Wayside Bill of Exceptions

In the previous discussion concerning the time allowed for the filing of the bill, it was noted that an appeal will lie only from a final judgment.[88] Several situations may arise in which more than one trial is required in the lower court, such as in the case of a mistrial,[89] or the trial judge's granting of a new trial. A party may have had a motion for a directed verdict overruled in the first trial;[90] or a plea in abatement, or an application for a continuance disallowed; or the appellant may desire to contest the granting of a new trial. In these cases the proceedings outside of the technical record of the first trial must be preserved. The office of the wayside bill is to preserve such matters.

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83. *Ibid.*, citing Rules, Tennessee Supreme Court, Rule 14, 185 Tenn. 866 (1948).
84. Kelly v. Cannon, 22 Tenn. App. 34, 117 S.W.2d 760 (1938). Tenn. Code §§ 9056 and 9057 (Williams 1934) (now Tenn. Code Ann. §§ 27-323 and 27-324 (1956) respectively) authorizing designation of parts of the record on appeal, have no application to the bill of exceptions.
85. Moulton v. State, 163 Tenn. 1, 41 S.W.2d 373 (1931).
86. Leath v. Carr, 22 Tenn. App. 305, 122 S.W.2d 819 (1938).
87. Rosenbaum v. Campbell, 196 Tenn. 555, 268 S.W.2d 580 (1954).
88. Note 58, *supra.*
89. Town of Dickson v. Stephens, 20 Tenn. App. 195, 96 S.W.2d 201 (1935).
90. Wm. J. Oliver Mfg. Co. v. Slimp, 139 Tenn. 297, 202 S.W. 60 (1917).

A recent case, *Howell v. Wallace E. Johnson, Inc.*,[91] illustrates the use of the wayside bill of exceptions. On the first trial the jury returned verdicts for both plaintiffs. The trial judge sustained a motion for a new trial on the grounds that the verdicts were against the weight and preponderance of the evidence. The plaintiffs were allowed sixty days in which to perfect wayside bills of exceptions. On the second trial the plaintiffs again received verdicts, and again the judge sustained motions for new trial by the defendant and entered an order dismissing the plaintiffs' suit and in favor of the defendant. On appeal, the court quoted with approval from the earlier case of *Memphis & C. R. Co. v Scott*,[92] holding that,

> The correct practice . . . authorizing a bill of exceptions to the action of the court in granting a new trial, is when the case finally comes before this court on appeal from the final judgment, at the succeeding trial, to first examine the record of the first trial, so far as it concerns the action of the court in granting the new trial. If the trial judge has committed no error in allowing such new trial . . . this court will refuse to disturb his action thereon, and will pass to the consideration of the record of the second trial. If, on the other hand, the trial judge has committed manifest error in setting aside the first verdict, this court will enter judgment on such verdict, without looking to the record of the succeeding trial or trials.[93]

The wayside bill thus offers a device whereby the proceedings of the first trial may be preserved, receiving priority on appeal over the transcripts and records of subsequent trials. The court can dispose of the case on the record of the first trial and may not be required to consider questions arising on the record of a subsequent trial.[94] *Howell v. Wallace E. Johnson, Inc.*, affirms the rule that where a new trial has taken place and a wayside bill saved, the prior wayside bill must be reviewed first upon appeal of the second trial where both bills were presented to the appellate court.[95]

The time extensions of time allowed for the wayside bill are the same as for other bills of exceptions, being computed, ". . . in the case of a wayside bill of exceptions, from the date of the action which occasioned the taking of such wayside bill of exceptions."[96] As in the

91. 298 S.W.2d 753 (Tenn. App. 1956).
92. 87 Tenn. 494, 11 S.W. 317 (1889).
93. 298 S.W.2d 753, 757 (Tenn. App. 1956).
94. General Outdoor Advertising Co. v. Coley (Two Cases), 23 Tenn. App. 292, 131 S.W.2d 305 (1938).
95. City of Nashville v. Mrs. Mayme Fox, and City of Nashville v. John T. Fox, 6 Tenn. App. 653 (1928).
96. TENN. CODE ANN. § 27-111 (1956).

case of the bill of exceptions, the certificate of approval of the trial judge upon the wayside bill will be sufficient leave to file same, when filed within the thirty-day period or an extension thereof.[97]

CONCLUSION

One serious limitation exists in the present law regarding the bill of exceptions. After examining some one hundred and fifty cases and reading the applicable statutes, the writer has been unable to discover any method for amending the bill. The basic purpose for the regulations governing the use of the bill of exceptions is to provide a method whereby the appellate court can be certain that the trial judge has examined and authenticated those things which were actually used in the trial and thus assure an accurate transcript for review. The reasoning behind the time limitations is, and justly so, that the materials should be presented to the judge while that which transpired in the course of the trial is fresh in his mind. If no extension of time is granted, then the time limit is thirty days. A bill or part of a bill authenticated on the thirty-first day or any time thereafter would not be considered on appeal for any purpose. However, if sixty extra days were allowed, then a bill filed eighty-five or ninety days later would be perfected for appeal. In view of the reasons for the present rules, this seems to be neither good logic nor good law.

Assume that the case is ready for the appellate court, and the bill of exceptions has been perfected, but one contract, or picture, or bill of sale has been lost. Three days after the time for filing the bill has elapsed, the document is found. Counsel for both sides, the trial judge, the clerk and the court reporter all acknowledge that it was used at the trial. Yet there is no available means for getting the document into the bill. The dangers of indefinitely extending the time for perfecting the bill are obvious and well founded, but it seems that the dangers could still be avoided and a practical method devised for amending the bill. Assuming that the present requirements remain the same, it would not be an insurmountable task to amend a properly filed bill. Amendment within a reasonable time could be accomplished by an affidavit of the trial judge, or by the judge and the clerk, or by the judge, clerk and counsel. This is not allowed.[98] Such a procedure would introduce no serious hazard into the accuracy or dispatch of the record. If a method of amendment could be devised, it is the opinion of the writer that a great percentage of the useless and sometimes unjust experiences now encountered under the present restrictions would be remedied.

MATTHEW S. PRINCE

97. TENN. CODE ANN. § 27-110 (1956).
98. Note 45, *supra*.

HOMESTEAD IN TENNESSEE

In early England, real property was not subject to alienation unless required by the king or for the defense of the realm. It was not until 2 VICT. c. 110, in 1838, that a debtor's lands could be sold to pay his debts.[1]

As the homestead exemption did not come to us through the common law,[2] it does not rest on the foundation of centuries of legal interpretation that is characteristic of the common law. Neither has development of legal doctrines in the field of homestead law been spontaneous.[3] Because of the lack of a common law background, it has been a source of frequent litigation and a constant subject of legislative amendment.

In Tennessee, the homestead exemption seems to have originated with the Code of 1858, becoming a constitutional right in 1870.[4] A substantial body of law touching upon homestead has since evolved in this state.

I. EVOLUTION OF CURRENT STATUTES

The original homestead statutes as set out in the TENNESSEE CODE OF 1858, §§ 2213-2223, have been altered, changed, and amended over the years.

In 1866-67, legislation extended the exemption to leaseholds, except for rent due thereon and authorized the exemption in favor of a housekeeper.[5] A year later, in 1868, provisions of the Code of 1858 which required a declaration of intention to claim homestead to be registered[6] were repealed, and the exemption was increased from $500 to $1,000.[7] And in 1870, we find the new Tennessee Constitution of 1870, Art. 11, § 11, providing:

> A homestead in the possession of each head of a family and the improvements thereon, to the value, in all of one thousand dollars shall be exempt from sale under legal process, during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife, when that re-

1. 2 TIFFANY, REAL PROPERTY 479, note 36 (3d ed. 1920).
2. 9 MONT. L. REV. 71 (1948); 26 AM. JUR., *Homestead* 9 (1940).
3. 97 U. PENN. L. REV. 677 (1949).
4. "Homestead in Tennessee is a constitutional right." 2 PRITCHARD, WILLS 135 (3d ed. 1955), citing State v. Clayton, 162 Tenn. 368, 38 S.W.2d 551 (1930).
5. TENN. CONST. Art. 11 § 11 does not include an exemption in favor of a housekeeper. Whitfield v. People's Union Bank & Trust Co., 168 Tenn. 24, 73 S.W.2d 690 (1933).
6. Deatherage v. Walker, 58 Tenn. 45 (1872); Kennedy v. Stacy, 60 Tenn. 220 (1872).
7. Kennedy v. Stacy, 60 Tenn. 220 (1872).

> lation exists. This exemption shall not operate against public taxes, nor debts contracted for the purchase money of such homestead or improvements thereon.

This constitutional provision is still the basic law today.

In 1870 legislation was also "passed to enforce the exemption embraced in the Constitution of 1870."[8] It repealed in form the Acts of 1868, but re-enacted in substance that statute.[9] Further, the Act of 1870 made no provision for setting the homestead apart during the life of the head of the family until the land is levied upon by execution or attachment.[10]

In 1873, it was provided,[11] in substance, that where the widow is entitled to both homestead and dower, the homestead shall be set apart in the same manner as dower,[12] homestead to be set apart first and then dower in one-third of the remainder.[13]

Before the enactment of 1879, actual occupancy was essential to the claim of homestead, but this statute extended the exemption to land not actually occupied. The right of occupancy has been held necessary, however.[14] It was further provided in 1879 that in case there was no widow, the property would be exempt for the benefit of minor children under fifteen.[15]

In the Code of 1932, the exemption was increased to $2,000,[16] but in 1933 it was reduced to $1,000.[17] This statute also purports to define the head of a family.[18]

A decade later we find Pub. Acts 1943, c. 131 providing, in substance, that where the wife owns land in severalty, such land may be conveyed by her sole act and deed.

The purpose of the homestead exemption is not to benefit the debtor, but mainly to protect the family in the possession of a home.[19] Although as was previously noted, homestead laws were unknown to the common law, "the prevailing view is that homestead laws are in character remedial, and are not in derogation of the common law";[20]

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8. Kennedy v. Stacy, 60 Tenn. 220 (1872); Bilbrey v. Poston, 63 Tenn. 232 (1874).
9. Deatherage v. Walker, 58 Tenn. 45 (1872).
10. Kennedy v. Stacy, 60 Tenn. 220, 226 (1872).
11. Tenn. Pub. Acts, 1873, c. 98.
12. TENN. CODE ANN. § 30-901 (1956).
13. TENN. CODE ANN. § 30-912 (1956).
14. Carey v. Carey, 163 Tenn. 486, 492, 43 S.W.2d 498 (1913); Howell v. Jones, 91 Tenn. 401, 402, 19 S.W. 757 (1892).
15. TENN. CODE ANN. § 30-807 (1956).
16. 2 PRITCHARD, WILLS § 637b, p. 135, note 2 (3d ed. 1955).
17. 2 PRITCHARD, WILLS § 637b, p. 135, note 2 (3d ed. 1955).
18. Tenn. Pub. Acts, 1933, c. 72, Preamble.
19. Swift v. Reasonover, 168 Tenn. 305, 77 S.W.2d 809 (1935).
20. 26 AM. JUR., *Homestead* 14 (1940).

they are to be construed liberally in favor of the right;[21] homestead is favored by Tennessee courts.[22]

II. Who is Entitled to Homestead

A. Citizen and Resident.

It is well settled that the homestead laws are for the benefit of citizens only;[23] therefore an alien wife of a deceased resident of Tennessee is not entitled to homestead.[24] The widow must also show that she is a resident of the state.[25]

B. Head of the Family.

The Tennessee Constitution provides for the exemption in favor of the head of a family.[26] As indicated in *Hinds v. Buck,* "to be the head of a family of course there must be a family. If there is a relation of father and child or husband and wife, there is a family."[27] "Head of a family" includes not only a father, or husband in his lifetime, but also a widow, and after the death of both, any minor children.[28] A person is not deprived of a homestead though he has never been married, but he must be the "head of a family" before the right attaches.[29] And as stated in *Ex Parte Brien*[30] a widow who, though childless, was keeping house with orphan nephews and nieces is allowed homestead. But where a bachelor took a child of 7 or 8 years into his home and raised him the court found no dependency when the child reached the age of 19, the time at which the homestead exemption was claimed;[31] *Ex Parte*

21. White v. Fulghum, 87 Tenn. 281, 10 S.W. 501 (1888); Jackson v. Shelton, 89 Tenn. 82, 16 S.W. 142 (1890); Loftis v. Loftis, 94 Tenn. 232, 28 S.W. 1091 (1895); Nelson v. Theus, 5 Tenn. Civ. App. 87 (Higgins, 1915); Hinds v. Buck, 177 Tenn. 444, 150 S.W.2d 1071 (1941).
22. Hinds v. Buck, 177 Tenn. 444, 150 S.W.2d 1071 (1941).
23. Farris v. Sipes, 99 Tenn. 298, 41 S.W. 443 (1897); Coile v. Hudgins, 109 Tenn. 217, 70 S.W. 56 (1902); Briscoe v. Baughn, 103 Tenn. 308, 52 S.W. 1068 (1899); Emmett v. Emmett, 82 Tenn. 369 (1884).
24. Emmett v. Emmett, 82 Tenn. 369 (1884).
25. Prater v. Prater, 87 Tenn. 78, 9 S.W. 361 (1888); "To constitute one a resident of the State, entitling him and his widow to homestead, he must have acquired a domicile in the State in the sense of residing here with intention to remain permanently. It is not sufficient that he has a mere home or habitation in the State with no intention of immediate removal." Headnote 3, in Hascall v. Hafford, 107 Tenn. 355, 65 S.W. 423 (1901). "Resident" or "domicile" is considered *infra.*
26. Tenn. Const., Art. 11, § 11 (1870).
27. Hinds v. Buck, 177 Tenn. 444, 447, 150 S.W.2d 1071 (1941).
28. Whitfield v. Peoples Union Bank & Trust Co., 168 Tenn. 24, 73 S.W.2d 690 (1934).
29. *Ibid.*
30. 2 Tenn. Ch. 33 (1874).
31. Whitfield v. People's Union Bank & Trust Co., 168 Tenn. 24, 73 S.W.2d 690 (1933).

Brien was distinguished in that there the widow had been married, and the children closely related by blood. Conceding that a case might be submitted where a bachelor is the head of a family, the court refused to allow the exemption for fear that it would open the door to fraud, *i.e.*, a debtor who finds himself in financial trouble could then go out and gather a "family."

Thus it is clear that where a marriage relationship exists, there is a "head of a family." And it is equally clear that a widow or widower who is supporting minors of blood kin in his or her household is the "head of a family." Further, it seems that a bachelor may be the "head of a family," but no clear test from which that status can be determined has been laid down by the Tennessee courts. The *Whitfield* case denied the exemption on the ground that there was no dependency, and distinguished *Ex Parte Brien* on the absence of blood relationship. By inference, for a bachelor to be the head of a family, there must be dependency and a blood relation.[32] This seems to be the prevailing view.[33] Although stated in a somewhat different manner, one writer framed the test on the existence of a moral obligation to support, as distinguished from a legal obligation.[34]

C. Effect of Divorce.

Under Tennessee Code § 36-824, we find that:

> If the head of a family is married, and his wife obtain a divorce on account of his fault or misconduct, the title to the homestead shall be vested, by the decree of the court granting the divorce, in the wife, and, after her death, it shall pass to their children.

It was early decided that this statute applies to an absolute divorce proceeding and not to a divorce *a mensa et thoro*; in the latter it is clear that such a divorce does not defeat *W*'s right to homestead on *H*'s death.[35]

If she obtains the homestead in the divorce proceeding, it goes to their children on her death.[36] If she does not, the right is lost, and minor children under fifteen cannot claim it even on their father's death.[37] A recent case softened the rule somewhat by holding that where, in a divorce, the wife prays for the whole property, she is en-

32. ". . . the homestead exemption, does not arise from marriage, since an unmarried person, if the head of a family, is likewise entitled to the exemption." 2 TIFFANY, REAL PROPERTY 478 (3d ed. 1939).
33. 40 C. J. S., *Homesteads* 449 (1944).
34. THOMPSON, HOMESTEAD AND EXEMPTION, 43, 44 (1878).
35. Howell v. Thompson, 95 Tenn. 396, 32 S.W. 309 (1895).
36. Carey v. Carey, 163 Tenn. 486, 43 S.W.2d 498 (1931).
37. Chapman v. Tipton, 292 S.W.2d 25 (Tenn. 1956).

titled to a decree granting her homestead in the husband's land since the whole includes the less.[38]

An interesting development occurred in *Walters v. Walters*[39] where *H* and *W* owned a farm as tenants by the entirety. When *W* divorced *H* for his misconduct, the court decreed half of the land to each and granted *W* homestead in *H*'s half.

The wife must demand that homestead be decreed to her in the absolute divorce proceedings or her rights to the same are forever lost;[40] the homestead cannot be recovered by her in a subsequent independent proceeding.[41]

D. Husband's Rights on Death of Wife.

As the Constitution provides that upon the death of the head of the family, the homestead shall "inure to the benefit of the widow. . . ."[42] it would seem from the specific wording that if *W* died and there were no minor children, *H* would not be entitled to a homestead. But *Beard v. Beard*[43] said that on the death of either spouse, homestead vests in the survivor. Although it does not necessarily follow from the Constitution or statutes, nevertheless if there were surviving minor children *H* would become entitled to homestead under the definition of "head of a family."

E. Lands of the Wife.

Although the Tennessee Constitution gives the exemption to the head of a family during his life, this has been extended by statute to provide that a wife is entitled to a homestead out of her own lands if the husband has none or is dead.[44] But the husband is not entitled to claim a homestead out of land which is the separate property of the wife.[45]

F. Rights of Children.

After the death of *H* and provided there are minor children, *W* is the head of a family under the homestead exemption as against debts incurred by her after *H*'s death, and on her death the minor children

38. Black v. Black, 30 Tenn. App. 51, 203 S.W.2d 174 (1947).
39. 192 Tenn. 392, 241 S.W.2d 503 (1950).
40. Moore v. Ward, 107 Tenn. 731, 64 S.W. 1087 (1901); Carey v. Carey, 163 Tenn. 486, 43 S.W.2d 498 (1931); Chapman v. Tipton, 292 S.W.2d 25 (Tenn. 1956).
41. Moore v. Ward, 107 Tenn. 731, 64 S.W. 1087 (1901).
42. TENN. CONST., Art. 11, § 11 (1870).
43. 158 Tenn. 437, 14 S.W.2d 745 (1929).
44. TENN. CODE ANN. § 26-302 (1956).
45. Turner v. Argo, 89 Tenn. 443, 14 S.W. 930 (1890).

become "immediate and complete beneficiaries of the constitutional clause. . . ."[46] *W* can, however, convey *inter vivos* and defeat the children's rights, but she cannot defeat their homestead by a devise.[47]

The extent of the interest acquired by the children was defined in *Carrigan v. Rowell*[48] where it was claimed that as homestead was set apart to *H* during his life and on his death it passed to his wife during her natural life, on her death it would pass to minor children in fee free from *H*'s debts. The court said:

> This contention is wholly erroneous. It has been repeatedly held by this court that the homestead is a mere right of occupancy, and the remainder or reversion therein may be sold, subject to the homestead.

Therefore, since the Constitution speaks of the minority of children and since "children" in TENN. CODE ANNOT. § 26-301 has been construed to mean "minor children,"[49] it seems clear that the children acquire interests in the homestead merely co-extensive with their minority.[50]

II. SELECTION

The right of selection of the homestead rests in the head of the family, whether he is living on it or not, under TENN. CODE ANN. § 26-308. The procedure for setting apart the homestead when real estate is levied on by execution or attachment is set out in the following Code section[51] which provides, in substance, that the officer levying the execution or attachment shall summon three disinterested freeholders who, after being placed under oath, shall set apart the homestead. Since Code § 26-309 provides that the homestead shall include "the mansion and outhouses, if so desired by the head of a family" and Code § 26-308 provides that the head of the family shall have the right of selection, it seems that the three freeholders would have little choice as to location, being limited to acquiescing in the debtor's choice and setting out the homestead by metes and bounds in writing.

Another possible interpretation of these two statutory provisions is that Code § 26-308 would allow the terms of the will of the head of the family to prevail where the wife or other member of the family disputed the location, and Code § 26-309 would merely give the head

46. McCrae v. McCrae, 103 Tenn. 719, 54 S.W. 979 (1900).
47. *Ibid.*
48. 96 Tenn. 185, 192, 34 S.W. 4 (1896); See also Flatt v. Stadler & Co., 84 Tenn. 371 (1886).
49. Flatt v. Stadler & Co., 84 Tenn. 371 (1886).
50. See also TENN. CODE ANN. §§ 26-312, 30-806, and 30-807 (1956).
51. TENN. CODE ANN. § 26-309 (1956).

of the family the right to choose the mansion house if he so desires, and if not, then the three freeholders shall use their own judgment under the circumstances.

The exact question has not been presented in Tennessee, but it has been held that the husband may select and the wife is bound by the selection if made in good faith and without intention of defeating or defrauding the wife.[52] Further, selection of the homestead may be inferred by his retention of a parcel of land of $1,000 or more in value.[53]

Actual residency on the site chosen is no longer required; the right exists if the head of the family owns or is possessed of the land.[54] Thus a bare lot used as a garden sufficed, it being the only real estate owned.[55]

Where the debtor has no single tract of land of the value of $1,000 or more, he may have homestead in two or more tracts[56] which need not be contiguous.[57] Further, once the homestead has been set aside, it is not subject to future valuation because of an appreciation in value.[58]

Under Tennessee Public Acts of 1868, c. 85, the widow on the death of the husband was not entitled to both homestead and dower.[59] If the dower was of less value than $1,000, she was entitled to so much more land as would make, with the dower, a property worth $1,000.[60] This construction was adhered to even after adoption of the Constitution of 1870[61] on the theory that homestead was not intended to be something exempt from execution which would go to the widow and not the administrator. There was given only an exemption as against a creditor levying an execution or attachment.[62]

Such is not the law today. Under Code § 31-104, on the death of *H*, homestead goes to his widow during her natural life, and on her death to minor children of her deceased husband, free from debts of husband, or mother, until they die or reach majority. Further, Code § 30-901 provides:

> The homestead in lands of a decedent, inuring to the benefit of his widow or minor children, shall be assigned and set apart

52. Burns v. Ralston, 4 Tenn. Civ. App. 451 (Higgins, 1912); Porter v. Porter, 2 Tenn. Civ. App. 91 (Higgins, 1874).
53. Burns v. Ralston, 4 Tenn. Civ. App. 451 (Higgins, 1912).
54. Hinds v. Buck, 177 Tenn. 444, 150 S.W.2d 1071 (1941); Dickinson v. Mayer, 58 Tenn. 515 (1872).
55. Dickinson v. Mayer, 58 Tenn. 515 (1872).
56. First Nat. Bank v. Meachem, 36 S.W. 724 (Tenn. Ch. App. 1896).
57. Moses v. Groner, 106 Tenn. 121, 60 S.W. 497 (1900).
58. Hardy v. Lane, 74 Tenn. 379 (1880).
59. Merriman v. Lacefield, 51 Tenn. 209 (1871); Lankford v. Lewis, 68 Tenn. 127 (1877).
60. Merriman v. Lacefield, 51 Tenn. 209 (1871).
61. See dates of cases cited in footnote 59, *supra*.
62. Lankford v. Lewis, 68 Tenn. 127 (1877).

> in the same manner as dower is assigned and set apart, and by the same commissioners.

And Code § 30-912 provides, in substance, that if the widow is entitled to both homestead and dower, the homestead shall be set apart first, and then one-third of the remainder as dower.

Thus, the initial position of the courts was statutorily reversed, and it is now well settled that the widow is entitled to both homestead and dower.[63] It is clear also that she cannot be deprived of the homestead by *H*'s will,[64] as was illustrated in *Chamness v. Parrish*,[65] where the husband, by will, gave *W* all his personal and real property for life or until she remarried. Sometime thereafter, *W*, wishing to remarry, brought an action to have homestead and dower set apart to her. The court held that *W* must elect between dower and the benefits given under the will, but she is not put to her election as between the will and homestead rights unless it plainly appears that such was the testator's intent.[66] Such intent will not be inferred from a mere gift.[67]

Subsequently in *Miller v. Fidelity Bankers Trust Co.* the court interpreting the *Chamness* case stated the general rule:

> Where testator has so disposed his property by will that some provision of the will will be defeated if the widow is given both the property devised to her by will and the homestead, the widow must elect between her rights under the homestead law and her rights under the will.

In a situation where the widow must elect, and she does elect homestead, she cannot be deprived of that right by *H*'s will;[69] further, she need not make a formal dissent from the will.[70]

The material difference between homestead and dower is that under dower *W* gets a life estate in only one-third of the land which, therefore, must be set apart by metes and bounds. In homestead, however, if the value of the land does not exceed $1,000, homestead will cover

63. Wilson v. Morris, 94 Tenn. 547, 29 S.W. 966 (1895). "The award of homestead is different from that of dower and in no way conditioned on the widow's election to take or not to take under the will. It is guaranteed to her as head of the family, under Article XI, section 11, of the Constitution . . . and is independent of the benefits she may have had under the will." Wrenne v. American Nat. Bank, 183 Tenn. 247, 191 S.W.2d 547 (1945).

64. Miller v. Fidelity Bankers' Trust Co., 164 Tenn. 149, 46 S.W.2d 516 (1932).

65. 118 Tenn. 739, 103 S.W. 822 (1907); followed in Miller v. Fidelity Bankers Trust Co., 164 Tenn. 149, 46 S.W.2d 516 (1932).

66. Carey v. Carey, 163 Tenn. 486, 492, 43 S.W.2d 498 (1931).

67. Chamness v. Parrish, 118 Tenn. 739, 103 S.W. 822 (1907).

68. 164 Tenn. 149, 46 S.W.2d 516 (1932).

69. Miller v. Fidelity Bankers Trust Co., 164 Tenn. 149, 46 S.W.2d 516 (1932).

70. Mason v. Jackson, 57 S.W. 217 (Tenn. Ch. App. 1900).

the whole.[71] Thus where *H* dies owning land valued less than $1,000, a homestead in the whole of it passes to *W* for life by operation of law and without any formal assignment.[72] "The law will dispense with barren technicalities. . . ."[73]

Another substantial difference is that the value of improvements are included in setting aside the homestead; they are not included in the dower.[74] *W* may waive her homestead rights to avoid complications in dividing the land so as to include both homestead and dower;[75] but when she demands both, "she is not permitted to have the homestead set apart so as not to include the dwelling house and outbuildings, but have them included in the dower without having same charged to her. . . ."[76] Once *W* elects to take both homestead and dower, she cannot later waive the homestead and get dower in one-third of the land.[77]

III. Undivided Interests in Land

Although a majority of jurisdictions allow homestead in an undivided interest in land,[78] it was early decided in Tennessee that a tenant in common is not entitled to a homestead exemption in land held in common,[79] the theory being that the statute contemplated the occupancy of a specific portion of land capable of being set aside by metes and bounds.[80] The argument was advanced in *J. I. Case Threshing Machine Co. v. Joyce*,[81] that the homestead act uses the phrase "real estate belonging to each head of a family" and as the term *real estate* includes undivided interests, such interests were intended to be included within this exemption. Rejecting this contention as erroneous, the court said that the legislature did not intend to protect any interest in real estate as such, but intended merely to exempt a right of occupancy upon such real estate. And the argument that land held by tenants in common could be partitioned on application to the courts was met with the court's observation that not all tenancies in common

71. Miller v. Fidelity Bankers Trust Co., 164 Tenn. 149, 46 S.W.2d 516 (1932); at page 155 the court said that after assignment, no practical difference exists between homestead and dower so far as the interest or estate is concerned.
72. Hale v. Sandusky, 181 Tenn. 26, 178 S.W.2d 386 (1944).
73. Carver v. Maxwell, 110 Tenn. 75, 71 S.W. 752 (1902).
74. Clark v. Bullen, 147 Tenn. 261, 247 S.W. 107 (1922).
75. Whitehead v. Brownsville Bank, 166 Tenn. 249, 61 S.W.2d 975 (1933).
76. Clark v. Bullen, 147 Tenn. 261, 247 S.W. 107 (1922).
77. *Ibid.*
78. An extensive annotation is contained in 89 A.L.R. 540 (1934).
79. Avans v. Everett, 71 Tenn. 76 (1879); J. I. Case Threshing Machine Company v. Joyce, 89 Tenn. 337, 16 S.W. 147 (1890); Savage v. Savage, 4 Tenn. App. 477 (1927); Mitchell v. Denny, 129 Tenn. 366, 164 S.W. 1140 (1914).
80. J. I. Case Threshing Machine Co. v. Joyce, 89 Tenn. 337, 343, 16 S.W. 147 (1890); Adcock v. Adcock, 104 Tenn. 154, 56 S.W. 844 (1900).
81. J. I. Case Threshing Machine Co. v. Joyce, 89 Tenn. 337, 16 S.W. 147 (1890).

can be partitioned because land or a small house could descend to a hundered persons. Further, the court emphasized:

> The homestead that our law contemplates is a specific parcel of land owned by him, and capable not of being partitioned in a suit in Court but of being partitioned and set apart by metes and bounds by the three freeholders summoned by the levying officer.[82]

The added argument "that because a co-tenant has not the whole is a very unsatisfactory and a very inhuman reason for depriving him of that which he has" was met by the terse admonition: "if he has not a homestead, the Court does not deprive him of any thing by saying he has not." The court suggested that it was to his, the claimant's, advantage that the court denied him homestead in that it gave him freedom of alienation; further, he was advised that it is not inhuman for him to pay his debts. "The creditor is not to be treated as a hostile enemy who is robbing him." The creditor, too, may want a home for his wife and children.[83]

The question was again squarely presented to the court in 1920 in *Kellar v. Kellar,*[84] but the court there observed that *Avans v. Everett*[85] and *J. I. Case v. Joyce,*[86] having been adhered to and followed for more than thirty years, could not now be disturbed.

The rule has subsequently been softened somewhat in at least two instances. In *Meacham v. Meacham*[87] homestead was allowed where there had been a parole partition. And in *Mitchell v. Denny,*[88] where *H* conveyed a one-third undivided interest to *W,* it was held that the conveyance was subject to homestead and *W* took homestead in the original tract.

Although, as we have seen, homestead does not exist in land held by tenants in common and notwithstanding occasional statements by the court to the effect that there is no homestead in lands held in joint tenancy or tenancy in common,[89] it is well settled that homestead exists in land held as tenants by the entirety.[90] This situation was first presented to the court in *Jackson, Orr & Co. v. Shelton.*[91] *H* and *W* owned

82. *Ibid,* at 345.
83. J. I. Case Threshing Machine Co. v. Joyce, 89 Tenn. 337, 16 S.W. 147 (1890).
84. 142 Tenn. 524, 221 S.W. 189 (1920).
85. 71 Tenn. 76 (1879).
86. 89 Tenn. 337, 16 S.W. 147 (1890).
87. 91 Tenn. 532, 19 S.W. 757 (1892).
88. 129 Tenn. 366, 164 S.W. 1140 (1914).
89. Mitchell v. Denny, 129 Tenn. 366, 164 S.W. 1140 (1914).
90. Jackson, Orr & Co. v. Shelton, 89 Tenn. 82, 16 S.W. 142 (1890); Waddy v. Waddy, 291 S.W.2d 581 (Tenn. 1956).
91. 89 Tenn. 82, 16 S.W. 142 (1890).

land as tenants by the entirety. The total value of the land was less than $1,000. They jointly executed a trust deed to secure an indebtedness, and when the debt was almost paid, other creditors filed a bill seeking to foreclose the deed of trust and reach the surplus for their own debts. Prior to that suit, *W* had gotten a divorce, and the chancellor had decreed that as between *H* and *W*, she was entitled to homestead in the land, "subject to the reservation that it should not operate to the prejudice of the rights of the complainants in the present bill." The court said that the reasoning in *Avans v. Everett*,[92] the leading case for the proposition that no homestead exists in lands held as tenants in common, has no application to this case, "because here the debtor's interest is practically equivalent to an estate for life, at the least, in severalty, and is not an undivided interest merely, as in that case; that if sound upon its own facts, which we do not decide, the doctrine of that case should not be extended."

In arriving at the conclusion that homestead exists in lands held as tenants by the entirety, the court seemed to take an entirely different view of the exemption than was taken in the *J. I. Case Co.* case, *supra;* the court here said:

> Undeniably the designation, "real estate," in its ordinary sense includes the interest of a husband in a house . . . owned by himself and his wife jointly as tenants by entireties. If such an interest is not, in fact and in law, real estate, what can it be? Certainly it is not personality. . . .
> He stands in the same or greater need of the law's favor. Is he any the less deserving of protection because he does not own the whole estate? Or is the officer of the law to take what he has because he has not more? Manifestly not. The protection of such an interest is clearly within the spirit and the letter of the statute.

The question was not again squarely presented to the court until 1956, in *Waddy v. Waddy*.[93] *H* and *W* owned land valued at about $6,000 as tenants by the entirety; the judgment creditor's claim was for $600; and *H* and *W's* equity in the land was approximately $700.00. *H* requested the appointment of freeholders to set aside a homestead, and if the homestead could not be set off by metes and bounds, that the court reinvest the first $1,000 from the sale in the purchase of his homestead. Although holding that *H* was entitled to homestead, the trial court ruled that it would not be set aside or the first $1,000 reinvested for his homestead. On appeal, the Tennessee Supreme Court said:

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92. 71 Tenn. 76 (1879).
93. 291 S.W.2d 581 (Tenn. 1956).

> We think the Chancellor made proper disposition of the case by decreeing that defendant's interest in the property be sold subject to the defendant's homestead right. Of course, if the defendant pre-deceases his wife, complainant would get nothing in the transaction. If he outlives his wife then this interest would continue in existence or rather the fee would go to the husband of purchaser subject to the mortgage debt.

Where an execution is levied on the interests of a tenant by the entirety and the interest is sold, all the purchaser at the sheriff's sale gets is an expectancy, *i.e.*, the purchaser would get nothing unless *H* survived *W*.[94] Therefore, whether the purchaser would eventually realize anything out of the sale is highly speculative. Further, if the land is sold subject to the homestead as was done in the *Waddy* case, the interest acquired by the purchaser is even more speculative; for when a homestead is vested, it becomes, in essence, a life estate.[95] Therefore, even if *H* did outlive *W*, the purchaser would get only the land in excess of the homestead until *H* died at which time the homestead would pass to the purchaser. The effect of this seems to be that where a judgment debtor has an equity of $700 and the creditor a judgment for $600, the debtor is to all practical effects judgment proof; for the value of such a speculative interest would be extremely small.[96]

IV. Type of Interest

Just as cases in other jurisdictions differ as to whether the homestead exemption creates an estate in land or merely an exemption or privilege,[97] decisions in Tennessee are in like confusion. The earlier cases seem to be consistent in their statements that homestead is not an estate in land.[98] The general effect of the language in the early opinions

94. Baugh, *Enforcement of Judgments in Tenn.*, 22 Tenn. L. Rev. 873, 877 (1953).
95. Oliver v. Milford, 190 Tenn. 456, 230 S.W.2d 963 (1950); Carey v. Carey, 163 Tenn. 486, 43 S.W.2d 498 (1931); Briscoe v. Vaughn, 103 Tenn. 308, 52 S.W. 1068 (1899).
96. See also Walters v. Walters, 192 Tenn. 392, 241 S.W.2d 503 (1950) where *H* and *W* owned a farm as tenants by the entirety. *W* divorced *H* for his misconduct. The court decreed half of the farm to each, and *W* demanded homestead in *H*'s share. As the land could not be divided, it was ordered sold and $1,000 from *H*'s half invested as a homestead for *W* for life. Further, see Wittichen v. Miller, 179 Tenn. 352, 166 S.W.2d 612 (1942) where *H* and *W*, owning land as tenants by the entirety, executed a trust deed to secure funds with which to improve the land. *H*'s business consisted in buying land, improving it and then selling it. The trust deed was foreclosed. It was there held that *W* was not entitled to homestead out of the proceeds superior to the mechanics' and materialmen's liens for the improvements because she did not give the contractors any notice or objection.
97. 26 Am. Jur., *Homestead* 9 (1940).
98. Neam v. Campbell, 1 Tenn. Cas. 673 (Shannon, 1876); Howell v. Jones, 91 Tenn. 401, 402, 19 S.W. 757 (1892); Fauver v. Fleenor, 81 Tenn. 622 (1884); Walters v. Walters, 192 Tenn. 392, 394, 241 S.W.2d 503 (1950); Carey v. Carey, 163 Tenn. 486, 491, 43 S.W.2d 498 (1931); Hicks v. Pepper, 60 Tenn. 42 (1873).

is that the homestead right is not a fee simple right, but a right of occupancy for life.[99] A closer examination of those and subsequent cases reveal that the homestead stands on a different footing before and after assignment.[100] Prior to assignment, it is a floating right which hovers over the whole land but does not rise to the dignity of an estate. But when it is assigned, it becomes a vested life estate;[101] if it is assigned during the life of both *H* and *W*, it is a joint estate in *H* and *W* for life.[102] It can be "rented, leased, or sold, and the party to whom it is thus rented, leased, or sold will have the same estate as the homesteader had previously."[103] If at the time of marriage *H* owned land valued in excess of $1,000, *W*'s homestead right is a floating right; if the land is of less value than $1,000 she has a vested right.[104] But, it seems, this right is not an estate in land until set aside by metes and bounds. Probably the reason for this is that the homestead right may never be realized in any particular parcel of land, for if it is incapable of being set aside by metes and bounds, the land will be sold and the first $1,000 invested in a homestead.[105] Just as it follows that there can be no estate in land without some parcel to attach it to, there can be no estate of homestead until there is some land to which it is assigned.

V. Alienation — Abandonment

Prior to the Tennessee Constitution of 1870, *H* could convey away the land and defeat the homestead without *W*'s consent;[106] but once the homestead was set apart, it could not be alienated or mortgaged

99. See cases cited in note 98, above.

100. After assignment, it becomes a full and absolute life estate. Carey v. Carey, 163 Tenn. 486, 43 S.W.2d 498 (1931); Oliver v. Milford, 190 Tenn. 456, 460, 230 S.W.2d 963 (1950).

101. "Homestead stands upon a different plane after its assignment than it does before. Prior to assignment homestead is floating and only under certain specified statutory circumstances is one entitled to homestead. Prior to its assignment it is a right hovering over the whole land which does not arise to the dignity of an estate. After assignment it becomes a life estate . . . ." Oliver v. Milford, 190 Tenn. 456, 460, 230 S.W.2d 963 (1950). "But when the homestead is assigned to particular realty, as by metes and bounds, it becomes in the widow a full and absolute estate in the land embraced, with every right of use or sale that attaches to any other life estate, with the exception that permanent removal from the State works a forfeiture and abandonment of it." Carey v. Carey, 163 Tenn. 486, 492, 43 S.W.2d 498 (1931) citing Briscoe v. Vaughn, 103 Tenn. 308, 318, 52 S.W. 1068 (1899); Beeler v. Nance, 126 Tenn. 589, 150 S.W. 797 (1912); Cowan, McClung & Co. v. Carson, 101 Tenn. 523, 50 S.W. 742 (1898).

102. Beard v. Beard, 158 Tenn. 437, 14 S.W.2d 745 (1929).

103. Oliver v. Milford, 190 Tenn. 456, 460, 230 S.W.2d 963 (1950).

104. But see Waddy v. Waddy, 291 S.W.2d 581 (Tenn. 1956).

105. Miller v. Fidelity Bankers Trust Co., 164 Tenn. 149, 156, 46 S.W.2d 516 (1932).

106. Kincaid v. Burem, 77 Tenn. 553 (1882); Kennedy v. Stacy, 60 Tenn. 220 (1872); Bilbrey v. Poston, 63 Tenn. 232 (1874).

except by the joint deed of *H* and *W*.[107] Under the Constitution of 1870, however, the following was provided:

> Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists.[108]

A few years later, in *Hodge v. Hollister*,[109] *H* and *W* signed a mortgage, *W* duly acknowledging it as required by law. When foreclosure was attempted, the court held that neither *H* nor *W* was estopped to assert the homestead right:

> The consent must be "joint," and evidenced . . . by "conveyance," an actual grant by the wife as well as the husband. . . . There must be a joint conveyance by both, showing on its face that they undertake to convey, and do convey. . . .

This would seem to require the appearance of *W*'s name in the granting clause of the deed.[110]

The doctrine of the *Hodge* case was reiterated two years later in *Marsh v. Russell*,[111] but the court there added that the husband's deed would convey his interest in the land subject to the homestead. The purchaser acquires the "legal title to the land in reversion expectant on the termination of the homestead estate."

This early view was weakened, if not entirely abandoned a few years later in *Kelton v. Brown*.[112] Taking cognizance of prior cases that held *W* estopped to assert homestead under these circumstances,[113] the court concluded that *W*'s name in the granting clause was not necessary if the intent to join in the conveyance could be gathered from the instrument. The court found this intent from the word "we" which was used four times throughout the deed. Further, the court in the *Kelton* case noted that in *Daly v. Willis*[114] the court stated that *W*'s name need not appear in the granting clause where there was a valid privy examination. It is noted that privy examination has been abolished by statute. Another solution is that, although words of conveyance are needed to pass an estate, homestead, before assignment, is not properly an estate, as was previously discussed. Therefore *W*'s name in the

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107. Kennedy v. Stacy, 60 Tenn. 220 (1872).
108. TENN. CONST., Art. 11, § 11 (1870).
109. Hodge v. Hollister, 2 Tenn. Ch. 606 (Cooper, 1876).
110. Shaw v. Woodruff, 156 Tenn. 529, 536, 3 S.W.2d 167 (1928).
111. 69 Tenn. 543 (1878).
112. 39 S.W. 541 (Tenn. Ch. App. 1897).
113. Anderson v. Akard, 83 Tenn. 182, 192 (1885); Gates v. Card, 93 Tenn. 340, 24 S.W. 486 (1893). The court in Porter v. Porter, 2 Tenn. Civ. App. 91 (Higgins, 1911) estopped the wife from asserting her right of homestead against an innocent third person who had acquired title to the land during her failure to act.
114. 73 Tenn. 100 (1880).

granting clause would not be necessary prior to assignment of the homestead by metes and bounds.

There seems to be no disagreement in the cases that the deed need not contain an express stipulation conveying the homestead,[115] or that verbal assent by *W* is not enough.[116] Also, the decisions seem unanimous in holding that a joint deed is necessary whether the homestead is floating or vested, or where it has or has not been set apart[117] although *H* and *W* need not execute the deed at the same time.[118] Also, as homestead does not attach to land held as tenants in common, the husband, who is head of the family, may convey such interest without any joinder by *W*.[119]

Where *H* owns several tracts of land of a value in excess of $1,000, he may convey so much without *W*'s joinder as will leave him a homestead in the value of $1,000.[120] And under the *Meachem* case:

> The rule is the same where he is the owner of a single tract of greater value than $1,000, upon which he resides, and sells off portions of it, but leaving unsold as much as $1,000 worth.[121]

On the question of notice to the purchaser, the court continued:

> It necessarily follows that where the husband is so residing with his family upon a particular piece of real estate, worth as much as $1,000, or where it is all the land he owns, this is notice to all persons taking conveyances from him that it has been adopted as a homestead, and that this homestead right cannot be barred except by an instrument executed in conformity with the statute.[122]

Where there has been an execution levied, homestead can be claimed on any land though it is not that which is occupied, but once this homestead is located and set apart, *W* acquires rights which cannot be taken without her consent manifested by a deed.

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115. Lover v. Bessenger, 68 Tenn. 393 (1876); Conyers v. Frye, 58 S.W. 1126 (Tenn. Ch. App. 1900); Daly v. Willis, 73 Tenn. 100, 102 (1880).
116. Collins v. Baytt, 87 Tenn. 334, 10 S.W. 512 (1889).
117. Bank of Cookeville v. Brier, 43 S.W. 140 (Tenn. Ch. App. 1897); Cox v. Keathley, 99 Tenn. 522, 42 S.W. 437 (1897); Eldridge v. Hunter, 125 Tenn. 309, 143 S.W. 892 (1911); Beeler v. Nance, 126 Tenn. 589, 150 S.W. 797 (1912); Mitchell v. Denny, 129 Tenn. 366, 164 S.W. 1140 (1914); Kennedy v. Stacey, 60 Tenn. 220 (1872); Dunn v. McLeary, 5 Tenn. Civ. App. 600 (Higgins, 1914).
118. Eldridge v. Hunter, 125 Tenn. 309, 143 S.W. 892 (1911).
119. J. I. Case Threshing Machine Co. v. Joyce, 89 Tenn. 337, 16 S.W. 147 (1890).
120. First Nat. Bank v. Meachem, 36 S.W. 724 (Tenn. Ch. App. 1896); See Driver v. White, 51 S.W. 994 (Tenn. Ch. App. 1898) to the effect that it is not necessary for *W* to join in the conveyance where *H* has other real estate worth more than $1,000 and which he occupied as a home.
121. First Nat. Bank v. Meachem, 36 S.W. 724 (Tenn. Ch. App. 1896); See also Cottrell v. Rogers, 99 Tenn. 488, 42 S.W. 445 (1897).
122. First Nat. Bank v. Meachem, 36 S.W. 724 (Tenn. Ch. App. 1896).

In *Rhea v. Rhea*,[123] *H* abandoned *W* in 1860 and went to California where he remained for nine years. He then returned. In 1875 he bought the land in question and lived on it with a woman, not his wife. *W* refused to join in the conveyance. *W* had never lived on the lands nor enjoyed the rents or profits. Further, *H* had never lived with *W* after buying the land, and the purchaser did not know of *W*'s claim. The court granted *W*'s petition for divorce and homestead was decreed in the land.

McBroome v. Whitefield[124] further illustrates the danger attendant upon the purchase of land from a married man. In that case *W* signed, but she was then a minor and she later disaffirmed. It was held that the homestead was not conveyed.

The early view was that the widow could not dispose of, or abandon, the homestead to the impairment of the children's rights.[125] In *Shelton v. Hurst*[126] the court said that the Tennessee Public Acts of 1879, c. 171 "confers a right and interest upon the widow and children. In neither is there a power of disposition without the consent of all. . . . Under it the abandonment or sale by either can not destroy the rights of the other. . . . Upon the dissolution of the marriage relation by death of the husband, the right of homestead is complete in the children, and the sale by the widow is a nullity." That case was overruled twelve years later in *Cowan, McClung & Co. v. Carson*,[127] and the rule as set out above was abandoned in favor of the view that the statutory direction that the homestead shall inure to the benefit of both widow and minor children must yield to the direction of the Constitution, Art. 11, §11 that it shall "inure to the benefit of the widow." Therefore, after the homestead has been assigned to the widow she can convey it, and her deed cannot be impeached by minor children.[128] The homestead of minor children, after *H* dies and while *W* lives has "not attached and is subsidiary to that of their mother, who is still living."[129] Therefore, where she removes from the state taking the children with her a forfeiture results not only of her own rights but also of the subsidiary

123. 83 Tenn. 527 (1885).

124. 108 Tenn. 422, 67 S.W. 794 (1902). Also, to the effect that there can be no joint consent where either husband or wife is insane, see Shaw v. Woodruff, 156 Tenn. 529, 3 S.W.2d 167 (1928).

125. Shelton v. Hurst, 84 Tenn. 470 (1886).

126. 84 Tenn. 470 (1886).

127. Cowan, McClung & Co. v. Carson, 101 Tenn. 524, 50 S.W. 742 (1898); Carey v. Carey, 163 Tenn. 486, 43 S.W.2d 498 (1931).

128. Carey v. Carey, 163 Tenn. 486, 492, 43 S.W.2d 498 (1931); Cowan, McClung & Co. v. Carson, 101 Tenn. 524, 50 S.W. 742 (1898).

129. Carrigan v. Rowell, 96 Tenn. 185 34 S.W. 4 (1896).

rights of her children.[130] But when *H* is still living, *W* is not required to elect between her husband and homestead; so when he moves within the state and she follows, she can claim homestead on later getting a divorce.[131]

W may forfeit her homestead rights either before or after assignment, or before or after *H*'s death. In *Coe v. Nelson*,[132] *W* abandoned and lived away from her husband, and led an adulterous life; this was not condoned by *H*. The court held that she ceased to be a wife in fact and thereby forefeited her right to a homestead in *H*'s property. This position was reiterated a few years later in *Swift v. Reasonover*[133] where the court held that the wrongful abandonment and neglect of *H* until his death four years later was also an abandonment of her right of homestead. But misconduct of *W* after *H*'s death and after homestead has been set apart to her will not work a forfeiture of the homestead.[134]

Since the right of homestead is not dependent upon occupancy, mere removal from the premises does not effect an abandonment;[135] but the acquisition of a domicile beyond the limits of the State or other "unequivocal attendant act" showing an intention to abandon the homestead will be effective to accomplish that purpose.[136] There are at least two cases saying that the homestead is abandoned by the widow when she becomes a resident of another state,[137] but probably the term "resident" is used in the sense of domicile:

> While it is a life estate it is such a life estate under the homestead exemption law, and subject to its incidents, one of which is that it can only be held by a resident, and is forfeited by the owner for the time being becoming a nonresident.[138]

Abandonment is a question of law and fact, largely dependent on the intention of the parties.[139] No intent to abandon will be found in a mere sale or alienation, for the intent is not to abandon but to receive its benefit by the enjoyment of the proceeds of the sale or investment elsewhere.[140]

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130. Carrigan v. Rowell, 96 Tenn. 185 34 S.W. 4 (1896).
131. Beard v. Beard, 10 Tenn. App. 52 (1928).
132. 59 S.W. 170 (Tenn. Ch. App. 1900).
133. 168 Tenn. 305, 77 S.W.2d 809 (1935).
134. Peterson v. Goudge, 6 Tenn. Civ. App. 288 (Higgins, 1916).
135. Briscoe v. Vaughn, 103 Tenn. 308, 52 S.W. 1068 (1899).
136. Briscoe v. Vaughn, 103 Tenn. 308, 52 S.W. 1068 (1899).
137. Coile v. Hudgins, 109 Tenn. 217, 70 S.W. 56 (1902); Clark v. Bullen, 147 Tenn. 261, 247 S.W. 107 (1922).
138. Coile v. Hudgins, 109 Tenn. 217, 224, 70 S.W. 56 (1902); see also Carrigan v. Rowell, 96 Tenn. 185, 34 S.W. 4 (1896).
139. Coile v. Hudgins, 109 Tenn. 217, 222, 70 S.W. 56 (1902).
140. *Ibid.*

In *Hale v. Sandusky*,[141] *H* died in 1930; there were five children; *W* was assigned 98 acres of land of a value less than $1,000 as homestead. About two years later, *W* married *H*-2, a resident of Alabama, and removed with him to that state where she resided until 1939, there establishing domicile. Before and after leaving Tennessee, she rented the homestead from year to year, returning at intervals to collect the rent. The children conveyed their interest to claimant who now claims as against *W*. The court there held that after assignment, either formally or by operation of law, homestead becomes a vested life estate and may be sold or leased while its owner is a resident of the state. The court went on to say that if *W* had sold the homestead or leased it for a term extending beyond the time of this suit before removing to Alabama, or for the term of her life, her lessee or vendee would have a good title regardless of her being domiciled in another state. Leases made while she was a resident of Tennessee are good, but it seems that the lessee may hold it only if he be a resident of Tennessee. When she became domiciled in Alabama, she forfeited the estate and no longer had any power to deal with the property. Therefore, from the viewpoint of the homesteader, it seems that if he or she contemplates removing from the state permanently, the homestead should sold or leased for a term of the lessor's life; but if there are debts and no other assets are available for creditors, the lease might possibly be inoperative as against the creditors because of fraud, *i.e.*, a fraudulent conveyance.

From the *Hale* Case the further inference could be drawn that homestead is not forfeited by remarrying.[142] But if, while *H* is still alive, *W* gets a divorce and does not demand homestead at that time she loses it.[143]

VI. Purchase Money

The Tennessee Constitution provides that "This exemption shall not operate against public taxes nor debts contracted for the purchase money of such homestead or improvements thereon."[144] Therefore, a homestead is liable for its purchase price;[145] it cannot be set up against a trust deed executed by the purchaser of land to secure money with which to pay the purchase price.[146] Further, a debt contracted for

141. 181 Tenn. 26, 178 S.W.2d 386 (1944).
142. In a majority of jurisdictions, the widow does not lose her homestead by remarrying. 21 Cyc., *Homesteads* 568 (1905).
143. Moore v. Ward, 107 Tenn. 731, 64 S.W. 1087 (1901).
144. Tenn. Const., Art. 11 § 11 (1870).
145. Tenn. Code Ann. § 26-302 (1956); Guinn v. Spurgin, 69 Tenn. 228 (1878); Bentley v. Jordan, 71 Tenn. 353 (1879); Simmons v. Edens, 1 Tenn. Civ. App. 56 (Higgins, 1910).
146. Guinn v. Spurgin, 69 Tenn. 228 (1878).

improvements on the land may be satisfied out of the homestead.[147] But where money is later borrowed from a third person to pay off the purchase price or cost of improvements, it is not a debt contracted for the purchase price but is subject to the homestead.[148]

In *Hollins, Burton & Co. v. Webb and Gooch,*[149] property subject to execution was used to buy the land; homestead was claimed against a creditor. The court said:

> This, we think, would be to allow the perpetration of a fraud upon his creditors and cannot be permitted.

But, it seems, if property exempt from execution is used for the purchase money, a homestead can be claimed. In *Maples v. Rawlins,*[150] the money used to buy land was furnished by other persons and was exempt from execution; there was a judgment in a court of record against the purchaser at the time he acquired the land. The Tennessee Supreme Court there held that homestead attached in his favor and prevails over the lien of the judgment.[151]

VII. Miscellaneous

A wife is entitled to a homestead out of lands fraudulently conveyed to her by her husband for the purpose of hindering and delaying his creditors;[152] also the right of homestead attaches to land owned at the time of marriage as against debts contracted by the owner prior to the marriage that are not liens on the land at the time of marriage.[153]

Equitable estates[154] and insurance from destroyed premises are subject to homestead,[155] but the right does not attach to a reversionary interest;[156] the claimant must have the right of present occupancy.[157]

147. Miller v. Brown, 79 Tenn. 155 (1883).
148. Loftis v. Loftis, 94 Tenn. 232, 28 S.W. 1091 (1895).
149. 2 Shan. 581 (1877); followed in McWherter v. North, 46 S.W. 478 (Ch. App. 1898).
150. 105 Tenn. 457, 58 S.W. 644 (1900).
151. To the effect that counsel in a suit to recover a homestead cannot have a lien on it for fees, see McBroom v. Whitefield, 108 Tenn. 422, 67 S.W. 794 (1902); but in McLean v. Lerch, 105 Tenn. 693, 58 S.W. 640 (1900), the court allowed a sale of the homestead to enforce a lien for attorney fees where they were declared by decree in the case and were rendered upon the written consent of the widower.
152. Rouhs v. Hooke, 71 Tenn. 302 (1879).
153. Dye v. Cook, 88 Tenn. 275, 12 S.W. 631 (1889).
154. Tenn. Code Ann. § 26-303 (1956); Fauver v. Fleenor, 81 Tenn. 622 (1884). But see McGrew v. Hancock, 52 S.W. 500 (Tenn. Ch. App. 1899) to the effect that a mortgagor is not entitled to a homestead exemption in the mortgaged premises when their value does not exceed the debt.
155. Tenn. Code Ann. § 26-305 (1956).
156. Howel v. Jones, 91 Tenn. 402, 19 S.W. 757 (1892). In Hamilton Nat. Bank v. Woods, 31 Tenn. App. 501, 506, 217 S.W.2d 14 (1948), the court said, "Homestead is entirely unconnected with the reversionary estate."
157. Howel v. Jones, 91 Tenn. 402, 19 SW. 757 (1892).

The holder of a life estate is entitled to homestead,[158] but the fee simple value is used in setting apart the exemption.[159]

VIII. Conclusion

When the homestead exemption first came into existence, the amount involved was substantial, and the litigation frequent. But with present inflation the actual purchasing power of the exemption is considerably less, and accompanying this decline in value we find a substantial decrease in reported cases. But the absence of cases in the current reports should not lead attorneys to believe that there is now no danger attendant upon the purchase of land from a married man. As has been heretofore shown, there are many submerged problems which will in time surface in the appellate courts to the detriment of some innocent purchaser. Safe procedure in the purchase of real estate from a married man would require the joinder of the wife in all cases, both in the granting clause and at the end of the deed.

Mark J. Mayfield

158. Arnold v. Jones, 77 Tenn. 545 (1882); Kincaid v. Burem, 77 Tenn. 553 (1882); Porter v. Porter, 2 Tenn. Civ. App. 91 (Higgins, 1911); Jackson, Orr & Co. v. Shelton, 89 Tenn. 82, 90, 16 S.W. 142 (1890).

159. Arnold v. Jones, 77 Tenn. 545 (1882); Kincaid v. Burem, 77 Tenn. 553 (1882).

CASE NOTES

CIVIL RIGHTS — GRADUAL INTEGRATION OF SCHOOLS

Negro applicants for admission to Memphis State College brought an action in the federal district court to enjoin the Tennessee Board of Education and the college officials from denying them admission solely on the basis of race. The Board had adopted a plan calling for the elimination of segregation at the end of a five-year period by admitting negroes, one class at a time, beginning at the graduate school level, with the next lower class to be integrated each succeeding year. The district court accepted the plan as fair and reasonable and as a good faith compliance with the mandate of the United States Supreme Court. On appeal, the court of appeals, in reversing and remanding, *held* that where the reasons given for delay of admission to negroes were equally applicable to limitation of enrollment of white students, these were racially discriminatory as applied solely to negroes and were not sufficient to justify a delay of up to five years in light of the Supreme Court's requirement of "all deliberate speed." *Booker v. State of Tennessee Board of Education,* 240 F.2d 689 (6th Cir. 1957).[1]

In support of the proposed gradual plan of integration, the Tennessee Board of Education cited the inadequacy of existing school facilities to absorb a potentially large and sudden increase in enrollment due to the dense negro population situated near the college. The court answered this by stating that the college could limit its enrollment in any manner it saw fit, but such limitation could not be based solely on the race of the party seeking admission; for example, the admission of out-of-state students and non-residents of Memphis could be curtailed or temporarily abolished; or the college could limit its enrollment by approving those applications for admission in priority of time and rejecting subsequent applications, provided this was done irrespective of race.

The reasoning of the court is not susceptible to challenge on this issue that, in general, enrollment may be limited in any manner the college sees fit. But Judge Miller in his dissent indicates the court does not meet the basic problem. It is pointed out in the dissenting opinion that the Supreme Court expressly stated in *Brown v. Board of Education,*[2] the second *Brown* case, that:

> . . . . the school authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will

1. *Cert. den.,* 353 U.S. 965 (1957).
2. Brown v. Board of Education of Topeka, 349 U.S. 294, 299 (1954).

> have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

Judge Miller pointed out further that the Supreme Court said that district courts can best perform this judicial function, and he was of the opinion that in the instant case, as the facts were not in controversy and as the proposed plan of integration was apparently made in good faith, the district judge should not be overruled.

As only a comparatively short time has passsed since the *Brown* case, there are few decisions which interpret it on this particular issue. In *Aaron v. Cooper*,[3] which arose in Arkansas, the federal district court approved a plan to integrate primary and secondary schools over a six-year period, finding the plan to be a prompt and reasonable start toward integration and that it would be an abuse of the court's discretion to overrule the plan. On appeal, this was affirmed by the circuit court,[4] the passage cited above from the *Brown* case being quoted with approval. In general the opinion of the court in the *Aaron* case followed the concepts expressed by Judge Miller dissenting in the principal case.

The court in the *Aaron* case said of the principal case that it served only to demonstrate that diverse plans of integration would be required for different sections of the country. It is submitted, however, that in result the *Aaron* case and the *Booker* case are inconsistent. The *Aaron* case views "a good faith" gradual integration over a period of years as satisfying the Supreme Court mandate. The principal case seems to deny this concept:

> . . . but the plan adopted postpones these qualified plaintiffs for five years in their admission to the freshman class, and expressly contemplates that white students who have registered later than these plaintiffs shall be admitted earlier. This is clear discrimination.

It would seem from this language that any plan of gradual integration falls within the above stated prohibition because any plan of this nature is for the benefit of one race to the detriment of another and thus is "clearly discriminatory." The only method of escaping unconstitutionality is to show that a gradual plan of integration would be equally beneficial to both races. This would be virtually impossible in view of the decision of the first *Brown*[5] case wherein the Supreme Court strongly expressed its views as to the inherent defects and detrimental effects of segregated schools. Such was the conclusion reached in *Pollock*

3. Aaron v. Cooper, 143 F.Supp. 855 (E.D. Ark. 1956).
4. Aaron v. Cooper, 243 F.2d 361 (8th Cir. 1957).
5. Brown v. Board of Education of Topeka, 347 U.S. 483 (1953).

v. Mitchell,[6] in which the District Court for the Western District of Kentucky ruled that a four-year plan for the integration of secondary and elementary schools in Hopkins County was invalid. The district judge there felt that the *Booker* case definitely ruled out any plan of gradual integration, although in a previous hearing he had intimated that he would look on a reasonable plan of gradual integration with favor.[7]

The point of departure between the cases seems primarily to turn upon the particular court's interpretation of what the United States Supreme Court was suggesting when it allowed time for compliance with the decree. There is some logical difficulty in holding that despite a showing by the plaintiff of a violation of his constitutional rights, he must wait a considerable time for the enforcement of his remedy. On the other hand, if all that is meant is that a plan of integration must be formulated, and time must be allowed for this formulation, there is less logical difficulty. This does not mean simply that the community must have time to become accustomed to the idea of complying with the constitutional mandate, but that the mandate is to be obeyed in a planned and orderly way. As the court aptly stated in the *Pollock* case:

> It is a radical change; it's something that has not been experienced during the existence of the county or the school system and as in every change there are some that oppose it and view it with alarm.[8]

The judge in the *Pollock* case, however, felt constrained by the decision in the principal case to give little or no effect to public opinion hostile to the concept of integration. This issue was more precisely met in *Jackson v. Rawdon*,[9] a case arising in Texas, where the court said that "community psychological unreadiness" was no reason for a delay of integration in compliance with the requirements of constitutional law. Most of the litigation in this field in the past has been directed towards the theoretical overthrow of segregated schools and not toward definite plans or methods by which this is to be achieved.[10] The courts have been very liberal in giving school authorities time to work out the administrative problems involving integration,[11] but the fact that the school authori-

6. Pollock v. Mitchell, 2 RACE REL. REP. 305 (W.D. Ky. 1957).
7. Pollock v. Mitchell, 1 RACE REL. REP. 1038 (W.D. Ky. 1956).
8. Pollock v. Mitchell, 2 RACE REL. REP. 305, 308 (W.D. Ky. 1957).
9. Jackson v. Rawdon, 235 F.2d 93 (5th Cir. 1956).
10. Roy v. Brittain, 297 S.W.2d 72 (Tenn. 1956); Board of Trustees of the University of North Carolina v. Frasier, 134 F.Supp. 589 (M.D. N.C. 1955); Bush v. Orleans Parish School Board, 242 F.2d 156 (5th Cir. 1957); Rippy v. Borders, 26 L.W. 232 (5th Cir. 1957).
11. Kelly v. Board of Education of Nashville, 2 RACE REL. REP. 21 (D.C.M.D. Tenn. 1957); Adkins v. The School Board of Newport News, 148 F.Supp. 430 (E.D. Va. 1957).

ties have no plan for integration is no defense against it.[12] The decisions regarding gradual integration are not harmonious enough to furnish a definite rule nor numerous enough to determine a majority view. If the court in the *Booker* case is holding, in effect, that any plan of gradual integration is bad, then it conflicts with the *Aaron* decision.

On the other hand the *Aaron* case and the principal case can be distinguished to some degree on the basis of local circumstances. In the *Aaron* case, six years were devoted to integrating twelve grades of primary and secondary schools in a situation in which, annually, there would be a large number of negroes integrated with a large number of whites. In the principal case, a period of five years was to be used in integrating five years of college work where it is likely that integration would involve a comparatively small number of negro students. On such administrative and sociological factors the actual holdings of the *Aaron* and *Booker* cases may be consistent, in spite of the widely different approaches to the problem. It is easy to demonstrate that the factors involved in integration at various levels of education are quite different, both in regard to the physical planning factor and the problem of meeting prevailing community hostility.

Time alone will reveal whether the two cases will be regarded as reconcilable by the United States Supreme Court.

W.D.J.T.

PROCEDURE — LIMITATION OF ACTIONS — TOLLING OF STATUTE BY FRAUDULENT CONCEALMENT

This cause of action was brought by decedent, and revived in the name of his widow and executrix, against defendant neurosurgeon who had performed an operation on the spine of decedent that allegedly exceeded the limits of surgery agreed to by the deceased. The extent of the operation, as performed, allegedly was not revealed to the decedent by the defendant and this did not become known to decedent for well over a year after the operation. Though this action was begun within less than a year after the nature of the operation was discovered by the deceased, it was met with a plea of the one year Statute of Limitations[1] relating to personal tort actions as a bar to the claim. On appeal from a directed verdict for the defendant, the court of appeals, in reversing and remanding for a new trial, *held* the evidence on the question of the defendant's alleged fraudulent concealment of the nature of the spinal

12. Brown v. Rippy, 233 F.2d 796 (5th Cir. 1956).

1. TENN. CODE ANN. § 28-304 (1956).

operation was sufficient to preclude a directed verdict. *Hall v. DeSaussure,* 297 S.W.2d 81 (Tenn. App. 1956).[2]

Statutes of limitation bar the right of action based on events occurring longer than some arbitrary time and are founded on the proposition that claims which are indeed valid are not usually neglected if the right to sue exists, and on the intent of the legislatures to bar actions which the passage of time favors by destroying evidence difficult to preserve and facilitating the manufacture of other evidence.[3]

Tenn. Code Annotated § 28-304 limits the right to bring an action for a personal tort to one year from the accrual of the cause. This is true whenever the action is for damages for injuries to the person whether the ground for the action is *ex contractu* or *ex delicto*.[4]

The time limit prescribed by the statute generally runs from the occurrence of the act rather than from the date of damage caused.[5] Certain exceptions such as infancy and incompetency are created by statute,[6] while others, such as the one under consideration in the instant case have been created by court decision. Other examples of exceptions created by decision are actions for occupational disease caused by the violation of a Tennessee statute [7] and for seduction.[8] These latter exceptions are based on the theory of the continuing tort[9] involved in pursuit of the same line of conduct after the initial harm.

Ignorance or failure to discover a cause of action on the part of the plaintiff cannot prevent the running of the statute.[10] On the other hand, fraudulent concealment on the part of the defendant of plaintiff's cause of action will prevent the running of the statute.[11] However, mere silence by the defendant does not amount to fraudulent concealment where there is no relationship between the parties leading to a duty to speak.[12] There must be a duty created by the peculiar relationship to reveal the facts constituting the plaintiff's cause of action where he cannot ascertain them for himself. In addition there must be knowledge of these facts by defendant since there can be no concealment of facts not in his possession.[13] Further, there must also be an allegation by the plaintiff that

2. Cert. den., 297 S.W.2d 90 (Tenn. 1956).
3. Bodne v. Austin, 156 Tenn, 353, 365, 2 S.W. 2d 100 (1928).
4. Bodne v. Austin, 156 Tenn, 353, 356, 2 S.W. 2d 100 (1928).
5. State v. McClellan, 113 Tenn. 616, 85 S.W. 267 (1904), quoting 19 AM. & ENG. ENCY. OF LAW 200.
6. TENN. CODE ANN. § 28-107 (1956).
7. Hercules Powder Co. v. Bannister, 171 F.2d 262 (6th Cir. 1948).
8. Heggie v. Hayes, 141 Tenn. 219, 208 S.W. 605 (1918).
9. *Ibid.*
10. Bodne v. Austin, *supra* Note 3, Hudson v. Shoulders, 164 Tenn. 70, 45 S.W.2d 1072 (1932).
11. Whaley v. Catlett, 103 Tenn. 347, 53 S. W. 131 (1899).
12. Patten v. Standard Oil Co., 165 Tenn. 438 55 S. W. 2d 759 (1933).
13. Albert v. Sherman, 167 Tenn. 133, 67 S. W. 2d 140 (1934).

the concealment was fraudulent since the court will not presume fraud for the purpose of interposing an escape to defendant's plea of the Statute of Limitations[14] which is looked on with favor as a statute of repose.[15] Fraudulent concealment sufficient to toll the running of the prescribed time may either consist of the use of an artifice planned to prevent or mislead inquiry[16] or the failure to speak where there is the duty to do so raised by a confidential or fiduciary relationship between the parties to the suit.[17]

There existed in the instant case a confidential relationship between the parties as physician and patient that raised a duty to speak. The court in its opinion[18] notes the rule applicable to this relationship between physician and patient[19] as being one of "trust and confidence" with the result that "all transactions between physician and patient are closely scrutinized by the courts, which must be assured of the fairness of those dealings."

The very nature of the operation in the instant case, a rhizotomy, which consists of entering the back some inch or two from the spinal column and clipping the nerve which runs through the area of pain, excludes disclaimer of knowledge of the facts by the physician as in *Albert v. Sherman*.[20] Apparently, in the instant case, it had been clearly understood between the parties that the operation was not to include the spinal column.[21] In the Albert case a dentist negligently failed to extract the entire tooth thereby leaving a root of the tooth which eventually caused the injury sued for, whereas here there was a conscious departure from the prescribed operation; the defendant entered the spinal column proper and removed a "big chunk" of the spine, according to the later spontaneous exclamation of another doctor upon looking at an x-ray of the patient's spine.

After the operation the decedent remained in the hospital for some two weeks during which time defendant made the customary visits to the patient in the presence of decedent's wife. Defendant at one time during these visits made the statement that he had "clipped the nerves."

14. *Ibid.*, Bodne v. Austin, *supra*, Note 3.
15. West v. Cincinnati, 108 Fed. Supp. 276 (E. D. Tenn. 1952); Coleson v. Blanton, 3 Tenn. 152 (1816).
16. Haynie v. Hall, 24 Tenn. 290 (1844); Patton v. Standard Oil, *supra*, Note 12. Hudson v. Shoulders, *supra*, Note 10.
17. Herndon v. Lewis, 36 S.W. 953 (Tenn. Ch. App. 1896); Hudson v. Shoulders, *supra*, Note 10.
18. Instant opinion, 297 S.W. 2d 81, 86 (Tenn. App. 1956).
19. See 41 Am Jur., *Physicians & Surgeons* § 74, p. 196 (1942).
20. Albert v. Sherman, *supra*, Note 13.
21. Instant opinion, 297 S.W. 2d 81, 85, 86 (Tenn. App. 1956) . . . "[decedent] wanted it understood that if any operation was to be performed on his spinal column he would not have the operation." ". . . entered into a contract with defendant to perform the operation above described and no other."

The Court of Appeals observed that the decedent at that time "had a right to assume that the nerves had been clipped in the manner agreed on. . . ."[22]

It is evident, therefore, that the allegations in the instant case involve the basic elements of fraudulent concealment: knowledge on defendant's part without the same knowledge on the patient's part; [23] a confidential relationship compelling disclosure; and a failure to disclose with the opportunity to do so arising from a continuing physician-patient relationship.

Under the decision in *Union Carbide & Carbon Corp. v. Stapleton,* the duty to disclose lasts as long as the relationship continues and does not end with the last examination or visit.[24] In that case the action arose out of an employer-employee relationship whereby the employer undertook to have its employees examined periodically and upon finding employee's tubercular condition failed to disclose it to him. The decision illustrates that the duty to disclose seems to continue throughout the relationship, so that the statute does not start running from the date of the examination at which the injury was discovered and not revealed. It is interesting to note that the *Union Carbide* case was not decided on the issue of fraudulent concealment but rather on negligence in failing to disclose. It thus holds that mere negligence in failing to disclose, at least in the case of the employer-employee relationship, is sufficient. In the instant case, however, the court did not need to go that far, if, as the court held, all fair inferences should be indulged in favor of the plaintiff rather than in favor of the defendant in an appeal from the trial judge's sustaining of defendant's motion for a directed verdict.

R. L. J.

RAILROADS — F.E.L.A. — FUNCTION OF THE JURY

Petitioner, a section gang laborer, had been assigned to burn weeds along the defendant's railroad tracks. In accordance with instructions, he stopped this operation when a train approached, in order to watch for hot boxes in the journals of the passing train. While so doing, he became enveloped in smoke and flames which had been fanned by the passing train. He quickly retreated to a nearby culvert from which he slipped and fell. In an action under the Federal Employer's Liability

22. Instant opinion. 297 S.W. 2d 81, 86 (Tenn. App. 1956).
23. The court said that the leaking of spinal fluid from the incision a few days after the operation did not charge the decedent or his wife with knowledge that the departure in procedure had been made, presumably on the ground that laymen do not possess the knowledge of the medical profession sufficient to place them on notice.
24. *Union Carbide & Carbon Corp. v. Stapleton,* 237 Fed. 2d 229 (6th Cir. 1956).

Act,[1] the petitioner alleged that the railroad, by requiring him to work in close proximity to a dangerous hazard, had failed to provide him a safe place to work; and secondly, that the railroad was negligent in not properly maintaining the culvert which, because of loose and sloping gravel on its surface, provided insufficient footing. On appeal from a trial court entered judgment on a jury verdict for the petitioner, the Missouri Supreme Court reversed and granted defendant's motion for a directed verdict.[2] Granting certiorari, the United States Supreme Court, *held,* that the evidence was sufficient to support the verdict in favor of the petitioner and that the Missouri Supreme Court had improperly invaded the function of the jury. *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500 (1957).

Justice Douglas once stated that the "Federal Employer's Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operation."[3] During its existence, and more particularly since 1939,[4] the Act has indeed accomplished to a large extent what Justice Douglas considered to be its

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1. 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U.S.C.A. sec. 51 *et seq.* (1943). This section provides in effect that railroads engaged in interstate commerce shall be liable in damages for any injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, etc. See also, 35 STAT. 66 (1908), 45 U.S.C.A. sec. 53 (1943) which provides that the contributory negligence of the employee shall only diminish his recovery in proportion to the amount of negligence attributable to such employee.
   The instant case note deals particularly with the negligence aspects of F.E.L.A. litigation. Problems arising under the Safety Appliance Acts, 45 U.S.C.A. §§ 1, *et seq.*, with its absolute liability aspect, are not covered here. However, a pertinent observation by Justice Brennan in the recent United States Supreme Court decision, Kernan v. American Dredging Co., 26 L.W. 4121 (1958), is worthy of note here:
   > We think that the irrevelance of the safety aspect in these cases demonstrates that the basis of liability is a violation of a statutory duty without regard to whether the injury flowing from the violation was the injury the statute sought to guard against.

   Four Justices dissented. As Justice Harlan commented in dissenting:
   > The Court thus reads these decisions to establish a doctrine under the FELA that injuries following *any* violation of *any* statute, not simply the Safety Appliance and Boiler Inspection Acts, are actionable without any showing of negligence, and it is this doctrine which, the Court argues, the Jones Act absorbs.
   >
   > So unjustifiably broad a view of the doctrine this Court is said to have established disregards the basis upon which these earlier decisions proceed.
2. Rogers v. Missouri Pacific Railroad Co., 284 S.W.2d 467 (Mo. 1955).
3. Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949).
4. In 1939 an important amendment to the F.E.L.A. was made, providing in effect that in any action brought by an employee against a common carrier to recover damages for injuries or death shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. 53 STAT. 1404 (1939), 45 U.S.C.A. 54 (1943).

underlying purpose. But in the wake of a persistent stream of cases, there has arisen a considerable amount of confusion as to the function of the jury and as to the concept of negligence under the Act.

The essence of the controversy involves the question of whether the function of the jury has become so enlarged by judicial interpretation that the term "negligence" has become in effect but a synonym for strict liability. Illustrative of this trend is the recent *Ringhiser v. Chesapeake & O. Ry.*[5] decision, a case typical in its history, language and result. While sitting in his engine waiting for an air-brake test, Mr. Ringhiser had an urgent call of nature and immediately set out for a toilet a short distance away. But this was precluded when a long train intervened. Unable to tarry longer, Ringhiser climbed into a nearby gondola car. In the meantime the yard crew had begun a switching operation that resulted in several cars coming into contact with the gondola car which was loaded with steel plates. As a result of the contact the plates shifted and crushed Ringhiser's leg. The jury returned a verdict for Ringhiser but the judge granted a motion notwithstanding the verdict; this was affirmed by the Court of Appeals for the 6th Circuit. Granting certiorari, the United States Supreme Court, in a 5-3 decision, reinstated the jury verdict. From evidence that other employees used the cars for such purposes, the Court, in a per curiam opinion, reasoned that "there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner would suffer just such an injury as he did." While from a factual standpoint the *Ringhiser* case is admittedly the most extreme of the recent F.E.L.A. cases, it nevertheless illustrates, perhaps more forcefully than any other of the recent cases, the extent of the trend which began shortly after the 1939 amendment and has continued uninterrupted to the present day.[6]

The fundamental appellate question raised by most of the recent cases under the F.E.L.A. is: To what extent has the sufficiency of the evidence become a question solely for the jury to determine? Starting in 1943 with *Tiller v. Atlantic Coast Line R.R.*,[7] the Supreme Court began to establish a policy of expanding and emphasizing the prerogative of the jury in F.E.L.A. litigation. In that case the Supreme Court reversed a directed verdict of the district court in favor of the railroad and ordered a new trial, because, in the opinion of the Supreme Court, where the facts are in dispute and the evidence in relation to them is that from which fair-

5. 354 U.S. 901 (1957).
6. For a definitive list of cases decided by the United States Supreme Court on the issue of sufficiency of the evidence under the F.E.L.A., see Rogers v. Missouri Pacific R.R., 352 U.S. 500, 524 (1957).
7. 318 U.S. 54 (1943). (Yard policeman was run over at night; plaintiff alleged failure to show a light).

minded men may draw different inferences, the question of negligence is one for a jury. Upon retrial the Court of Appeals reversed a jury verdict for the plaintiff, but the Supreme Court, in reinstating the verdict, held that the disputed evidence as to whether the railroad had made an unusual departure from its ordinary practice in switching cars without giving adequate warning was sufficient to justify a finding of negligence.[8] Further, in referring to what the Court considered as a misinterpretation by the Court of Appeals as regards assumption of risk, Justice Black stated: "We hold that every vestige of the doctrine of assumption of risk was obliterated by the 1939 amendment, and that Congress . . . did not mean to leave open the identical defense for the master by changing the name to non-negligence."[9] Justice Frankfurter, in a concurring opinion, was somewhat less emphatic than Justice Black. He noted that assumption of risk is a slippery and ambiguous legal term which can relate both to natural or inherent hazards and to hazards which are created by the negligence of the employer. Justice Frankfurter quite correctly concluded that the amendment by its terms related only to risks created by negligence. As Justice Frankfurter saw it: "Assumption of risk in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care has not been written out of the law."[10]

Within a year, in *Bailey v. Central Vt. Ry.*,[11] the Supreme Court again reversed a directed verdict for the defendant. In attempting to open the doors of a hopper car, Bailey lost his balance and fell to his death from a railroad bridge. In overturning the directed verdict, Justice Douglas, speaking for the Court, found that the nature of the job, its hazards, and the place and difficulty of its performance were enough to raise a question for the jury as to whether the employer failed to provide a safe place to work. The Court also emphasized that where alternative methods are available it is for the jury to decide whether the method chosen was reasonable under the circumstances.[12] Without laying down any definitive standard, Justice Douglas concluded that "to deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."[13]

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8. Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945).
9. 318 US. 54, 58 (1943).
10. *Id.*, at 72.
11. 319 U.S. 350 (1943).
12. See also, Stone v. New York C. & St. L. R.R., 344 U.S. 407 (1953); Blair v. B. & O. R. Co., 323 U.S. 600, 604 (1945); Ellis v. Union Pacific R. Co., 329 U.S. 649, 653 (1947); Coray v. Southern Pacific Co., 335 U.S. 520, 523 (1949); Carter v. Atlantic & St. A.B.R. Co., 338 U.S. 430, 433 (1949).
13. 319 U.S. at 354 (1943).

Generally speaking, the cases fall into two rather distinct categories: first, as in the *Bailey* case, those in which the probative facts are in issue; and second, those in which the basis of the claim is of a speculative or circumstantial nature. *Tennant v. Peoria P. & U. Ry.*[14] clearly falls within the latter category. Tennant, an experienced switchman, was killed while engaged in coupling freight cars. There were no eyewitnesses and no direct evidence as to his location at the time of his death. In reversing a directed verdict for the defendant, the Supreme Court, quoting from *Galloway v. United States.*,[15] observed that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonable possible inferences favoring the party whose case is attacked."[16] The most important aspect of the *Tennant case* is that the Supreme Court clearly indicated that the jury's verdict will stand if supported by any reasonable inference, even if other inferences seem more reasonable to the Court.[17]

In 1945 the classic *Lavender v. Kurn*[18] decision brought the issue of speculation by the jury squarely before the Court. There the decedent Haney had been killed by a blow on the head while engaged in his normal activities as a switchtender for the defendant railroad. As in the *Tennant case* there were no eyewitnesses and no direct evidence as to causation. The petitioner's theory was that Haney had been struck by a mail hook swinging loosely from a passing train. This was rather effectively refuted by the defendants who offered evidence that Haney had been murdered.[19] The Missouri Supreme Court, in reversing the lower court, stated that the petitioner's claim was based only on speculation and conjecture and that the mere possibility of negligence was insuffi-

14. 321 U.S. 29 (1944).
15. 319 U.S. 372 (1943).
16. 321 U.S. 29, at 32-33 (1944).
17. *Id.*, at 34-35, ". . .The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life . . . In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence . . . It is not the function of the court to search the record for conflicting circumstantial evidence . . . It is the jury (which) draws the ultimate conclusions as to the facts."
18. 327 U.S. 645 (1946).
19. The difficulty with the plaintiff's theory was that the tip of the mail hook was some 6 feet 8 inches from the ground while Haney was only 5 feet 7½ inches tall. Plaintiff introduced evidence that near the scene of the accident there was an uneven pile of cinders; they argued that had Haney been standing on the mound he could have been struck by the hook. The railroad pointed to the estimates that the mound was 10 to 15 feet north of the rail; and to support their theory, the defendants introduced evidence that some six days after the fatal accident the decedent's billfold was found on a high board fence about a block away from the scene of the accident near the place where he had been put in the ambulance. However, the decedent's diamond ring and gold watch were still on his person when he was found.

cient as a foundation for an inference of negligence sufficient to justify sending the case to the jury.[20] The United States Supreme Court granted certiorari and held that an appellate court may not set aside the jury's verdict unless there is a complete absence of probative facts to support the conclusion of the jury. In reference to the element of speculation, Mr. Justice Murphy said: "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute . . . a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."[21] *Lavender v. Kurn* is perhaps the landmark case of the F.E.L.A. litigation. It not only serves as a reminder of the limited power of the judge to overrule a finding of the jury, but it also emphasizes that the plaintiff's burden of proof need be little more than a scintilla in order to get to the jury.

The question naturally arising from *Lavender v. Kurn* is: To what extent have the decisions of the Supreme Court curtailed the judge's power to direct a verdict? In short, is the decision of the jury unassailable? The reversal by the Supreme Court of the directed verdicts in all of the cases thus far discussed resulted in confusion in the lower courts, state and federal, on both the trial and appellate levels. The frustration below was pointedly expressed in *Griswold v. Gardner*[22] by Judge Major of the Court of Appeals for the 7th Circuit:

> Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. This is so regardless of what we might think of the sufficiency of the evidence in this respect. The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees.[23]

In the light of decisions prior to 1939 clearly holding that speculation and conjecture were not sufficient to support a jury's verdict, Judge Major may well have been justified in his observation. For example, back in 1933, in *Pennsylvania R.R. v. Chamberlain*[24] the Supreme Court adhered to the view that where the proven facts give equal support to each of two inconsistent inferences, neither of them being established, judgment, as a matter of law, must go against the party on whom rests the necessity of sustaining one of these inferences. The same philosophy

20. 354 Mo. 196, 189 S.W.2d 253 (1945).
21. 327 U.S. 645, at 653.
22. 155 F.2d 333 (7th Cir. 1946).
23. *Id.*, at 333-334.
24. 288 U.S. 333 (1933).

was expressed by Justice Stone a few years earlier in *Atchison, Topeka & Santa Fe Ry. v. Toops*[25] when, in commenting on the facts, he stated that to sustain the verdict would be to remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture.

But *Lavender v. Kurn* did not entirely change the pattern that existed prior to 1945. The lower courts continued as before, but the Supreme Court continued to demonstrate that it preferred a trend away from the directed verdict, at least if any possiblity of negligence can be imagined. Thus in *Wilkerson v. McCarthy*[26] the plaintiff fell into the defendant's wheel pit and brought suit under the F.E.L.A. The defendant railroad contended that the plaintiff's negligence in squeezing between a chain post and a passenger car and attempting to cross the pit on a narrow boardwalk was the sole proximate cause of his injuries. The trial court granted a directed verdict which was upheld by the Utah Supreme Court.[27] Granting a certiorari, the United States Supreme Court held that there were sufficient facts present to require submission of the case to the jury on the issue of whether the defendant had failed to provide a safe place to work. Revealing its sensitivity to the criticism of Judge Major, the Court, per Justice Douglas in a concurring opinion, denied that the Act has been transformed into a workmen's compensation act and reiterated that liability was imposed only for negligence.[28] But in a dissenting opinion Justice Jackson makes a highly pertinent observation: "If in this class of cases . . . this Court really is applying accepted principles of an old body of liability law in which lower courts are generally experienced, I do not see why they are so baffled and confused at what goes on here."[29]

During the past term of the Supreme Court there was presented an unparalleled opportunity to clarify the function of the jury in F.E.L.A. cases and to dispel the confusion to which Justice Jackson referred. The

25. 281 U.S. 351 (1930). See also, Chicago, Milwaukee & St. Paul Ry. v. Coogan, 271 U.S. 472 (1926) where the Court, in reversing a judgment for the plaintiff, specifically stated that speculation and conjecture were not enough to support the jury's verdict. There the trainman engaged in coupling a train was later found dead some 15 feet from where he had been working. Plaintiff attempted to connect marks on decedent's shoe to a detached air hose, the rationale being that decedent's foot was caught in the air hose. There were no eyewitnesses. The facts in the *Coogan* case were not unlike those in Lavender v. Kurn. In New York Central R.R. Co. v. Ambrose, 250 U.S. 486 (1930), the court stated that it was not for the jury to guess at a half dozen causes and come up with a verdict against the employer.
26. 336 U.S. 53 (1949).
27. The trial court, the Supreme Court of Utah agreeing, held as a matter of law that the evidence presented by the plaintiff was insufficient to establish a custom of using the board as a walkway. Wilkerson v. McCarthy, 112 Utah 300, 187 P. 2d 188 (1948).
28. 336 U.S. 53, at 69.
29. *Id.* at 76.

concerted effect of all eleven of the 1957 F.E.L.A.[30] cases should be amply sufficient to convince the lower courts that directed verdicts are reversible error if, in the language of Justice Brennan in the *Rogers* case, the evidence meets the following test: "Simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the results to other causes, including the employee's contributory negligence."[31] Justice Brennan then proceeded to criticize the lower courts for failing to take into consideration the special features of the F.E.L.A. litigation which make it significantly different from the ordinary negligence case. The special features to which the Court refers are found in the 1939 Amendment, wherein, as previously noted,[32] the doctrine of assumption of risk is abolished. From this Justice Brennan concludes that the aforementioned amendment removed the strictures which previously had retarded the basic congressional intention of leaving the fact-finding function to the jury. It is of course indisputable that such an amendment would tend to help the plaintiff, but it seems somewhat questionable that this provision in and of itself would increase the number of jury cases or even affect the function of the jury.

The above language also raises an issue as to causation. As noted, Justice Brennan stated that there is liability where the employer's negligence played "any part, even the slightest, in producing the injury." Ordinarily, for proximate causation, the defendant's negligence must play

30. Rogers. v. Missouri Pacific R.R., 352 U.S. 500 (1957); Webb v. Illinois Central R.R., 352 U.S. 512 (1957); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957) (Jones Act); Herdman v. Pennsylvania R.R. 352 U.S. 518 (1957); Furtelle v. Atlantic Coast Line R.R., 353 U.S. 920 (1957); Shaw v. Atlantic Coast Line R.R., 353 U.S. 920 (1957); Deen v. Gulf C.&S.F. Ry., 353 U.S. 925 (1957); Thompson v. Texas & P. Ry., 353 U.S. 926 (1957); Arnold v. Panhandle & Santa Fe, 353 U.S. 360 (1957); McBride v. Toledo Terminal R R., 354 U.S. 517 (1957); Ringhiser v. Chesapeake & O. Ry., 354 U.S. 901 (1957). Of the eleven cases decided only the Herdman case was found to present no question for the jury. There the plaintiff, a conductor, fell when the train made a sudden stop in order to avoid a collision with an automobile filled with school children. The plaintiff acknowledged that such stops were not unusual. The Court held that no jury question was presented by the evidence under the doctrine of *res ipsa loquitur*. According to the Court, the proofs did not meet the test as laid down in Jesionowski v. Boston & M.R. Co., 329 U.S. 452 (1946) where the court held that derailments are extraordinary, not usual happenings. Herdman v. Pennsylvania R.R. Co., Brady v. Southern R. Co., 320 U.S. 476 (1943); Hunter v. Texas Electric R. Co., 332 U.S. 827 (1947); and Eckenrode v. Pennsylvania R.R. Co., 335 U.S. 329 (1948) are the only cases since 1943 where the Supreme Court has sustained lower courts which set aside a jury verdict for the employee, or rendered judgment for the employer on a question of law.

31. 352 U.S. 500, 506 (1952).

32. See note 4 *supra*.

a substantial part in producing the results.[33] Possibly, however, the F.E.L.A. is different from the common law in this respect. The Act provides that the defendant is liable for injury or death caused "in whole or in part" by the defendant.[34] Of course, under ordinary tort principles, a partial cause may be a proximate one if it substantially contributes to the result. It is not clear however that the Act intends to lay down as Justice Brennan's language may suggest, a rule that something less than proximate causation is enough for liability.

The prerogative of the jury was again shown in *Ferguson v. Moore-McCormack Lines, Inc.*[35] where the plaintiff found the ice cream too hard for the scoop furnished him. Finding a butcher knife nearby, he attempted to chip the ice cream with it and cut himself. Justice Douglas, speaking for the majority, agreed with the jury that such a result was forseeable and reversed the Court of Appeals which had reversed the jury verdict directing a verdict for the defendant.

Two recent cases before the Court of Appeals in the 7th Circuit bear witness to the impact of *Rogers v. Missouri Pacific Railroad* and companion cases.

In *Gibson v. Elgin, Joliet & Eastern Ry. Co.*[36] the plaintiff testified that he slipped and struck his head on a desk while placing an adding machine under the desk; and that the fall was due to cinders and grease on the floor. There was no direct competent evidence that there was any such substance under or in front of the desk where the plaintiff alleged that he had received his injury. The jury found for the plaintiff but the trial court granted the defendant's motion for judgment notwithstanding the verdict because the finding was based on one inference which rested in turn on another inference. Agreeing that this was the case, the Court of Appeals nevertheless reversed (2-1) saying that the Supreme Court now takes the position that jury verdicts under the F.E.L.A. can be allowed to stand even though based solely on speculation. The majority opinion expressly indicated that in the light of the *Rogers* case no other conclusion was tenable. On petition to rehear, Chief Justice Duffy stated that it was the duty of the court to follow the rulings of the Supreme Court "even if the interpretation given does violence to our preconceived ideas of what the law is."[37] A petition for writ of certiorari in the United States Supreme Court was denied, but Justice Frankfurter, joined by Justice

33. PROSSER, TORTS 221, 256 (2d ed. 1955); RESTATEMENT TORTS § 431, 433 (1934), § 433 (1948 Supp.).
34. Note 1 *supra*.
35. 352 U.S. 512 (1957). See Gee, *A Dissenting Postscript or, Notes from Underground*, 36 TEXAS L. REV. 157, 158 (1957) where it is stated as regards the *Ferguson* case: "Now in order to maintain the terminology of fault here, we must somehow find a duty which we can recite with a straight face."
36. 246 F.2d 834 (1957).
37. *Id.* at 840.

Harlan in filing a memorandum, noted the nonsignificance of the denial of certiorari, and took a firm stand on the conjecture issue:

> Not until the Court explicitly holds that in "F.E.L.A. cases, speculations, conjecture, and possibilities suffice to support a jury verdict" which is the holding of the Court of Appeals in this case, 246 F. 2d 834, 837, is that to be assumed to be the law of this Court.[38]

In the second case, *Milom v. New York Central Railroad Co.*[39] the employee alleged that he had injured his wrist while attempting to grasp a piece of ice that was slipping from his ice tongs. The trial court denied defendant's motion for a directed verdict, and entered judgment on a jury verdict in favor of the plaintiff. The defendant appealed and the Court of Appeals reversed, finding that there was no evidence that the defendant was negligent with reference to the ice tongs. While agreeing that there was not even a scintilla of evidence to support the verdict below, Judge Duffy in a concurring opinion expressed "considerable doubt that our decision will be upheld" by the United States Supreme Court. He concluded his opinion with the comment that recent decisions of the Supreme Court "have just about convinced me that in any case where the trial judge submits a case to the jury under the F.E.L.A., and the jury returns a verdict for the plaintiff, the defendant may as well pay up, irrespective of the proof on the question of negligence and causation."[40] The judge was wrong.[41]

Nor has expression of such predictions been confined to the lower courts. Justice Roberts, in his dissenting opinion in *Bailey v. Central Vermont Ry.* stated that he could not concur in what he thought were the implications of that case: that since "Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault."[42] Justice Harlan expressed a similar admonition in his dissent in the *Rogers* case: that the Court had departed from the scintilla rule, as well as from the rule that the evidence should be sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence itself. And Justice Clark, who had concurred in the *Rogers* case, felt that to allow recovery in the *Ringhiser* case

38. Elgin, Joliet & Eastern Ry. Co. v. Gibson, 78 S. Ct. 270 (1958).
39. 248 F.2d 52 (1957); Certiorari denied March 3, 1958. (Docket no. 688), 26 L.W. 3247 (1958).
40. *Id.* at 56; see also, Cahill v. New York, N.H. & H.R.R., 224 F.2d 637, 640 (2d Cir. 1955) where Judge Jerome Frank, dissenting, said: "I assume, arguendo, that the inference needed to support the verdict would not suffice in a suit not brought under the Federal Employers' Liability Act. But the more recent Supreme Court decisions make it clear that, under that Act, the jury's power to draw inferences is greater than in common-law actions."
41. Certiorari was denied, 26 L.W. 3247 (1958).
42. 319 U.S. 350, 358 (1943).

would extend the doctrine of the Rogers case "far beyond any theory of liability for negligence that Congress intended under the Federal Employer's Liability Act."[43] Perhaps the most forthright position of all was taken by the late Justice Jackson when he commented that if the Court thought that a reform of the F.E.L.A. was appropriate he saw no reason why it should deny that it was in fact making a reform.[44]

Despite the rather strong dissents of the minority group, the majority of the Court—Justices Black, Douglas, Brennan, and Clark, together with Chief Justice Warren—have invariably voted to grant certiorari and to allow the jury verdict to stand.[45]

In the F.E.L.A. decisions of the past decade, with the exception of his memorandum dissent in the recent *Kernan*[46] case, Justice Frankfurter has avoided the intra-Court controversy by seeking to have writs of certiorari dismissed as improvidently granted. In *Rogers v. Missouri Pacific Railroad Co.*[47] may be found a complete exposition of his "persistent protest against granting petitions for certiorari to review judgments in the state courts and the United States Courts of Appeals involving application of the Federal Employers' Liability Act."[48] He began be observing that his position has been said to violate the so-called rule of four,[49] that is, the practice of granting certiorari on the vote of four justices. The question is basically this: Does the rule of four require a decision on the merits? Justice Frankfurter firmly believes that it does not because the oral argument may disclose that the case did not in fact warrant certiorari. Secondly, and more importantly, the rule of four does not mean that the majority of members has given up its right to vote on the disposition of the case as it sees fit.[50]

43. 354 U.S. 901, 904 (1957).
44. Wilkerson v. McCarthy, 336 U.S. 53, 76 (1949).
45. Mr. Justice Black did not participate in the *Ferguson* case, but in all of the cases decided during the last term (except the *Herdman* case), he and Justices Douglas, and Brennan, along with Chief Justice Warren have voted together. Although Justice Clark dissented in the *Ringhiser* case, he made it clear that he still adhered to the opinion in the *Rogers* case.
46. Kernan v. American Dredging Co., 26 L.W. 4121 (1958) (A Jones Act case; four Justices dissenting).
47. 352 U.S. 500, 524 (1957).
48. Memorandum dissent in Kernan v. American Dredging Co., 26 L.W. 4121 (1958).
49. Leiman, *Rule of Four*, 57 COLUM. L. REV. 975 (1957).
50. However in Bailey v. Central Vt. Ry. 319 U.S. 350, 359 (1943) Chief Justice Stone said: "But as we have adhered to our long standing practice of granting certiorari on the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided."
And in U.S. v. Shannon, 342 U.S. 288, 298 (1952) Justice Douglas said: "A justice who has voted to deny the writ of certiorari is in no position after argument to vote to dismiss the writ as improvidently granted. Only those who voted to grant the writ have that privilege." And in his dissenting opinion in Rogers v. Missouri Pacific R.R., 352 U.S. 500, 559 (1957) Justice Harlan said that, in his opinion, once certiorari had been granted, it was his duty to consider the case on its merits.

Aside from this somewhat unique position, Justice Frankfurter would dismiss the writs because to him a mere review of the sufficiency of the evidence does not satisfy the criteria for granting certiorari. Quite persuasively he points out that the evidence has already been reviewed by two lower courts which are familiar with this type of litigation and that the Supreme Court is merely substituting its opinion on a subject upon which there is always a division of opinion. In concluding his dissent, Justice Frankfurter contends that from the standpoint of granting certiorari it is wrong for the Supreme Court to review the facts of every case which has been "unjustly decided" by the lower courts for the inevitable result is to divert the Court's attention from its essential business.

It should be noted, however, that for some time Justice Frankfurter has found certain aspects of the F.E.L.A. unpalatable. In *Stone v. New York C. & St. L. R.R.*, he gave full expression to his views as follows:[51] "I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. . . . Under the guise of suits of negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages realized all too often after years of unedifying litigations". He expressed similar criticism in the *Rogers* case, but this time with an additional thought that "one cannot acquit the encouragement given by the Court for seeking success in the lottery of obtaining heavy verdicts of contributing to the continuance of this system of compensation whose essential injustice can hardly be alleviated by the occasional 'correction' in the Court of ill-success."[52] However true this may be, the majority of the Court has demonstrated that it will continue to vigilantly exercise its power of review in order to fulfill what it considers to be the mission of the F.E.L.A.

What is this mission? Perhaps the clearest and most unequivocal presentation of the philosophy of the majority of the present Court is found in a Jones Act decision decided during the present Term. In *Kernan v. American Dredging Co.*,[53] a seaman lost his life in a fire caused by the defendant's violation of a Coast Guard navigation rule, the purpose of which was to prevent collisions rather than fires. In

51. 344 U.S. 407, 410-411 (1953).
52. 352 U.S. at 539-540 (1957).
53. 78 S. Ct. 394 (1958).

finding absolute liability for violation of this statutory duty, Justice Brennan, speaking for the majority, observed:

> In the railroad and shipping industries, however, the FELA and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers, [citing the *Rogers* case] and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty towards its workers.[54]

Again, a little farther on in Justice Brennan's opinion, we find this thought reiterated and expanded:

> For Congress, in 1908, did not crystallize the application of the Act by enacting specific rules to guide the courts. Rather, by using generalized language, it created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles providing compensation for injuries to employees consistent with the changing realities of employment in the railroad industry.[55]

To this Justice Harlan, in dissent, retorted:

> Indeed, not content with its particular conclusion that violation of a statutory duty leads to absolute liability under the FELA and Jones Act, the Court goes on to say that "the theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this act, and his fault, in whole or in part, causes injury, liability ensues . . . whether the fault is a violation of a statutory duty or the more general duty of acting with care . . ." Thus the Court in effect reads out of the FELA and the Jones Act the common-law concepts of foreseeability and risk of harm which lie at the very core of the negligence liability, and treats these statutes as making employers in this area virtual insurers of the safety of their employees.
>
> Whatever may be one's views of the adequacy of "negligence" liability as the means of dealing with occupational hazards in these fields, Congress has not legislated in terms of absolute liability. . . .
>
> I cannot agree that Congress intended the federal courts to roam at large in devising new bases of liability to replace the liability for negligence which these Acts imposed upon employers.[56]

54. 78 S. Ct. 394, 398 (1958).
55. 78 S. Ct. 394, 400 (1958).
56. 78 S. Ct. 394, 407 (1958).

Although the Court has never specifically and explicitly rejected the traditional linguistics of negligence,[57] it is hard to visualize many situations where, in the view of the majority of the present Court, the plaintiff's evidence would be insufficient to support a verdict.[58] It is clear, moreover, that the Court has greatly altered in F.E.L.A. litigation the traditional judge-jury relationship whereby the judge has the preliminary duty of deciding whether the facts are sufficient to go to the jury. The pre-eminence of the jury is now firmly established in virtually all F.E.L.A. cases where the evidence of negligence and/or causation is either circumstantial or in dispute. Consequently the burden of proof has become little more than a technical requirement which is met by even a scintilla, or less, of evidence. The upshot of these procedural alterations has been, as Judge Frank observed,[59] a change in the law of negligence, for it is hard to understand how a failure to remove a small stray clinker would be a sufficient allegation of negligence in a non-F.E.L.A. case.[60] True, it is not always the Supreme Court which in the first instance found that negligence existed; initially, except in the directed verdict cases, the jury has found negligence. On the other hand in re-appraising an appellate reversal of a jury verdict in favor of the employee, or the action of an appellate court in sustaining a directed verdict for the defendant, the Supreme Court majority is actually deciding whether a reasonable man would be justified in making an inference of negligence. Around the stray clinker and the inadequate scoop is spun the gossamer web of negligence. Whether a strong web can be woven with the silken strands of "speculation, conjecture and possibilities," we know not. [61] That such a web has once sufficed, we know.[62]

J. B. R.

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57. Whatever may be the implications of the language of the opinions recently written by Justice Brennan speaking for the majority of the Court, it was as recently as 1949 that we find the Court in *Urie v. Thompson*, 337 U.S. 163, 174, 182, stating:

> The section [§ 1 of the FELA] does not define negligence, leaving that question to be determined . . . "by the common law principles as established and applied in the federal courts". . . . We recognize that the Federal Employers' Liability Act is founded on common law-concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms.

Justice Harlan, dissenting in the *Kernan* case, found difficulty in reconciling the above language from the *Urie* decision with the position of the majority of the Court in the *Kernan* case.

58. The evidence was insufficient in the *Milom* case.

59. Note 40, *supra*.

60. Webb v. Illinois Central R.R., 352 U.S. 512 (1957).

61. See Justice Frankfurter's memorandum opinion in Elgin, Joliet & Eastern Ry. Co. v. Gibson, 78 S. Ct. 270 (1958), discussed at footnote 38, *supra*.

62. Gibson v. Elgin, Joliet & Eastern Ry. Co., 246 F2d 834 (1957); *certiorari* denied, 78 S. Ct. 270 (1958), discussed in text at footnote 38, *supra*.

RAILROADS — F.E.L.A. — STATE PROCEDURE IN DEROGATION OF FEDERAL RIGHT

In an F.E.L.A. action by a railroad car inspector for injuries sustained when he was struck by a motor truck backing into a passageway in which he was inspecting railroad cars, the trial court entered judgment on a jury verdict for the plaintiff. The Texas Court of Civil Appeals reversed the judgment, applying a Texas procedural rule that where the jury's finding on special issues negatived each of the specific alleged acts of negligence by the railroad, the general verdict by the jury that the railroad failed to furnish the employee with a reasonably safe place to work was a mere conclusion of law that could not support the judgment against the railroad. Certiorari was granted and the United States Supreme Court *held,* in a 5 to 4 decision, that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice; and further, that the evidence was sufficient to sustain the jury's finding that the employer's negligence in failure to provide a safe place to work played a part in producing the employee's injury. *Arnold v. Panhandle & Santa Fe Railroad Co.,* 353 U.S. 360 (1957).[1]

The instant case presents two of the principal questions that have constantly plagued the United States Supreme Court in actions arising under the Federal Employer's Liability Act.[2] First, what degree of evidence is sufficient to show negligence on the employer's part; and second, to what extent may local procedure or practice govern in the trial of such actions.

The last decade has witnessed an almost unbroken line of decisions by the Supreme Court consistently enlarging the role of the jury in deciding fact issues of negligence and causation under the F.E.L.A. The scope of the jury decision has been so expanded as to make the occasion for a directed verdict rare and exceptional.[3] Within the past year alone, the Court has handed down at least a dozen decisions dealing with the question of the jury's prerogative. These decisions clearly show that the question of the railroad's negligence almost inevitably must go to the jury and cannot be sidetracked by a directed verdict for the railroad; nor may the jury's verdict be set aside by an Appellate court, be it federal or state, if the jury's con-

1. On remand, the Texas Court of Civil Appeals in a per curiam opinion, 305 S.W. 2d. 207 (1957) reversed its former position and affirmed the judgment of the trial court in favor of the plaintiff.
2. 35 STAT. 65 (1908), as amended, 36 STAT. 291 (1910), 53 STAT. 1404 (1939), 45 U.S.C. § 51 *et seq.*
3. DeParcq, *A Decade of Progress Under the Federal Employer's Liability Act,* 18 LAW & CONTEMP. PROB. 257, 280. (1953).

clusion is based on some evidence that the railroad was negligent. This current development in F.E.L.A. litigation is discussed in a companion casenote presented *supra,* immediately preceding the instant casenote.

In the light of the present position of the United States Supreme Court as to the sufficiency of evidence necessary to go to the jury, it is clear that the testimony in the principal case clearly presented a jury question. The point at issue was whether the jury's verdict on the special findings or its general verdict should govern. In the language of the per curiam opinion of the United States Supreme Court:

> The jury's general verdict, that the respondent negligently contributed to the petitioner's injury, has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties. The special issues claimed to be in conflict with this finding concerned alleged negligence only in the operation and presence of the truck on this passageway. But even if the rule announced by the Court of Civil Appeals controlled, as we see it, these answers present no square conflict. The findings on these special issues do not exhaust all of the possible ground on which the prior unsafe-place-to-work finding of the jury may have been based. Hence all of the findings in the case might well be true insofar as the record indicates.[4]

The Texas Court of Civil Appeals, however, took a different view. That court thought that, if the railroad were negligent in not furnishing the employee a safe place to work, it was solely because the motor truck was allowed to back into the passageway when the employee was working. But the jury in its special findings, found that this was not a negligent act on the employer's part.[5]

As the United States Supreme Court saw the problem, it was not sufficient that the employer might not have been negligent in allowing the truck in the passageway; the Court felt that other testimony justified the inference that the passageway as used was not a safe place to work. The nature of this supporting evidence is not stated in the Court's opinion.

As pointed out by Justice Harlan, with whom Justice Burton and Justice Whittaker joined in dissent, "This case involves more than the sufficiency of the evidence to support a jury verdict. . . . The state appellate court, applying Texas law, held that the general verdict must yield to the inconsistent findings on the special issues, and that the trial court should have entered judgment for the respondent."

4. 353 U.S. 360 (1957).
5. 283 S.W.2d. 303 (1955).

Justice Harlan went on to observe that he could find no valid reason for the Supreme Court's upsetting the state appellate court judgment. It seemed to Justice Harlan that "the Texas procedural rule, which the Court of Civil Appeals applied in resolving the head-on collision in the jury's verdict, did not subvert assertion of the federal rights established by the Federal Employers' Liability Act, nor did it deprive him of any substantive right given him by the federal statute."

The majority of the Court, however, felt otherwise. The assertion of federal rights, "when plainly and reasonably made," said the Court, "is not to be defeated under the name of local practice." In support of this position, the Court cited *Davis v. Wechsler*,[6] *Dice v. Akron, Canton & Y.R. Co.*,[7] and *Brown v. Western R. Co.*[8]

The *Davis* decision, a non-F.E.L.A. case, involved a personal injury suit in a Missouri state court by a passenger, an Illinois resident, against the Director General of a railroad operated under federal control. The accident in question occurred in a Missouri county other than forum. The applicable federal regulation provided that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose." A defense on the merits was united with a plea to the jurisdiction. A judgment for the plaintiff was affirmed by the Missouri Court of Appeals on the ground that the federal regulation in question went only to the venue and was waived by the appearance of the defendant. A writ of certiorari was denied by the Missouri Supreme Court. The United States Supreme Court thereupon granted certiorari and reversed the Missouri courts on the ground that:

> Whatever springes the State may set for those who are indeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice . . . The state courts may deal with that [the effect of the appearance and the uniting of the defenses] as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. . . . If the Constitution is to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. . . . This is familiar as to the substantive law and for the same reason it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.[9]

6. 263 U.S. 22 (1923).
7. 342 U.S. 359 (1952).
8. 338 U.S. 295 (1949).
9. 263 U.S. 22, 24 (1923)

The *Davis* case appears ultimately sound since, otherwise, the assertion of the federal right might result in its loss.

Twenty-five years later, in an F.E.L.A. case, *Brown v. Western Railway of Alabama*,[10] we find the *Davis* doctrine still in full vigor. In granting certiorari on the question of the action of the Georgia courts in sustaining a general demurrer for failure to state a cause of action, the United States Supreme Court felt that the "implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts."[11] Under the local rules of Georgia practice construing pleading allegations "most strongly against the pleader," and finding no precise allegation that the clinker upon which the petitioner stumbled was beside the tracks due to the railroad's negligence, the Georgia courts sustained the demurrer and dismissed the action. This, the Supreme Court refused to abide by.

The principal argument presented to the Supreme Court in the *Brown* case was that "while state courts are without power to detract from substantive rights granted by Congress in F.E.L.A. cases, they are free to follow their own rules of practice and procedure." But the Supreme Court, after noting the impossibility of laying down any precise rule to distinguish between substance and procedure, said:

> Fortunately, we need not attempt to do so. A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right cannot be defeated by the forms of local practice. And we cannot accept as final a state court's interpretation of allegations in a complaint asserting it. This rule applies to FELA cases no less than to other types. . . . Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws . . . . Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.[12]

The Supreme Court held that the allegations of the complaint did set forth a cause of action which should not have been dismissed.

Justice Frankfurter with whom Justice Jackson joined in dissent, emphasized that under the F.E.L.A. the state courts were empowered to entertain such suits, and that there must be an adjustment made be-

10. 338 U.S. 294 (1949).
11. 338 U.S. 294, 295 (1949)
12. 338 U.S. 294, 296, 298 (1949).

tween the federal and state judicial systems to avoid needless friction. He pointed out that in other instances the F.E.L.A. petitioner must take the state court system as he finds it, such as where the state has dispensed with the jury in civil suits, or has modified the common-law requirements of trial by jury, citing the *Bombolis* case,[13] which found a state provision for five-sixths jury verdict not invalid in F.E.L.A. actions. After all, as Justice Frankfurter pointed out, the federal courts are always available.

Conceding that the Supreme Court is not concluded by the view of a state court regarding the sufficiency of allegations of a federal right of action or defense, Justice Frankfurter felt that "this merely means that a State court cannot defeat the substance of a federal claim by denial of it. Nor can a State do so under the guise of professing merely to prescribe how the claim should be formulated." Recognizing that Georgia may not put "unreasonable obstacles in the way of a plaintiff who seeks in the State court what a federal enactment gives him," Justice Frankfurter thought the crucial question to be:

> . . . whether the Georgia courts have merely enforced a local requirement of pleading, however finicky, applicable to all such litigation in Georgia without qualifying the basis of recovery under the Federal Employers' Liability Act or weighting the scales against the plaintiff.[14]

Thus the *Brown* case may be felt simply to say just what Justice Frankfurter admitted: that federal law controls as to what facts state a federal claim, even in a state court.

The third of the leading causes, the *Dice* case,[15] deals with the

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13. Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211 (1916).

14. 338 U.S. 294, 301 (1949).

15. 342 U.S. 359 (1952). The effect of the *Dice* case and the more recent *Rogers* case (352 U.S. 500) was recently felt in Illinois in Bowman v. Illinois Central R. Co.11 Ill. 2d. 186, 142 N.E.2d 104 (1957):

> It is established that the rights created under this Federal statute, including the right to jury trial which is a substantial part of the relief provided, are governed not by State law but by the decisions of the Federal courts, in order that the act be given uniform application. Hence, it has been held that such rights cannot be affected by "local rule[s] of procedure." [Citing the *Dice* case] . . .
>
> If jury verdicts could be set aside according to local standards and rules of procedure in appellate courts, whereby the evidence is reweighed, as was done in the instant case, then the right to jury trial may be rendered impotent and lose its significance. Consequently, in accordance with the mandate in the Dice case, we are bound by the determination of the United States Supreme Court as to the province of the jury in such cases . . . Releases necessarily are a part of the administration of the Federal act and their validity must be determined according to the uniform Federal law.

In a vigorous dissent, Justices Schaefer, Hershey and Davis observed:

> We also dissent from the court's holding that the Federal Employers' Liability Act has abrogated the traditional jurisdiction of our reviewing courts to set

validity of a release of an F.E.L.A. claim. Under Ohio law, the validity of the release was to be determined by the trial judge under his equity jurisdiction. Notwithstanding a verdict of the jury in favor of the plaintiff the trial court entered judgment for the defendant. The Ohio Court of Appeals reversed, but the Ohio Supreme Court sustained the trial court's action and held that state, not federal law, governed; that under that law the petitioner was bound by the release; and that under controlling state law, federal issues as to fraud in the execution of the release were properly decided by the judge rather than the jury.

Granting certiorari, the United States Supreme Court observed that the Ohio Supreme Court "appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act." Holding that the validity of releases and other devices designed to liquidate or defeat injured employees' claims under the act raises a federal question to be determined by federal rather than state law, the Court admonished that "state laws are not controlling in determining what the incidents of this federal right shall be"; that the federal rights under a federal standard could be defeated "if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." In the opinion of the majority, since the railroad had practiced deliberate fraud in inducing the employee to sign the release, to deny recovery would be "wholly incongrous with the general

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aside verdicts as being contrary to the manifest weight of the evidence. That jurisdiction in the trial of jury in no way invades the traditional function of the jury, and has been embodied in our statutes for more than 100 years . . . It is neither the prerogative, nor the intent, of Congress to regulate the jurisdiction of State courts, not to control and affect their modes of procedure . . .

Nevertheless, the opinion of the court has ordered the Appellate Courts of this State to retreat from their time-honored jurisdiction and abdicate the duties imposed on them by the Illinois legislature and the common law because of nebulous dicta contained in certain decisions of the United States Supreme Court. We have examined the cases cited by the court, as well as four recent cases [citing the *Rogers* case and others] and find that they involved final judgments which had been entered either taking the case from the jury, or reversing the jury verdicts without a remand. They did not involve the historical attribute of the common-law jury trial which permits a court to weigh the evidence and remand for a new trial. In short, these cases all involved a legal question of how much evidence is required under the Federal Employers' Liability Act to make out a *prima facie* case. They did not involve the procedural method of review and the supervision of the jury verdicts. . . .

We conclude that the court is over-cautious in believing that Congress has stricken down the procedural rights of State courts. Such a serious impingement upon the rights and powers of State courts should require a positive expression. When dealing with our traditional and historical legal procedures, we should be slow to find some unspoken compulsion of Federal law requiring their abolishment.

policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers."

The *Dice* case may be conceived of as holding that Congress may require a jury trial on particular issues involved in federal rights, at least when the state procedure provides a jury system for related issues.

More recently, in a non-F.E.L.A. case, we find a similar problem facing the Court. In *Staub v. City of Baxley*,[16] decided in the present term of the Supreme Court, Justice Frankfurter, in dissenting to the Supreme Court's reversal of a Georgia Appellate Court's affirming a conviction of a charge of violating a city ordinance prohibiting solicitation of members for an organization without a permit, reiterated his firm stand as to the proper function of the local practice and procedure:

> This is one of those small cases that carries a large issue, for it concerns the essence of our federalism—due regard for the constitutional distribution of power as between the Nation and the States, and more particularly the distribution of judicial powers as between this Court and the judiciaries of the States. . . .
>
> While the power to review the denial by a state court of a nonfrivolous claim under the United States Constitution has been centered in this Court, carrying with it the responsibility to see that the opportunity to assert such a claim be not thwarted by any local procedural devise, equally important is observance by this Court of the wide discretion in the States to formulate their own procedures for bringing issues appropriately to the attention of their local courts, either in shaping litigation or by appeal. Such methods and procedures may, when judged by the best standards of judicial administration appear crude, awkward and even finicky or unnecessarily formal when judged in the light of modern emphasis on informality. But so long as the local procedure does not discriminate against the raising of federal claims and, in the particular case, has not been used to stifle a federal claim to prevent its eventual consideration here, this Court is powerless to deny to a State the right to have the kind of judicial system it chooses and to administer that system in its own way. It is of course for this Court to pass on the substantive sufficiency of a claim of federal right, . . . but if resort is had in the first instance to the state judiciary for the enforcement of a federal constitutional right, the State is not barred from subjecting the suit to the same procedures, *nisi prius* and appellate, that govern adjudication of all constitutional issues in that State.[17]

16. 78 S. Ct 277 (1958).
17. 78 S. Ct. 277, 284, 288 (1958).

The majority of the Court, saw the issue in a different light; citing the *Davis* case and others, the Court observed:

> At the threshold, appellee urges that this appeal be dismissed because, it argues, the decision of the Court of Appeals was based upon state procedural grounds and thus rests upon an *adequate* nonfederal basis, and that we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an *adequate* one in the circumstances of this case. "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that question, this court must determine for itself the efficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.". . . Whether the constitutional rights asserted by the appellant were ". . . given due recognition, by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully our power to review easily may be avoided."[18]

Numerous other cases have held the federal rules rather than state procedural rules must prevail on such points as: (1) burden of proof as to contributory negligence;[19] (2) sufficiency of evidence to go to jury;[20] (3) presumptions of negligence;[21] (4) statutes of limitations;[22] (5) measure of damages;[23] (6) kind and amount of evidence required;[24] (7) reversal for lack of supporting evidence;[25] (8) limit on recovery.[26] On the other hand, the Supreme Court has held itself bound by state procedural rules even in F.E.L.A. cases in actions involving (1) the time and manner in which a substantive right must be asserted,[27] (2) the manner of amending pleadings,[28] (3) the effective operation of the statute of limitations,[29] (4) the right to grant a partial

18. 78 S. Ct. 277, 280 (1958).
19. Central Vermont R. Co. v. White, 238 U.S. 507 (1915).
20. Wilkerson v. McCarthy, 336 U.S. 53 (1949).
21. New Orleans & N.E. R.R. v. Harriss 247 U.S. 367 (1917).
22. Atlantic Coast Line R.R. v. Burnette, 239 U.S. 199 (1915).
23. Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916).
24. Chicago M. & St. P. Ry. v. Coogan, 271 U.S. 472 (1925).
25. Bailey v. Central Vermont Ry., 319 U.S. 350 (1943).
26. Chicago & Rock Island R.R. v. Devine, 239 U.S. 52 (1915).
27. Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532 (1917)
28. Central Vermont R.Co. v. White, 238 U.S. 507 (1915).
29. Brinkmeier v. Missouri P. R Co., 244 U.S. 268 (1912).

new trial on one issue only,[30] (5) the degree of proof necessary to upset a release,[31] and (6) the function to be performed by the trial court in directing the preparation of proper instructions for the jury.[32]

In each of the above categories the issues involved would generally be classified as procedural matters by state courts, yet the Supreme Court called some substantive, and others procedural. What should the distinction be? What test is available to determine which state rules should properly be called procedural and permitted to apply, and what rules should be called substantive and not applicable to a suit involving the Federal right? One writer has suggested that the test should be whether the rule is "outcome determinative", *i.e.* would a different conclusion result from applying the federal rule rather than the state rule.[33] It has also been suggested that the answer can be found by turning to a converse situation involving suits in Federal Courts under the "diversity jurisdiction". Under *Erie R.R. v. Tompkins*[34] the federal district courts must apply in diversity cases the substantive law of the state in which the court is sitting, but would follow federal procedural rules. The modern rule under *Erie R.R. v. Tompkins* is well illustrated in a leading case, *Guaranty Trust Co. v. York*,[35] where the court said that the test is whether the disregarding of the state rule will cause the federal court to reach a substantially different result than the state court would have reached. If it will, the state rule is substantive for the purpose of reaching a decision in a diversity case.

Applying this rule to the F.E.L.A. cases, a state rule would appear to be substantive if it will produce a substantially different result than would be reached if the state rule were disregarded. This approach would reconcile a good many of the apparent inconsistencies in the cases above listed. However, in the principal case Mr. Justice Harlan asserts that the Texas procedural rule is identical with that which would have been applicable had the case been tried in the federal courts, citing Federal Rules of Civil Procedure, Rule 49 (b) which provides that a court may enter a judgment in accordance with special answers notwithstanding a general verdict.

The propriety of overriding local procedure in favor of federal concepts in F.E.L.A. actions appears to be based on the premise that

30. Norfolk, S. R. Co. v. Ferebee, 238 U.S. 269 (1915).
31. Kansas City Southern Ry. Co. v. Stamford, 182 Ark. 484, 31 S.W.2d 963, *cert. den.* 283 U.S. 825 (1931).
32. Louisville & Nashville R. Co. v. Holloway, 246 U.S. 525 (1918).
33. Hill, *Substance and Procedure in State F.E.L.A. Actions—The Converse of the Erie Problem*, 17 OHIO STATE L.J. 384 (1956).
34. 304 U.S 64 (1938).
35. 326 U.S. 99 (1945).

only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purpose. If the emphasis is placed on the uniformity of procedural and substantive law within federal and state courts, it is thought there will be some diminution of forum-shopping, but this advantage would be slight since the "more adequate award" seems to be the main attraction in seeking greener pastures. It is urged further that only through such conformity can the intent of Congress that federal and state courts have concurrent jurisdiction, and, by implication, uniform litigation, be carried out. Also, if this rule were not adhered to, different results would be found as between the state courts themselves. The position has been taken by some courts, however, that when Congress creates rights and confers jurisdiction on courts of the state to enforce such rights, it impliedly adopts the state rules of procedure prevailing in the forum.

The great question to weigh is whether nationwide uniformity by applying concepts current in the United States Supreme Court is to be secured at the expense of creating procedural confusion at the state court level. In a *Brown Case* situation, a Georgia court must apply liberal rules in construing pleadings of one group of litigants in a negligence action, but adhere to strict construction for another group asserting claims of a similar nature. As Justice Frankfurter observed in the *Dice* case:

> The state judges and local lawyers who must administer the F.E.L.A. in State Courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of state and Federal practice in the State Courts as to a single class of cases.[36]

It thus appears that in F.E.L.A. litigation there is not only an amorphous Supreme Court concept of the substantive aspects of negligence, but also an intangible procedural bundle of safeguards to protect and nurture the same.

On the other side of the argument, however, it must be conceded that the distinction between substance and procedure is ephemeral at best. A substantive right without a procedural remedy is non-existent. A procedural remedy without a substantive right is a contradiction. The power of Congress to regulate pleadings in state courts need not be conceded; here the Court need only to sustain the power of Congress to say that an allegation of one fact states a cause of action under a federally created right. It is a short step from this to the proposition

36. 342 U.S. 359, at 368 (1952).

that an allegation of negligence in providing an unsafe place to work is an allegation of a fact which states a cause of action, without necessity of particularizing the specific acts.

The instant case may be so considered. The decision would then be simply that the plaintiff alleged a good cause of action when he alleged generally an unsafe place to work, and that the jury found in his favor on this issue. So stated, the case does not hold that a general verdict must take precedence over a special verdict. There was not a special verdict that the defendant furnished a safe place to work. There were only special verdicts that in a series of particulars the defendant did not furnish an unsafe place.

Congress can hardly be expected to consider in advance the innumerable problems that state procedural and pleading rules can raise in such cases. The Court is not exceeding its proper sphere in interpreting the Federal Acts. The only complaint can be that the Court does not properly determine the will of Congress. The Court does not restrict its favorable interpretations to plaintiffs. In the *Davis* case, the interpretation burdened the plaintiff; in the instant case, the interpretation burdened the defendant.

Lawyers naturally prefer local rules favoring their clients, just as they prefer federal rules favoring their clients. One of the desirable goals in enforcing national rights, is to dispense, insofar as possible, with giving either side an advantage by the choice of forum. This the Supreme Court appears to be doing rather consistently. It is difficult to establish that Congress did not desire this.

R. W. F., JR.

RAILROADS — STATUTORY PRECAUTIONS ACT — APPEARANCE UPON THE ROAD

Plaintiff, while walking across a single track trestle, was forced by the danger of an approaching train to swing out over the south side of the trestle, where he remained for only a few seconds before the vibrations from the train jarred him loose, causing him to sustain severe personal injuries. On appeal to the Tennessee Court of Appeals from a jury verdict for the plaintiff, *held,* the court's failure to sustain defendant's motion for a directed verdict for the lack of material evidence on which the case could have been submitted to the jury was not error; that the evidence did not require a finding of contributory negligence as a matter of law; and that the evidence was sufficient to take the case to the jury for failure to comply with either the

common law duty or the Tennessee Statutory Precautions Act. *Southern Railway Co. v. Cradic,* 301 S.W.2d 374 (Tenn. App. 1956).

In determining the obligations of the railroad under the Statutory Precautions Act[1] in connection with the appearance of any obstruction upon the road, particular consideration must be given the duties prescribed by Subsection Four which reads as follows:

> Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

As to what constitutes the "road," the court in the principal case relies upon what appears to be the well-settled rule as stated in the *Gaines* case: "Appearance on the road means appearance on the track in front of the moving train, or so near that the object will be struck by the moving train."[2] In the principal case the plaintiff was an obstruction on the defendant's track within the sweep of the moving train when he first became visible, even though he had moved beyond striking distance at the time he was shaken from the track. Had he been on the edge of a wider trestle when he first became visible, the decision would have been more difficult, assuming he would then not have been within actual striking distance, though near enough to be shaken off by the wind or the vibrations from the train.

The interpretation given to the word "road" has not always been constant and many interesting legal questions have arisen as to its scope. To fully understand and appreciate what appears to be a simple problem, consideration must be given the complexities which have arisen throughout its judicial history. Prior to the 1954 case of *Louisville & N. R. Co. v. Tucker,*[3] there seemed to be no doubt that the above construction given the statute in the *Gaines v. Tenn. Cent. Ry. Co.*[4] case was the correct one. However, the view originally taken by the United States Court of Appeals in the *Tucker*[5] case, was that the ". . . 'road', in contemplation of the statute, is not merely what is

1. TENN. CODE ANN. § 65-1208 (1956).
2. Gaines v. Tenn. Cent. Ry. Co., 175 Tenn. 389, 393, 135 S.W.2d 441 (1940). The court cited the following cases in support of its statement: Tennessee Central R. Co. v. Binkley, 127 Tenn. 77, 153 S.W. 59 (1912); Chesapeake & N. Ry. v. Crews, 118 Tenn. 52, 99 S.W. 368 (1906); Nashville C. & St. L. R. Co. v. Seaborn, 85 Tenn. 391, 4 S.W 661 (1887).
3. 211 F.2d 325 (6th Cir. 1954). The erroneous original opinion in the *Tucker* case, prior to modification in 215 F.2d 227 (6th Cir. 1954), is discussed in 23 TENN. L. REV. 865 (1955).
4. See *supra,* Note 2.
5. See *supra,* Note 3

called strictly the roadbed or track, but also includes the public approaches thereto and it is the duty of the lookout to view the whole road within the orbit of his vision."[6] Upon petition for rehearing, however, the court stated that the above quotation should be deleted because it did not properly state the Tennessee rule.[7]

A subsequent federal case, *Louisville & N. R. R. v. Farmer*,[8] followed the present Tennessee rule as set forth in decisions prior to the original *Tucker*[9] case and is in accord with the final ruling that resulted upon the rehearing of the *Tucker*[10] case. Under the instructions in the *Farmer* case, "The word 'obstruction' in the statute means that which may obstruct or hinder the free and safe passage of the train or that which may receive an injury or damage if struck by the train, as in the case of an automobile on the road or near enough to the railroad to be within striking distance of the train."[11]

In the light of many Tennessee decisions,[12] this instruction was correct. It is interesting to note, however, that a 1932 federal case[13] involving the Tennessee Statutory Precautions Law, after referring to the striking distance rule, proceeds to state, perhaps inconsistently, that when the engineer saw the plaintiff was not going to stop, the plantiff's vehicle then became an "obstruction." In view of the fact that the plaintiff's truck moved steadily without stopping, the question is when did it become apparent that the vehicle was not going to stop? This problem is interesting in that in the original *Tucker*[14] case, the fireman testified that when he first saw the car he realized that at the rate of speed it was traveling it would not stop and there would be an impact. Was it when it became apparent that the vehicle was not going to stop that it became an "obstruction," although at that time it was about 50 feet from the crossing, or did it not become an "obstruction" until it appeared upon the road or within lateral striking distance of the train so as to hinder the train's free and safe passage? It would appear the railroad was under no duty to comply with the requirements of the statute to sound the whistle and put down the brakes until the vehicle became an obstruction within the orbit of the striking distance rule.

6. See *supra* Note 3, at 330. The court relied on Majestic v. Louisville & N. R. R., 147 F.2d 621 (6th Cir. 1945); and Nashville & Chattanooga R. R. Co. v. Anthony, 69 Tenn. 516 (1879).
7. 215 F 2d 227 (6th Cir. 1954).
8. 220 F.2d 90 (6th Cir. 1955).
9. See *supra,* Note 3.
10. 215 F.2d 227 (6th Cir. 1954).
11. 220 F.2d 90, 97 (6th Cir. 1955).
12. See *supra,* Note 2
13. Cincinnati, N.O. & T.P.Ry. Co. v. Galloway, 59 F.2d 664 (6th Cir. 1932).
14. See *supra,* Note 3.

It may be that the duties of the railroad under the present rule have been unduly limited. A liberal construction of the above quoted Subsection Four[15] of the statute would lead one to believe that the intent of the legislature may have been to impose upon the railroad precautionary duties greater than those involved in the striking distance rule in at least some additional situations, as where the engineer has the best opportunity to prevent an accident. The writer agrees with other commentators[16] that it would be absurd to impose upon the railroad the duty of complying with the requirements of the statute everytime it perceives the presence of a vehicle approaching a crossing. On the other hand, even though the lookout has the right to assume that a person approaching a crossing will exercise ordinary care for his own safety,[17] would it be unreasonable to impose upon the railroad the duty to comply with the requirements of the statute to sound the whistle and put down the brakes whenever it becomes "apparent" that one who is still a short distance from the crossing will not stop, even though he is not yet within striking distance?

It is generally held that even when an obstruction appears actually on the track, if it appears so suddenly as to make it impossible for the engineer to prevent an accident, the failure to see the object earlier will not result in statutory liability except where the failure is due to the fault of the railroad.[18] Such fault may well be present where an obstruction appears on a straight line of track. On the other hand, if the lights of the engine do not show the presence of the obstruction until the train is within only a short distance because of a curve in the track, normally there is no fault on the part of the engineer.

Suppose further, however, that the contour of the track is such that had the engineer, before entering the curve, looked across an intervening space to the further end of the curve, he would have seen the obstruction. Would liability result if the engineer or lookout did not look across the intervening space, but took all precautions required by the statute when the obstruction first was actually sighted? In a very recent Tennessee case, *Page v. Tennessee Central Ry. Co.*,[19] the Tennessee Court of Appeals held that under the statute, ". . . enginemen are not required, when on a curve, to look across the intervening space to the further end of the curve, thereby withdrawing the lookout from the track immediately ahead of the engine."[20] The situation may thus

15. TENN. CODE ANN. § 65-1208 (1956).
16. 8 VAND. L. REV. 1144 (1955).
17. Tenn. Central Railway v. Ledbetter, 159 Tenn. 404, 19 S.W.2d 258 (1929).
18. See *supra*, Note 2.
19 305 S.W.2d 263 (Tenn. App. 1956).
20. *Id.*, at 267.

exist, as it did in the *Page* case, where an obstruction is actually on the road, but the duties of the railroad to sound the whistle and put down the brakes do not arise until the obstruction becomes "apparent" to the lookout while performing his duty of looking at the track immediately ahead of the engine. The *Page* case indicated that on straight tracks the headlight on the engine would disclose an obstruction approximately 600 feet in front of the engine, but that on a curve the light would not disclose an obstruction such as a man until the locomotive turned the curve. It would seem, however, that if an obstruction were on the further end of a curve, there might be a duty to look across the intervening space when the locomotive has not yet entered the curve, as this could be done by looking immediately ahead of the engine.

In support of the decision of the *Page* case, another Tennessee case[21] was cited. However, it is interesting to note that, in that case also, facts existed which made it practically impossible for the lookout to see the deceased. There the deceased, while standing in a curve on a double-tracked line watching the approach of one train, was not noticed by the other train which struck him due to the interposed positions of the locomotives. The decision in such a case need not be understood as laying down a blanket rule to be applied in all cases, regardless of the facts of each individual case and regardless of whether an engineer looking straight ahead could see across the intervening space to the obstruction beyond the approaching curve. Such a construction would give unwarranted relief from statutory duties. What constitutes a lookout ahead in such situations should be determined by the facts of each case. It would appear that to more closely approximate the intent and purpose of the statute, *viz.*, the prevention of accidents, a flexible rule should be applied. However, if the decision in the *Page*[22] case is considered as being a blanket rule, then before liability can be predicated on the Statutory Precautions Act, the obstruction must not only appear on the track or so near as to be struck by the moving train,[23] but in addition, the obstruction must be apparent to the lookout while exercising his duty of watching the track "immediately" ahead of the engine.[24]

C. D. M.

21. Cincinnati N. & T.P.Ry. Co. v. Wright, 133 Tenn. 74, 179 S.W. 641 (1915).
22. 305 S.W.2d 263 (Tenn App. 1956).
23. See *supra*, Note 2.
24. 305 S.W.2d 263 (Tenn. App. 1956).

TORTS—MALICIOUS PROSECUTION—PROBABLE CAUSE—ERROR OF LAW

Plaintiff instituted the instant action against defendant oil company for loss of services and consortium allegedly caused by the false arrest of his wife by the defendant on a worthless check charge. Under a misapprehension that her husband, the plaintiff, had agreed to lease the defendant's service station, *W* wrote a savings-account check in the sum of $600 in payment for gasoline and other supplies delivered by the defendant. When the bank refused payment of the check because no savings bankbook was presented, the defendant orally requested payment. The plaintiff and his wife refused on the ground that he had not leased the station and that nothing of value was received in the transaction. Without giving W any written notice of the worthlessness of the check, and without consulting an attorney, the defendant procured a criminal warrant and began proceedings against *W* on the charge of writing a worthless check under TENN. CODE ANN. §39-1904. On advice of the general sessions judge, W immediately paid the amount of the original check and proceedings were terminated. H then instituted the instant action. On appeal from a judgment of the circuit court on a directed verdict for the defendant, held, the jury could have reasonably found that the defendants knew that the accused had received no written notice of the worthless check, as required by statute; and that the criminal proceedings, brought apparently for the purpose of collecting the debt, were without probable cause and with malice. *Dunn v. Alabama Oil & Gas Co.*, 299 S.W.2d 25 (Tenn. 1956)[1]

To be successful in an action for malicious prosecution the plaintiff has the burden of proving first, that the defendant instituted or continued a proceeding against the plaintiff; second, that the proceeding terminated in favor of the accused;[2] third, that there was lack of probable cause for the proceeding; and lastly, that the proceeding was actuated with malice, that is, by a motive other than that of bringing the accused to justice.[3]

The controlling issue in the instant case is whether the defendant had probable cause to bring criminal proceedings against the accused. As defined in *Poster v. Andrews,* probable cause is "the existence of such facts and circumstances as would excite in a reasonable mind the be-

1. Certiorari denied by the Tennessee Supreme Court on March 8, 1957.
2. See 21 TENN. L. REV. 449 (1950) for a discussion of the various aspects of the requirement that the proceeding terminate in favor of the accused.
3. PROSSER, TORTS 646 (2d ed. 1955); 1 HARPER & JAMES, TORTS § 4.2 (1956); Pharis v. Lambert, 33 Tenn 228 (1853); Kinnard v. Frierson, 190 Tenn. 304, 229 S.W.2d 348 (1949).

lief that the person charged with crime was guilty thereof."[4] Probable cause is not dependent on what the facts really are, that is, on the question of whether the accused is in fact guilty, but only on a reasonable and prudent belief in the guilt of the person accused.[5] It is founded on appearances, not reality.

There are three basic requisites for probable cause:[6] first, that the accuser actually believed that the accused did the act with which he was charged;[7] second, that such belief was reasonable, based on circumstances which would create such a belief in the mind of an ordinary man;[8] and thirdly, that the alleged act must, in law, constitute the crime charged.[9] If, however, proceedings are initiated upon the advice of an attorney after a full disclosure of all material facts within the accuser's knowledge, a conclusive presumption of probable cause is made out.[10] This advice must be sought in good faith[11] and the attorney must be qualified and disinterested.[12] The courts in Tennessee have imposed the additional requirement that the accuser be held knowledgeable of all facts which could have been ascertained by the exercise of reasonable diligence.[13] Thus the complete defense of having acted on the advice of counsel is not operative if such advice is given on the basis of an incomplete disclosure of relevant facts of which the accuser either had knowledge or, with reasonable diligence, could

4. 183 Tenn. 544, 194 S.W.2d 337 (1946).
5. Raulston v. Jackson, 33 Tenn. 128 (1853); F W. Woolworth Co. v. Conners, 142 Tenn. 678, 222 S.W. 1053 (1920); Roberts v. Smart Motor Co., 4 Tenn. App. 271 (1926); Abbott v. Ledbetter, 1 Tenn. App. 458 (1925); Bry-Block Mercantile Co. v. Proctor, 13 Tenn. App. 45 (1931).
6. Annot., 65 A.L.R. 225 (1930).
7. See Greer v. Whitfield, 72 Tenn. 85 (1879), and Abbott v. Ledbetter, 1 Tenn. App. 458 (1925) to the effect that the actual belief in the guilt of the accused must also be reasonable.
8. Kendrick v. Cypert, 29 Tenn. 291 (1849); Woolworth Co. v. Conners, 142 Tenn. 678, 222 S.W. 1053 (1920); Raulston v. Jackson, 33 Tenn. 128 (1853).
9. Hall v. Hawkins, 24 Tenn. 357 (1844).
10. RESTATEMENT, TORTS § 666 (1938); Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115 (1930); Cooper v. Flemming, 114 Tenn. 40, 84 S.W. 801 (1904); *Contra*, where the defendant did not disclose all material facts, Citizens Savings & Loan Corp. v. Brown 16 Tenn. App. 136, 65 S.W.2d 851 (1932); where the facts known to the defendant and his attorney negatived their belief in the guilt of the accused, Morgan v. Duffy, 94 Tenn. 686, 30 S.W. 735 (1895). See also, Kendrick v. Cypert, 29 Tenn. 291 (1849) where it is said that "the opinion of counsel, to be available [as a defense], in such case, must be honestly sought, and understandingly given."
11. RESTATEMENT, TORTS § 666 (1938); Kendrick v. Cypert, 29 Tenn. 291 (1849); Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115 (1930); Cooper v. Flemming, 114 Tenn. 40, 84 S.W. 801 (1904).
12. RESTATEMENT TORTS § 666 (1938).
13. Tennessee Valley Iron & R. Co. v. Greesom, 1 Tenn. C.C.A. 369 (Higgins 1910); Citizens Savings & Loan Corp. v. Brown, 16 Tenn. App. 136, 65 S.W.2d 851 (1932); Citty v. Miller, 1 Tenn. App. 3 (1925); Thompson v. Schulz, 34 Tenn. App. 488, 240 S W.2d 252 (1949).

have had knowledge.[14] As regards a conclusive presumption of probable cause, it has been held that it is no defense to act upon the advice of a police officer, justice of the peace, or a magistrate.[15]

The respective functions of the court and jury in deciding the issue of probable cause can be separated by either of two methods. As stated in *Memphis Gayoso Gas Co. v. Williamson,*[16] the court must either "state hypothetically to the jury the facts relied on by both sides, and whether or not they will, if established, satisfy the allegations in the pleadings, or the jury just find the facts specially, and from such special verdict the court must determine whether a reasonable man would have instituted suit on them." The issue of probable cause has often been described as a mixed question of law and fact. This means that the issue of whether facts and circumstances constitute probable cause is a question of law for the court, and the issue of whether alleged facts exist is a question for the jury.[17] By far the majority of courts adopt the view that the issue of probable cause is ultimately for the court to decide; only a few jurisdictions hold otherwise.[18]

Aside from probable cause, the issue next in importance is that of malice. Actual malice, in the colloquial sense, need not be shown. For malice, in its legal context, is an artificial word having reference to any use of legal process for a purpose other than bringing an offender to justice.[19] In short, the legalistic concept of malice means an improper motive which may, of course, include actual malice in its ordinary meaning.[20] For example, in *Morgan v. Duffy* [21] malice was inferred when it was manifest that the object of an unsuccessful prosecution was to enforce the payment of a debt. Likewise, malice has been inferred when an accuser has brought criminal proceedings to coerce performance of a contract[22] or to recover property from another.[23] Unlike the issue of probable cause, malice is usually determined exclusively by the jury.[24] Moreover, it is generally held, as noted in the

14. Mauldin v. Ball, 104 Tenn. 597, 58 S.W.248 (1900); Brown v. Kisner 192 Miss. 746, 6 So.2d 617 (1942); HARPER & JAMES, TORTS § 4.5 (1956).
15. 1 HARPER & JAMES, TORTS § 4.5 (1956); Mauldin v. Ball, 104 Tenn. 597, 58 S.W. 248 (1900).
16. 56 Tenn. 314 (1872).
17. Abbott v. Ledbetter, 1 Tenn. App. 458 (1930).
18. PROSSER, TORTS 658 (2d ed. 1955)
19. Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W.2d 252 (1949).
20. Sinis v. Kent, 221 Ala. 589, 130 So. 213 (1931); Long v. Rodgers, 19 Ala. 321 (1851); Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W.2d 252 (1949).
21. 94 Tenn. 686, 30 S.W. 735 (1895); to the same effect see Poster v. Andrews, 183 Tenn. 544, 194 S.W.2d 337 (1946).
22. Whiteford v. Henthorn, 10 Ind. App. 97, 37 N.E. 419 (1894).
23. Hall v. American Investment Co., 241 Mich. 349, 217 N.W. 18 (1928).
24. Pharis v. Lambert, 33 Tenn. 228 (1853); Greer v. Whitfield, 72 Tenn. 85 (1879); Abbott v. Ledbetter, 1 Tenn. App. 458 (1925); Tennessee Valley Iron & R. Co. v. Greeson, 1 Tenn. C.C.A. 369 (Higgins 1910).

principal case, that malice may be inferred from an absence of probable cause.[25] In that event, however, it is a mere inference of fact which the jury may or may not make.[26] On the other hand, the absence of probable cause cannot be inferred from a showing of malice.[27] And unless both probable cause and malice are proved,[28] the action for malicious prosecution must fail. Subject to the same requirements as in the case of probable cause, malice may be negatived by a showing that the defendant acted on the advice of counsel.[29]

The principal case turns primarily on the rather unusual point of law that probable cause cannot be proved if the facts alleged do not in law constitute the crime charged.[30] Thus, while an erroneous belief as to facts may be sufficient to establish probable cause, a mistaken belief as to the law cannot furnish probable cause unless the prosecution was instituted upon the advice of counsel, honestly sought, after a full and fair disclosure of all the material facts. In the instant case, the accused was unsuccessfully prosecuted under the bad check law, TENN. CODE ANN. § 39-1904, which expressly states, as an element of the crime, that the drawer must have written notice of the fact that the check was not good. By definition, therefore, the crime of passing a worthless check cannot be committed unless the drawer has received written notice.[31] Thus the conclusion inevitably follows that by failing to give the required notice the defendant did not, in law, charge the accused with a crime,[32] even though the latter had been given oral notice of the bad check. Nor could the defendant, in this case, be aided by the defense of acting on counsel's advice since, as noted, the defendant began proceedings without consulting an attorney.

So far as can be determined, the doctrine of a mistake of law is unequivocally supported by only one case in Tennessee, *Hall v. Haw-*

25. Poster v. Andrews, 183 Tenn. 544, 194 S.W.2d 337 (1946); Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W 2d 252 (1949); Pharis v. Lambert, 33 Tenn. 228 (1853).

26. Abbott v. Ledbetter, 1 Tenn. App. 458 (1925); Greer v. Whitfield, 72 Tenn. 85 (1879).

27. Stewart v. Sonneborn, 98 U.S. 187 (1878); Nashville Union Stockyards, Inc. v. Grissim, 13 Tenn. App. 115 (1930).

28. Memphis Gayoso Gas Co v. Williamson, 56 Tenn. 314 (1872); Thompson v. Schulz, 34 Tenn. App. 488, 240 S.W.2d 252 (1949); Kinnard v. Frierson, 190 Tenn. 304, 229 S.W.2d 348 (1949).

29. 1 HARPER & JAMES, TORTS § 4.6 (1956).

30. See RESTATEMENT, TORTS § 662 (1938) *Comment* 1 for the exception: where a statute upon which the accused is convicted is later declared unconstitutional, the accuser is subject to no liability for having prosecuted on the basis of that statute.

31. To the effect that written notice is mandatory and that actual notice is not enough, see Payne v State, 158 Tenn. 209, 12 S.W.2d 528 (1928).

32. Hunter v. Moore, 38 Tenn.App. 533, 276 S.W.2d 754 (1954); State v. Crockett, 137 Tenn. 679, 195 S.W. 583 (1917); Jones v. State, 197 Tenn. 667, 277 S.W.2d 371 (1955).

kins,[33] decided in 1844. In fact, there are relatively few cases anywhere which expressly discuss this particular point.[34] Prosser states that the decisions supporting this view are founded, as he puts it, on "the antique and questionable theory that he [the layman] is required at his peril to know the law."[35] Questionable indeed is a rule whose rigid severity precludes the possibility of proving probable cause when the accuser has made a mistake as to the law. Such a rule seems arbitrary and unrealistic in its assumption that a mistake of law, however reasonable, is inexcusable. There is no logical reason to consider a mistake of law in such an entirely different manner from a mistake of fact. In determining the issue of probable cause, the question ought not to turn on the kind of mistake, whether of fact or of law, but rather on the reasonableness of the mistake. A few scattered cases support this view[36] although the *Restatement of Torts* and a slight numerical majority of cases are in accord with the position expressed in the principal case.

In holding as it did, however, the court doubtless reached the correct result. The facts make it clear that the defendant's conduct was irresponsible and easily susceptible to an inference of bad faith. Yet the same result could have been reached by a holding that under the circumstances it was unreasonable for the defendant to believe that the plaintiff committed a crime, in which event the court could have avoided the questionable rule of a mistake of law.

J. B. R.

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33. 24 Tenn. 357 (1844).
34. Parli v. Reed, 30 Kan. 534, 2 Pac. 635 (1883); Turner v. O'Brien, 5 Neb. 542 (1877); Nehr v. Dobbs, 47 Neb. 863, 66 N.W. 864 (1896); Brown v. Kisner, 192 Miss. 746, 6 So. 2d 611 (1942); State Life Insurance v. Hardy, 189 Miss. 266, 195 So. 708 (1940); Hazzard v. Flury, 120 N.Y. 223, 24 N.E. 194 (1890); Smith v. Deaver 49 N.C. 513 (1857); Cabiness v. Martin, 14 N.C. 454 (1832).
35. PROSSER TORTS § 654 (2d ed. 1955).
36. Dunlop v. New Zealand F&M. Ins. Co., 109 Cal. 365, 42 Pac. 29 (1895); Franklin v. Irvine, 52 Cal. App. 286; 198 Pac. 647 (1921); Clinchfield Coal Corp. v. Redd, 123 Va. 420, 96 S.E. 836 (1918); Vencioni v. Phelps Dodge Corporation, 35 N.M. 81, 290 Pac. 319 (1930).

BOOK REVIEWS

THE LAW OF TORTS. By Fowler V. Harper and Fleming James, Jr. Boston: Little, Brown and Company. 1956. Pp. xxv, 2062 (3 volumes). $60.00.

The first volume of this book deals mainly with intended torts, including, however, chapters on such matters as defamation, misrepresentation, family relationships affecting tort liability, and contribution. The style of the first volume is reminiscent of the earlier well-known book on torts by Mr. Harper, who doubtless is the principal author of this volume. It is no mere revision, however, of the earlier work; the material has been much amplified, re-organized, and thoroughly revised.

The second volume, dealing with accidents, is to a considerable extent based on the series of articles on negligence and related matters written by Mr. James during the past ten years, and it is evident that he is the main author of the second volume, with the exception of the chapter of the rule of *Rylands v. Fletcher* and the concluding chapter on conflict of laws. (See Harvard Law School Record, Vol. 25, No. 2, p. 2 (Oct. 1957). The third volume of the book is taken up entirely with tables of cases and statutes, a bibliography of periodical material, and the table of contents.

The treatise itself, apart from the third volume, runs to 1714 pages. It seems to contain about twice as much material as there is in the other principal modern treatise, *Prosser on Torts* (2d ed. 1955). Some topics, such as the single publication rule in defamation (pp. 394-398), and the care owed by a motorist toward a guest (pp. 950-968) are treated in considerably more detail than in Prosser's book.

The writers of this new treatise both have an unusual gift for clear expression and logical organization. They support any position they take with the skill of experienced advocates along with the learning and intuition of profound scholars. The style definitely is above the average in a law book, and it is pleasant to find legal writers who can use effectively a bit of verse to illustrate the subject of forcible entry (p. 259) or a few striking lines from T. S. Eliot to bring out the slippery meaning of some commonly accepted terms. (p. 755)

The first question the average practitioner is apt to ask about any law book is whether it will provide much practical help in the handling of his tort problems. The answer in this case is that anyone handling tort cases or claims cannot afford to be without these volumes. The practical needs of counsel are constantly kept in mind, and the unusually complete citation authority, including references to many statutes, will save hours of research. Furthermore, new lines of approach, particularly helpful to a plaintiff's attorney, frequently are presented. Of course the defendant's attorney needs equally to be aware of these approaches. He, as well as the plaintiff's attorney, certainly needs to know that often it is no longer safe to rely on a traditionally accepted rule. This treatise makes it clear that in such fields as liability of landowners to trespassers, negligent misrepresentation, or products

liability, claims formerly blocked by a definite rule of law are being successfully put forward in an increasing number of situations.

Practitioners also will find useful the emphasis on problems of proof. So in the discussion of duties to licensees there are several suggestions as to how knowledge of the dangerous condition may be established over the usual denials, (p. 1474) and in the discussion of liability of suppliers of chattels about ten pages are devoted to showing what the plaintiff must do to establish that the injury resulted from the product, that the chattel was unreasonably dangerous, and that the defendant was negligent (p. 1560 *et seq.*). The discussion of legal cause brings out how the decision often will depend on what factors in the case are selected by attorneys for emphasis, and how the various tests for proximate causation used by the courts can be utilized to fit the facts of a particular situation (p. 1149). Practitioners also will welcome the rather full discussion of the vital topic of damages.

Besides providing a useful tool for practitioners the book makes a substantial contribution to the development of the law of torts. The authors bring out how traditional tort doctrine has not given sufficient consideration to the protection of the victims of the accidents resulting from modern industry. As they remark, "A fleet of trucks cannot be operated, a railroad run, or a skyscraper built without the certainty that the enterprise will take some toll in human life and limb." (p. 752). Along with this, too little account has been taken of the widespread presence of liability insurance, with the result that often "tort liability no longer merely *shifts* a loss from one individual to another but it tends to *distribute* the loss according to the principles of insurance, and the person nominally liable is often only a conduit through whom this process of distribution starts to flow." (p. 765). Consequently when courts talk about a rule of law as if a judgment were to come out of the defendant's pocket, they may be thinking in terms of complete unreality.

The authors propose as a remedy to this situation a wider adoption of the principle of social insurance, which is summarized as follows: "If a certain type of loss is the more or less inevitable by-product of a desirable but dangerous form of activity it may well be just to distribute such losses among all the beneficiaries of the activity though it would be unjust to visit them severally upon those individuals who had happened to be the faultless instruments causing them." (p. 763).

There seems to be much merit in this line of thought, at least in some areas of tort law, and probably those opposed to widening the area of strict liability have relied too exclusively on the fault principle as the only proper basis for liability. On the other hand, the fault principle still seems vital in most areas of tort law, and the authors of this treatise seem to unduly minimize this element. Is it true, for example, that the negligence concept simply "embodies the morality of individualism and laissez faire"? (p. 762) Or is the failure to use ordinary care for the protection of others a basic moral shortcoming in any kind of a society? Should we give great weight to the fact that the tendency of some recent psychological studies "has been to cut down the importance of personal moral shortcoming as a factor in causing accidents and to do so in many cases where the 'layman's common

sense' would find something to blame"? (p. 753) The tendency of most lawyers and judges, as well as of most laymen, for a long time, has been to consider that fault has a good deal to do with accidents and that a conscious effort to exercise due care is perhaps the most significant contribution that can be made to a solution of the accident problem. These judges and lawyers are men of intelligence, most of whom have had no little experience with human nature as well as with the application of legal rules. Psychology is a useful science, but it still is in a developing state, and is interesting to observe that an occasional student of psychology "finds more room for fault than do most." (p. 753)

While it seems fair enough to make all beneficiaries of an activity causing accidents pick up a larger portion of the bill than at present, in order that the victims of modern accidents may be more certainly compensated, there should be some way of making those who are shown to be mainly at fault pay a larger portion of the cost than is shouldered by beneficiaries generally of the activity. Probably the authors would not question this proposition, but some of the language in the book suggests that the terms negligence and fault have so little meaning that strict liability coupled with a general distribution of the loss by means of insurance would take care of almost all problems now dealt with under the negligence principle. The authors concede that in some situations, such as that where the accident results from a dangerous condition of the premises, "there is more room for finding something like individual ethical blame . . . and more chance that legal liability may have some effect in controlling conduct." (p. 741). In general, however, the authors seem inclined to restrict rather narrowly the operation of any assumption that the actor had a choice and of his own free will chose a culpable line of conduct. This does not accord with the general conviction of common law judges and lawyers that free will ordinarily is present in human action or failure to act.

It would seem that the extension of strict liability in particular fields can be supported without resort to this deterministic philosophy, and the authors themselves develop some effective arguments of a more factual nature. They point out how a system of strict liability leads to significant efforts by insurance companies and the like to promote safety and reduce accidents, as under workmen's compensation, where the accident reduction rate has been impressive. They further show how strict liability has not in fact overburdened desirable activity, as in the case of aviation. (pp. 755-758). Furthermore the authors point out that "If a system of absolute liability involves fixed limitations on the amount to be recovered, as in the case of workmen's compensation, it may actually cost little or no more than a system where liability is for negligence as determined by a jury without limitation on the amount." (p. 757). While it is unlikely that the courts will adopt this viewpoint with reference to negligence law generally, they may well decide to apply it in limited areas, such as manufacturer's liability (p. 1571).

The authors are of course in favor of cutting down all sorts of immunities from tort liability, both private and public. In that connection there is convincing argument in the chapter on the rule of *Rylands*

v. Fletcher that the Federal Tort Claims Act subjects the government to strict liability for ultrahazardous activities as well as to liability for negligence. (p. 859). In the field of liability for radio defamation the authors are for once in favor of a defendant, the broadcasting company. They find that the broadcasters should be exempted from strict liability, for in this situation they consider that the interest in free speech outweighs the principle of social insurance. It is said that strict liability in this area might lead to private censorship on matters of public interest, and that "The danger of individual hardship must be borne in the larger interest of free public discussion." (p. 408).

At first sight the authors seem to favor a considerable restriction of the defendant's liability in their support of the risk theory of the *Palsgraf* case, which limits liability to a foreseeable plaintiff. They contend that cases cited by Prosser as rejecting the risk theory do not in fact do so, except under "the most myopic notion of foresight." (p. 1024). Defendant's attorneys, however, will not take much comfort from this part of the treatise, for the authors find that the concept of foreseeability is capable of indefinite expansion. They assert that "the concept of foreseeability is elastic, and as knowledge increases and the pressure towards social insurance grows, limitation will probably be pushed further and further back." (p. 1026). Furthermore, it is concluded that the issue of whether or not the plaintiff was in fact foreseeable ordinarily should be left to the jury, a result not always welcomed by attorneys for the defense. (p. 1059).

The writing of a full-length treatise on torts is a considerably more complex task today than it was a generation ago and it is not surprising that the authors have found it necessary to devote about thirty years to the preparation of these volumes. The number of court decisions which must be considered is staggering, to say nothing of the constantly growing body of statutory law. It also is essential to be aware of many new and complicated developments in our economic and social life. The authors have brought to this task a broad and deep scholarship. Along with this they have an awareness of the demands of litigation gleaned from experience in practice. Both writers have an unusual appreciation of economic realities and the requisites of public welfare secured from service in highly responsible governmental positions. The tendency of the book to advocate the principle of social insurance and more assured compensation for plaintiffs does not prevent the authors from dealing with the main body of tort law in a way that takes account of well-marked patterns of professional thought, in a highly competent manner. Anyone interested in the field of torts, whether as a practitioner, judge, legislator, student, or teacher, will be making a mistake if he does not have this work close at hand and use it frequently.

The University of Tennessee DIX W. NOEL

RACIAL DISCRIMINATION AND PRIVATE EDUCATION. By Arthur S. Miller. Chapel Hill, University of North Carolina Press. 1957. Pp. ix, 136. $3.50.

Although acute problems of implementation and enforcement remain, the legal principle that the Constitution of the United States forbids compulsory segregation of races in public schools is now the law of the land. Those who proclaim otherwise are not legal scholars, but wishful thinkers crying in the wilderness. Attempts of state legislatures, short of abolition of public school systems, are declared to be unconstitutional almost as fast as they are enacted.

In the field of private education, however, the legal principles applicable to problems of racial discrimination and desegregation are still to be determined. This book, by a professor of law in the Lamar School of Law of Emory University, deals with the problems which may be expected to arise in this area. The questions are interesting and significant both because of the present considerable number of private educational institutions and because of the threat of some states to abolish their public school systems rather than accept desegregation.

Although there is one chapter dealing with private, non-governmental sanctions against integration – *viz.*, physical, economic and psychological sanctions – the book is primarily a legal analysis of two basic questions. The first question is, Can state governments exercise legal sanctions against private educational institutions which voluntarily attempt desegregation? With respect to this, Professor Miller suggests several possible deterrents which might be attempted. They include direct statutory prohibitions of a penal nature; denial of benefits, primarily tax exemptions: and discrimination in the enforcement of traditional regulatory powers, such as sanitary requirements, requiring fire-escapes and the like. Although there are few cases dealing with these problems, the author's evaluation is that "it can be forecast with some confidence that the Supreme Court would adhere to the spirit of the recent racial cases and would strike down attempts to compel private groups to maintain policies of racial separation." (p 48) But it is recognized that this litigation would take time, and that in the interim serious difficulties would confront the private institution attempting desegregation against the wishes of militant local governments.

As is pointed out in the book, so far states have done little even to enforce existing legislation available for use against desegregating private schools, although the legislatures of Mississippi and Louisiana in 1957 considered bills to prevent desegregation of non-public schools. It may be well that this problem may never become a hotly contested issue. It is the second question that the author raises, which is almost certain to become important. This question is, Does the U. S. Constitution forbid racial discrimination by private institutions?

The 14th Amendment is by its terms applicable only to state action, although as noted by the author (p. 89), argument has been advanced that at the time of its adoption individual action was believed to be included in state action. Under existing decisions a determination that private education involves state action would be essen-

tial to a holding that private schools are forbidden to practice racial discrimination. That such a determination might be made is suggested by decisions in other areas. The development of the concept of "state action" in the fields of racial covenants, voting rights, discrimination by unions, and the like, is well presented. Although recognizing that the Supreme Court has gone far in finding state action in these areas, the author predicts that "true" private education will not be held to fall in that category, in large part because of the acceptable alternative of public education. As to "private" schools which are simply made-over public ones, the author says:

> "The 'private school' plans of some Southern states, enacted in an attempt to avoid the impact of the Court's decision, are quite another matter; it is probable that they generally will be invalidated judicially when, or if, they are challenged." (p. 95)

One other legal problem, the validity of racial restrictive clauses or limitations in grants and gifts to private institutions, is treated by Professor Miller. A question which this reviewer would like to see discussed is not considered, although it is suggested by quoted language from some decisions. That is, is public education now a legally enforceable duty of the states?

One final point of the author deserves attention.

> "Finally, it may well be that racial integration in the denominational and other private schools will be the wedge that opens the doors of the public schools in many parts of the South. If the pattern already started in an increasing number of private institutions of desegregating their student bodies continues, then the private school may operate as a proving ground for testing racial relations in education. Assuming some comparatively high degree of success in private school integration, the road ahead for the public schools may possibly be found. If the fears, rational or irrational, of the white man are not realized in one system of education, perhaps he will withdraw his opposition to integration in the other (public) school system." (p. 130)

Professor Miller has written an excellent book, scholarly, objective, and well-presented. It should be required reading by all concerned with the problems of private educational institutions, and will be interesting and informative to anyone sensitive to the particular problem or the general problem of desegregation.

The University of Tennessee F. W. LACEY

TENNESSEE LAW REVIEW

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RES IPSA LOQUITUR AND ACTIONABLE RADIATION INJURY

BY GERALD L. HUTTON*

Man has always been exposed to some form of ionizing radiation. At sea level he receives approximately 30 millirem[1] per year from cosmic radiation that bombards the earth from interstellar space. The dose rate is greater at higher altitudes. An additional 50 to 80 millirem per year are received from the naturally occurring elements in the earth, primarily uranium and thorium. Man breathes measurable quantities of radon gas, a decay product of uranium, liberated from the earth and diffused into the atmosphere. Man also ingests measurable quantities of Potassium 40, Carbon 14, and radium, and other radioactive materials in his food and water intake.

An additional source of ionizing radiation was introduced with the discovery of x-rays by Roentgen in 1896. Breast cancer was treated by x-rays two months after Roentgen's announcement of his discovery of x-rays. A patient's skull was x-rayed shortly thereafter, resulting in epilation and considerable skin damage. The x-ray machine was employed for other medical purposes in the year of its discovery. These early uses of the x-ray machine clearly demonstrated that ionizing radiation could be invaluable to man in some respects and highly damaging or even lethal under other circumstances. Uranium was discovered in 1896 and radium in 1898. Man also learned at an early date that ionizing radiation from radioactive materials could prove highly damaging if proper care is not exercised in their use.

Notwithstanding these early experiences, however, it was many decades before serious attention was given to radiation safety considerations. X-Ray machines and radium were used in World War I for radiographing of metallic structures. Medical and dental patients continued

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The opinions expressed herein are those of the author and do not necessarily reflect the views of the U. S. Atomic Energy Commission or its general counsel.

1. A "millirem" is one-thousandth of a "roentgen-equivalent-man." A "roentgen-equivalent-man" (abbreviated as "rem") is that dose of ionizing radiation that when absorbed by man, produces a biological effect equivalent to the absorption by man of one roentgen of X or gamma radiation.

to receive painful burns from the diagnostic uses of x-rays, such burns resulting from defective equipment or unskilled operation thereof.

The most tragic and best documented example of radiation injury is found in the "dial painters" cases of the 1920's.[2] Several hundred girls, fifteen to twenty years of age, were employed to paint watch dials with luminous paint[3] in 1914. In addition to inhaling the radon gas and radium particulates in the atmosphere, and receiving external radiation from the luminous paint, the girls ingested relatively large quantities of radium in the process of pointing the fine brushes by mouth. A dentist reportedly first discovered severe radiation damage to the mandible of one of the girls. At least thirty of these girls over an extended period of years died from the effects of the ingested luminous paint — osteogenic sarcoma, fibro-sarcoma, anemia, and various types of both benign and malignant tumors. Although some cases may have been settled out of court none of the actions at law or equity[4] brought by the girls succeeded.

Radium was also administered orally and intravenously to medical patients for a wide variety of ailments ranging from arthritis to anemia during the period from 1915 to 1930. Radioactive materials were incorporated into certain contrast media used in roentgenographic examinations. Fluoroscopic devices have also been employed for several years in the fitting of shoes, inspection of manufactured products for foreign materials, improper fill of packaged items, and many other purposes.

The construction of nuclear reactors has made possible the production of large quantities[5] of radioactive materials at reasonable prices.[6] As of February 28, 1958 3,512 industrial firms, medical institutions, physicians, federal and state laboratories, foundations, and institutions were licensed by the Atomic Energy Commission to use byproduct ma-

2. See Martland, *The Occurrence of Malignancy in Radioactive Persons*, 15 AM. J. OF CANCER 2435 (1931). Also Martland, *Occupational Poisoning in Manufacture of Luminous Watch Dials*, 92 AM. MED. ASSN. J. 466 (1929). Also Evans, *Radium Poisoning*, 37 AM. J. ROENTGENOLOGY 368 (1937).

3. In most instances the luminous paint contained mesothorium and radiothorium in addition to radium.

4. See the well known case of La Porte v. United States Radium Corp., 13 F. Supp. 263 (D.C.N.J. 1935) holding the statute of limitations as a bar to plaintiff's action.

5. Whereas fewer than three pounds of radium are available to man at this time, a single nuclear reactor can produce the curie equivalent of several hundred tons of radium.

6. A millicurie of tritium, for example, cost $10,000 in 1942 when produced in some cyclotrons. Today it can be produced in nuclear reactors for less than one cent a millicurie.

terial or reactor produced radioisotopes.[7] More than fifty of these licensees are located in the State of Tennessee. The great majority of byproduct material shipments in the United States are made by facilities of the Atomic Energy Commission and commercial laboratories in Oak Ridge, Tennessee.

Other sources of ionizing radiation are cyclotrons and other types of particle accelerators, nuclear reactors, electron microscopes, inspectoscopes, and a wide range of devices such as ionotrons, alphatrons, beta gages, gamma cameras, neutron sources, and other devices incorporating either naturally occurring or reactor produced radiomaterials.

The rapidly increasing uses of radioactive materials and radiation generating machines has stimulated a growing interest in the legal problems which may attend or result from the widespread use of such radiation emitters. The legal literature thus far has been limited generally to construing various provisions of the Atomic Energy Act of 1954, particularly the patent sections, and the regulatory aspects of this statute.[8] The regulatory role of the state governments in this area has also received some attention.[9] Only a few legal papers, however, have been devoted to the tort aspects of radiation injury or the procedural[10] and evidentiary[11] problems which may be encountered in tort or workmen's compensation[12] actions founded upon actionable radiation injury.

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7. For further discussion of uses and controls of radioisotopes see: HUTTON, RADIOISOTOPES—USES, HAZARDS, CONTROLS (1958). Also HUTTON, APPLIED ATOMIC ENERGY RESEARCH, Ch. VIII, Science and the Social Studies, NATIONAL COUNCIL FOR THE SOCIAL STUDIES, TWENTY-SEVENTH YEAR BOOK (1956-57). Also Aebersold and Hutton, *Procurement and Use of Radioisotopes,* HOSPITALS August, 1955.

8. See e.g., Aebersold and Hutton, *Federal Regulation of Atomic Activities,* 7 CLEVELAND-MARSHALL L. REV. 77 (1958). Also, Hutton, *Public Control of Radiation Emitters,* 69 PUB. HEALTH REP. 1133 (1954). Also, Price, *The Civilian Application Program,* A Forum Report on Commercial and International Developments in Atomic Energy, in ATOMIC INDUSTRIAL FORUM 202 (1956). Also, Lowenstein, *Legal Aspects of Control,* in OHIO STATE UNIVERSITY, HEALTH PHYSICS CONFERENCE (1955).

9. Dietz and Harris, *How Shall California Government Meet the Challenge of Atomic Energy?* 8 HASTINGS L. J. 119 (1957). Krebs and Hamilton, *The Role of the States in Atomic Development,* 21 LAW AND CONTEMP. PROB. 182 (1956).

10. See Hutton, *Statute of Limitations and Radiation Injury,* 23 TENN. L. REV. 278 (1954).

11. See Hutton, *Evidentiary Problems in Proving Radiation Injury,* 46 GEORGETOWN L. J. 52 (1957). Also, Becker and Huard, *Tort Liability and the Atomic Energy Industry,* 44 GEORGETOWN L. J. 58 (1955).

12. See Hutton, *Workmen's Compensation and Radiation Injury,* to appear in a forthcoming Symposium on Law and Atomic Energy in VAND. L. REV. (Dec. 1958). Also, Hiestand, *Compensation for Injury to Life or Property,* in UNIV. OF MICH. LAW SCHOOL, ATOMIC ENERGY INDUSTRIAL AND LEGAL PROBLEMS 216-230. Also, Biemiller, ATOMIC HAZARDS FOR WORKERS, I.A.I.A.B.C. PROC. (1956).

RADIATION INJURY IN BRIEF

Ionizing radiation can prove injurious or lethal in itself and it can also aggravate or intensify the seriousness of thermal burns and other types of injuries. A radiation dose in the range of 400 to 600 rem, if delivered to the whole body or critical organs, will result in death to approximately one-half of human beings exposed thereto and cause serious injury to the others. The harmful effects will be less if this same dose is delivered to the human subject in fractionated doses (e.g. 100 rem in each of four successive weeks). The damage will also be less if the dose is delivered to a limited area of the body such as the hands, other factors being equal.

Growing tissues or immature cells, or those in an active stage of division, are more easily damaged than other tissues or cells. The basic cells of the hematopoietic system are especially vulnerable to ionizing radiation. These include the lymphocytes, erythroblasts, and myeloblasts. Similarly, the germinal cells of ovaries and testes are highly sensitive to radiation. It is to be noted, however, that any living cell can be destroyed by radiation if a sufficient dosage is employed.

Where extremely large radiation doses are received, death may follow within a short period of time. Death may ensue within a few minutes or hours following a radiation dose of several thousand rem. The radiation syndrome with such dose will be characterized by neurological symptoms whereas one-thousand rem may be exemplified by acute gastrointestinal symptoms. Anemia, hemorrhage, and other evidence of bone marrow damage are typical with dosages of 600 to 1000 rem, death ensuing in one to eight weeks.

Radiation injury is characterized by a latent period between receipt of the radiation dose and manifestation of symptoms or effects of radiation injury. The manifestation of clinical symptoms of injury may be delayed for many years if low radiation dose is involved or a particular dose is fractionated or received over an extended period of time.

Many conditions have been associated with radiation injury although they may be due to other causative agents in a particular case — e.g. lukemia, anemia, cataracts, sterility, and various types of cancer. The life span may be shortened as a result of injury to a particular organ or as a result of lowered immunity to infection. A radiation effect, for example, which reduces the white blood cells leaves the organism vulnerable to infection. The very young are particularly sensitive to radiation because the cells are immature and growing. The very old are unable to effect the necessary repairs of tissue and cell damage resulting from ionizing radiation.

Radiation damage may result from external exposure such as x-rays or gamma rays from an x-ray machine or cobalt 60 radiographic unit, or gamma and beta rays from a radium capsule. Radiation injury may also follow ingestion, inhalation or other entry of radioactive material into the body where it serves as an internal source of radiation, in intimate contact with the tissues, until it is excreted from the body. Radium, Strontium 90, and Polonium 210 are particularly hazardous if taken into the body. The greater portion of radium taken into the body is eliminated, but that amount that becomes deposited in the bone is eliminated very slowly. The biological half-life in the human body of all radioactive materials is not known with a great deal of certainty. Thus in many cases it is necessary to extrapolate from data derived from animal experimentation and from such human experience as is available.

Radiation Damage to Property

Radioactive materials and ionizing radiation, under certain circumstances, may cause extensive property damage. Photographic materials, for example, may be fogged by ionizing radiation. In the event of an accident such as rupture of a sealed radioactive source, adjoining machinery or property may be seriously contaminated with radioactive particles or dust rendering them unsafe for use or occupancy until thoroughly decontaminated. Decontamination may not be feasible in some instances or may be economically prohibitive. A laboratory may be contaminated to the extent, that, although safe for occupancy, the use of sensitive radiation measuring instruments is seriously interfered with. The fact that a building his been contaminated with radioactive materials, although subsequently cleaned up reasonably well, may deter many persons from buying or leasing such structure. Thus the value of the building may be significantly depreciated.

Res Ipsa Loquitur, Generally

The doctrine of res ipsa loquitur,[13] literally "The thing speaks for itself", is an exception or qualification of the general rule that negligence will never be presumed. Under this doctrine, in the absence of a satisfactory explanation by defendant, it is reasonable evidence that an accident arose from the want of due care if it can be shown that the thing or instrumentality that caused the injury is under the manage-

13. The doctrine was first stated in the historic case of Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863). See also Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 601 159 Eng. Rep. 665, 667 (Ex. 1865).

ment of the defendant, or his servant, and the accident is of the type that ordinarily does not happen if the person having control thereof exercises the requisite degree of care. This doctrine is recognized in essentially every jurisdiction. Although res ipsa loquitur has been rejected by name in a few jurisdictions, such courts follow the doctrine under another label with equivalent legal effect. In Pennsylvania, for example, the courts speak of the "exclusive control doctrine".[14] South Carolina, which has rejected the doctrine in name, permits negligence to be established by circumstantial evidence, achieving essentially the same effect as under res ipsa loquitur. The Michigan rule is likewise stated in terms of circumstantial evidence.[15] The confusion which surrounds the doctrine has given rise to suggestions that the phrase be abandoned entirely.[16]

Res ipsa loquitur is a rule of evidence and not of pleading or of substantive law.[17] The effect of res ipsa loquitur, where applicable and properly invoked, is to permit a prima facie case of negligence without direct proof of negligence. The doctrine is frequently referred to as a "rule of necessity" permitting a plaintiff to establish a prima facie case of actionable negligence under circumstances in which direct evidence of negligence is not available.

The courts frequently do not apply the doctrine in a particular case due to the failure of plaintiff's counsel to establish a proper foundation for invocation of the rule. More must be shown, for example, than the fact that plaintiff was injured by a particular instrumentality. The fact that defendant owns the offending instrument is occasionally shown by plaintiff rather than that the instrument was under the control of defendant. In some jurisdictions it must be shown that the instrumentality which caused the injury complained of was, at the time of injury, under the exclusive control of defendant, his servants or agents and, in the latter case that he was responsible for the acts of his servants or agents.[18] Mere ownership, of course, does not necessarily constitute exclusive control thereof.[19]

14. The "Doctrine of Exclusive Control" is an exception to the principle that plaintiff must establish a prima facie case of negligence and causation. Its effect is to shift to the defendant the burden of disproving negligence by a satisfactory explanation. Mitchell v. Scharf, 179 Pa. Super 220, 115 A.2d 774 (1955).
15. 65 C.J.S. *Negligence* § 220 (2) (1950).
16. See PROSSER HANDBOOK OF THE LAW OF TORTS, 293 (1941). Prosser *The Procedural Effect of Res Ipsa Loquitur,* 20 MINN. L. REV. 241, 271 (1936).
17. Quinley v. Cocke, 183 Tenn. 428, 192 S.W.2d 992 (1946). Keystone-Fleming Transport v. City of Tahoka, 277 S.W.2d 202 (Tex. Civ. App. 1954). Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N.W.2d 228 (1955).
18. Giacalone v. Raytheon Mfg. Co., 222 F.2d 249 (1st Cir. 1955).
19. Mitchell v. Scharf, 179 Pa. Super. 220, 115 A.2d 774 (1955).

"Control" has frequently been construed as having the authority to authorize the use of the instrument.[20] The doctrine may not be applicable where there is divided control over the offending agent or the instrument was partly under the control of plaintiff or a third party. Some courts, however, will allow plaintiff the evidentiary effect of the doctrine despite divided control. If divided control is involved, however, the plaintiff must show that he is free from fault.[21] Plaintiff may avail himself of the rule even though defendant has relinquished control of the instrument if it can be shown that the injurious agent was not tampered with or altered by other parties from the time that defendant gave up possession to the time that the injury occurred.

Care must be exercised in pleading specific acts of negligence if counsel is to avail himself of the doctrine. It is particularly important that the pleadings contain a general allegation of negligence although an increasing number of courts will permit a plaintiff to rely on res ipsa loquitur, in an appropriate case, irrespective of the form of pleading.[22]

Evidentiary Effect of Res Ipsa Loquitur

The courts, even in the same jurisdiction, are not in accord as to the evidentiary effect which will be accorded res ipsa loquitur. In some instances it has been held to raise an "inference",[23] or a "compulsory inference".[24] In other cases the effect is stated as giving rise to a "presumption of negligence". There is a difference between inference and presumption. Either of these in turn may be conclusive and irrefutable, or mandatory and rebuttable, or merely permissive. The doctrine has also been referred to as furnishing or constituting evidence of negligence whereas other courts have stated that it merely takes the place of evidence.

Res ipsa loquitur frequently makes it possible for a plaintiff to recover under circumstances in which otherwise it would be impossible for him to establish a cause of action. An increasing number of cases appear to rely primarily upon this doctrine which, although criticized, frequently is the deciding factor as to which of the two parties will prevail. An important consideration for a plaintiff is the fact that making out a proper case of res ipsa loquitur will almost always assure that the case will go to the jury. The court seldom can justifiably direct

20. Rodin v. American Can Co., 133 Cal. App.2d 524, 284 P.2d 530 (1955).
21. Whalen v. Phoenix Indem. Co., 222 F.2d 121 (5th Cir. 1955).
22. State for Use of Parr v. Board of County Commissioners, 380 Pa. 600, 112 A.2d 397 (1955).
23. Leonard v. Watsonville Community Hospital, 291 P.2d 496 (Cal.App. 1956).
24. Redfoot v. J. T. Jenkins Co. 138 Cal. App.2d 108, 291 P.2d 134 (1955).

a verdict in such cases since the jury may accept the inference of negligence as having greater weight than the testimony and other evidence of due care presented by defendant's witnesses. Availability of the doctrine, however, does not compel a finding for plaintiff nor does it shift the ultimate burden of persuasion. Tennessee follows the weight of authority that res ipsa loquitur merely permits the jury to consider and choose the inference of defendant's negligence in preference to other permissible and reasonable inferences.[25]

Res Ipsa Loquitur and Radiation Injuries

Malpractice Actions. The courts have been extremely reluctant to apply the doctrine of res ipsa loquitur to malpractice suits. The doctrine is not ordinarily applied in malpractice actions[26] and is limited in such cases.[27] As a general rule an action against a physician for failure to exercise requisite care or skill sounds in tort rather than contract. Negligence ordinarily cannot be inferred merely from bad results following medical treatment. As a general rule negligence of the physician cannot be presumed, a presumption operating in his favor that he possesses requisite skill and exercised such skill with requisite care in any particular case.

In many malpractice actions, however, res ipsa loquitur is not applied because a proper foundation is not laid by counsel. The fact that the case is one of malpractice is not necessarily controlling in such instances. The practice of medicine, surgery, and the use of an x-ray therapeutically have been described as inexact sciences and res ipsa loquitur, according to some cases, is not applicable.[28] One or more requisites for res ipsa loquitur may be lacking in a particular malpractice action involving ionizing radiation.

The therapeutic use of x-ray has been categorized with other forms of medical therapy, making it difficult to establish a case for res ipsa loquitur. This is undoubtedly justifiable in most instances involving x-ray *therapy* inasmuch as radiation therapy for malignant and other serious conditions necessarily involves burns and other damage to diseased areas and adjoining tissues. In view of the nature of diseases such as cancer, and the difficulties of treating them it cannot be said that bad results do not follow radiation therapy unless the physician has been negligent.

25. McCloud v. City of LaFollette, 38 Tenn. App. 553, 276 S.W.2d 763 (1954).
26. Quinley v. Cocke, 183 Tenn. 428, 192 S.W.2d 992 (1946).
27. Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W.2d 659 (1950).
28. Adams v. Heffington, 216 Ark. 534, 226 S.W.2d 352 (1950).

Many therapeutic applications of x-rays, however, involve superficial radiation for minor skin conditions or blemishes. It may be argued in such instances that serious radiation burns and skin and tissue damage do not happen in the normal course of events unless the operator of the radiation emitter is negligent or the machine is defective. It is possible that res ipsa loquitur will be applied to superficial radiation therapy just as an increasing number of courts permit invocation of the doctrine in the case of diagnostic x-rays.

Further, modern x-ray equipment when properly calibrated and operated is highly reliable and dosage can be regulated to a higher degree of precision than was true several decades ago. Radiation units have been fairly well standardized and proper dosage levels for a particular condition have been established within certain ranges.

Some jurisdictions have reversed earlier decisions that res ipsa loquitur will not be applied in malpractice actions involving x-rays. The California rule restricts application of the rule in malpractice actions to cases "where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."[29]

Other courts have left the door open for application of res ipsa loquitur in malpractice suits involving radiation injury. In *Emrie v. Tice*[30] for example, it was held: "This court is not committed to the rule that the doctrine of res ipsa loquitur can never be applied to x-ray treatments of human ailments but will consider each case on the basis of facts alleged and evidence adduced." This case involved x-ray treatment of a wart or growth on the ear and injury resulted to other areas.

Casenburg v. Lewis[31] is an excellent example of the probative effect of res ipsa loquitur. This case involved a third degree x-ray burn about seven by nine inches on the abdomen of plaintiff who during the course of therapy received about 160 x-ray treatments. Testimony indicated destruction of tissue throughout to the abdominal membrane. Defendant argued supersensitiveness of Mrs. Lewis to x-rays and also asserted that the use of scarlet red on the itching surface converted a first degree to a third degree burn. The court noted:

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29. Costa v. Regents of U. of Cal., 247 P.2d 21 (Cal.App. 1952), citing Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695 (1939).
30. Emrie v. Tice, 174 Kan. 739, 258 P.2d 332 (1953).
31. 163 Tenn. 163, 40 S.W.2d 1038 (1931).

> As stated in the former opinion, the doctrine of res ipsa loquitur is applicable if the instrument that produced the injury was under the exclusive control of the defendant and injury would not ordinarily result if due care was exercised. Applying the rule, it is said the fact of injury makes out a prima facie case of negligence, and in the absence of countervailing explanatory proof to overcome the prima facie case liability would follow. It is said that the inference of negligence arises under the doctrine of res ipsa loquitur, and the prima facie case thereby established becomes conclusive unless rebutted by opposing counsel. When rebutted by opposing evidence, the weight of the inference as well as the weight of the explanation is for the determination of a jury, unless uncontradicted explanatory evidence excludes the inference that injury resulted from want of ordinary care.
>
> Taking the explanatory evidence altogether, it does not destroy the weight of the inference arising from the doctrine res ipsa loquitur, and so the weight of evidence, as well as the weight of the explanation, was matter for determination by the jury.

Routen v. McGehee[32] pertains to an action for a radiation burn in the use of a fluoroscope to locate an imbedded needle. The complaint alleged that plaintiff's foot was burned inside to the extent that the ligaments were partially destroyed, impairing use of the member for about a year and preventing removal of the needle. The court stated:

> Res ipsa loquitur is ordinarily available where the party charged has exclusive control of the means by or through which the injury or damage is produced and the result is not such as would reasonably be expected to attend. But we have very definitely held that the doctrine does not apply (a) to the practice of medicine and surgery, or (b) to the use of x-ray machines.
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> In Brown v. Dark, 196 Ark. 724, 119 S.W. 2d 529, 535 it was said: ". . . If the doctrine res ipsa loquitur applied, the judgment might be sustained. But it does not. Medicine and surgery are inexact sciences and physicians are not guarantors of results." (Remanded for new trial.)

Bennett v. Los Angeles Tumor Institute[33] is illustrative of the difficulties which a plaintiff may encounter in making a case for res ipsa loquitur in a malpractice action. A judgment of nonsuit was issued by the lower court and sustained on appeal. Plaintiff alleged negligence in the administration of x-ray treatments for papillomae on the ball of each foot. X-ray therapy, it appeared was administered to plaintiff on three occasions at weekly intervals. Reddening of the irradiated areas occurred, followed by blistering, sloughing of the tissue and denudation of a small area of the sole.

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32. 208 Ark. 501, 186 S.W.2d 779 (1945).
33. 102 Cal. App.2d 293, 227 P.2d 473 (1951).

> Appellant contends that such evidence was sufficient to warrant submitting the issue to the jury under the doctrine of res ipsa loquitur, relying on Moore v. Steen, 102 Cal. App. 723, 283 P 833 and Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107. The doctrine was applied to x-ray burns in these decisions but they are distinguishable from the case at bar in that their plaintiffs suffered x-ray burns of which there was no denial. The x-rays therein involved were used solely for diagnostic purposes and in the Moore case the court itself pointed out this distinction, 102 Cal. App. at page 731, 283 P at page 836.
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> The application of the doctrine of res ipsa loquitur is necessarily limited in the field of malpractice. The courts have applied it in only a restricted class of cases where the layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.
>
> It cannot be said as a matter of common knowledge that the conditions which the plaintiff described which included blisters and sores on the soles and tops of her feet and on her shins was something caused by the negligence of Dr. Johnson. In the absence of expert medical testimony the inference that the condition was proximately caused either by a change in the original condition suffered by plaintiff or by some new trouble having nothing to do with the radiation was just as reasonable. Under the circumstances the res ipsa loquitur doctrine is not applicable.

In *Hess v. Millsap*[34] x-ray treatments were applied to a small sore on the crown of plaintiff's head. The skin blistered and underlying tissues apparently were affected, plaintiff being rendered entirely bald except around the edges. Damages in the amount of $1800 were awarded by the jury and the judgment was affirmed on appeal. The following dictum appears in this case:

> A case involving the doctrine of res ipsa loquitur might have been presented if the correctness of the factors of dosage and manner of treatment as testified to by appellant had not been disputed.

The doctrine of res ipsa loquitur was not followed in *Cooper v. McMurry*.[35] In this case plaintiff had received a fluroscopic examination and the complaint was premised upon a severe x-ray burn. Among other defenses, defendant argued that he had used requisite care and that the x-ray machine employed in the examination was not defective. An argument was also set forth that the injury to plaintiff was due to an unusual sensitivity of his skin which had not been apparent and could not be guarded against. The court stated:

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34. 72 S.W.2d 923 (Tex. Civ. App. 1934).
35. 194 Okla. 241, 149 P.2d 330 (1944).

> It is generally held that the doctrine of res ipsa loquitur is without application in malpractice actions brought by a patient against a physician. The reason why this is the rule was succinctly stated in Nixon v. Pfahler (279 P. 377) in the following language. "It is necessary for those engaged in the medical profession to constantly employ dangerous agencies like electricity, radium, surgical instruments, poisons, anesthetics, etc., and if prima facie liability attaches for an accident resulting from the use of one, logically it should from the use of the other, and the practitioner employing such would be practically an insurer of the safety of his patients, which the law declares he is not. The question of liability does not hinge upon the dangerous character of the agency employed, but upon the manner of its use, as to which the presumption of due care is in favor of the practitioner, until overcome by evidence to the contrary. . ."

The circuitous reasoning appearing in the above excerpt clearly reflects a misunderstanding of the basic concept of the res ipsa loquitur doctrine. The doctrine, for example, does not attach prima facie liability merely because an accident has occurred — it must be an accident of the type which ordinarily does not occur unless the person having control over the instrumentality causing the injury is negligent. It is not based, either, upon the dangerous character of the agency employed.

Thomas v. Lobrano[36] promises to be a leading case on the principle of res ipsa loquitur as applied to malpractice actions, as far reaching in impact, if followed, as the original case of *Byrne v. Boadle.* The complaint asserted that x-ray injury occurred in the treatment of boils in both armpits. Chronic radiodermatitis ensued requiring removal of skin from injured areas and application of skin grafts. Holding for the plaintiff the court stated:

> *The rule* (of ordinary care) *makes it incumbent on the physician, surgeon* or dentist who becomes defendant in a malpractice case to *show that he is possessed of the required skill and competence indicated and that in applying that skill to the given case he used reasonable care and diligence along with his best judgment.* The rule therefore may be said to bear some relation to the doctrine of res ipsa loquitur which places the burden on a defendant having control of the dangerous instrumentality which caused an accident to show his freedom from negligence in a case where such accident would not ordinarily have occurred had proper care and use been made of the instrumentality. As stated by the Court of Appeals in its opinion in this case, however, that does not mean that the defendant must show just what was the cause of the occurrence. (Emphasis supplied.)

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36. 76 So.2d 599 (La. App. 1954).

> It is obvious from the above emphasized portion of the court's pronouncement that the burden in the instant case is upon the defendant physician to affirmatively establish his use of reasonable care and diligence, together with his best judgment, in his treatment of the plaintiff. . . . It follows as a corollary that the defendant is also under the burden of negativing the many specific charges of negligence or want of proper care.

There is little reason to assume that the medical use of radioisotopes produced in nuclear reactors will be treated differently from the use of radium and x-ray machines insofar as application of the doctrine of res ipsa loquitur is concerned. A Cobalt 60 teletherapy unit, for example, emits gamma rays which are equivalent to x-rays except for their origin. Such units, as indicated by the name, are employed for therapeutic purposes and may involve less skin damage than x-ray therapy for deep-seated conditions. Logic would dictate that no distinction be made, insofar as the doctrine of res ipsa loquitur is concerned, between therapeutic use of ionizing radiation from a teletherapy unit incorporating reactor produced radioisotopes and an x-ray generating maching.

Similarly, there should be no distinction between medical use of a beta ray eye applicator containing Strontium 90 and one incorporating radium, or a beta ray plaque for topical application which uses a reactor produced radioisotope rather than radium. Undoubtedly, the courts will be reluctant to apply res ipsa loquitur to a malpractice action involving ionizing radiation from radioisotopes *for therapeutic purposes* just as they have applied the doctrine sparingly to the therapeutic use of x-ray machines.

The uncertainties which attend the internal administration of any drug for diagnostic or therapeutic purposes also apply to radioactive pharmaceuticals. It is probable, therefore, that res ipsa loquitur will not be applied in the ordinary case of malpractice involving internal administration of radioactive drugs such as Iodine 131, Phosphorus 32, etc. just as the doctrine is not applicable in the usual case of drug therapy. A fine question might be raised, however, if a bad result followed the diagnostic use of small "tracer doses" of such radiopharmaceuticals as Iodine 131 since experience has shown that adverse physiological effects do not normally result from such tracer doses. In all probability defendant in such cases, if they do occur, will set up unpredictable allergy as an explanation of such bad results, thereby countering or explaining away the inference of negligence.

Tort Actions Other Than Malpractice

Res ipsa loquitur has found wider application in the ordinary negligence action than in malpractice suits. A fine question is raised

as to whether the doctrine is likely to be applied in the event of a nuclear accident or radiation injury flowing from the industrial or other use of the manifold types of radioactive materials currently employed in industrial radiography, product control, or the like. The view has been expressed by Becker and Huard[37] that a plaintiff will be permitted to plead res ipsa loquitur if he has been injured by the escape of radiation, his inability to establish negligence being apparent. These writers conclude also that the excellent safety record of the atomic energy industry may "boomerang" inasmuch as it suggests that any accident that occurs, must occur through someone's negligence. They note also that the classic requirement of "exclusive control by the defendant of the instrumentality" has been virtually eliminated in some cases.

On the other hand it may be argued that an excellent safety record in a particular industry is not controlling on the question as to whether res ipsa loquitur will apply in a specific case. It cannot be assumed that every "rare" accident is due to negligence. As a matter of fact it has been held that the lack of other accidents may be shown by a defendant to overcome the prima facie case of negligence arising from the doctrine or res ipsa loquitur.[38]

It is true that some courts have admitted evidence of the absence of other accidents. It must be established, first, however, that the conditions which prevailed in the other instances were essentially the same as those in the case at bar. Further, introduction of such evidence, where successful, usually accrues to the benefit of the defendant if it is shown that accidents have not occurred in the past. The fact that one device fails in operation is not necessarily convincing evidence of negligence, but if it can be shown that several of such devices have proved defective in use, the latter is fairly strong evidence that someone has been negligent.

The fact that a radioactive device is involved in a particular accident is not controlling with regard to applicability of res ipsa loquitur. Plaintiffs have been accorded the benefit of the inference of negligence in cases of escaping water, chemicals, falling objects, defective electrical appliances, machinery, and exploding boilers. The doctrine has not been applied in almost similar cases involving defective appliances, or machinery, and the like. It cannot be assumed that res ipsa loquitur will be applied merely because radioactivity is involved. It is to be

37. Becker and Huard, *Tort Liability and the Atomic Energy Industry*, 44 GEORGETOWN L. J. 58, 67 (1955).

38. See 65 C.J.S. NEGLIGENCE § 234(7)b. p 1087 (1950) citing Thompson v. B. F. Goodrich Co., 48 Cal. App.2d 723, 120 P.2d 693 (1942); City of Oakland v. Pac. Gas and Elec. Co., 47 Cal. App.2d 444, 118 P.2d 328 (1941).

noted, however, that there is a tendency of courts to apply res ipsa loquitur more freely if the instrumentality is dangerous in nature.[39]

Some apparent conflict in the cases is due to a difference in the relationship of the parties. Privity is involved in some cases and not in others. In some jurisdictions where there is a contractual relationship, the mere occurrence of an accident resulting in damage gives rise to a presumption (or inference) of negligence which may be rebutted. The degree of care in these cases and that required in the case of an injury to a trespasser, for example, differ. Counsel may attempt to avail his client of the benefit of res ipsa loquitur and base his plea upon a mere showing of an accident resulting in injury. This standing alone will not justify res ipsa loquitur in the great majority of cases. The inference flowing from contractual relationships should not be confused with the conventional res ipsa loquitur doctrine. As noted previously, many res ipsa cases are rejected because counsel does not show enough — not necessarily that the courts are inconsistent from case to case.

In rebutting the inference arising from res ipsa loquitur it is not necessary that defendant show the cause of the accident or even establish the instrumentality that did cause the plaintiff's injury. It is enough that he offer sufficient explanation to establish that actionable injury, if any, is not due to his negligence. On the other hand, the probative effect of the inference of negligence is not dissipated by a mere showing of a *possibility* that the injury was due to causes other than defendant's possible negligence.

Many devices are constructed of parts manufactured by several different entities. A radioactive material may be placed in a certain compound by one company, encapsulated as a sealed source by a second entity, distributed by others, and ultimately used by a particular firm. It may be exceedingly difficult to establish the precise cause, and responsibility, if the device should leak radioactive material and a plaintiff should allege injury, relying upon res ipsa loquitur as against one of the manufacturers or distributors. The right of inspection and use are important factors in such cases where responsibility is not clearly pinpointed. The time which elapses between the time a piece of equipment is installed and the plaintiff's injury is also an important element. In any event a particular defendant need only rebute the inference of his own negligence and is not required to explain the true cause of the accident.

The fact that a party has the benefit of res ipsa loquitur does not

39. See 65 C.J.S. NEGLIGENCE § 220 (10) (1950); Pacific Coast R. Co. v. American Mail Line, 25 Wash.2d 809, 172 P.2d 226 (1946).

entitle him to a directed verdict, as a rule. Similarly, the fact that defendant has offered some evidence to explain away the possibility of his own negligence does not necessarily entitle him to a directed verdict. As noted in *Rutherford v. Huntington Coca Cola Bottling Co.*,[40] "The establishment by plaintiff's proof of the elements necessary to make applicable the rule or res ipsa loquitur never shifts the burden of proof to the defendant. Establishing an inference of negligence by the evidentiary rule of res ipsa loquitur may be sufficient for the jury to find a verdict for the plaintiff, but it is never required to do so, and a directed verdict for the defendant is not warranted even though the latter, at the peril of an adverse verdict, offers no evidence."

Many cases in which res ipsa loquitur is not applied hinge upon the conclusion that defendant did not have exclusive control over the device complained of at the time of the accident. In some instances it is not possible to establish that the particular item was sound in all respects, but a standard practice of inspection and other control measures is set forth with the view of establishing that the particular item was probably subjected to the same inspection and tests as pertinent. In *Mabee v. Sutliff and Case Co. Inc.*,[41] for example, two one-gallon jugs of sulphuric acid were delivered to the plaintiff. While carrying them toward the back of the house one of the jugs broke, spilling acid on plaintiff. The court held, first, that res ipsa loquitur was not applicable. Title and physical possession had passed from defendant to plaintiff. Plaintiff also had physical control and exclusive possession of the container and had carried it some distance before it broke. Further, even though the doctrine were applied there was sufficient evidence to overcome the circumstantial presumption of negligence which may have arisen from the evidence offered on behalf of plaintiff. Defendant offered evidence showing the nature and properties of sulphuric acid, the accepted method of dispensing it in glass containers, inspection of containers for defects prior to filling and the method used in packing, transporting and delivery to plaintiff. Res ipsa loquitur was not applied; if pertinent, the presumption of negligence was rebutted; the lower court's verdict for plaintiff was against the weight of evidence.

In *Dockray v. Security Mutual Life Insurance Company*,[42] however, the doctrine was held applicable. Plaintiff sued for personal injuries sustained in an apartment rented to her by defendant. Here, com-

40. 97 S.E.2d 803 (W.Va. 1957).
41. 404 Ill. 27, 88 N.E.2d 12 (1949).
42. 20 N.J.Super. 600, 90 A.2d 105 (1952).

pressors supplied sulphur dioxide gas to refrigerators in each apartment. The compressors, and connecting pipes between the refrigerators and compressors, were held to be in exclusive control of the defendant. Gas escaped into plaintiff's apartment and she was moribund for some period of five weeks of hospitalization. The court held:

> There is essentially no difference between the refrigerating system here involved and a heating system with the radiators which are customarily to be found in apartments of tenants. The evaporator was the property of the defendant, it had the sole right to make repairs, replacements, or adjustments. How, then can it be said that it had lost control?

A new trial was granted, the court holding that whether defendant's evidence was adequate to overcome the presumption of negligence was for the jury. The court also pointed out that res ipsa loquitur does not necessarily assure that a case will go to the jury. The defendant's evidence offered in explanation or exculpation may be so strong and convincing that the trial judge will conclude that reasonable men could not doubt that the explanation met and overcame the inference of negligence.

In actual practice many cases are reversed because the judge concluded erroneously that reasonable men could not doubt that the explanation met and overcame the inference of negligence. In actual practice many cases are reversed because the judge concluded erroneously that reasonable men could not doubt that the explanation overcame the inference of defendant's negligence and ruled against plaintiff. A directed verdict in the face of a presumption of negligence flowing from the doctrine of res ipsa loquitur is usually questionable inasmuch as defendant's testimony may be very strong *if the jury believes the witnesses.* It is the province of the jury to weigh the veracity of the witnesses' testimony and believe or disbelieve the evidence thus presented.

There is little question but that the doctrine of res ipsa loquitur will play a very important, or even decisive, part in any tort action based on radiation injury which in most instances will involve difficult evidentiary problems. Application of the doctrine in an appropriate case will almost always assure that the case will go to the jury, a factor usually favorable to a plaintiff suffering a substantive injury. An attorney who relies on the doctrine, however, must exercise considerable care in laying the foundation for the doctrine and capitalizing on the inference of negligence which it affords.

Counsel for the defense, on the other hand, will insist that plaintiff establish the fact that the instrument which allegedly caused plaintiff's

injury was under the control of defendant and that it was the proximate cause of the injury of which he complains. He will insist, further, that plaintiff show to the satisfaction of the court that the incident complained of was the type that normally does not happen in the absence of actionable negligence. In some jurisdictions he will insist that plaintiff prove that defendant's control over the injurious agent was "exclusive." Defendant may also interpose a plea of contributory negligence in bar of plaintiff's suit or of remote negligence in mitigation of damages. He may go further and offer a sufficiently convincing explanation of the incident in question that the effect of the inference of negligence is dissipated.

In searching the case law, counsel must keep in mind that (a) courts frequently use the terms inference and presumption interchangeably although they would normally have a different legal effect, (b) relationship of the parties and degree of care required in a particular case may be a factor in rejection of the doctrine in a specific case, and (c) many cases based upon purely circumstantial evidence actually are res ipsa loquitur cases although the term is not referred to in the reported case. Counsel's search is not complete if he researches only those cases in which the term "res ipsa loquitur" appears. In some jurisdictions where applicability of the doctrine is confused it may be the better part of wisdom to make out a case of res ipsa loquitur but avoid the phrase.

It is virtually impossible to draw valid generalizations regarding the doctrine of res ipsa loquitur and its possible applicability in certain types of cases. It is unlikely that radiation injury will prove to be an exception to this statement.

BOOBY TRAPS IN DRAFTING WILLS

By Raymond B. Witt, Jr.*

There are serious psychological aspects to will drafting that sometimes we lawyers are inclined to overlook. Before we can draft a will, we must first determine from the client what property he has and, secondly, we must determine from him what he wants to do with his property.

On the surface this appears to be quite a simple procedure, but the psychological attitude of a client when he comes to a lawyer for the first time to discuss the drafting of a will is somewhat disturbed. All of us have an aversion to considering death, and necessarily the drafting of a will requires a realistic evaluation of problems created by death. There is no more personal matter to all of us, and it is no less personal to the client who is talking to you for the first time about what to do with his property at his death.

Because of this strong aversion to even thinking about death and what will happen at death, the average client has no clear cut idea of what he wants to happen at his death, because his mind has refused to give thorough consideration to this problem.

Assume the client is in our office and we are discussing with him the problems arising at his death. It can well be the first time that he has ever seriously discussed this problem with anyone, including his wife and pastor. In this situation the lawyer is in a peculiar position and should be extremely sensitive to the emotional aspects of this procedure for the emotions can distort an appraisal of assets as well as appraisal of the needs of the family and the desires of the client. One of the first things we should do as lawyers is to gradually and gently lead into a more detailed conversation as to the problem, remembering always that there is an emotional tinge to the situation so far as the client is concerned.

As a result of this psychological block, few clients have any detailed idea of what they actually want to do with their property at their death. This vagueness arises directly from the fact that they have refused to give thorough consideration to the problem. Consequently, not having considered the problem thoroughly, they could not possibly know with any degree of certainty what they want to do.

One of the purposes of the first conference is to find out from the

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client what property he has, its exact nature, its approximate value, and the manner in which it is held, meaning by that any joint ownership or similar relationships. It is impossible to assess the Tennessee inheritance and federal estate tax consequences, and the income tax consequences, of a will until you have a fairly accurate idea of the value of the property. By value I mean the value at the time the will is being taken under consideration and I also mean the probable income producing value of the property after the death of the testator. Evaluation is a field of its own, and if you have a sole proprietorship or a closely held corporation where there have been no sales of its stock in many years and where there is no market for this particular type of business, you have an extremely difficult evaluation problem and one that must be carefully scrutinized. There is no pat formula that will assist in such circumstance. The client must be made aware of the fact that the valuation problem of such an asset presents the attorney or the representative of the estate with a difficult problem in the event of death where there is an estate or inheritance tax question.

Once you have determined what the property is and its nature, then you can move to an expression from the client of what he wants done with his property, or rather what he thinks he wants done with his property. Most clients think this is a simple matter and will continue to have such an attitude unless you carefully disabuse them of the presence of such sublime simplicity. After the client has generally stated what he wants to do with his property, then it is the attorney's responsibility to call to his attention certain situations which he has not considered and which should be given consideration. For example, you can make a relative approximation of what is called the liquidity needs at his death including probable federal estate taxes that will have to be paid, the Tennessee inheritance tax, and any debts and other administration expenses. These expenses must be met within approximately eighteen months after the death of the testator, and will have to be paid in cash. Quite often it is a substantial problem to determine from what source these cash funds will be forthcoming. Another matter that should be called to his attention is the necessity of continuing a sole proprietorship or perhaps a partnership upon his death and the loss that would occur if the sole proprietorship would have to be liquidated at death. This raises a question of successor management of his business affairs. In a small business, this is always a problem of considerable magnitude. Very often such a business has been extremely successful from the viewpoint of producing income so long as the client-testator was conducting that business. This record of good earnings will have to be taken into consideration in the computation of the federal estate

tax, yet without competent successor management this property may be of little value. It is quite probable that a substantial estate tax will have to be paid on such property but then from an income producing viewpoint and from the viewpoint of such business being able to support the family, it is a dud.

Most male testators assume that their wives will survive them and therefore that their wives will live long enough to take care of their minor children. In this day of great speed and accidents, simultaneous deaths are becoming more frequent so we should stimulate the client to consider what would happen if his wife predeceased him. With whom would the minor children actually live? Who is the best qualified person to handle their financial affairs? When do you want the property turned over to them without restrictions? The question of a testamentary guardian comes up at this point.

Generally speaking, the first conference is a preliminary conference and if the estate is of any size at all it usually requires further thought by the client on the questions that you have raised in the first conference, followed by a second conference when he has resolved whatever questions you have raised. In the meantime, the client is thinking of his side of the problem and the lawyer should take a very careful look at all of the various legal and tax aspects that the problem presents.

While I do not believe that the tax aspects of wills should be allowed to play a predominant part in the planning, I do think it is the lawyer's responsibility to survey the tax aspects of a proposed will and advise the client of the tax results of the disposition of his estate as he desires it. I also believe that it is the lawyer's responsibility to point out to the client where taxes might be saved by varying the method of disposition to some extent. This does not mean that the lawyer will make the decision as to how the man's property will be left in his will. That remains a decision for the testator, but the testator is not in a position, and cannot be in a position, to make a wise decision until the lawyer has given him the facts upon which to make the decision. And certainly the heavy estate tax incidence at his death is a major factor to be considered in arriving at the method of disposition of the testator's property.

For example, the possible use of the so-called marital deduction should be explained to the client, including the fact that this, if properly used will result in no federal estate tax on this particular portion of his property at his death but will result in a tax at the death of his wife, the second to die if she still owns the property. A fairly simple but thorough and accurate description of the marital deduction should

be given to the testator and it should be made clear to him that such property must be substantially the wife's without limitation, else the marital deduction is not possible. Many husbands do not want to leave their wives a substantial amount of property without restriction, and it is their decision whether or not the increased estate tax saving is less important than the restrictions be placed over the property left to the wife. The marital deduction is not a simple matter and when lawyers begin to think of it as a simple proposition then we are developing a mental attitude that may lead us into making substantial mistakes in the drafting of wills.

It is my opinion that there is no such thing as a simple will, unless the testator is a man who has virtually no property and who knows exactly the approximate date on which he is going to die and knows exactly what assets he will have at that time and which members of his family will survive him and which of them will be in good health and which of them will be capable of handling their own financial affairs. To further develop this point, let's assume we have a man who has an estate of approximately $50,000 with three children and a young wife. He says to you that he just wants to leave everything to his wife. You can draft such a will and if his wife survives him it may be a perfectly good will unless she also dies while the children are still minors. But I query whether or not you have discharged your responsibility to him. There is always the possibility that his wife will not survive him and then you have the situation of three minor children with $50,000 worth of property to take care of them until they are able to earn a living. If you have not taken care of this situation in the will, you will have the necessity of creating guardianships for each of the three children and then you will have to make your annual reports and operate under the rather strict rules that are applicable to guardians. On such a small estate this may require legal fees periodically in an amount which may not be large when considered separately but when you consider them as a percentage of the total estate and the needs of three children on a relative basis the fees can well be too great. In this instance, a trust would be indicated and it would certainly simplify the administration of the property while the children are minors and reduce the expense in the long run. It seems to me that it is the lawyer's responsibility to call to the client's attention these rather remote possibilities that may occur and to suggest ways in which said remote possibilities can be taken care of. If the client desires to forego any such arrangements, that is his decision and not that of the attorney.

I want to repeat that it is the attorney's responsibility to suggest to the testator the various problems to which should be given thorough

consideration. It is not the attorney's responsibility to make these decisions for him. On the contrary, the attorney should avoid making decisions for the client, but we do not discharge our responsibility if we fail to advise the client of these problems.

The will should be coordinated with all other settlement arrangements. For example, if the philosophy of the will is to create a trust for the minor children should both parents die prior to the children becoming of age, then the insurance beneficiary arrangements should be consistent with this philosophy. That means that the lawyer should follow through to see that the secondary beneficiary on the life insurance policies is made the estate of the decedent and not his children. In many instances the settlement arrangements or the beneficiary designations will indicate the wife, if living, otherwise the children equally. If the lawyer fails to follow through on this particular coordination problem, then the will does not do what the client was told it would do because guardianships will be required before the insurance proceeds can be collected if the wife predeceases.

Another aspect of this problem has to do with jointly owned property. The actual status of all jointly owned property should be carefully analyzed first hand by the attorney and the client's word for it should not be taken because clients, in this particular field, are very vague. In this instance it is usually advisable after the will is drafted or the first general idea has been approved by the client to actually go through a distribution of the client's estate, assuming that he is dead and then discovering what property will go where. It is sometimes very revealing to make this particular calculation. It may well result in substantial value going to the wife but very little income. We must differentiate between value and income producing qualities because these two do not necessarily coincide and after all the problem the wife and children will have after the death of the father is what they are going to live on.

Another problem in coordination is to be sure that any buy and sell agreement under a partnership proprietorship or close corporation is consistent with the terms of the will and has been given careful consideration.

Without developing the other points in detail, I would merely like to mention some other pitfalls that should be given consideration. After the estate distribution plan has been adopted in general, I think it should be carefully analyzed from one viewpoint alone and that is flexibility in the overall picture. We should carefully avoid attempting to perpetuate our own ideas into the future and into circumstances which none of us can predict.

We should not assume that our fiduciaries first named will survive to carry out their duties. Consideration should always be given to succession of fiduciaries, both executor and trustee.

General and limited powers of appointment can be very useful in many circumstances and they should not be overlooked.

We must always check every will we draw that has a trust involved from the viewpoint of the rule against perpetuities.

We should constantly attempt to draw the client into the will drafting process in all aspects so that the will, when completed, is his will and not that of the attorney or what the attorney thinks the client's will should be.

Tax saving is a relative matter, and the dollars alone are not so important as they are when considered as a percentage of the total estate. For example, a small saving to a small estate may mean the difference between a college education for one of the children and no college education. Many can remember when $500 in cash at the right time was tremendously important in their own lives.

Beware of assuming that your client will redraft his will if there occurs a substantial change in his circumstances. It is true we cannot draft a will for all circumstances but we certainly should make an effort to do so and we should educate the client as to what we are doing. To do otherwise would not be discharging our responsibility.

If life insurance is planned to be used by the estate for the payment of liquidity needs, such as taxes, then be sure that your will says so in no uncertain terms, otherwise it may not be available for the planned purpose. In designating beneficiaries it is certainly wise to designate them not only by name but by relationship and by address.

We should always consider simplicity of administration and the minimizing of administration expenses as distinguished from tax expense. A complicated will can cost money in expense of administration.

I think we should as attorneys utilize a portion of our conference time with the client to do a gradual education job with him on the importance and the difficulty of adequately and fairly handling the disposition of his estate at his death, reminding him that he has spent his lifetime accumulating these assets and that certainly to prepare a bill of sale of his assets is an important job and one that should be done with care. No two wills are alike — no two families are alike — no two testators are exactly alike. And the fear that the lawyer will receive

inadequate compensation for our services to the client should never be allowed to result in a sloppy job on our part.

Finally, we should not allow difficult problems to result in the client having no will at all. I have experienced this in the sense that I have raised certain questions which the client could not resolve, and as a result he put off many, many months the drafting of a will and in one instance has not yet executed a will. This presents a difficult problem and I think we have a responsibility, once a client comes to us, to urge him to draft a will even though it does not cover all contingencies because the client cannot make up his mind. He should have a will, and an incomplete will is better than no will at all.

JUDICIAL SELECTION AND TENURE

By Thomas F. Turley, Jr.*

Much that has been recently said on this subject seems to me to conceive the problem if, indeed, it concedes that there is a problem, in terms purely mechanical, to suggest that it is largely a matter of formulae and gadgets. I say that there is defenitely a problem, a serious one, and would deal but briefly with its mechanical aspects, hoping in the brief time allotted for the purpose to illumine a few, and at least touch upon a few other, of what I conceive to be its deeper and more significant aspects. To speak frankly of these matters is to raise dangerous questions and I undertake to do so with humility, more mindful than most of their ramifications and complications. It is like opening Pandora's box. And it runs headlong into the doctrine so widely accepted and fanatically supported nowadays, that "whatever is is right," ipso facto.

Formally and logically, there are five basic methods of selecting judges: 1st, by heredity; 2nd, by judicial civil service; 3rd, by executive appointment; 4th, by appointment of a legislative or other such body; and 5th, by popular election.

The Sons of Levi are perhaps the example best known to us of judges selected by heredity, but that method is a dead letter in the modern world except insofar as politicians occasionally use heredity as a predicate for an argument in favor of the candidate of their choice.

The judicial civil service method is not widely used but has much to recommend it. It provides safeguards against incompetence and favoritism on original appointment. That and the system of internal promotions tend to place younger men of greater competence and potential on subordinate benches which under other systems are too often filled by older men whose professional potential has been demonstrated to be less than outstanding. It tends to engender an esprit de corps and has produced, notably in France, judges distinguished by learning and technical competence. On the other hand, it tends to isolate the judiciary from the society of which it is a part, to make it both conservative in outlook and excessively formalistic in method. At worst, the system could produce a judiciary, as someone once said of the court of Versailles, "exclusive, incompetent, corrupt, unteachable and unconcerned." The system's greatest weakness, however, lies in the tendency of the

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internal promotions system to deprive the higher echelons of the judiciary of the services of men who come to the law with a knowledge of the world outside the courts, mature men with something of a statesman's insight into the problems of law and society. Such a system could well produce judges to rival Story in learning, but could hardly produce judges with the breadth and vision of Marshall. (And to succeed at the task of adjusting law to society a judicial system must somehow be able to avail itself of the services of men like Marshall, regardless of the wails of those, mostly outside the profession, who advocate internal promotions as the only method of selecting the judges of the higher courts.)

The executive appointment system, when responsibly used, also has much to recommend it. Absent the need for confirmation of the executive appointee, however, the system tends to let motives irrelevant to fitness for judicial office enter into appointments. Too often it simply puts on the bench as a reward for political services men who have held high political office.

Appointment of judges by a legislative or other such body tends to put judicial appointments on a purely partisan basis, as was our experience with the legislative appointment system in Tennessee many years ago.

The case against the popular election of judges, especially for short terms, seems all but unanswerable, in theory at least. Qualities which make a good judge are not readily discernible by a vast and amorphous electorate. That and the necessity for standing for re-election dissuades many capable men from accepting appointment and neither is conducive to that independence of mind without which a judge can scarcely be expected to do his work adequately and properly. (After a man gives up his practice and burns his ships he is seldom in a position to be independent of those who have it in their power to defeat him for re-election, whatever his inclination may be.) Such systems tend, however, to select and keep judges closer to the society of which they are a part and certainly tend to produce fewer martinets than some other systems. Indeed, for all theoretical objections to the selection of judges by popular election, there is no denying that such systems especially where extralegal restraints on nominations are responsibly used, have produced some excellent judges.

There you have the formal and academic highlights of the five basic methods of selecting judges. Now for the same on some of the widely used variants and combinations:

Our federal judges are appointed by the President "by and with the

Advice and Consent of the Senate," "provided two thirds of the Senators concur," a combination of methods three and four. (That sounds simple and sound enough, but if it is understood to mean that the selection of federal judges is conducted like Diogenes' search for an honest man, let me assure you that it doesn't work that way!)

All judges of the State courts in Tennessee are, as an academic matter, elected. As a practical matter, however, they first take office in most instances as appointees of the Governor to fill unexpired terms and thereafter stand for election, a combination of methods three and five. (It should be pointed out, however, that extra-legal restraints on the nominating process, both on original appointment and subsequent election, make the workings of the system vastly more complex than is indicated by simply saying that it is a combination of methods three and five.)

The "Missouri Plan," which is used in Missouri and elsewhere and has the strong support of the American Bar Association, is a combination of methods three, four and five. Under that plan, when a vacancy occurs in the judiciary anywhere in the state, a statewide committee appointed for staggered terms of such length that no governor is ever likely to have opportunity to appoint a majority thereof, nominates three eligibles, one of whom the governor must appoint to fill the vacancy. The appointee serves until the next general election and then runs on a ballot which asks as to him the question, "Should Joe Doe succeed himself as judge of the blank court?" No other personality is injected into the situation and the electorate cannot be certain who will succeed Judge Doe if they reject him because in such event the Committee again names three eligibles and again the govrenor appoints one of the three, who may or may not be who the electorate had in mind for the office. (Though I have had no first hand experience with this system, my understanding is that there again the practical complicates and sometimes overwhelms the theoretical.)

Now as to tenure: Federal judges hold office "during good behavior" and receive for their services at stated times compensation "which shall not be diminished during their continuance in office." Impeachment proceedings brought by the House of Representatives and tried by the United States Senate are the only legal procedure for depriving a federal judge of his office. Consequently, federal judges have, as a practical matter, all but absolute and certain assurance of lifetime tenure at undiminished compensation.

The terms of elected judges vary in the different States from as little as two years to as much as twenty-one years. The term in Tennes-

see is eight years. What security of tenure an elected judge has must, of course, be determined by the situation existing at the time and place he stands for re-election.

The "Missouri Plan" certainly eliminates for the incumbent many of the hazards attendant upon re-election under all theoretical and some practical variants of the elective system, but it does not eliminate all the hazards and the resultant consequences of peace of mind and independence.

There you have the mechanical aspects of selection and tenure, including the formulae and gadgets most widely applied to it, with only a few allusions to the deeper and more significant aspects of the problem. What of them?

I would not have you weep "for golden ages on the wane." Nor would I burden you with remote and irrelevant precepts addressed to forgotten issues. ("Distance lends enchantment to the view" and the "good old days" were never as good as some would have you believe.) But I would remind you that the Founding Fathers accepted as a basic premise that there is a law above the rulers, a law natural in the sense that it can be discovered by any rational mind, a law that is not the will and arbitrary command of the sovereign power. They conceived that law to be a necessary assumption without which it is impossible for different peoples with conflicting interests to live together in peace and freedom in one community. Then I would ask you, "What, if anything, have we substituted for that, Vox populi, vox Dei?" What is justice as we conceive it, that which is being dispensed as such at a particular time and place? Or is it simply a solemn jugglery for reconciling power and expediency, a matter to be discussed only between equals?

Next, I would suggest that in structuring institutions, in speaking about executives, legislators and judges, about men and issues, they were realists. They never once deviated from the law of which Kipling speaks in these words:

> This is the law, and the law shall run
> Till the earth and its course is still
> And the ages, trickling one by one,
> The cup of time shall fill
> That he who eateth another's bread
> Shall do that other's will.

What reason do we have for thinking and acting as though that ancient law has been repealed?

Nation and statewide television hookups, campaign biographies, public relations experts, full-time fund raisers and full-page ads and the other expensive modern devices used to secure election to high executive positions were not a part of the scheme of things in the early days of our republic, though they doubtless had their counterparts. Is there anything in what the Founding Fathers said or did which would indicate their lack of familiarity with the old adage, and the implications thereof, that "he who pays the fiddler calls the tune"? Could a tune that includes verses on Port Directors, Insurance Commissioners whose myopia makes twenty million dollars in over-charges too small to detect, verses on bigger and bigger trucks, et cetera, possibly include a few verses on judicial appointments? Could there be appendaged to the judiciary department counterparts of the "influence peddlers" and lobbyists on and in the executive and legislative departments? Have we done as much to forestall such a possibility as did the Founding Fathers to forestall a smaller and less dangerous one?

We read in books and magazines and sometimes in the newspapers —often with chapter and verse and full marginal notes and references —how those who make our laws are increasingly dependent, how loblyists and their retainers seek by flattery, favors, political contributions and sometimes bribery to obligate a legislator if possible, to compromise him if he can't be obligated, to befriend him if he can't be compromised, and to defeat him if he can't be befriended, thereby endeavoring to secure enactment of a law partial to particular groups and interests. (Often a little gimmick scarcely perceptible even to the initiated is enough to do the trick.) If *how* the laws are written is of that much inportance to some, what about this:

No society is ever static. The statutes and regulations, rules of law and even constitutions are always more or less behind the times. Moreover, they are and needs must be, *general*—that is—adaptable, but not adapted, to the particular. Hence, it follows, aside from anything else, that

> "He who has in his hands the interpretation of the law is by the nature of things its master."

In other words, despite all the talk about "a government of laws, not of men," it is, as a practical proposition, the judges who interpret and apply the law, who adapt the past to the present, who apply the general to the particular, who are the masters of the law, whether we like it or not. It is they who can and do, in the way in which they interpret and apply it, make bad law better and, by the same token, make the best law an instrument of iniquity, in applying it to a particular situation.

It is to be supposed that those who seek partiality in *enactment* would do any less to secure partiality in *interpretation* and *application* of law, especially when it is rather obvious that while the former can be secured only by official activity attended with some risks, the latter can be obtained by official inactivity, attended with little or no risk. Indeed, passivity, complacency, intellectual timidity, or ineptitude, which are thought by many to be nothing less than the manifestation of deliberate and discerning impartiality, are usually more than sufficient.

The Founding Fathers conceived that all those exercising judicial functions should be the third branch of government, the judiciary department, separate and distinct from, and independent of, the executive and legislative departments, a department without force or will, without power or sword, with no direction either of the strength or wealth of society, devoid of power even to enforce its own judgments and with only one weapon—judgment. Indeed, they went so far as to say that,

> "There is no liberty if the power of judging be not separated from the legislative and executive powers."

Now the decisions which most vitally affect the lives, liberties and property of most of us are made not by an independent judiciary department but by agencies which are actually branches of the executive department, the decisions of which agencies of the executive department frequently cannot be overturned in the courts if there is "any evidence" to support the decision, even though the agency wrote its own rules of evidence as it went along. The weapon of judgment is seen more and more of late in the hands of the legislative department, from which there is no appeal. And if you think this is significant only in the realms of utility rates and franchises, labor relations and the like, significant only to labor racketeers and big-time gamblers, you owe it to yourselves to read an article in the August, 1956, *Harper's* on what the neglect of the important principle of independent judgment is doing to justice in our juvenile courts.

How far the judiciary department has fallen since the days when it was conceived of as the third coordinate branch of the government is further attested by the fact that at least one of the federal executive departments now points to a federal statute as authority for its position that without "by your leave" from the head of that department, no employee of the department, not even a truckdriver or a broom-pusher, can come into any court even under subpoena, and testify about anything, not even about a matter so remotely concerned with the affairs of that department as what that employee may know about an automobile accident or about his neighbor's domestic relations prob-

lems. In other words, the executive department can control the decision of the judiciary department by determining what facts it will permit the judiciary department to have as a basis for judgment.

To regain its place and prestige, to secure the personnel it needs, perhaps the judiciary department should first apply for a divorce such as that recently granted elsewhere, according to an Associated Press dispatch from London:

> The Russian courts have today been divorced from the grip of the secret police and the armed services.

The Founding Fathers conceived of the judiciary as a sort of open aristocracy; open not in the sense that all alike are qualified but open in the sense that those with the requisite character and integrity who are steeped in the traditions of our civilization and have the necessary broad theoretical and practical knowledge of the place and function of law in the framework of democratic institutions are equally eligible for membership; aristocratic in the sense that it should be purposely placed above the "tumult and shouting," in a position to get the perspective requisite to any just judgment, indeed, in a position where its members have opportunity at least to be "better there they are," and to grow in the process.

How far we have departed from that! We no longer so much as idealize breadth and impartiality. Certainly we do not seek and support them. Indeed, the opposite, Those selected today to wield the weapon of judgement in a wide and increasing variety of vital matters are admittedly selected not for their competence in law, with all that entails, but for their alleged expertness in limited fields, not for their willingness to vote in decisions "fairly and impartially, according to the law and the evidence," but for their willingness to tacitly foreswear their obligation to do that and to decide in favor of a particular group, interest or point of view, usually of the group whose influence is responsible for their appointment. Isn't there something inherently incongruous about a tribunal whose members are known to be partisans of particular groups and whose votes in decision consistently reflect the points of view of those groups? Yet scarcely a day passes that someone isn't sounding off about turning over to the "experts" some other important judicial function.

That our judicial system turns out as fair a facsimile of jusitce as it does, with the imperfections alluded to above and others which could be mentioned if time permitted, is a tribute to the character and courage of many of our judges, to the integrity and competence of many

of our lawyers and to the patience and determination and the strong sense of justice which ennobles so many of our citizens.

I am convinced that the first and greatest problem which arises in our, or any, judicial system is the method by which the judges are selected. Next, of course, comes the problem of the conditions under which they hold office, around which problem revolve problems of whether and to what extent a judge's judgment shall be his own or someone else's. Nowhere are the dangers attendant upon entrusting mediocrity with power greater or less immediately apparent than in the judiciary. Nowhere are the insidious consequences which can and too often do attend placing men on precarious pinnacles more risky than in the judiciary. My hope is that when opportunity comes, and it will come again and again, to do your part toward the solution of these problems, you will not pass by on the other side of the road.

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COMMENTS

ACCELERATION OF REMAINDERS

Down through the centuries, judges and lawmaking bodies have been astute in meeting new problems with new rules and concepts. Such is the nature of our evergrowing and complex system of law. Such was the situation when a widow's dissent first brought turmoil to a carefully conceived and meticulously drafted estate plan.

As far back as 1595[1] the doctrine of acceleration of remainders[2] was being applied. Yet, despite four hundred years of precedent, attorneys today are too frequently unaware of the necessity of specifically providing for this contingency.[3] Too frequently the probate judge, faced with a will disemboweled by a dissent, is forced to gather tattered and shredded provisions in an attempt to remedy the attorney's dereliction.[4] With this in mind, the following Comment is presented.

When a future interest is created, such as a remainder, and the preceding supporting estate fails to come into existence, or, having come into existence, fails prematurely in a manner not anticipated by the testator,[5] the problem of acceleration arises. This prior estate may fail in a variety of ways such as (1) the failure of a testamentary gift in consequence of the death of the devisee or legatee during the life of a testator;[6] (2) the invalidity of the prior gift under a suspension of the power of alienation statute;[7] (3) or where the testator devises one piece of property not owned by him to one person and another piece to the owner of the first piece and the true owner elects to take

1. In Fuller v. Fuller, Cro. Eliz. 423, 78 Eng. Rep. 664 (1595), the devise was: To *A* in tail with remainder over. Devisee died before testator leaving issue. The court held: "He in remainder shall have it presently; for the devise being void to the first, it is as if it never had been made; so it is if the first devisee refuse, he in the remainder shall have it presently."
2. "Acceleration is the hastening of the enjoyment of an estate, which is otherwise postponed to a later period . . ."Compton v. Rixey, 124 Va. 548, 98 S.E. 651 (1919).
3. Decisions wherein the will contained provisions for a dissent "are very rarely found." Annot., 36 A.L.R.2d 293, ftn.2 (1954).
4. "If Mrs. Park, the widow of the testator, had not dissented from the will, it is probable that it never would have been supposed that a construction of it, by this court, was necessary." Armstrong, Adm. v. Park's Devisees, 28 Tenn. 194, 202 (1848).
5. 33 AM. JUR., *Life Estates, Remainders, Etc.* 620 (1941).
6. Fuller v. Fuller, Cro. Eliz. 423, 78 Eng. Rep. 664 (1595); Nicholson v. Holt, 174 Tenn. 358, 125 S.W.2d 483 (1939).
7. 33 AM. JUR., *Life Estates, Remainders, Etc.* 620 (1941).

that which was originally his;[8] (4) or where one spouse dissents from the other spouse's will.

The doctrine of acceleration of remainders is firmly embedded in Tennessee law[9] where it is regarded as a rule for interpreting testator's intent.[10]

The simplest case for the application of the doctrine is illustrated in *State v. Smith*[11] where the devise was to *W* for life, remainder to Shelby County schools. *W* dissented. The court held that the remainder was accelerated and that there was an immediate right to possession, "so far as it might not be included in the widow's dower." This was a vested remainder with only one remainderman. The great majority, if not all jurisdictions, would reach a similar result. Using the presumed intent of testator, the courts find that testator intended to devise the property in remainder from and after the determination of the preceding estate, and not from and after the death of the life tenant.[12]

The problem becomes more complex when there are several remaindermen. A dissent opens the whole estate so that the widow can go about gathering her statutory rights as if the will did not exist;[13] this frequently results in a loss to some remaindermen while gifts to others are undisturbed. This question first arose in Tennessee in 1896,[14] in *Latta v. Brown* where the gift was: one-half to *W* for life and then to be equally divided between *X* and *Y*. The other one-half was given to *Y* also. *W* dissented and the dower was assigned out of *X's* share. If the remainders, although vested, were accelerated, *X* would alone suffer a loss while the other legatees would gain immediate possession. The court said that the right or equity in *X* to compensation for her loss is superior to, and must prevail over, the right and equity of the remaindermen to be accelerated. Therefore the court sequestered the

8. Where *T* purports to dispose of property that does not belong to him and also makes a gift to the true owner, if the true owner insists on asserting his title, the gift to him will be appropriated by equity to the extent necessary to satisfy the disappointed legatee. Colvert v. Wood, 93 Tenn. 454, 25 S.W. 963, (1894); Annot., 5 A.L.R. 1628 (1920) and cases cited therein.
9. Albright v. Albright, 192 Tenn. 326, 331, 241 S.W.2d 415 (1951).
10. Hill v. Hill, 159 Tenn, 27, 16 S.W.2d 27 (1929); Nicholson v. Holt, 174 Tenn. 358, 125 S.W.2d 483 (1939).
11. 84 Tenn. 662 (1886).
12. "The legal effect of the dissent was the same as regards the widow's life estate as if she had died." Meek v. Trotter, 133 Tenn. 145, 180 S.W. 176 (1915), *aff'd.* in Albright v. Albright, 192 Tenn. 326, 334, 241 S.W.2d 415 (1951).
13. 2 PRITCHARD, WILLS (3d ed. 1955)."Dower constitutes no obstacle to acceleration of remainders, although actual enjoyment may be postponed . . . The remainder may vest subject to the widow's dower." 33 AM. JUR., *Life Estates, Remainders, Etc.* 628 (1941).
14. Latta v. Brown, 96 Tenn. 343, 34 S.W. 417 (1896).

gift to *W* under the will and gave it as compensation to *X*. But that still did not fully remedy the injury. The court, after citing several cases, said:

> The gist of these decisions, as we understand them, is that the residuary legatees, and, by parity of reason, heirs, will be required to make good such losses rather than specific legatees.

Observing that there was no residuary fund and no intestacy as to any portion, the court held not only that the property refused by *W* could be given to the disappointed devisee, but that other devisees must contribute pro rata according to the respective values given them to make good the deficit.

Where there is a residuary fund, the majority of jurisdictions require the residuary legatee to make contribution first.[15] Some jurisdictions require all to contribute equally;[16] others prescribe equality of contribution unless the will itself indicates that its application would be inappropriate such as where it appears that primary objects of testator's bounty are preferred.[17]

Clearly, in Tennessee, the courts will sequester *W's* gift;[18] further, it seems that they will also apply the "preferred object of testator's bounty" rule. Thus in *Meek v. Trotter,*[19] though the court did not definitely decide that there was a residuary clause, it was observed that, assuming there was, "it is not unusual for a testator to provide for the preferred object of his bounty by means of a residuary clause in his will." Then after citing a Pennsylvania case,[20] the court observed:

> It is there held that the residuary estate must bear the whole loss incident to a dissent "unless there is a plain intention in the will that the residuary legatee is the preferred object of testator's bounty." It is submitted that this places the rule on an illusory and unsatisfactory basis. But if it were a true test, the minor legatees meet it in the case at bar.

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15. Annot., 36 A.L.R.2d 299 (1954).
16. At least two states have equalization of loss statutes: COL. REV. STAT., § 152-14-10 (1953); ILL. ANN. STAT., Ch. 3, § 202. See Mohn's Appeal, 76 Penn. 92 (1874) where a provision in the will to the effect that if *W* dissented, a designated legatee would bear the loss was sustained.
17. *Re* Byrnes, 149 Misc. 449, 267 N.Y.S. 627 (1933); *Re* Sheppard's Estate, 100 N.Y.S.2d 249 (1950); *Re* Goldsmith's Estate, 175 Misc. 757, 25 N.Y.S.2d 419 (1940).
18. Meek v. Trotter, 133 Tenn. 145, 180 S.W. 176 (1915); Alexander and McAdams v. McAdams, 163 Tenn. 11, 40 S.W.2d 407 (1930). See Note, 36 A.L.R.2d 306 (1954) where cases from twenty-four states, including Tennessee, and also decisions in England and Canada are cited as holding that *W's* interest will be appropriated to ease the disappointed legatee. The court in *Re* Marshall's Will, 239 Wis. 162, 300 N.W. 157 (1941) said, however, that compensation to the disappointed legatee or devisee will be denied when it would be contrary to testator's intent.
19. 133 Tenn. 145, 180 S.W. 176 (1915).
20. Estate of Vance, 141 Penn. 201, 21 Atl. 643 (1891).

The court went on to hold the remainders accelerated and the wife's gift sequestered, with all contributing to make up the deficit.

The problem becomes still more complicated when we encounter contingent remainders. Will they be accelerated? As with so many legal problems, the answer is: "That depends." Some courts refuse to accelerate contingent remainders;[21] others hold them accelerated;[22] still others find that since the doctrine is based upon testator's intention, there need be no distinction between vested and contingent remainders.[23]

In Tennessee, the answer remains uncertain. In *Waddle v. Terry*,[24] the devise was: One-half to *W* for life, and if she dies before *S*, the half given to her for life to revert to *S*; if *S* should die without issue and under twenty-one before *W*, the half given to him should revert to *W* for life; if *S* arrives at the age of 21 and survives *W*, to him and his heirs, with a gift over to testator's brothers and sisters. The testator died and *W* dissented; then *S* died without issue under twenty-one. After finding that *S* and *W* had life estates, the Tennessee Supreme Court held that the brothers and sisters had a contingent remainder in the whole, the contingency being the death of *S* during minority without issue. This contingent remainder became vested on *S's* death. The court then said:

> Upon principle, as well as authority, we think it clear, that the beneficial use and enjoyment of the interest in the remainder, took effect immediately on the termination of the prior estates.

Therefore, clearly a contingent remainder was accelerated. But subsequently in *Albright v. Albright*[25] it was conceded that there could be no acceleration of a contingent remainder where testator clearly intended to create such an estate.

Thus, on the surface, Tennessee law as to acceleration of contingent remainders seems to be in a state of confusion. But going deeper into precedent from other jurisdictions, and upon analyzing the Tennessee cases more closely, the situation becomes clearer.

The inconsistency of common law rules of destructibility and acceleration of contingent remainders, as rationalized by some courts, is explained in that the contingent remainder is regarded as operative at the time of the testator's death. The widow's dissent is regarded as relating back to the death of the testator, and the will is viewed in the light of that fact. Thus, the court does not regard itself bound by the usual

21. 33 AM. JUR., *Life Estates, Remainders, Etc.* 625 (1941); 31 C.J.S., *Estates* 96 (1942).
22. See Annot., 5 A.L.R. 475 (1920).
23. 2 TIFFANY, REAL PROP., 70 (3d ed. 1939); 33 AM. JUR., *Life Estates, Remainders, Etc.* 626 (1941).
24. 44 Tenn. 51 (1867).
25. 192 Tenn. 326, 241 S.W.2d 416 (1951).

rules as to construction of particular phraseology. Consequently, the widow's estate under the will is regarded as never having been in existence; if the contingency is met and the remainderman determined, the interest is vested and comes into existence at testator's death.[26]

Clearly there could not be an acceleration where the contingency is the determination of the taker;[27] but where the taker is determined and certain, the courts have been very liberal in declaring that whatever terminates the life estate is equivalent to the death of the life tenant.[28] This is again based upon the presumed intent of the testator. This situation is illustrated in *Albright v. Albright*[29] where the gift was to *W* for life, remainder to daughters. Another item provided that if either daughter died without children, her share was to go to the surviving daughters. *W* dissented, and it was contended that the remainder was contingent upon the daughters surviving *W*, and that, therefore, there could be no acceleration. The court observed "that no remainder will be construed as contingent which may, consistent with the testator's intention, be deemed vested." Therefore, the court apparently held that the daughters had vested interests subject to being divested, and hence acceleration was ordered.

The courts are divided as to whether remainders vested subject to either partial or complete divestiture are accelerated.[30] And in *Hill v. Hill*, [31] acceleration was refused where the remaindermen could not be determined until the death of the life tenant. Tennessee Supreme Court there said:

> Where the taking effect in possession of the ulterior remainder is postponed only in order that a life estate may be given to a life tenant, upon the failure or destruction of the life estate the rights of the second taker are accelerated although the prior donee be still alive; but where the intention of the testator is that the remainder shall not take effect until the expiration of the life of the prior donee, the remainder will not be accelerated.

In conclusion we find that the doctrine of acceleration of remainders is pretty much an ouija board procedure in the hands of the court. An attorney who goes to great length to set out the testator's intent in the will but does not provide for a widow's dissent commits an expensive error of draftsmanship which can only be corrected by extensive litigation and often an invasion of the tomb to find testator's supposed intention. That all wills are not drawn by attorneys is a matter of common

26. Simes, *The Acceleration of Future Interests*, 41 YALE L. J. 659, 663 (1932).
27. 31 C.J.S., *Estates* 96 (1942); see also Annot., 5 A.L.R. 473 (1920).
28. Compton v. Rixey, 124 Va. 548, 98 S.E. 651 (1919).
29. 192 Tenn. 326, 241 S.W.2d 415 (1951).
30. 33 AM. JUR. *Life Estates, Remainders, Etc.* 626 (1941).
31. 159 Tenn. 27, 16 S.W.2d 27 (1929).

knowledge; the doctrine of acceleration of remainders should be useful only for those wills, not attorney-drawn wills. Where an attorney draws a will but does not provide for a dissent, the client is sold a lawsuit which could channel a great portion of his estate into litigation and result in great disharmony among the legatees and devisees.

The better procedure in the drafting of wills would seem to be, in effect, to make two wills: Draw the will in the ordinary manner, and then provide that if *W* dissents, the distribution is to be made in another specified manner.

MARK J. MAYFIELD

THE INDETERMINATE SENTENCE LAW IN TENNESSEE

The indeterminate sentence law was instituted as a more effective approach to penology. Its underlying design is to subject the offender to reformative influences, reclaim him for useful citizenship, and thus enable him to assume proper relations with society.[1] The basic theory behind the plan is that neither the judge nor jury is in a position to determine at the conclusion of a trial just how long the convicted person should be committed to a penal institution. Different individuals have different needs, and each offender should be kept in the custody of the state until the job is done. In the following article the subject will be considered under the topics: I. Early History in Tennessee; II. Crimes Included; III. Crimes Excluded; IV. Duty of the Jury; and V. The Judgment of the Court.

I. EARLY HISTORY IN TENNESSEE

The first part of the indeterminate sentence law as enacted in Tennessee was passed by the legislature in 1913.[2] Under the provisions of this Act, when any person over eighteen years of age was convicted of a felony or other crime punishable by imprisonment in the penitentiary, the court was to impose a sentence for an indefinite period, not to exceed the maximum term nor to be less than the minimum term provided by law for the crime for which the offender was convicted.[3] The first case arising under the Act sprang from a felony committed some two months after the legislation took effect. The jury assessed the punishment at confinement in the state penitentiary for seven years. The supreme court, holding that the judgment should have been framed in accordance with the indeterminate sentence law, modified the judgment so that the defendant would be imprisoned in the peni-

1. 24 C.J.S. *Criminal Law* § 1993 (1941).
2. Tenn. Pub. Acts 1913, c. 8; TENN. CODE ANN. § 40-2707 (1956).
3. *Ibid.*, sec. 1.

knowledge; the doctrine of acceleration of remainders should be useful only for those wills, not attorney-drawn wills. Where an attorney draws a will but does not provide for a dissent, the client is sold a lawsuit which could channel a great portion of his estate into litigation and result in great disharmony among the legatees and devisees.

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3. *Ibid.*, sec. 1.

tentiary for a term of not less than three nor more than twenty-one years.[4] This practice by the supreme court was to be changed later, both by statute and by judicial action.

The constitutionality of the Indeterminate Sentencing Act was attacked within a year of its passage. In *Woods v. State,* the plaintiff in error assailed the enactment as unconstitutional on four grounds: deprivation of the right to trial by a jury; deprivation of liberty without due process of law; the conferring of judicial powers upon administrative officials; and invasion of the pardoning powers of the governor.[5] All of these objections were held to be unfounded and the Act was sustained as constitutional. There is no impairment of the right to a trial by jury, since at common law the jury had no right to assess punishment; this was reserved for the legislature. The Act is not a violation of due process, since it applies to a definite and reasonable class of cases and the accused still has the right to have his guilt or innocence determined by his peers as the right existed at common law. Although this article will not deal in any detail with probation, pardon or parole, suffice it to say that the last two objections were rejected because the administrative officials constituting the board of parole were not exercising judicial functions in that they did not deal with a prisoner until after he had served his minimum term and even then they had no authority to fix any term of punishment.[6] The board was merely an agency for the execution of the judgment. As for the governor's pardoning power, it was preserved inviolate; under the Act he alone could pardon.

In 1923, ten years after its enactment, the indeterminate sentence law was amended to provide that the jury, in addition to finding the defendant guilty, should fix the maximum term of imprisonment.[7] This amendment completed the indeterminate sentence law as it now exists in Tennessee.

The procedure under the Act is as follows: the jury first finds the defendant guilty and then fixes a maximum term within the statutory limit for the particular crime; the judge then sentences the offender to an indefinite period of not more than the maximum set by the jury and for the minimum period as provided by law. After the minimum period is served (less "good time") the prisoner can be considered for parole.

4. McCommon v. State, 130 Tenn. 1, 168 S.W. 994 (1914).
5. Woods v. State, 130 Tenn. 100, 169 S.W. 558 (1914).
6. State v. Rimmer, 131 Tenn. 316, 174 S.W. 1134 (1914).
7. Tenn. Pub. Acts 1923, c. 52; TENN. CODE ANN. § 40-2707 (1956).

II. Crimes Included Under the Act

The crimes falling under the operation of the indeterminate sentence law include any felonies or other crimes, "punishable by imprisonment in the penitentiary, with the punishment for said offense within minimum and maximum terms provided for by law."[8] But what if a statute failed to provide a minimum sentence for a particular crime? This problem arose out of a conviction for fraudulent breach of trust.[9] The maximum sentence for this crime was fixed at ten years, but there was no provision for a minimum term. The court held that since the minimum was not fixed by the fraudulent breach of trust statute the minimum punishment would be determined by reference to Shannon's Code § 7206 which forbade confinement for a felony for less than twelve months.[10] Thus the crime fell under the indeterminate sentence law and the court amended the judgment to provide that the defendant was to be committed to the state penitentiary for an indeterminate term of not more than five years (the maximum set by the jury) and not less than one year.[11]

In more recent years another problem case presented itself in which the applicable statute fixed the minimum but not the maximum term.[12] In this case, the court relied on Code § 10753 which reads: "Whenever a person is convicted, either as principal or accessory, of a felony the punishment for which is not otherwise provided for in this Code, he shall be sentenced to imprisonment in the penitentiary not less than one nor more than ten years."[13] In this manner the court supplied the missing maximum and sentenced the defendant accordingly, in keeping with the provisions of the indeterminate sentence law.

The provisions of the indeterminate sentence law are to govern all felonies and crimes, "punishable by imprisonment in the penitentiary."[14] There is however, another Code section which might be construed as excluding certain crimes:

> In all cases where any person shall be convicted of a felony, and the jury trying the case shall be of the opinion that the offense merits a punishment of five (5) years or less, the court, in its discretion, may order said person confined in the county workhouse for the term of such sentence, provided that the trial judge shall have the power to order the removal of the prisoner

8. Tenn. Code Ann. § 40-2707 (1956).
9. Burke v. State, 157 Tenn. 105, 6 S.W.2d 556 (1928).
10. Tenn. Code Ann. § 40-2703 (1956).
11. 157 Tenn. 105, 119 (1928).
12. Everhart v. State, 194 Tenn. 272, 250 S.W.2d 368 (1951); Tenn. Pub. Acts 1947, c. 182.
13. Tenn. Code Ann. § 39-104 (1956).
14. Tenn. Code Ann. § 40-2707 (1956).

> from the county workhouse to the penitentiary whenever in his opinion they are being treated in a brutal or inhuman manner, or when is shall appear to him that the physical condition of the prisoner is such that working on the roads is deleterious to his health.[15]

Although this statute makes crimes, the maximum term for which is set at five years or less, punishable by confinement in the workhouse at the judge's discretion, it is obvious that such felonies are still punishable by imprisonment in the penitentiary. Such has been the holding as recently as 1955,[16] and this statute is no bar to the operation of the indeterminate sentence law where it would otherwise apply. There are, however, several types of crimes to which the indeterminate sentence law does not apply.

III. Crimes Excluded

At least four classes of crimes do not fall under the operation of the indeterminate sentence law. It was early established that this law has no application to persons under eighteen who are convicted of a felony or other crime punishable by imprisonment in the penitentiary. Thus in *Martin v. State* where the defendant was under eighteen years of age at the time of conviction, it was held that he was excluded from the operation of the indeterminate sentence law and thus was subject to punishment only under the law as it stood independent of or before the Act was passed – that is, sentence to the reform school for a term of imprisonment to be fixed by the trial jury.[17] The judge's action under the Act of 1913[18] taking the assessment of punishment from the jury was reversed and the cause remanded for a new trial.

The indeterminate sentence law does not apply to the crimes of rape and murder in the first degree. In *Adams v. Russell*[19] it was held that the crime of murder in the first degree was included within the Act, but this case was expressly overruled five years later in *Franks v. State*.[20] The reasoning of the court in the latter case was that the crimes

15. Tenn. Code Ann. § 40-3105 (1956).
16. Graham v. State, 198 Tenn. 276, 279 S.W.2d 265 (1955).
17. Martin v. State, 130 Tenn. 508, 172 S.W. 311 (1914); Haynes v. State, 144 Tenn. 178, 231 S.W. 543 (1920).
18. Tenn. Pub. Acts 1913, c. 8, § 1.
19. Adams v. Russell, 179 Tenn. 428, 167 S.W.2d 5 (1942).
20. Franks v. State, 187 Tenn. 174, 213 S.W.2d 105 (1948). In Williamson v. State, 194 Tenn. 341, 250 S.W.2d 556 (1952), under a conviction of murder in the first degree, the punishment was fixed at a term not to exceed thirty years. The judgment was affirmed with the modification that the sentence be thirty years in the state prison, as the indeterminate sentence law did not apply. In State *ex rel.* Gosnell v. Edwards, 198, Tenn. 83, 277 S.W.2d 444 (1955), a prisoner sentenced in 1934 challenged the jurisdiction of the sentencing court in 1955. He was sentenced under the statute when it was interpreted as falling under the indeterminate sentence law. He brought *habeas corpus* on the ground that

of murder in the first degree and rape are not primarily punishable by imprisonment in the penitentiary. The punishment for murder in the first degree is death, or if there are mitigating circumstances, the jury *may* fix the punishment at imprisonment for life or for some period over twenty years.[21] Language of the same general import is used in the statute fixing the punishment for rape.[22] This seems to be a reasonable interpretation of these statutes, since the primary punishment for both is death; by the wording of the statutes the legislature apparently did not intend to set forth any maximum and minimum terms.

Within the third class of excluded cases are those in which the jury by its own determination fixes a definite term. The statute provides:

> In no case shall any person convicted of a felony be confined in the penitentiary for less than twelve (12) months. Whenever the minimum punishment is imprisonment in the penitentiary for one (1) year, but in the opinion of the jury the offense merits a less punishment, the jury may punish by confinement in the county jail or workhouse for any period less than twelve (12) months except as otherwise provided.[23]

Since the indeterminate sentence law applies only to offenses punishable by imprisonment in the penitentiary, felonies meriting less punishment by confinement in county jail or workhouse under the above quoted statute do not fall under the operation of the indeterminate sentence law.[24] This is especially true in light of the provision at the end of the Act of 1913, ". . . this Act shall not interfere with the operation of statutes providing for punishment for certain offenses by fine or imprisonment in the county jail or both."[25] The court said that nothing short of an irreconcilable conflict between two statutes works a repeal by implica-

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the more recent holdings were retroactive, depriving the court of its jurisdiction to sentence him under the indeterminate sentence law when he pleaded guilty to first degree murder. The court held that the judgment was not void and not subject to collateral attack by *habeas corpus;* that the court in 1934 did have power to pronounce an indeterminate sentence, though in 1948 the court held that the power did not exist. This seems to involve the power of the court in a proprietary sense. The question is not: Does the court have the power? but: Should the court use the power it has?

21. TENN. CODE ANN. § 39-2406 (1956).

22. TENN. CODE ANN. § 39-3702 (1956). Although not yet judicially interpreted, there would seem to be little doubt that armed robbery now falls in the same category as rape and first degree murder by virtue of Tenn. Pub. Acts, 1955, c. 72, sec. 1: "If the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years." Judge J. Fred Bibb of the Criminal Court, Third Circuit, Knox County so interprets this amendment and is sentencing those convicted accordingly. See TENN. CODE ANN. § 39-3901 (1957).

23. TENN. CODE ANN. § 40-2703 (1956).

24. State v. Chadwick, 131 Tenn. 354, 174 S.W. 1145 (1914).

25. Tenn Pub. Acts 1913, c. 8, sec. 1.

tion, and the court must harmonize such if it can. It did.[26] This holding was reaffirmed in *Jenkins v. State,* where the court added that the trial court should charge the involved statute[27] without request where the punishment prescribed by law was as low as twelve months.[28]

The fourth class of excluded cases involves misdemeanors, for which the court sets the punishment unless the defendant makes a seasonable demand that the jury fix his penalty.[29] The misdemeanant may plead guilty and submit his case to the trial judge for assessment of punishment, or he may plead guilty, waive his right to a trial by jury, and submit his case to the trial judge for decision both as to guilt and punishment.[30]

IV. Duty of the Jury

The jury, if it finds the defendant guilty, must then fix the maximum term.[31] The court cannot discharge this function of the jury; if it does, this constitutes an invasion of the right of the prisoner to have the jury fix the maximum period of his confinement, and the case will be reversed and remanded.[32] If the jury does not fix the maximum term, then the verdict is a nullity, and upon a new trial the defendant will not be in double jeopardy.[33] The jury must be given the opportunity to use its discretion in setting the maximum period of confinement. Where no evidence is allowed on which the jury might base the exercise of such discretion, the case will be reversed and remanded.[34]

Once the jury has fixed the maximum punishment, any attempt by the jury to fix the minimum period is treated as mere surplusage, even though the minimum thus fixed is below the statutory minimum for the crime involved.[35] The jury can, however, fix the maximum term at the minimum provided by statute.[36] In *Landers v. State,* the jury set the maximum term at three years, the minimum term for the offense. The trial court sent the jury back for further consideration of their verdict, the jury returning and fixing the maximum at five years and the minimum at three years. The supreme court corrected the judgment so as to fix the maximum punishment at three years, as originally found

26. 131 Tenn. 354, 358 (1914).
27. Tenn. Code Ann. § 40-2703 (1956).
28. Jenkins v. State, 163 Tenn. 635 45 S.W.2d 531 (1932).
29. James v. State, 196 Tenn. 435, 268 S.W.2d 341 (1954). Tenn. Code Ann. § 40-2704 (1956).
30. Tenn. Code Ann. § 40-2705 (1956).
31. Tenn. Code Ann. § 40-2707 (1956).
32. Oliver v. State, 169 Tenn. 320, 87 S.W.2d 566 (1935).
33. Gang v. State, 191 Tenn. 468, 234 S.W.2d 997 (1950).
34. Knowles v. State, 155 Tenn. 181, 290 S.W. 969 (1926).
35. Hensley v. State, 166 Tenn. 551, 64 S.W.2d 13 (1933).
36. State *ex rel.* Brinkley v. Wright, 193 Tenn. 26, 241 S.W.2d 859 (1951).

by the jury.[37] If, however, the maximum term is fixed below the minimum as provided by statute, the supreme court can only reverse.[38]

A distinction must be noted between the jury's setting the maximum time and in finding the defendant guilty of a greater crime than the evidence supports. When this is done, the supreme court can reduce the sentence, although the Tennessee supreme court has no power, as exists in a few states, to reduce a sentence which falls within statutory limits simply because it considers the sentence excessive.[39] In *Corlew v. State*,[40] the jury found the defendant guilty of grand larceny. The value of the goods did not exceed sixty dollars. The minimum punishment for grand larceny is three years. The supreme court reduced the sentence to one year, the minimum for petit larceny. The court reasoned that this violated no beneficial right of the defendant, since the finding of the jury included guilt of all lesser included offenses and since the right to a jury's assessment of punishment was not a right reserved by the Constitution.[41] In *Forsha v. State*, the court followed the reasoning of the *Corlew* case in reducing a sentence of twenty-one years and one day for first degree murder to ten years (the minimum term for second degree murder) where the evidence did not support murder in the first degree.[42] In one case, the court reduced the maximum punishment from twenty-one years (the maximum for assault with intent to commit murder) to five years, the maximum for the lesser offense of assault with intent to commit a felony. This was done without remanding for a new trial.[43]

It is the positive duty of the jury to fix the maximum punishment. The jury also has a negative duty. It is not to consider or speculate on the effect of the indeterminate sentence law. The jury cannot speculate on the power of the governor to pardon, the power of the parole board to grant paroles or on what the supreme court might do on appeal. As the court stated in the recent *Graham* case: "Both the state and the defendant are entitled to a verdict that is based solely and alone upon the facts of the case and the law as given in charge by the court."[44] Argument of the district attorney to the jury in the *Graham* case asking them to consider the indeterminate sentence statute in fixing the defendant's punishment was reversible error.

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37. Landers v. State, 157 Tenn. 648, 11 S.W.2d 868 (1928).
38. Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944).
39. See Hall, *Reduction of Criminal Sentences on Appeal*, 37 COL. L. REV. 521 (1937).
40. Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944).
41. *Ibid.*, at 224.
42. Forsha v. State, 183 Tenn. 604 194 S.W.2d 463 (1945).
43. Stooksbury v. State, 197 Tenn. 485, 274 S.W.2d 10 (1954).
44. Graham v. State, 304 S.W.2d 622, 624 (Tenn. 1957).

V. The Judgment of the Court

The trial judge is to sentence the defendant to not more than the maximum set by the jury and at the minimum as prescribed by law.[45] Where this is not done, and the maximum only is fixed, the supreme court can correct the judgment in keeping with the indeterminate sentence statutes.[46]

Under Tennessee Code Annotated 40-3105, discussed above, the trial court can in its discretion order the defendant to confinement in the county workhouse when the jury is of the opinion that the offense merits a punishment of five years or less. In *West v. State,* a case arising before the 1923 amendment, the supreme court was of the opinion that such discretion could not be exercised where the maximum punishment provided by statute was over five years.[47] After the 1923 amendment, the court in *Gilliam v. State* held that the trial judge could exercise such discretion if the jury in its opinion thought the offense merited five years or less.[48] Although the decision did not mention the *West* case, a later case held that the result in the *West* case was not consistent with the statutory provision regarding the jury's opinion, and reaffirmed the *Gilliam* case.[49]

VI. Conclusion

Two serious objections have been raised to the operation of the indeterminate sentence law in Tennessee. The first concerns the structure of the law itself. The maximum punishment is within the discretion of the jury and the minimum is prescribed by law. Only the minimum is considered on the question of parole. The following hypothetical illustrates the objection:

> A man holds another up with a broken pistol, and takes $2.50 from him. That is robbery. The minimum punishment is five years. If the jury convicts of the offense shown and assesses the maximum punishment at five years the sentence will read: "not less than five years nor more than five years." Another man tortures his victim to make him tell where his money is and then robs him. If the jury convicts it can give him the punishment of fifteen years — or thinks it can. If so assessed the sentence reads: "not less than five nor more than fifteen years." The two men, unless the behavior of one of them is bad while confined in the penitentiary, are subject to parole in the same length of time.[50]

45. Gang v. State 191 Tenn. 468, 234 S.W.2d 997 (1950).
46. Pope v. State, 149 Tenn. 176, 258 S.W. 775 (1923); Humphrey v. State, 187 Tenn. 377, 215 S.W.2d 791 (1948).
47. West v. State, 140 Tenn. 358, 204 S.W. 994 (1918).
48. Gilliam v. State, 174 Tenn. 388, 126 S.W.2d 305 (1939).
49. Graham v. State, 198 Tenn. 276, 279 S.W.2d 265 (1955).
50. Henderson, *Necessary Reforms in Criminal Procedure,* 16 Tenn. L. Rev. 503, 510 (1940).

A further ramification of the same objection stems from the fact that juries are often misled into believing that their assessed punishment will be the term served.[51]

The second problem, if solved, would perhaps in turn resolve the first. The suggestion was made by the report of the Criminal Procedures Committee to the Tennessee Bar Association in 1951 that the indeterminate sentence law be modified. The principal recommendations concerned more adequately trained parole officers, less change of personnel, and an increase of such qualified officers.[52] If these suggestions were possible of fruition, then the individual prisoner would receive the necessary treatment and the indeterminate sentence law would be nearer its ultimate objective.

MATTHEW S. PRINCE

CORPORATE PAYMENTS TO WIDOWS—THE COMMISSIONER'S QUANDARY

For years the Loophole Corporation had prospered under the management of its president and co-founder, John Doe. During this tax year Mr. Doe was earning a salary of $24,000 and in addition was receiving a dividend on his one-third share of outstanding capital stock. Mr. Doe suffered a heart attack and died on July 15. An emergency meeting of the board of directors was called on July 31 to select a new president. At the meeting, the board, realizing the corporation had no formal measures whereby widows or heirs of deceased officers or employees would be provided with a pension, adopted the following resolution:

> Resolved: That since the late John Doe had for many years performed his office as President in such a manner as to enable the Corporation to prosper and greatly expand; and in order for Mrs. Mary Doe to know in a tangible way the appreciation the Corporation feels for her late husband, the board hereby authorizes certain payments to be made to Mrs. Mary Doe, these payments to be such amounts as John Doe was drawing per month at his death, said payments to commence August 1 and to continue for the remainder of this calendar year.

Mrs. Doe had never performed any services for the Loophole Corporation, and she was neither stockholder nor director contemporaneously with the adoption of the quoted resolution. The earned but unpaid amounts of decedent's salary due at his death were paid to the Estate of John Doe, but no other payments were made under the contract of employment which terminated by Doe's death.

51. *Ibid.*
52. *Report of Criminal Procedures Committee of the Bar Association of Tennessee,* 22 TENN. L. REV. 169, 171 (1951).

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51. *Ibid.*
52. *Report of Criminal Procedures Committee of the Bar Association of Tennessee,* 22 TENN. L. REV. 169, 171 (1951).

From August through December, Loophole paid directly to Mrs. Doe $2,000 per month. When the corporation's income tax return for that year was filed, the payments to Mrs. Doe were deducted as salary expense. However, the joint return of Mr. and Mrs. Doe excluded these monthly payments from taxable income and merely reported them by an attached declaration of the payments as gifts.

The foregoing hypothetical presents two salient tax questions:

1. Can Loophole Corporation make these payments and then deduct them as salary expense, and
2. Are these payments taxable income to the widow, Mrs. Doe?

At first observation, the logical solution would appear to be this: if the corporation deducts the payments as an expense then the amounts paid should be taxable income to the widow. But, as can be seen in other areas of tax law, the "tax benefit"[1] rule does not necessarily apply where the benefit taken by one taxpayer causes economic gain to a separate taxpayer.

Perhaps an explanation of this apparent inconsistency lies in the fact that, where two taxpayers are involved, the Commissioner may have difficulty placing both issues before the court as justiciable matters. For example, the corporation could deduct these payments on its return, and the widow under advice of counsel could concede the taxability of the payment to her and pay her tax. After the corporation return has been audited and approved on the basis of the widow's reporting the payments as taxable income, but immediately preceding the expiration of the three year statute of limitations for reopening the corporation return and her right to claim refund, the widow files claim for refund. The Commissioner will naturally deny this claim but in the meantime the three years limitation has lapsed, and the widow is then free to sue without litigating the deduction by the corporation except on the limited issue of intention, the corporation's intention at the time of payment being relevant to the issue of whether the payments were gifts or income to the widow.[2]

With the "tax benefit" rule inapplicable, each of the two questions must be considered individually. In order to limit the scope of this comment to reasonable bounds, however, the writer wishes to more fully discuss the second question: Are these payments taxable income to the widow? To answer Question One briefly, we can say that corporations have generally been successful in deducting these payments

1. The Tax Benefit Rule, briefly stated, is that those amounts which have been deducted in prior years result in income when collected in a subsequent year. See 26 U.S.C.A. § 111 (1954).
2. Fisher v. Commissioner, 59 F.2d 192 (2d Cir. 1932).

to the widow as salary expense where paid in recognition of the services rendered by the decedent and paid for a limited period of time and in reasonable amounts.[3]

The taxability of these payments from a corporation to a widow of a deceased employee or officer hinges upon whether the payments are considered additional compensation for past services of the decedent or a gift, additional compensation being taxable and a gift non-taxable. Immediately, another question arises in resolving the issue: compensation or gift? On the surface this appears to be a question of fact: the intentions of the corporation and the widow, especially that of the corporation, and the surrounding circumstances.[4] But in *Bogardus v. Commissioner*[5] the Supreme Court ruled that this is a "conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from findings of primary evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board."[6] However, since the basic facts in these cases are usually stipulated, the court's decision appears to be a mere formality, and once a rule of stare decisis has been established the frequency of litigation should decrease.

In the last decade, more than twenty cases concerning the taxability of a corporation's payments to the widow of a deceased employee or officer have been decided. In not one of these cases can be found a holding that voluntary payments made to the widow are taxable income to her. Thus the continued non-acquiescence of the Commissioner appears futile.

I. The Commissioner's Position

In discussing the development of the present situation, it is enlightening to trace the Commissioner's Rulings on corporate payments to widows. Office Decision 1017,[7] promulgated in 1921, appears to be the first direct ruling on the question under discussion. Therein the Commissioner held that payments by a corporation to the widow of a deceased officer, equal to the salary which the deceased officer would have earned in two months were without consideration, and were a gratuity voted as a compliment to the deceased and a gift to the widow. Thus the cornerstone was laid and when a similar situation was presented to the Commissioner in 1939, he followed O.D. 1017 in issuing I.T. 3329.[8]

3. See Regulations 118. § 39.23(a)9 (1953); this is identical with Regulations 111, § 29.23(a)9 (1943).
4. Bankston v. U.S., P-H 1957 Fed. Tax Serv. ¶ 72, 662 (D.C. Tenn. 1957).
5. Bogardus v. Commissioner, 302 U.S. 34 (1937).
6. Bogardus v. Commissioner, 302 U.S. 34, 39 (1937).
7. 1921 Cum. Bull. 101.
8. 1939-2 Cum. Bull. 153.

The payments presented for the ruling in I.T. 3329 were authorized by a corporation to the widow of a deceased officer and stockholder owning a minority of stock. The board of directors voted the widow the salary of the deceased for the remainder of 1937 and reduced the 1938 payments. Wording of resolution termed the payments as a "pension" but made it clear the corporation was under no obligation to the widow or the deceased. In ruling the amounts to be a gift, the words "pension" and "gift" were held not to be mutually exclusive, and further:

> When an allowance is paid by an organization to which the recipient has rendered no service, the amount is deemed to be a gift or gratuity and is not subject to federal income tax in the hands of the recipient.[9]

The key factor seemed to be the phrase, "the recipient has rendered no service," but the fact that the corporation was under no obligation to make these payments is also significant, as can be seen in I.T. 3840.[10]

The situation upon which a ruling was requested in I.T. 3840 involved a question of taxability where a corporation, pursuant to a voluntary death benefits plan, made payments to the widow of a deceased employee. This plan consisted only of contributions by the corporation, none by the employee. Further, the corporation in hiring an employee always made it clear that the plan was purely voluntary and could be terminated at the will of the employer. The Commissioner, relying upon precedents in three cases[11] where the heirs of the deceased employees had enforced such voluntary plans against the employer, held the payments represented additional compensation for services rendered by the deceased employee and were taxable income in the hands of the recipients.

The position of the Commissioner in I.T. 3840 is tenable, since the plan, even though voluntary, was in operation prior to the death of the employee. Thus it seems logical to say that where payments are arranged by the employee or officer prior to his death the motivating reason for the payments is the consideration to be given by the deceased. With this as the principal motivation, the intention of the parties must be for the payments to consist of additional compensation for the services of the deceased. However, where we have a situation as presented in I.T. 3329, with no formal plan or obligation by the corporation to make payments, then it appears that more weight

9. 1939-2 CUM. BULL. 153, 154.
10. 1947-1 CUM. BULL. 7.
11. McLemore v. Western Union Telegraph, 88 Ore. 228, 171 Pac. 390 (1918); Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N.W. 385 (1936); Mary Sutro v. U.S., (N.D. Calif. 1942), (an unreported case).

should be placed on whether the *recipient* had given any consideration for the sums received. As a logical conclusion, since there is no consideration by the recipient, and none given by the deceased but that for which he was already compensated, the payments constitute a gift. This point of differentiation was further marked by the issuance of I.T. 3972,[12] which followed the logic of I.T. 3840; but the Commissioner, evidently foreseeing a rash of situations as that ruled on in I.T. 3329, and provoked by the Tax Court's decision in *Louis K. Aprill*,[13] issued I.T. 4027.[14]

In I.T. 4027 a different explanation of the facts presented and ruled on in I.T. 3329 was revealed. The Commissioner cited § 29.22 (a)-2 of Regulation 111: "However so-called pensions awarded by one to whom no services have been rendered are mere gifts . . . ," and further observed:

> . . . the regulations stress the position of the payor, that ruling (I.T. 3329) incorrectly emphasizes the position of the payee. The regulations are not applicable if services have been rendered to the person making the payments.[15]

Thus the only time such payments from a corporation to a widow would be a gift is where the corporation had never received any benefit from either the deceased or the recipient.[16] The Commissioner's current position is succinctly stated in a 1950 ruling:

> . . . irrespective of a "plan", a voluntary or involuntary, definite or indefinite, payments . . . [by an employer to the widow of deceased officer or employee made after January 1, 1951] constitute taxable income [to the recipient].[17]

As previously pointed out, the courts have given little attention to the wording of I.T. 4027 and have continued to differentiate between obligatory and non-obligatory payments by the corporation, phrasing their opinions in terms of the parties' intentions. In fact, the Tax Court, when speaking of I.T. 4027, said:

> We, however, do not ascribe the far reaching effect to that ruling which he [Commissioner] does. We understand his ruling to mean that if the amounts paid to a deceased employee's widow were not a gift, but were payment for his past services, they constitute ordinary income to the widow. The respondent, obviously, cannot by administrative ruling tax as ordinary income a payment which the payor made and intended as a gift.[18]

12. 1949-2 CUM. BULL. 15.
13. 13 T.C. 707 (1949).
14. 1950-2 CUM. BULL. 9.
15. 1950-2 CUM BULL. 9, 10.
16. See L.O. 1040, 1920-3 CUM. BULL. 120; Varnedoe v. Allen, 158 F.2d 467 (5th Cir. 1946), *cert. den.*, 330 U.S. 821 (1947).
17. I.T. 4027, 1950-2 CUM. BULL. 9, 11.
18. Estate of Arthur W. Hellstrom, 24 T.C. 916, 919 (1955).

The only judicial reference to I.T. 4027 which could perhaps be cited as following the Commissioner's position is *Fisher v. U.S.*[19] There the widow of a deceased officer of a trade association had received the remaining portion of the decedent's retirement pay as authorized by the Board for the year 1951; the decedent himself had drawn from the fund for some 6 months prior to his death. The payments to the widow were held as taxable income. Here again the situation is not one where the payments were voluntarily authorized following the officer's death, but one where a fixed annual pension which the decedent had not fully drawn prior to death was continued to the widow. Further, the court in referring to I.T. 4027 refused to rule on the Commissioner's position but instead based its decision on the intentions of the payor not to make a gift.

Since the Commissioner's position conflicts with court decisions in this area, and intentions of the parties are afforded the controlling weight by the courts, a determination of the relevant facts which comprise these intentions is necessary. In determining these facts and what weight they have in deciding the question of intention, the most illustrative method is to consider the major facts usually present and discuss them in the light of the existing case law.

A. Obligation to Pay.

As previously noted, the Commissioner, prior to I.T. 4027, made a dintinction between payments made pursuant to an obligation before death of the employee or officer and those authorized and made after death on a voluntary basis. All of the cases litigated on this issue holding the payments non-taxable have this common thread: non-obligatory payments. This appears to carry great weight when considered by the court in determining the intent of the parties. But what is included within this term, *non-obligatory payments?* Does it exclude a contract obligation based on consideration and a voluntary plan conceived and in operation prior to death of the employee or officer? The exact meaning is difficult to discover, but usually the courts have found this as a fact where the corporation had no formal pension plan or individual obligation to the deceased.[20] Consequently, by implica-

19. 129 F. Supp. 759 (D.C. Mass. 1955).

20. Louise K. Aprill, 13 T.C. 707 (1949); Bledsoe v. U.S., P-H 1956 FED. TAX SERV. ¶ 73, 010 (D.C. Ind. 1956); Graves v. U.S., P-H 1956 FED. TAX SERV. ¶ 73, 041 (D.C. Tex 1956); Baur v. U.S., P-H 1956 FED. TAX SERV. ¶ 73, 909 (D.C. Ind. 1956); Slater v. Riddell, P-H 1956 FED. TAX SERV. ¶ 72, 972 (D.C. Calif. 1956); Estate of Arthur W. Hellstrom, 24 T.C. 916 (1955); Elizabeth R. Matthews, P-H 1956 T.C. Mem. Dec. ¶ 56,046; Estate of Ralph Reardon, P-H 1955 T.C. Mem. Dec. ¶ 55,154; Marie G. Haskell, P-H 1955 T.C. Mem. Dec. ¶ 55, 196; Ruth Hahn, P-H 1954 T.C. Mem. Dec. ¶ 54,103; Jackson et al., Exec., of Estate of P. L. Jackson v. Granquist, P-H 1957 FED. TAX SERV. ¶ 72,759 (D.C.

tion non-obligatory payments would appear to mean those payments made by the corporation without any legal obligation.

Further delineation is seen in the cases which have taxed the payments to the widow. Thus, where the corporation and the decedent, prior to death, had contracted to pay a certain amount to the employee as salary for life, with a remainder interest to the widow, provided the employee guarantees his continued services, the payments were held taxable to the widow.[21] Payments made pursuant to a state retirement plan to the widow of a deceased state employee were also held taxable. [22] And in an unreported case cited in I.T. 3840,[23] *Mary Sutro v. U.S.*,[24] the court held payments made pursuant to a voluntary death benefit plan in effect before death of the employee were taxable to the widow where the plan could have been legally enforced by the widow.[25]

Perhaps the only case which could pierce this theory of taxability of non-obligatory payments is *Florence E. Carr.*[26] There the decedent, president of Francis Carr & Co., contracted with the corporation in 1927 to withhold some $100,000 in his previously earned commissions and pay them to his widow at his death. The Tax Court held the amounts paid to the widow non-taxable, reasoning that the amounts now received had been earned by the decedent prior to 1927 and consequently were a non-taxable gift or property settlement from the decedent. But a ready distinction can be made between this and the other cases cited. Here the widow had a legally enforceable right which should have been taxed to the decedent at the time the commissions were earned. In the other cases, the employees had no rights to the amounts which the widows later received and consequently were not taxed thereon. Thus, in determining the taxability of corporate payments to widows

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Ore. 1957); Bankston v. U.S., P-H 1957 FED. TAX SERV. ¶ 72,662 (D.C. Tenn. 1957); Ethel Gregg Mann, P-H 1957 T.C. Mem. Dec. ¶ 57,048; Estate of Frank Foote, P-H 1957 T.C. Rep. Dec. ¶ 28.58; Estate of John Hekman, P-H 1957 T.C. Mem. Dec. 57,070.

21. Flarsheim v. U.S., 156 F.2d 105 (8th Cir. 1946).

22. Varnedoe v. Allen, 158 F.2d 467 (5th Cir. 1946), *cert. den.* 330 U.S. 821 (1947).

23. *Supra,* note 11.

24. Unreported (N.D. Calif. 1942), see 1950-2 CUM. BULL. 9.

25. Just how formal this voluntary plan must be is not clear. Evidently an extensive plan covering most employees arouses an expectation in the employee that the plan is additional compensation for the employee's services. In *Ruth Hann,* P-H 1954 T.C. Mem. Dec. ¶ 54,103, the court dismissed the Commissioner's contentions that prior payments made to widows on infrequent occasions has created a policy which employees expected as part of their compensation by saying that the policy had to be a well established one, but there would remain a question as to whether the policy would be for gift-making or compensation.

26. 28 T.C. 86 (June 28, 1957), P-H 1957 T.C. Rep. Dec. ¶ 28.86.

a true and recognizable distinction lies between payments made under no obligation and those made under legal obligation.

B. Services by the Widow.

As previously discussed, the Commissioner asserts that lack of services by the widow is immaterial in deciding taxability of these payments.[27] But in ten recent decisions, all of which are squarely contra to the Commissioner's position, the courts have placed emphasis on this lack of services by the widow.[28]

Why is this factor so prevalent in the court's findings? To answer this question, the final determination in these decisions must be analyzed, *i.e.,* an intention to make a gift. The courts move from the fact that the widow has rendered no services, that the corporation fully compensated the decedent in his salary, and the like, to the question:

> Why would the corporation, without legal obligation, make payments to a widow of a deceased employee when the widow has rendered no benefit to the corporation in return?

The answer must be: either (1) to compensate the employee more fully even though no obligation exists to do so, or (2) to make a gift. Since there is no direct benefit bestowed upon the corporation from these payments, excepting employee morale or good will, and since there is no way to compensate the decedent now, courts have concluded the proper answer to be — to make a gift. So strong is this conclusion that a few of the cases disregard such services by the widow as nominal officer and director.[29] But where the widow is actually rendering a service and is drawing a monthly salary for periods beyond a reasonable time after the decedent's death, the amounts received have been held taxable.[30] Thus, in addition to deciding whether the services of the decedent created an obligation by the corporation to make these payments to the widow, one must examine the status of the recipient herself in relation to the payments. Where the widow is performing no services for the corporation or is a mere nominal officer or director, then the courts will readily conclude that this fact favors a decision that the corporation intended to make a gift.

27. *Supra,* at Note 15.

28. Ruth Hahn, P-H 1954 T.C. Mem. Dec. 54,103; Jackson, Exec. of Estate of P. L. Jackson v. Granquist, P-H 1957 FED. TAX SERV. ¶ 72,759 (D.C. Ore. 1957); Bankston v. U.S., P-H 1957 FED. TAX SERV. ¶ 72,662 (W.D. Tenn. 1957); Estate of Frank Foote, P-H 1957 T.C. Rep. Dec. 28.57; Estate of John Hekman, P-H 1957 T.C. Mem. Dec. 57,070; Bledsoe v. U.S., P-H 1956 FED. TAX SERV. ¶ 73,010 (D.C. Ind 1956); Baur v. U.S. P-H 1956 FED TAX SERV. ¶ 73,909 (D.C. Ind. 1956); Graves v. U.S. P-H 1956 FED. TAX SERV. ¶ 73,041 (D.C. Tex. 1956); Slater v. Riddell, P-H 1956 FED. TAX SERV. ¶ 72,972 (D.C. Calif. 1956); Elizabeth R. Matthews, P-H 1956 T.C. Mem. Dec. ¶ 56,046.

29. Marie G. Haskell, P-H 1955 T.C. Mem. Dec. ¶ 55,196; Louise K. Aprill, 13 T.C. 707 (1949).

30. Louise K. Aprill, 13 T.C. 707 (1949).

C. Wording of Corporate Resolutions.

Corporate resolutions are the most apparent source for any determination of corporate intention, and most courts have indicated some consideration of the resolution authorizing payments to the widow. Though the weight afforded the particular words of any resolution appears to be insignificant in the ultimate decision of the court, no corporate advisor can ignore such a prominent factor, if for no other reason than as a point of conservative insurance.

The cornerstone case in the trend of decisions paying little heed to corporate resolutions is *Bogardus v. Commissioner*,[31] decided in 1934 by the United States Supreme Court. While this decision does not deal with payments to widows, it does decide a question of corporate intentions which generated payments by a successor corporation to employees of the succeeded corporation. The resolution of the successor recited the payments as being a "bonus . . . in recognition of past loyal services." Justice Sutherland in delivering the opinion of the Court said:

> What occurred at that meeting, as we have already said, indicated their clear intention to make gifts. And since intention must govern, we must consider the word used in the light of the intention. . . . In other words, the thing that was decided upon and intended . . . was misdescribed in the resolutions. . . . Certainly, where all the facts and circumstances in the case . . . clearly show the making and the intent to make a gift, it cannot be converted into a payment for services by inaccurately describing it, in the consummating resolutions, as a bonus.[32]

And in a concluding statement when speaking of the words "in recognition of past loyal services", Justice Sutherland said:

> But this recital amounts to nothing more than the acknowledgement of an historic fact as a reason for making the gifts. A gift is none the less a gift because inspired by gratitude for the past faithful service. . . .

Thus, it is without surprise that we find the lower courts reflecting the import of these words in their decisions.

Such wording as "in recognition of the services rendered by";[33] "as further consideration for the past services of the deceased"; [34] "That in recognition of . . . long service with the Company, his compensation continue to be paid";[35] and "out of appreciation and as a token

31. Bogardus v. Commissioner, 302 U.S. 34, 43 (1937).
32. Bogardus v. Commissioner, 302 U.S. 34, 43, 44 (1937).
33. Louise K. Aprill, 13 T.C. 707 (1949); Bankston v. U.S., P-H 1957 FED. TAX SERV. ¶ 72,662 (W.D. Tenn. 1957); Jackson, Exec. of Estate of Jackson v. Granquist, P-H 1957 FED. TAX SERV. ¶ 72,759 (D.C. Ore. 1957).
34. Slater v. Riddell, P-H 1956 FED. TAX SERV. ¶ 72,972 (D.C. Calif. 1956).
35. Ruth Hahn, P-H 1954 T.C. Mem. Dec. ¶ 54,103.

of corporate esteem"[36] have been held as not conclusive of a compensatory intent by the corporation. In fact the Tax Court has concluded rather strongly by saying:

> We think it makes a little difference how the corporation formally expresses its motives for the payment. Where such a payment is a gift, as the whole here establishes that the payments in question were, it remains a gift regardless of the fact that the corporation may state its reasons for making the payment were "because of" or "in recognition" or "in consideration of" the services of the deceased employee.[37]

As a concluding word of caution, it should be pointed out that the resolutions are indecisive when other facts indicate the payments to be gifts. However, where the other facts are not decisive, proper wording in the resolution would be helpful, for there are many cases, outside the area of payments to widows, which seem contra to the cited line of decisions.[38]

D. Corporate Deduction of Payments to Widows.

Where the corporation has made payments to a former or present employee, and the corporation has taken a deduction from current income,[39] great weight has been given this fact in determining corporate intention. Where the corporation authorizes payments to a widow, the converse situation is apparent. In practically all of these cases the court has ignored the fact or at least held it to be indecisive.

An apparent explanation for this conflicting result lies in I.T. 3329.[40] As previously discussed, the Commissioner therein held that a corporation could make gifts to a widow and still deduct them for income tax purposes. Thus, the position of the Commissioner was such as to conclude that deductions by the corporation did not preclude an intent to make a gift. Corporations could make these payments with a good faith gratuitous intent and deduct the amounts so paid in reliance on the Commissioner's ruling. The courts, evidently relying on I.T. 3329 or similar reasoning, decided the intent, on other factors, *i.e.*, obligation to pay, services by the widow, and the like. At the time

36. Bledsoe v. U.S. P-H FED. TAX SERV. 73,010 (D.C. Ind. 1956); Baur v. U.S., ¶ P-H FED. TAX SERV. ¶ 73,909 (D.C. Ind. 1956); Estate of Frank Foote, P-H 1957 T.C. Rep. Dec. ¶ 28.58.

37. Arthur W. Hellstrom, 24 T.C. 916 (1955).

38. See Wilkie v. Commissioner, 127 F.2d 953 (6th Cir. 1942), *cert. den.* 317 U.S. 659 (1942); Noel v. Parrott, 15 F.2d 669 (4th Cir. 1926), *cert. den.* 273 U.S. 754 (1957); and compare Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929).

39. Fisher v. Commissioner, 59 F.2d 193 (2d Cir. 1932); Wilkie v. Commissioner, 127 F.2d 953 (6th Cir. 1942), *cert. den.* 317 U.S. 659 (1942); Blair v. Rosseter, 33 F.2d 286 (9th Cir. 1929).

40. 1939-2, CUM. BULL. 153.

the Commissioner reversed his position by issuing I.T. 4027,[41] the courts could see no other reason for changing their trend of thinking.[42]

Another reason for excluding the corporate deduction from the factors from which the corporate intentions are to be derived lies in the element of time. Usually the board of directors will authorize the payments to the widow during a time of the year when tax deductions are not prominent in the minds of the directors. Consequently, the year-end financial report and tax return preparation should not be determinative of the intent of the corporation at the time the payments were authorized.[43] This argument would lose its validity, however, where the resolution itself specifies the amounts paid are to be deducted as an expense of business. Even then, the court has held the payments to be gifts.[44]

No better summation of this thinking can be found than the words of the Tax Court:

> In view of the other evidence in the record, we attach no particular significance to the fact that the corporation claimed deductions on its returns for the amount paid to petitioner [widow].[45]

E. Payments Made Directly to Widow.

This factor should be correlated with the previous discussion of whether the payments were made under an obligation. Obviously, much of the vitality of the argument that the corporation intended a gift is lost when the payments are made to the personal representatives or estate of the deceased employee. Payments made to the representative or estate are in effect payments made to the deceased employee. Immediately, an analogy can be drawn between such a situation and those cases where corporations have authorized payments to a former employee. In the latter cases the court has repeatedly said:

> An employer may make a gift to an employee without rendering it taxable whether made before, during or after the termination of service. However, a payment of an additional sum by an employer to an employee carries a strong presumption that such payment is for services rendered.[46]

Thus, the tax court, when faced with the question, held payments made to the deceased employee's estate as taxable income to the estate.[47]

41. 1950-2 CUM. BULL. 9.
42. Arthur W. Hellstrom, 24 T.C. 916 (1955).
43. Ruth Hahn, P-H 1954 T.C. Mem. Dec. ¶ 54,103.
44. Louise K. Aprill, 13 T.C. 707 (1949).
45. Arthur W. Hellstrom, 24 T.C. 916, 919 (1955).
46. Wilkie v. Commissioner, 127 F.2d 953 (6th Cir. 1942), *cert. den.* 317 U.S. 659 (1942).
47. Estate of Edward Bausch, 14 T.C. 1433 (1950), *aff'd.* 186 F.2d 313 (2d Cir. 1951).

And in the decisions where the payments were made directly to the widow, the court has impliedly indicated this fact to be of importance by listing it as an element favorable to an intention to make a gift.[48]

The lone case which holds the payments to the estate as non-taxable gifts is *Estate of Frank J. Foote*.[49] However, this case can be distinguished from the *Bausch* case mentioned above in that Mr. Bausch had no heirs and the payments were made as a mere extension of compensation with no heir or widow to whom the corporation could feel obligated. In *Foote* the corporation could have paid the heirs but the decedent had become involved in domestic difficulties; to give effect to the wishes of decedent, the payments were made to his estate. Thus, *Foote* probably is not an exception to the general rule.

The general rule appears to be that where the payments are made directly to the widow and not to the estate of the deceased, this is a relevant factor in concluding the corporate intention.

F. Stockholders' Ratification of Board's Authorization.

To reach a decision on any corporate intention to make a gift, it would seem logical to first determine whether the authorizing body has the power to make a gift. The more modern trend of case law probably would authorize the making of a corporate gift by a business corporation so long as there is some expectation of receiving a pecuniary benefit therefrom or furthering the business interests and welfare of the corporation thereby.[50] But under such a rule there arises a question as to whether any corporate benefit or furthering of business interests will be derived by payments to the widow of a deceased officer or employee. Where some benefit can be shown from these payments, the board of directors probably would have the power to make a gift. A more practical explanation lies in the circumstance surrounding these corporate gifts. Usually such payments are made by close corporations to the widow of a prominent past officer, and the board of this close corporation is composed of all the stockholders. Consequently, when the board acts, the stockholders are acting and there is no one to object on ultra vires grounds; in other words, if the corporation cannot make a gift the stockholders can.

48. Louise K. Aprill, 13 T.C. 707 (1949); Alice M. McFarlane, 19 T.C. 9 (1952); Slater v. Riddell, P-H FED. TAX SERV. ¶ 72, 972 (D.C. Calif. 1956); Ruth Hahn, P-H 1954 T.C. Mem. Dec. ¶ 54,103; Jackson et al., Exec. of Estate of Jackson v. Granquist, P-H 1957 FED. TAX SERV. ¶ 72,759 (D.C. Ore. 1957); Estate of Hekman, P-H 1957 T.C. Mem. Dec. ¶ 57,070; Elizabeth R. Matthews, P-H T.C. Mem. Dec. ¶ 56,046.

49. P-H 1957 T.C. Rep. Dec. ¶ 28.58.

50. 6A FLETCHER, CYCLOPEDIA OF CORPORATIONS § 3940 (1950).

Even with this uncertainty present, few of the cases litigating the question of corporate intention to make a gift have considered that the board may be acting ultra vires. Those cases which discussed the issue found ratification of the board's action by the stockholders.[51] But several cases have found that the shareholders did not ratify and still decided the payments to be gifts.[52] No rationalization can be offered for the courts' vagueness in this area because the power or lack of power to make gifts should be most relevant in deciding whether the corporation intended to make a gift. But until such time as it becomes a determining factor, this power to make gifts should be considered by the corporation only insofar as the law of the forum makes it pertinent.

III. Effect of Internal Revenue Act of 1954

The case law previously discussed involved, for the most part, questions arising prior to enactment of the Internal Revenue Code of 1954. There is some doubt whether this new compilation will have any effect on the trend of decisions. Under the 1939 Code, death benefits paid to the heirs of a deceased employee by reason of a contract between employer and employee were excluded up to $5,000. This code section required a binding contract and, as previously discussed, where there was a contract obligation by the employer the court usually has precluded a gratuitous intention by the corporation. Thus the only source of tax relief would be under Code § 22 (b) (1). Conversely, where no contract existed prior to the death of the employee, the $5,000 was not available, but the court could find a gratuitous intent.

The 1954 Code in § 101 (b) deletes the requirement of a pre-existing contract before the heirs or widow of the deceased employee could exclude $5,000 of the death benefits paid. Thus, the widow now seems to have a choice — exclude the $5,000 under Code § 101 (b) or seek to have the payments declared gifts. The logical approach would be to determine the net tax result and cast her lot in that direction, *i.e.*, if the payments amount to less than $5,000 it would be more advantageous to claim under Code § 101 (b) and avoid gift tax; but where the payments are sufficiently large to create an advantage under gift tax rates, the proper foundation should be established to show a gratuitous intention of the payor.

Thus it can be seen that the minor change in the 1954 Code is not likely to affect the decision of the court when the litigation is concerned

51. Elizabeth R. Matthews, P-H 1956 T.C. Mem. Dec. ¶ 56,046; Bledsoe v. U.S., P-H 1956 Fed. Tax Serv. ¶ 73,010 (D.C. Ind. 1956); Baur v. U.S., P-H 1956 Fed. Tax Serv. ¶ 73,909 (D.C. Ind. 1956).

52. Ruth Hahn, P-H 1954 T.C. Mem. Dec. ¶ 54,103; Slater v. Riddell, P-H 1956 Fed. Tax Serv. ¶ 72,972 (D.C. Calif. 1956).

with the question of gratuitous intention. Therefore, the case law cited by this comment would still be in full effect and probably will be until some express legislation changes the law.

IV. Conclusion

Reverting to the hypothetical case of Mrs. Doe which was set forth in the introduction, and applying the rules discussed herein, a conclusion may be reached that the payments to Mrs. Doe are non-taxable. Loophole Corporation was under no obligation to make any further payments. Mrs. Doe was never employed by the corporation, and the corporate resolution merely described the purpose of the payments. The payments were made directly to Mrs. Doe and the corporation, being a closed one, evidently would encounter no challenge to its power of gift-making. Consequently, whenever any corporation wishes to benefit by this tax advantage, the proper foundation can be achieved by following the steps taken in the Loophole case.

Furthermore, the only apparent significance which Code § 101 (b) of Internal Revenue Code of 1954 has on these payments to widows, is to allow an alternative approach by the widow in seeking tax relief. The court has clearly defined the tax consequences in this area and the Commissioner must either seek specific legislation favoring his position or eventually acquiesce in the judicial precedents.

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CASE NOTES

EVIDENCE – ADMISSIBILITY IN FEDERAL PROSECUTION OF WIRE TAP EVIDENCE OBTAINED BY STATE OFFICERS

Police officers of the City of New York established a wire tap, as authorized by New York law, in order to obtain evidence that petitioner and others were violating state narcotics laws. Acting upon information secured by the wire tap, the city police stopped and searched an automobile driven by petitioner's brother, and discovered that he was transporting alcohol without the tax stamps required by federal law. No narcotics were found. The federal officers were notified and a prosecution in a United States District Court ensued. Petitioner's motion to suppress the evidence obtained by the wire tap was denied, and he was convicted. The Court of Appeals, Second Circuit, affirmed the conviction and on certiorari, the United States Supreme Court, reversed it, and *held,* unanimously, that evidence obtained as a result of wire tapping by state law enforcement officers, though acting pursuant to state law, and without participation by federal authorities, is inadmissible in a federal criminal prosecution. *Benanti v. United States,* 78 S. Ct. 155 (1957).

In 1928 the United States Supreme Court held, in a five-four decision, that interception of telephone conversations by wire tapping did not amount to a search and seizure prohibited by the Fourth Amendment.[1] In a dissenting opinion, Justice Brandeis believed that the Fourth as well as the Fifth Amendment had been violated, asserting: "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."[2] Justice Holmes, joining in the dissent, called wire tapping "dirty business" and expressed the view that "apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act."[3]

In the principal case, the Supreme Court did not reach the constitutional question,[4] but rested its determination on the Federal Com-

1. Olmstead v. United States, 277 U.S. 438 (1928).
2. 277 U.S. 438, 476 (1928)
3. In the State of Washington where the Olmstead case arose wire tapping was prohibited: WASH. COMP. STAT. ANN. § 2656-19 (Remington, 1922).
4. The question of illegal search and seizure was explored at length by Judge Medina in the Court of Appeals opinion, 244 F.2d 289 (2d Cir. 1957).

munications Act.[5] This statute was enacted in 1934, regulating communications by wire and radio. Tucked away in Section 605 of the Act is the following language:

> . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person.

This provision went unnoticed until the decision in *Nardone v. United States,*[6] involving wire tap evidence obtained by federal authorities and introduced in a criminal proceeding in a federal court. The Supreme Court, finding such evidence inadmissable held that the phrase "no person . . . shall intercept" applied to federal officers and that the prohibition against divulgence to "any person" rendered inadmissible in federal court evidence so obtained. This decision was followed by others expanding the rights under Section 605 to include not only the communication intercepted but also the indirect use of information and other evidence obtained by the government from the interception.[7] This prohibition applied to intrastate as well as interstate communications.[8]

Then, in 1952, came *Schwartz v. Texas,*[9] where the Supreme Court considered the question whether Section 605 applied to criminal prosecutions in a state court where wire tap evidence was obtained and introduced by state officers. It was there held that, in the absence of an expressed intention on the part of Congress, "where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute."[10] In conclusion the Supreme Court said: "We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof."[11]

In the instant case the Court viewed as its task the resolving of the alleged conflict between the *Nardone* case and the *Schwartz* case. The

5. 48 STAT. 1064 (1934), 47 U.S.C. § 151 et seq. (1952).
6. 302 U.S. 379 (1937).
7. Nardone v. United States, 308 U.S. 338 (1939).
8. Weiss v. United States, 308 U.S. 321 (1939).
9. 344 U.S. 199 (1952).
10. Texas had in 1948 amended its Code of Criminal Procedure, providing that evidence obtained in violation of the Constitution or laws of Texas or the Constitution of the United States was inadmissible: TEX. STAT., Code Crim. Proc., Art. 727 (a) (Vernon 1948). In 1953 after the Schwartz case the Texas Code of Criminal Procedure was again amended so as to provide that evidence obtained in violation of the laws of the United States was inadmissible, TEX. STAT., Code Crim. Proc., Art. 727 (a) (Vernon 1953).
11. 344 U.S. 199, 203 (1952).

state officers in the instant case had legally made the tap under a New York statute authorizing wire tapping under certain circumstances and restrictions.[12] The Supreme Court's position that the *Nardone* case controlled seems to be justified. The *Schwartz* case does not present a direct conflict. That case dealt with a state court proceeding and is limited to the holding that the exclusion under Section 605 does not apply in a state court proceeding. It did not consider the admission in a federal court proceeding of wire tap evidence obtained by state officers, as in the instant case. However, language in the previous federal cases centered upon actions of federal officers, and the government in the principal case urged that therefore the exclusionary rule was limited to evidence obtained by such officers. The Court rejected this contention and held that the statute governed federal prosecutions in federal courts whether the evidence was obtained by federal authorities or by state officers. The Court felt that to allow the use in federal courts of evidence gained by state officers through wire tapping, even though authorized by state law, would be inconsistent with the purpose of the Communications Act as defined in the second *Nardone* case.

The government further argued that, unlike the *Schwartz* case where it was assumed that the evidence violated the provisions of Section 605 of the Federal Communications Act, the interception and divulgence of the communication in the principal case was not unlawful since it was done in accordance with state statutory provisions and Congress had not expressly forbidden this exercise of the state's police power. The Second Circuit Court of Appeals rejected this contention, finding "no alternative than to hold that . . . the New York officers violated the federal statute."[13] The Supreme Court apparently felt that the government's position amounted to the argument that the Act had no application to intrastate communications. This proposition, the Court remarked, had been rejected in the *Weiss*[14] case, since it would be impossible adequately to protect interstate communications without interdicting interception of all communications. The Court recognized that the practical effect of the government's interpretation would be to subject interstate messages to interception since, at the time the wire tap was installed, it would be impossible to tell whether interstate messages would be overheard, and that "Congress did not intend to place protection so plainly guaranteed in Section 605 in such a vulnerable position."[15] The Court further held that the permission in the Act for

12. N.Y. Const. Art. I § 12; N.Y. Code of Crim. Proc. § 813 a (1942).
13. 244 F.2d 389, 391 (2d Cir. 1957).
14. 308 U.S. 321 (1939).
15. 78 S. Ct. 155, 160 (1957).

state regulation of certain aspects of public utility service did not mean that the states could upset the policy of Congress concerning the use of evidence in federal courts.[16]

It should be noted however, under the decision in the principal case, that the question of whether wire tap evidence can still be used in state courts is a matter for state law to determine. Many states permit the use of illegally obtained evidence and this has never been held to be a violation, as such, of the United States Constitution.[17] There still remains open the question whether all evidence illegally seized by state officers is inadmissible in federal prosecutions.[18]

That the principal case is limited to the interpretation of the particular phraseology of Section 605 of the Federal Communications Act is shown by *Rathbun v. United States*,[19] decided on the same day as the *Benanti* case. The *Rathbun* case held that eavesdropping on an extension line with the permission of the receiver of the call, was not a violation of the Act, and the information thus obtained by state officers could be used in a federal prosecution. This decision poses the interesting point that, though the Act requires the consent of the sender or originator of the message to justify an "interception", eavesdropping may be authorized by the receiver, without the knowledge or consent of the originator. Justices Frankfurter and Douglas, dissenting, believed that this was an interception and that consent of one party was not enough.

Absent ingenious arrangements, such as the *Rathbun* case, it is clear that evidence obtained through violation of the Federal Communications Act, Section 605, whether by federal authorities or by state officers under the sanction of state law, will not be admissible in federal courts, nor in state courts which prohibit the introduction of evidence obtained in violation of a state or federal law.

The Court in the instant case expressly refrained from touching the question whether both an *interception* and a *divulgence* are neces-

16. It has recently been stated by Justice Hofstadter of the New York Supreme Court, New York County, that warrants authorizing a wire tap, though in accordance with the New York statutes, cannot be issued. 139 N.Y.L.J. #2, p. 1 (Jan. 3, 1958). In *People v. Dinan* decided Feb. 18, 1958 in County Court, Westchester County, New York, the Court held that the *Benanti* decision required the dismissal of a bookmaking indictment obtained on evidence obtained by wiretapping. The effect of the *Benanti* decision on the *Schwartz* case was not clear according to the court in the *Dinan* case. The New York Courts are also faced with the question whether *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926) admitting illegally obtained evidence can now apply to wiretapping evidence. See 26 U.S.L.W. 1135 (1958).
17. Wolf v. Colorado, 338 U.S. 25 (1949).
18. 78 S. Ct. 155, 158, footnote 10 (1957).
19. 78 S. Ct. 161 (1957).

sary elements for a violation of Section 605. Nor did the Court find it necessary to reach the issue "whether Section 605 is violated by an interception of the communication and a divulgence of its fruits without divulging the existence, contents, etc., of the communication."[20]

It is interesting to note that a bill to amend Section 605 was recently introduced by Senator McClellan providing: "That this Section shall not apply to . . . (b) the interception by any law enforcement

20. 78 S. Ct. 155, 157 (1957). The District Attorney of New York County recently took the position that the federal law does not prohibit interception alone. 139 N.Y.L.J. #4 p.1 (Jan. 7, 1958). The New York State Bar Association has urged a strengthening of anti-wire-tapping and eavesdropping laws and for new legislation making evidence obtained by such practices inadmissible. Under New York Laws, 1957, c. 880 adding § 345a of the Civil Practice Act, evidence obtained through, or resulting from eavesdropping, as defined by Penal Law, § 738, is inadmissible in any civil action, but admissible in any disciplinary trial or hearing or in an administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or governmental agency. Under the provisions of a bill introduced on recommendation of the New York Joint Legislative Committee on Privacy of Communications, Section 345-a would be amended, striking out the word civil and make such evidence inadmissible in both civil and criminal actions, proceedings and hearings. The bill would continue the exception as to disciplinary proceedings but would limit the administrative proceedings in which such evidence is admissible to those "with respect to the acts or conduct of any officers or employees." The bill provides that such evidence shall be admissible in any action or proceeding against the person who has or is alleged to have violated Penal Law § 738. See N.Y. STATE BAR ASSN. CIRC. No. 122, Feb. 17, 1958.

New York Penal Law § 738 defines an eavesdropper as:

> A person: 1. not a sender or receiver of a telephone or telegraph communication who willfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to do so without the consent of either a sender or receiver thereof; or
>
> 2. not present during a conversation or discussion who willfully and by means or instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or
>
> 3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping.

Under New York Penal Law § 740, violation of section § 738 is a felony punishable by imprisonment for not more than two years.

Applicable statutory provisions in Tennessee are contained in Tenn. Code Ann. § 65-2117, 2118, 2119, (enacted in 1921.) Section 65-2117 provides:

> It shall be unlawful for any person to damage or obstruct any telegraph or telephone poles, wires, fixtures, or other apparatus or appliances, or to impede or impair the service of any telegraph or telephone line; or to connect by wire or other means, with any such line or lines, so as to hear, or be in a position to hear, messages going over said line or lines, without first procuring the consent of the owner or owners of said line, or the duly authorized agent of same.

Tenn. Code Ann. § 65-2118 provides that it shall be a misdemeanor to violate § 65-2117 and punishable by a fine of not less than twenty-five dollars nor more than fifty dollars.

See also Tenn. Code Ann. 39-4533 making tapping or injuring telegraph or telephone lines a misdemeanor; apparently this is a malicious mischief statute and is not concerned with the evidentiary problem of eavesdropping as such.

officer or agency of any State (or any political subdivision thereof) in compliance with the provisions of any statute of such State, of any wire or radio communication, or the divulgence, in any proceeding in any court of such State, of the existence, contents, substance, purport, effect of meaning of any communication so intercepted, if such interception was made after determination by a court of such State that probable cause existed for belief that such interception might disclose evidence of the commission of a crime."[21]

R. W. F., Jr.

TORTS — VIOLATION OF PURE FOOD AND DRUG ACT — HEPATITIS VIRUS IN BLOOD PLASMA

After plaintiff received a severe cut, manufactured blood plasma was administered to him. This introduced into his blood stream a virus serum hepatitis which was present in the plasma. Although his recovery was normal, he became afflicted with jaundice allegedly administered with the plasma. In an action against the manufacturer alleging adulteration under provisions of the Tennessee Food, Drug, and Cosmetic Act,[1] the jury returned a verdict for the plaintiff. On appeal from the judgment of the district court, *held* as a matter of law, virus of serum hepatitis is not a "filthy substance" under the meaning of the Act. *Merck & Co., Inc. v. Kidd,* 242 F.2d 592 (6th Cir., 1957).[2]

The principal case is one of first impression under the pure food and drug acts. The decision in the instant case, as in many others, turned on the definition of a common word which cannot be accurately defined. Under the Tennessee Act, a drug shall be deemed to be adulterated if it consists in whole or in part of any "filthy" substance. The novel question presented was whether a live virus which, when introduced into the blood stream, causes a harmful and serious illness, is a "filthy substance."

At the outset both parties agreed that since there were no cases interpreting this section of the Tennessee statute, any cases arising under the federal pure food and drug act on which the state acts are

21. S. 3013, 85th Cong., 2nd Sess. (1958). (To Senate Committee on Interstate and Foreign Commerce.)

1. TENN. CODE ANN. § 52-101, *et. seq* (1957).
2. *Certiorari denied,* 78 S. Ct. 15 (1957). This was a diversity of citizenship case against the manufacturer drug company. Another action instituted against the hospital is pending in the trial court.

patterned would be in point.[3] Thus, although laying down Tennessee law, the instant decision actually turned on an interpretation of language in federal cases.

Since both the food and drug sections of Tennessee's Food, Drug and Cosmetic Act use the term "filthy,"[4] it would seem that the same interpretation should apply under each. It should be noted, however, that because of the different wording of the food statute, encompassing in addition, "any poisonous or deleterious substance which may render it injurious to health," a substance could adulterate food and yet not adulterate drugs. In this connection the court stated:

> If the hepatitis virus were present in food, the food would clearly be adulterated under the Tennessee statute. The virus is "a deleterious substance" which may render food "injurious to health."[5]

Expert testimony in the trial court in the principal case established that there is no medical or scientific definition of the term "filthy." Clearly, to be "filthy" an item need not be injurious to health,[6] and conversely the court considered that a substance injurious to health would not necessarily be "filthy." Further, there is no requirement that the item be unfit for food in order to be "filthy."[7]

Though the appellate court in the principal case held that "filthy" should be given its ordinary meaning, "in ordinary English speech," it further held as *a matter of law* that *virus serum hepatitis* was not filthy. This appears to be paradoxical. It would seem that if the ordinary meaning is to be attached to the word, twelve ordinary men would be the best judges of that ordinary meaning. In the instant case, the jury

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3. 21 U.S.C.A. 342 (a) (3), (1957) provides as follows:
A food shall be deemed to be adulterated . . . if it consists in whole or part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.
21 U.S.C.A. 351 (a) (1), (1957) provides:
A drug or device shall be deemed to be adulterated . . . if it consists in whole or in part of any filthy, putrid or decomposed substance;
Under TENN. CODE ANN. 51-110 (a) (3), 1956:
A food shall be deemed to be adulterated . . . (a) (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food;
TENN. CODE ANN. § 51-115 (a) (1), (1956) provides as follows:
A drug or device shall be deemed to be adulterated: if it consists in whole or in part of any filthy, putrid or decomposed substance;
4. See footnote 3, *supra.*
5. Merck & Company v. Kidd, 242 F.2d 592 (6th Cir. 1957); TENN. CODE ANNOT. § 52-110 (1956): "A food shall be deemed to be adulterated: (a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health. . . ."
6. U.S. v. 133 Cases of Tomato Paste, 22 F. Supp. 515 (E.D., Penn., 1938).
7. Salamonie Packing Co. v. U.S., 165 F.2d 205 (8th Cir. 1948), *cert. den.* 333 U.S. 863 (1948).

had determined that the virus was "filthy." Why overturn the jury verdict?

Closely analogous to the virus of serum hepatitis is the *trichinella spiralis* sometimes found in fresh pork,[8] which has been held to make the pork infected or diseased food. The *trichinella spiralis* is of microscopic size; whereas the virus or serum hepatitis is below microscopic size. Also the fresh pork is a food, and as the court in the principal case noted, since "filthy is not synonymous with 'infected' or 'diseased,' the trichinosis cases shed no light upon the question in issue."[9]

The language of the opinion in the principal case, although not explicitly so stated, seems to indicate that the portion of the Tennessee and Federal Pure Food, Drug, and Cosmetic Act which employs the word "filthy" was not enacted to protect the health and welfare of citizens but merely to protect the aesthetic tastes and sensibilities of the public.[10] The court says that "filth" is not synonymous with "injurious to health" or "unfit for food," and finds that the "fact that hepatitis virus is injurious is thus clearly irrelevant to the question of whether or not it is filthy."[11] We are thus left with the conclusion that a tomato paste with worms or worm excreta is filthy although not injurious to consumer's health;[12] but *virus serum hepatitis* is not filthy although extremely injurious to the consumer's health.[13]

It should be pointed out, however, that the virus hepatitis cannot be discovered by microscopic examination whereas worms or worm excreta can be so discovered. *United States v. Sprague*[14] was distinguished on that ground, *inter alia*.[15] In that case, live oysters were shipped in a living state in barrels without any treatment or manufacture other than that of gathering and packing for shipment. The adulteration complained of consisted of the bacteria which were absorbed by the live oysters during the process of growth from the liquid which

8. See Leonardi v. A. Haberman Provision Co., 143 Ohio St. 623, 56 N.E.2d 232 (1944).
9. Merck & Company v. Kidd, 242 F.2d 592, 595 (6th Cir. 1957) and cases cited therein.
10. See U.S. v. 133 Cases of Tomato Paste, 22 F. Supp. 515, 516 (E.D. Penn., 1938) where the foreign substance was worms and their excreta in food which did not render the food injurious to the consumer's health. The court there observed: "there can be no doubt that this section of the act was designed to protect the aesthetic tastes and sensibilities of the consuming public and that the visible presence of such material in food would offend both."
11. Merck & Company v. Kidd, 242 F.2d 592 (6th Cir. 1957).
12. U.S. v. 133 Cases of Tomato Paste, 22 F. Supp. 515 (E.D. Penn., 1938).
13. Merck & Company v. Kidd, 242 F.2d 592 (6th Cir. 1957).
14. 208 F. 419 (S.D.N.Y., 1913).
15. That case was also distinguished on the basis that typhoid bacillus is transmitted to the oysters in human sewage and other filth.

they consumed in their natural functions. In holding that the *bacillus typhosus* was filthy, the court observed:

> As to the objection that the oysters did not consist in whole or in part of filthy . . . substance, no argument would be needed if living bacilli had been knowingly introduced into an oyster by the defendants. . . . It seems hardly open to argument that the words "filthy, decomposed, and putrefied" would be applicable to certain conditions resulting from the presence of living organisms; and in fact, from common knowledge of the present state of scientific research, the conditions of animal substance known as "filthy, decomposed and putrefied" are caused by the presence of such living organisms. A substance containing bacilli liable to cause disease to such an extent as to make it dangerous for food purposes, is certainly "filthy" under the meaning of that word as generally used.

As was pointed out by Judge McAllister in his dissenting opinion in the principal case, although *bacillus typhosus* is microscopically visible, each individual oyster would have to be examined; for all practical purposes, this necessarily renders them undiscoverable. Of course the public could get along without oysters while it may be unable at a given moment to do without blood plasma.

Despite some questionable arguments in the opinion, the result reached seems to be the correct one when we observe the circumstances of the particular case. Manufactured plasma involves pooling the blood of a great many donors and then processing it to form dried plasma. This dried powder can be readily reconstituted into liquid blood plasma by the addition of sterile water. This dried plasma has a useful life which is much longer than that of whole blood. Further, unlike whole blood, plasma may be administered without cross-matching the types. Through this pooling method, large banks of blood are possible. But if blood from any one donor contains the virus of *serum hepatitis,* the entire pool of plasma will be contaminated, and a transfusion may produce the liver disease known as serum hepatitis.

The presence of this virus cannot be discovered by any test known to science other than administering some to volunteers and awaiting the result. Further, the virus cannot be destroyed without destroying the utility of the plasma. Consequently, the use of pooled plasma involves a calculated risk. This risk is well known to the medical profession, and as required by law, notice of the risk was on the label of the container of plasma administered to the plaintiff in the principal case.[16] The plaintiff, however, apparently did not know of the risk.

Unless the chances of acquiring *virus serum hepatitis* are so small as compared with the amount of manufactured plasma sold that the

16. See Merck & Company v. Kidd, 242 F.2d 592 (6th Cir, 1957).

price would not be substantially increased were the manufacturer made an insurer, it seems that the patient should take the calculated risk of acquiring the virus. It also seems unlikely that the pure food and drug acts, which involve criminal sanctions, are intended to proscribe as filthy a useful and often vitally needed product such as this blood plasma if it was made as perfectly as it could be made. In that connection, although not mentioned by the court, there is a provision of the Tennessee Code, § 52-102 (0) which strengthens and supports the result arrived at in the principal case. This section reads:

> The term "contaminated with filth" applies to any food, drug, device or cosmetic not securely protected from dust, dirt, and, *as far as possible,* from all foreign or injurious contamination. *(Italics added.)*

Although the statute in issue in the principal case does not use the words "contaminated with filth," it seems that Code § 52-102 (0) should be of some value in determining what the legislature had in mind in using the term "filthy." Here the plasma was perfected "as far as possible," and might not be filthy for that reason under the language of the Tennessee act.

M. J. M.

TRADE REGULATION — TRADING STAMP ACT — CONSTITUTIONALITY — PRIVILEGE AND GROSS RECEIPTS TAX

Complainants filed a bill in Chancery Court of Davidson County seeking a declaratory judgment on the validity of the Tennessee Trading Stamp Act. An amendment to the Act increases the privilege tax imposed upon trading stamp companies or agencies doing the business of selling, distributing, delivering or giving away trading stamps from $300 to $600 per annum. This privilege tax is not applicable to merchants or manufacturers who issue and redeem their own coupons. The statute also imposes a new tax equal to two percent of the gross receipts of every person, firm or corporation issuing trading stamps redeemable for goods from third persons. The gross receipts tax was not imposed upon the using of stamps redeemable in cash or merchandise from the general stock of the merchant issuing the stamps. A further exemption is made as to coupons redeemable by a manufacturer or packer.[1] The chancellor held that the increase in the flat annual rate was valid, but the portion of the statute imposing the gross receipts tax upon issuing merchants was unconstitutional. On appeal to the Tennessee Supreme Court, *held,* affirmed. The provision imposing tax

1 TENN. CODE ANN. § 67-4203, Item 106 (Supp. 1957).

upon those merchants who issue trading stamps redeemable through a third party while exempting merchants who give and redeem their own stamps is unconstitutional class legislation, not based on a reasonable classification. *Logan's Supermarkets, Inc. v. Atkins,* 304 S.W.2d 628 (Tenn. 1957).

At the outset it may be noted that neither the chancellor nor the supreme court dealt with all exemptions, and both courts to some extent rewrote the statute. In sustaining the increase from $300 to $600 neither court, so far as can be determined from the reported opinion, considered any exception or exemption. It is possible that the exemption in favor of merchants who issue and redeem their own coupons was construed as applicable not to trading stamps but only to *other* coupons. Thus the chancellor and the supreme court held that a $600 tax on trading stamp companies was valid.

In holding the two percent gross receipts tax invalid, the chancellor and the supreme court apparently treated the exemption relating to stamps redeemable "in cash or *merchandise from the general stock of said merchant*" issuing the stamps as though it had been in favor of "merchants who redeem their own stamps." Thus, to some extent, the words of the statute were rewritten, although it is by no means clear that the intent of the legislature was not followed.

The statute involved in the instant case appears on its face to be intended as a regulatory or prohibitory measure, rather than as a revenue-raising plan. The imposition of a tax of two percent of gross sales upon those merchants utilizing a plan under which redemption is handled by third persons, coupled with the cost of the stamps, which is approximately three percent of gross sales,[2] would clearly impose a practically prohibitory burden upon the merchant operating under such a plan. Absorption of this five percent increase from the profits of the issuing merchant appears quite unlikely,[3] and it is doubtful whether the merchant could effectively compete if he passed the increased cost along to the consumer. Without going into a detailed economic analysis of the effects of the five percent increase in costs upon profits or competition, it would appear that the result of the tax imposed by this statute would be a severe curtailment, if not total prohibition, of the use of trading stamps redeemable by third persons.

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2. District of Columbia v. Kraft, 35 App. D.C. 253, 269 (1910); Publix Super Markets, Inc., v. City of Orlando, 8 Fla. Supp. 96, 97 (1955); Webb, *The Trading Stamp,* 24 TENN. L. REV. 557, 564 (1956), citing *Forum on Trading Stamps,* NEW YORK RETAILER, Nov. 1955, p. 5; U.S. DEP'T OF AGRICULTURE, DO TRADING STAMPS AFFECT FOOD COSTS? p. 1 (Marketing Research Report No. 147, 1957).
3. See Webb, *The Trading Stamp,* 24 TENN. L. REV. 557, 563-66 (1956) and materials therein cited.

The Tennessee Supreme Court has previously upheld statutes imposing a regulatory tax where the legislature has chosen to control, regulate, or prohibit through the imposition of a tax rather than by outright statutory prohibition.[4] Such regulation has been sustained as an exercise of the police power without the limitations normally placed upon measures designed to raise revenue.[5] The distinction drawn between the taxed and the untaxed, however, must be on a reasonable basis; it may not be arbitrary, capricious or discriminatory.[6] In the instant case the Tennessee Supreme Court was unable to find a reasonable basis for the demarcation drawn between stamp plans under which redemption is handled through a third person and those under which the stamps are redeemable by the issuing merchant.[7]

By its decision in the instant case, the Tennessee Supreme Court has joined a long list of courts which have struck down legislative attempts to regulate or control the use of trading stamps.[8] Prior to 1916 the prevailing judicial opinion was that any regulation or control of the trading stamp violated some provision of the 14th Amendment to the United States Constitution.[9] In that year, however, the United States Supreme Court handed down three decisions which seemed to establish the contrary. In *Rast v. Van Deman & Lewis Co.*[10] the Court held that a Florida statute imposing allegedly prohibitive taxes upon merchants issuing trading stamps violated neither the Due Process, Equal Protection nor the Contract Clauses of the United States Constitution. In so holding the Supreme Court rejected the contention that the stamp plans were only another phase of advertising, indistinguishable from other methods and modes of merchandise promotion. The Court pointed out that advertising is "merely identification and description, apprising of quality and place . . . single in its purpose and motive . . ." and that "its consequences are well defined, there being nothing ulterior;. . . ."[11] Although the stamp plans could not properly be classified as lotteries or as gaming, the Court stated that they may be considered as "having the seduction and evil of such, and whether [they have] may be a matter in inquiry, —a matter of inquiry and judgment that it is finally within the legislature to make . . . it is not required that we should be sure as to the

4. See, *e.g.*, State v. McKay, 137 Tenn. 280, 193 S.W. 99 (1916); Phillips v. Lowe, 3 Tenn. Cas. 230 (Shannon 1877); State v. Anderson, 144 Tenn. 564, 234 S.W. 768 (1921).
5. Memphis Natural Gas Co. v. McCanless, 183 Tenn. 635, 194 S.W.2d 476, *appeal dismissed* 329 U.S. 670 (1946).
6. See *e.g.*, State v. McKay, 137 Tenn. 280, 193 S.W. 99 (1916).
7. Logan's Supermarkets, Inc. v. Atkins, 304 S.W.2d 628, 632 (Tenn. 1957).
8. See Webb, *The Trading Stamp*, 24 TENN. L. REV. 557, 568-74 (1956).
9. Webb, *The Trading Stamp*, 24 TENN. L. REV. 557, 569 (1956).
10. 240 U.S. 342 (1916).
11. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 364-65 (1916).

precise reasons for such judgment or that we should certainly know them or be convinced of the wisdom of the legislation."[12] In the companion cases, *Tanner v. Little*[13] and *Pitney v. Washington*,[14] a Washington statute imposing a $6000 annual license tax on merchants giving trading stamps was held not to be in violation of any provision of the United States Constitution.

The United States Supreme Court noted the differences of judicial and legislative opinion and, referring to the substantial body of state court decisions which had previously held that such attempts to regulate the industry were violative of the United States Constitution and the various state constitutions, the Court stated:

> In such differences of judicial and legislative opinion where should the choice be? . . . That necessarily depends upon what reasoning judicial opinion was based. . . . Regarding the number of cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion. The foundation of all of them is that the schemes detailed are based on inviolable right, that they are but the exercise of a personal liberty . . . that in them there is no element of chance or anything detrimental to the public welfare. But there may be partial or total dispute of the propositions. And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities. As to all of which not courts but legislatures may be the best judges, and it may be, the conclusive judges. . . . Certainly in the first instance . . . [their] judgment is not impeached by urging against it a difference of opinion. . . .[15]

It should be noted that the Supreme Court decisions above-mentioned dealt with statutes that taxed the trading stamp scheme in its broadest aspect, making no distinction between the differing modes of promotion. Thus it can fairly be said that these cases were not determinative of the validity of statutes which attempt to regulate or control one method of promotion while leaving untaxed or unregulated another and different type of operation. Consequently the reasonableness of such distinctions as those between redemption in cash or in merchandise, and between stamps redeemable by the merchant who issued them and those to be redeemed by a third party, are not controlled one way or the other by the three cited cases.

The decisions by the United States Supreme Court, of course, are not controlling in determinations of validity of legislation under the

12. *Ibid.*
13. 240 U.S. 369 (1916).
14. 240 U.S. 387 (1916).
15. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 364-65 (1916).

state constitutions. Where the state constitution embodies clauses identical with or substantially similar to those in the United Stated Constitution, however, it would seem that these decisions might represent at least highly persuasive authority. The state courts generally have not found them so.[16] The Tennessee Supreme Court in the instant case noted the three above-mentioned United State Supreme Court decisions and stated:

> There are five decisions in three states which follow these decisions. They were rendered within three years of the Supreme Court decisions. . . .[17]
>
> The last case which held that the prohibition of the issuance of trading stamps was within the police powers of the legislature was decided in 1919.
>
> However, the weight of authority and the later cases hold that such prohibition statutes are not valid because violative of state constitutions.[18]

The Tennessee court stated that it would ". . . unnecessarily prolong this opinion to take up and discuss the many cases from other jurisdictions."[19] The court then cited a recent Iowa case, *Sperry & Hutchinson v. Hoegh*,[20] and quoted at length from that opinion as based upon the "great weight of authority" holding that trading stamp legislation is unconstitutional. It should be noted, however, that Chief Justice Garfield of the Iowa Supreme Court, dissenting in the *Hoegh* case, critically analyzed the "great weight of authority" relied upon by the majority of that court.[21] Chief Justice Garfield pointed out that two of the cases, *State v. Dalton*[22] decided in 1900 and *State v. Dodge*,[23] decided in 1904 (these cases were also cited by the Tennessee Supreme Court in

16. See Webb, *The Trading Stamp*, 24 TENN. L. REV. 557, 571-72 (1956). The applicability of the fair trade laws to trading stamps is an interesting related problem that is also subject to diverse solutions by the state courts. Cases holding that the giving of trading stamps with the purchase of fair traded items is permissible under fair trade statutes are: Bristol-Myers Co. v. Lit Brothers, Inc., 336 Pa. 81, 6 A.2d 843 (1939); Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956); Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942). But the following cases have found such a practice to be in violation of fair trade statutes: Colgate-Palmolive Co. v. Max Dichter and Sons, Inc., 142 F. Supp. 545 (D. Mass. 1956); Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950); Colgate-Palmolive Co. v. Elm Farm Foods Co., 26 U.S.L. WEEK 2482 (Mass. Mar. 11, 1958).
17. Citing State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); State v. Crosby Bros. Merchantile Co., 103 Kan. 733, 176 Pac. 321 (1918); *In re* Trading Stamp Cases, 166 Wis. 613, 166 N.W. 54 (1918); Sperry & Hutchinson Co. v. Weigel, 169 Wis. 562, 173 N.W. 315 (1919).
18. Logan's Supermarkets, Inc. v. Atkins, 304 S.W.2d 628, 631-32 (Tenn. 1957).
19. *Id.* at 630.
20. 246 Iowa 9, 65 N.W.2d 410 (1954).
21. Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 25, 65 N.W.2d 410, 419 (1954) (dissenting opinion).
22. 22 R.I. 77, 46 Atl. 234 (1900).
23. 76 Vt. 197, 56 Atl. 983 (1904).

the instant case) held that the legislation violated the 14th Amendment to the United States Constitution,[24] a decision that could not be reached after the 1916 decisions by the United States Supreme Court, although a similar decision could still be rendered with reference to similar clauses in state constitutions. Chief Justice Garfield further noted that the *Dalton* and *Dodge* cases, as well as *People* ex rel. *Appel v. Zimmerman*,[25] (also cited by Tennessee court in the instant case) were decided more than fifty years ago when it was commonly held that the scope of the police power of a state was limited to "measures that promote . . . the public health, safety or morals."[26] It is now generally held that the police power may be exercised for the promotion of the general welfare, prosperity, comfort and convenience of the people. The Tennessee court recognized this extension as early as 1899.[27] The fourth decision referred to by Chief Justice Garfield, *In re Opinion of Justices to Senate*, [28] (also cited in the instant decision) was an advisory opinion in which the Justices held that a previous decision in an adversary proceeding would not be overruled in an advisory opinion, but only in another adversary proceeding between parties.[29] The dissenting justice further pointed out that *People* ex rel. *Attorney General v. Sperry & Hutchinson Co.*[30] was based at least in part upon a defect in the title to the statute.[31] In addition, it should be noted that although the Tennessee Supreme Court directly pointed out that the cases supporting stamp acts were rendered within three years of the United States Supreme Court decisions of 1916, the Tennessee court did not point out that seven of the nine decisions upon which it relied were decided prior to 1921.[32] Of the two remaining cases cited herein by the Tennessee court, one was decided in 1954 (the *Hoegh* case,[33] in which Chief Justice Garfield vigorously dissented)

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24. Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 26-27, 65 N.W.2d 410, 420 (1954) (dissenting opinion).
25. 102 App. Div. 103, 92 N.Y. Supp. 497 (4th Dep't 1905).
26. Sperry & Hutchinson v. Hoegh, 246 Iowa 9, 27, 65 N.W.2d 410, 421 (1954) (dissenting opinion).
27. Leeper v. State, 103 Tenn. 300, 53 S.W. 962 (1899).
28. 226 Mass. 613, 115 N.E. 978 (1917).
29. *Id.* at 617, 115 N.E. at 982; Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 28, 65 N.W. 2d 410, 421 (1954) (dissenting opinion).
30. 197 Mich. 532, 164 N.W. 503 (1917).
31. *Id.* at 537, 164 N.W. at 504; Sperry & Hutchinson Co. v. Hoegh, 246 Iowa 9, 29, 65 N.W.2d 410, 421 (1954) (dissenting opinion).
32. State v. Holtgreve, 58 Utah 563, 200 Pac. 894 (1921); Sperry & Hutchinson Co. v. State, 188 Ind. 173, 122 N.E. 584 (1919); People *ex rel.* Att'y Gen. v. Sperry & Hutchinson Co., 197 Mich. 532, 164 N.W. 503 (1917); State v. Dodge, 76 Vt. 197, 56 Atl. 983 (1904); People *ex rel.* Appel v. Zimmerman, 102 App. Div. 103, 92 N.Y. Supp. 497 (4th Dep't 1905); *In re* Opinion of Justices to Senate, 226 Mass. 613, 115 N.E. 978 (1917); State v. Dalton, 22 R.I. 77, 46 Atl. 234 (1900).
33. Sperry & Hutchinson v. Hoegh, 246 Iowa 9, 65 N.W.2d 410 (1954).

and the other was a trial court decision in Orlando, Florida, decided in 1955, holding a city ordinance invalid.[34] The Tennessee Supreme Court went on to state in the instant case:

> We therefore conclude that there is no real and substantial difference between a merchant who uses stamps and redeems his own stamps, and a merchant who uses stamps and for a consideration has someone else to redeem them for him. . .[35]

Consequently the court found an arbitrary inclusion of one class under the operation of the statute while another class of individuals in about the same situation was exempted.

Was there any reasonable basis for the legislative conclusion that the tax should apply only to stamps redeemable by a third party? The opinion in the instant case fails to mention any basis whatsoever for the distinction, but there would seem to be a few not entirely unreasonable grounds which the legislature may have had in mind. The additional cost imposed upon the sale of goods accompanied by trading stamps redeemable by a third party is three percent of gross sales,[36] regardless of whether or not the stamps are redeemed. Whether this additional amount is absorbed by the retailer or passed on to the purchaser,[37] the three percent cost of the stamps is introduced into the cost structure. It can hardly be argued that the cost of the trading stamps magically disappears during the three way transaction – stamp company to retailer to consumer. The legislature may well have thought that this would exert an unfavorable inflationary pressure on the economy. On the other hand the cost of stamps redeemable by the issuing merchant appears to be only printing and handling costs, plus the cost of the merchandise exchanged for stamps actually redeemed. It is submitted that where the issuing merchant also redeems the stamps, neither the retailer nor the consumer pays for merchandise which is never claimed. It is futile to engage in conjecture as to the percentage of stamps which are actually exchanged for premiums – estimates have ranged from 40 to 98.9 percent;[38] the $40,076,808 reserve for unredeemed stamps maintained by one leading stamp company[39] indicates that all stamps issued are not redeemed. A conclusion that the inflationary pressure exerted

34. Publix Supermarkets v. City of Orlando, 8 Fla. Supp. 96 (1955).
35. Logan's Supermarkets, Inc. v. Atkins, 304 S.W.2d 628, 632 (Tenn. 1957).
36. See note 2 *supra*.
37. U. S. DEPT. OF AGRICULTURE, DO TRADING STAMPS AFFECT FOOD COSTS? p. 1 (Marketing Research Report No. 147, 1957).
38. Webb, *The Trading Stamp*, 24 TENN. L. REV. 557, 566 (1956).
39. 16 STANDARD & POOR'S STANDARD CORPORATION DESCRIPTIONS § 2, p. 6951 (Sept. 21, 1955). [This fund is now listed as a part of a combination figure of reserves for unredeemed stamps, taxes and bad debts. 18 STANDARD & POOR'S STANDARD CORPORATION DESCRIPTIONS § 2, p. 4428 (July 22, 1957)]; See also Webb, *The Trading Stamp*, 25 TENN. L. REV. 557, 566-68 (1956). The State

by the use of stamps redeemable by a third person, who adds no economic value to the goods sold, is substantially greater than that involved in the use of stamps redeemable by the issuing merchant would appear to be within the bounds of reason. This difference might be further increased by the fact that when redemption is handled by a third party, the third party has a right to expect a reasonable profit for his services. The legislature may reasonably have concluded that the merchant's profit plus a profit to the stamp company would exceed the amount constituting a fair return to the issuing merchant who handled his own redemptions. It is not entirely unreasonable to conclude that this differential, conceding that proof of the amount is difficult, might represent a further inflationary influence.

The legislature may well have considered that the introduction of a middleman — the stamp company — who adds no apparent economic value to the goods sold while reaping a profit for himself, not only in the sale of stamps to the merchant but also in unredeemed stamps, constitutes a force which is more detrimental to the general welfare of the public than that exerted by the use of stamps redeemable from the general stock of merchandise of the issuing merchant.[40]

The legislature is normally not required to act only upon certainties, but may exercise its discretion in choosing between opposing theories.[41] The requirement is normally stated to be that the classifications made made by the legislature must be reasonable and not arbitrary or capricious. Under this test the result which should be reached with reference to this statute does not seem nearly as clearly discernible as the opinion

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of New Jersey is attempting to effect an escheat to the state of this reserve for unredeemed stamps. In State v. Sperry & Hutchinson Co., 23 N.J. 38, 127 A.2d 169 (1956), the Supreme Court of New Jersey reversed a Chancery Division holding that the Custodial Escheat Act, N.J. R.S. § 2:53-16, now § 2A: 37-29 providing for escheat of "cash, dividends, interest or wages," applied only to *cash dividends,* interest or wages. The supreme court pointed out that it had no power to remove the comma following the word "cash" in the statute and that only by the excision of the comma which the legislature placed there could the statute be read as a single item *cash dividends.* In a recent decision on this point, the Superior Court of Mercer County found that "[t]he escheatable property, if any exists, is that which the recipient of the stamps had and have not seen fit to redeem, not the balance in the company's hands set aside for their possible redemption. . . . The statute cannot create or revive obligations which never existed and by statute, contract and practice, the cash or merchandise can only go to the collector of stamps upon presentation of stamps as required thereby." The court apparently further held that no escheat could be effected unless the state could identify the particular claimants holding the unredeemed stamps. State v. Sperry & Hutchinson Co., 26 U.S.L. WEEK 2480 (N.J. Mar. 6, 1958). A novel approach, to say the least!

40. See State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); District of Columbia v. Kraft, 35 App. D.C. 253, 269 (1910).

41. Jacobson v. Massachusetts, 197 U.S. 11 (1905); Rast v. Van Deman & Lewis Co., 240 U.S. 342, 364-65 (1916); State v. McKay, 137 Tenn. 280, 193 S.W. 99 (1916).

suggests. It is submitted that the legislative classification involved is not so seriously lacking in a reasonable basis as the court's opinion would indicate. The court may well have given to these and other possible bases for the legislative choice more consideration than is reflected in the opinion in the instant case. If it did consider the possibility that the classification had a reasonable basis, no indication of the court's reasoning in rejecting possible bases is evident in the reported opinion.

If the exemptions written literally into the statute had been followed there would apparently have been no discrimination against merchants issuing stamps to be redeemed by others, but only against merchants issuing stamps to be redeemed in merchandise other than the merchandise from the "general stock of said merchant." What the legislature had in mind may have been to discriminate against companies who are in the business of selling to merchants this trading stamp method of doing business and in favor of merchants who themselves engage in premium giving. If this was the intent, it seems more clearly valid than a discrimination against the merchant for using another's stamp plan rather than his own. Possibly clearer legislative draftsmanship would have shown that the discrimination was not intended to be against the merchant but was intended to be against the trading stamp companies. Of course in final economic analysis the discrimination *is* against the trading stamp company under either alternative, but there may be a natural hesitancy to allow a discrimination *patently* against a merchant in order to discriminate *latently* against a trading stamp company.

In view of the previous history of trading stamp legislation in the courts, it was not surprising that the Tennessee Supreme Court followed the numerical "majority" in striking down the legislation considered in the instant case. However, the act could have been upheld upon well-reasoned and respectable authority had the court chosen to do so.

J. W. W.

WORKMEN'S COMPENSATION — REFUSAL OF OPERATION

Claimant, thirty-four years old and otherwise in good health, sustained a ruptured intervertebral disc during the course of, and arising out of, his employment. After several months of conservative treatment, his three physicians were unanimous in recommending that he undergo a laminectomy,[1] advising that his disability would otherwise remain total.

1. "The surgical excision of the posterior arch — the curved part — of a vertebra." MALOY, MEDICAL DICTIONARY FOR LAWYERS 344 (2d ed. 1951).

They testified that the operation would probably result in a reduction of his condition to a 15% to 20% permanent partial disability; that after a laminectomy two-thirds of the patients are able "to return to their usual duty" and "the remaining third to at least light duty"; and that, though the operation is a major one, the danger of detrimental results is remote. Claimant refused to submit to the operation, basing his refusal upon an unfavorable childhood experience in two minor operations, and his fear as to the result of the operation. The trial court found claimant's fear to be sincere, but ordered that he either undergo the laminectomy or have his compensation payments suspended. On appeal to the Tennessee Supreme Court, *held,* reversed. The statute providing for suspension of payments to an injured employee who refuses to comply with a reasonable request to accept medical services proffered by his employer[2] does not require submission to a laminectomy. *Edwards v. Travelers Insurance Co.,* 304 S.W.2d 489 (Tenn. 1957).

The *Edwards* case presents a novel question in Tennessee only in that it involves a type of injury and operation not hitherto considered by the court. The same problem had previously arisen with regard to hernia,[3] a broken and badly healed leg,[4] a mangled hand,[5] a leg possibly needing amputation,[6] and other injuries. In the course of these decisions, certain principles evolved. The question in such situations is whether or not the employee's refusal is reasonable;[7] this is a question of fact to be decided in each case as it arises.[8] The employee's refusal may be reasonable if his physician has advised him not to undergo the particular operation,[9] or if the doctors disagree as to the necessity or probable success of the operation,[10] or if it involves risk to the employee's life or health.[11] Another factor which is likely to have much weight with the court is the characterization of the operation as a major one. In the principal case, the court attached considerable significance to the fact that a

2. TENN. CODE ANN. § 50-1004 (1956).
3. Sun Coal Co. v. Wilson, 147 Tenn. 118, 245 S.W. 547 (1922); Crane Enamelware Co. v. Dotson, 152 Tenn. 401, 277 S.W. 902 (1925).
4. Fred Cantrell Co. v. Goosie, 148 Tenn. 282, 255 S.W. 360 (1923).
5. DuPont Rayon Co. v. Bryant, 160 Tenn. 362, 24 S.W.2d 893 (1930).
6. Russell v. Virginia Bridge & Iron Co., 172 Tenn. 268, 111 S.W.2d 1027 (1938).
7. Note 6, *supra.*
8 Note 4, *supra;* Glotfelter Erection Co. v. Smith, 156 Tenn. 268, 300 S.W. 6 (1927); Note 5, *supra.*
9. Note 6, *supra.*
10. Note 5, *supra.* See Kingsport Silk Mills Co. v. Cox, 161 Tenn. 470, 33 S.W.2d 90 (1930).
11. Note 4, *supra.* See Trent v. American Service Co., 185 Tenn. 298, 206 S.W.2d 301 (1947). See STONE AND WILLIAMS, TENNESSEE WORKMEN'S COMPENSATION § 88 (1957). That the foregoing principles are generally accepted, see 1 LARSON, WORKMEN'S COMPENSATION LAW § 13.22 (1952); 10 SCHNEIDER, WORKMEN'S COMSATION § 2019 (a) (3d ed. 1953).

laminectomy is a major operation, and felt that holding the claimant's refusal unreasonable would necessitate overruling *Fred Cantrell Co. v. Goosie*,[12] and *Russell v. Virginia Bridge & Iron Co.*,[13] cases decided in the employee's favor at least partly on the ground that the operations involved in those cases were major ones.[14] It may be pointed out, however, that the decision in the *Edwards* case was not a foregone conclusion, for Tennessee has twice required an employee to submit to an operation for hernia,[15] though many courts find this to be an operation of such major character as to justify the employee's refusal to submit thereto.[16]

The particular provision of the Workmen's Compensation Act involved in the instant case is by no means peculiar to Tennessee; at least four other jurisdictions have passed on the question of the reasonableness of an employee's refusal to submit to a corrective operation similar or identical to the one in the principal case.[17] The testimony of the physicians in the *Edwards* case is representative of that presented in the cases from other jurisdictions, and in determining reasonableness, these decisions have all placed considerable emphasis on the fact that the operation is a major one.

It is interesting to note the striking disparity between the statements of the doctors in the instant case and the following excerpt from a standard work on legal medicine. It is there stated:

> The review of the literature discloses an exceedingly cautious viewpoint on the part of the majority of experts. They recognize . . . the fact that laminectomy with exposure of the spinal cord is a major operation indeed. Although results reported on the whole have been good, such procedures except in the hands of exceedingly experienced operators must be considered as very

12. Note 4, *supra*.

13. Note 6, *supra*.

14. The court, in the instant case, found corroboration for its position in the fact that though the *Cantrell* and *Goosie* cases were decided in 1923 and 1938 respectively, and though the legislature has amended the Workmen's Compensation Act numerous times in the intervening years, yet the statute as construed in these cases has gone untouched. 304 S.W.2d 489, 491 (Tenn. 1957).

15. Note 3, *supra*.

16. 1 LARSON, WORKMEN'S COMPENSATION LAW § 13.22 (1952). For a contrary view, however, that a majority of the courts require submission to operation for hernia, see 105 A.L.R. 1470, 1473 (1936) and cases there cited. See generally 10 SCHNEIDER, WORKMEN'S COMPENSATION § 2019(m) (3d ed. 1953).

17. United States Coal & Coke Co. v. Lloyd, 305 Ky. 106, 203 S.W.2d 47 (1947); K. Lee Williams Theatres, Inc. v. Mickle, 201 Okla. 279, 205 P.2d 513 (1949); Sultan & Chera Corp. v. Fallas, 59 So.2d 535 (Fla. 1952) (involving myelograph as well as operation); Walker v. International Paper Co., 92 So.2d 445 (Miss. 1957). See also Pruszenski v. Edo. Aircraft Corp., 275 App.Div. 1015, 91 N.Y.S.2d 684 (1949); Mancini v. Superior Court, 78 R.I. 373, 82 A.2d 390 (1950); Dudansky v. L.H. Sault Const. Co., 244 Minn. 369, 70 N.W.2d 114 (1955).

> hazardous. Our experience under compensation coverage has been extremely poor. The majority of those operated never return to work.[18]

Even with allowances for possible recent advances in the field of spinal surgery it seems clear that there still is some danger attendant upon such operations. Seen from this point of view, the decisions seem sound, but it is submitted that it would be better to emphasize the danger and uncertainty of result of such operations, rather than to rely too heavily upon the fact that the doctors classify them as major.

The problem here presented is "one of the most delicate medico-legal issues in the entire realm of workmen's compensation,"[19] and establishing a rule that the injured employee need never submit to a major operation probably is too simple a solution. Such a rule would tend to abrogate the test of reasonableness, and to substitute an arbitrary principle for what traditionally has been a flexible determination by boards and courts skilled in making such determinations as to whether or not under all the circumstances the injured workman acted reasonably. The test of reasonableness takes into account the fact that cases may sometimes arise in which a malingering employee's refusal to submit to one of the more routine and practicable major operations is unreasonable. It does not appear that the courts have yet adopted the arbitrary rule mentioned, but, in the absence of some medical or legal change, it seems probable that the courts will continue, in cases involving ruptured intervertebral discs, to honor such sentiments as those referred to in the report of a Mississippi case: "He agreed that the physicians know better about it than he, but he said it 'ain't their back.' "[20]

J. T. H.

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18. 1 GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE § 11.60 (3d ed. 1949). See also comment on reluctance of medical authorities to commit themselves as to reasonableness of refusal to submit to this type of operation, 1 LARSON, WORKMEN'S COMPENSATION LAW § 13.22 N.50 (1952).
19. 1 LARSON, WORKMEN'S COMPENSATION LAW § 13.22 (1952).
20. Walker v. International Paper Co., 92 So.2d 445 (Miss. 1957).

BOOK REVIEWS

THE MEDICAL ASPECTS OF WHIPLASH INJURIES; AGGRAVATION OF PRE-EXISTING CONDITIONS; MEDICAL ASPECTS OF HEART INJURY CASES. NEW YORK: Practising Law Institute Forum Series, 1957. Pp. 52, 46. $3.50 per volume (paperback).

With the publication of "Medical Aspects of Whiplash Injuries" and "Aggravation of Pre-Existing Conditions—Medical Aspects of Heart Injury Cases", the Practising Law Institute, a non-profit institution devoted to elevating the standards of competence of attorneys, has increased the number of guide books on negligence matters to seven. The previously published volumes in the Forum Series are:

"Negotiating Settlements in Personal Injury Actions"
"Investigating and Preparing the Medical Aspects of Personal Injury Actions"
"Medical Proof in Head Injury Cases"
"Medical Proof in Back Injury Cases"
"Trial Tactics in Personal Injury Actions"

The concept of the Forum Series was to make available to practicing lawyers in individual volumes, corresponding to reasonably sequestered subdivisions of the negligence field, the pertinent useful information necessary to update the practitioner with current trial techniques and basic scientific knowledge in that subdivision.

The method of the editors was particularly appropriate as applied in the two volumes reviewed here. For example, in connection with "The Medical Aspects of Whiplash Injuries", the presentation begins with excerpts from a typical hospital record of what might have been recorded following a trauma transmitted to the cervical spine via a whiplash mechanism. We then see the case in court, with the direct and cross-examination of a neurosurgeon called by the plaintiff. The defendant's neurologist is then examined and cross-examined.

There then follows a panel discussion in which three of the outstandingly qualified specialists in New York City, skilled in forensic medicine as well as in their specialties, discuss with seven well known personal injury trial lawyers the mechanics of whiplash injury, the possibility of brain damage, the significance of the determination of which cervical vertebrae are injured, the significance of the narrowing of the intervertebral space, myeolography, electromyography, and settlement value. The use of medical literature in the trial of whiplash cases is then discussed.

Various other aspects, including hypothetical questions, differential diagnoses, testimony of chiropractors and osteopaths, and summation in this type of case, round out the volume. Finally, a useful bibliography of medical and legal literature on whiplash injuries is added.

To facilitate the use of this valuable tool for the preparation of one's own case, the volume has been printed on the left side only so

that paralleling notes referrable to one's own case may conveniently be incorporated in this soft, paperbacked volume.

The editors have accomplished their purpose with a vengeance. The presentations are of much greater value than any formal treatise because the frame of reference for the introduction of most of the knowledge spread upon the pages of these valuable aids corresponds with the admissibility into evidence of that knowledge and its utilization under courtroom conditions. It is a great time saver to use these volumes rather than a medical text in trial preparation, because just enough scientific data is included for the problem at hand without preparing the attorney with information having primary utility in the operating room or clinic rather than the courtroom. The result, therefore, is an apt synthesis of medical knowledge and legal techniques in a format which is the most practicable for the busy lawyer. The books are of value to both plaintiffs' lawyers and defendants' lawyers, since representatives of all diverse viewpoints participated in the forum sequences which were the genesis of these volumes.

In the volume dealing with heart injury cases and aggravation of pre-existing conditions there will be found, in addition to the treatment of information on heart damage cases (paralleling that just described for whiplash injuries), a very valuable section dealing with the frequently troublesome problem of differentiating between aggravation and precipitation. The sub-headings of this particular phase of the presentation illustrate the provocative and informative nature of the discussion: — "importance of differentiating between aggravation and precipitation"; — "when it should be claimed that there was a precipitation"; — "trauma as the producing cause of the disability"; — "trauma as affecting the underlying process"; — "what precipitation means"; — "differentiating between legal standards of probability and scientific certainty"; — "effect of trauma on plaintiff's adjustment to pre-existing condition".

In reading these volumes for the purpose of this report your reviewer, as one closely identified with the Practising Law Institute as a lecturer, felt very much like the man in Maeterlinck's "Bluebird", when he finally discovered the bluebird of happiness in his own back yard. The Forum Series will have a prominent place in the library activities of our personal injury trial office and the very expensive medical texts will be reserved hereafter for specialized problems and cross-examination.

The Bar is indebted more than ever to the Practicing Law Institute for its valuable services in post-admission legal education. All seven of the Forum Series volumes can be obtained for $20.00 on a satisfaction guaranteed basis. Every lawyer handling even an occasional personal injury case on either side of the docket should have these volumes.

Arnold B. Elkind

Of the New York Bar

FRONTIERS OF CONSTITUTIONAL LIBERTY. By Paul G. Kauper. Ann Arbor: University of Michigan Law School, 1956. Pp. xvii, 251.

The material constituting this volume was delivered as the Seventh in the series of the Thomas M. Cooley Lectures presented by The University of Michigan Law School "for the purpose of stimulating legal research and presenting its results in the form of public lectures."

Mr. Kauper has presented a stimulating, informative, and inspiring study. At a time when there is so much misunderstanding and when there are so many ill conceived notions concerning the constitution, the courts, and the general functioning of our system of constitutional law, the presentation is timely, helpful, and illuminating.

The lectures were given as a series of five. The first lecture, *New Wine in Old Bottles,* examines the judicial role in constitutional interpretation, and the characteristics and action of the Supreme Court during the past twenty-five years. Considerable attention is given to decisional law in the area of constitutional liberties, with the decline of emphasis on economic liberty and the emphasis on freedom of expression, freedom from discrimination, and procedural safeguards. The concluding portion of the lecture examines the rationale of the recent developments. This lecture like the others is so full of significance that one is tempted to quote large portions. The function of a constitution to "capture the distillate of wisdom and experience accumulated over the centuries and to elevate the interests so captured beyond the reach of passing majorities" is an entrancing statement of an idea that must be kept in mind constantly. Equally enticing is the concept that "save by the process of interpretation and reinterpretation, a constitution has no survival value."

The appraisal that might be deemed to be the distillate of the first lecture views the judicial process as follows:

> The resiliency of our Constitution has been preserved by a process of judicial review that has on the whole attempted to preserve a balance between the cautious look backward and the bold look forward, that has not hesitated at times to pour new wines into old bottles, that has constantly faced the problem of resolving the conflict between new needs and ancient liberties, that has not been content with doctrinal conceptualism, and that has been mindful of the necessity of interpreting the organic law as a living instrument of government.

Accordingly, the appointments to the Court are themselves a "commentary on the Executive's understanding that the Supreme Court, faced with the task of accommodating the Constitution to an ever shifting scene, requires the kind of political-judicial statesmanship that is distinguishable from the usual judicial process in the adjudication of strictly legal problems."

In tracing the shift of emphasis from economic liberty to liberties of expression and protection of minorities, Kauper traces the factors in society and government and the values of men that accompanied, or preceded the shift. It seems possible that, rather than saying as the author did that the decisions for all practical purposes destroyed the

concept of economic liberty as a substantive right protected by the constitution, it would be preferable to say that the shift was in the permissible goals of government and the means to achieve those goals. For economic liberty is still protected as a substantive right against governmental goals of certain sorts and against certain means.

Even as they arise there is a recession from the liberties of speech and religion, however, and the trend "toward absolutism" in this area has been counteracted by the "process of pragmatic inquiry." The protection of minorities has been particularly conspicuous in the period, as has the tightening of procedural safeguards afforded accused persons. The process may be viewed as characterized by a "conscious reorientation of constitutional values in response to the democratic presuppositions that furnish the dominant motif of contemporary American life."

The second lecture, *The Market Place of Ideas,* examines in detail the development of the doctrines of freedom of speech and press. The examination looks closely at the "struggle between free expression of ideas, and the restraints sought to be justified in the name of public interest." The ebb and flow of emphasis is recounted with the thoroughness one would expect of the lecturer of Kauper's scholarship. Once again it is apparent that the "underlying conceptions of value furnish the index to the meaning written into the text" and that "the recent decades have witnessed as clear a demonstration of natural-law thinking at work in the Supreme Court as in the earlier years." The future problems and their solutions pose "serious problems in the free expression area".

> In conclusion, it is well to remind ourselves that the strength of the free speech tradition ultimately derives not from the Constitution, nor from the Supreme Court, but from the understanding and appreciation of the common citizenry. The First Amendment did not create free speech. All of our freedoms must find their source and strength in the loyalty they command in the popular mind . . . If freedom of speech is to stand high in the hierarchy of judicial values, it must be nurtured and cultivated in the legislative halls and in the popular mind as well.

The third lecture, *God and Caesar,* examines the development of religious freedom, and shows how our modern conception is conspicuously at odds with the earlier colonial establishments, and how state churches were not truly abolished in the United States until 1833. Our American idea was crystallized in the struggle in Virginia culminating in the Memorial and Remonstrance of 1785. Again, like other liberties, religious freedom and separation is not an absolute, but comparisons of "religious liberties elsewhere, serve to dramatize the meaning of the American concept."

The fourth lecture, *The Process That Is Due,* deals with procedural due process. This is more important than many realize. The author feels that:

> The thesis may be advanced that procedural limitations represent the supreme legal achievement of any civilized

> society, for in their primary impact on the administrative and judicial process they do symbolize the basic idea of government by law, and the further idea, implicit in the first, or certainly a corrollary to it, that all men shall receive equal treatment before the law.

In this field, "the interstitial gaps are smaller, but the room for judicial discretion is still large enough to be reflected in the course of decisional law." Due process enabled the court not only to insist upon a "rule of general law, incorporating minimum conceptual standards to fair trial" but to require that these standards be actually met in the specific case.

The fifth lecture, *Constitutional Color Blindness,* examines developments in this area as specific applications of the "constitutional idea which is the center core of any structure of constitutional right; namely, that all persons stand equal before the law." The author remarks:

> That all persons, regardless of empirically observed differences, shall nevertheless be treated as equals, is an extraordinary conclusion and nothing more than fiction unless supported by religious and moral insights that bear witness to the unity of the race and to man's status as a spiritual creature, equal before God and his fellow men.

The constitutional policy against racial discrimination is bound to be even more conspicuous than the policy against religious discrimination:

> Here is a specific constitutional provision that illuminates the meaning of equal protection and accentuates the historical purpose of the post-Civil War Amendments to secure equality in the enjoyment of right without discrimination on the basis of classification by race.

Here again the judicial history "furnishes another illustration of the rise and fall of judicial doctrines and accommodation of constitutional interpretation to new conceptions of policy and the felt needs of the time."

The earliest cases substantiate the conclusion that the postwar amendments were to neutralize the color or race line as a basis for classification. The intervening cases diluted the postwar amendments in respect to their significance for the Negro race, and reach a climax in *Plessy v. Ferguson.* The author conceives this case as a "deliberately conceived judicial philosophy, developed as a concomitant to the policy of Congress and the Executive, of re-establishing the former slave states in the full fellowship of the federal union," and as "a response by the judiciary to its understanding of a marked change in national policy that represented a radical departure from the controlling policy of the Reconstruction Period."

During this new period, color became an unpermissable classification in property ownership, jury selection, procedural due process, voting; and these developments culminated in the decisions concerning segregated education. The author examines in detail the factors that prevented racial discrimination from longer being "isolated and enclosed behind state boundary lines."

The author believes that it is "safe to predict that the Court will be inevitably carried by the force of its decisions to outlaw all segregation legislation and to adopt the Harlan view that the Constitution is color-blind and that no classification based on race or color can be accepted consistent with the imperative of equal protection."

He states of the Segregation decisions:

> It must be acknowledged that the recent decisions overrule precedents, but our whole constitutional history demonstrates that the process of judicial review requires a readiness to reconsider and overrule precedent when found to rest on premises either erroneous in their inception or demonstrated by experience to be erroneous. The basic premises undergirding *Plessy v. Ferguson* can no longer be sustained.

It is difficult for a reviewer to over praise a work as significant as this book. It is beautifully written. It is clear, concise, convincing and authoritative. It should be read and understood by all who would understand the "American Way" as expressed by judges, courts, and the Constitution, and the unusual liberty of "our system".

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MUNICIPAL LAW. By Charles S. Rhyne, Washington: National Institute of Municipal Law Officers, 1957, Pp. 1125. $22.50.

Here is a book written by the municipal attorney's attorney. It is based upon source materials gathered over a period of more than twenty years by the National Institute of Municipal Law Officers, and upon the experience of the author and of other municipal attorneys from all parts of the country. Charles S. Rhyne has been General Counsel of NIMLO for the past twelve years, and before holding that position he served as Secretary of that body from its founding in 1935. He has written extensively in the field of municipal law. To his achievements in that field is now added the honor of being President of the American Bar Association.

This is a one-volume book, the first single volume of treatise in this field in nearly fifty years. Excluding the excellent index, it contains 980 pages. Of these from one-half to one-third constitute footnote material. Say, then, the author has taken 650 pages of text to cover the law of municipal corporations. Obviously the author did not intend a comprehensive treatment of the subject such as it found in *McQuillin's* twenty volumes.

In a field as broad as municipal corporations, a one-volume work on the subject should be viewed from the object which the author had in writing the book. According to the preface the book is designed to meet the need for a current restatement of the basic principles of law applicable to the modern city. From this viewpoint the book will be

of great value to those who have never had a course in municipal corporations, and to lawyers having problems in municipal law for the first time who need general orientation as well as an answer to specific questions. It also will be most useful to the law student who needs a hornbook, for before the publication of this book there was no current concise restatement of basic principles, and everyone recognizes the difficulty of attempting to gain these concepts from digests, encyclopedias or a twenty-volume treatise. Being a restatement of basic principles, the style may be called "hornbook": definition, general rule, exception to the general rule. But the subject is handled more completely than in many hornbooks, and the style is unusually readable, with good transition and cohesiveness.

This is not to imply that the experienced city attorney will not be able to make extensive use of the book. As further stated in the preface, it was written as a handbook for the daily use of the municipal attorney. As a refresher on basic principles and as a source for ready reference, it would be a valuable addition to any law library. As a research tool, it has limitations imposed by its nature and length. The striking thing is that a book of this kind should provide as many references as it does. Citation is almost exclusively to decided cases which seems in harmony with its purpose. This book might well be consulted as the first step following the state code and digest.

After chapters covering definition, creation, alteration, dissolution, general powers and functions, and organization, a chapter of more than one hundred pages is devoted to officers and employees. Exclusive chapters are devoted to areas of the law which are most important to modern cities: federal-city and city-state relations, extraterritorial powers, parking and parking facilities, public housing, slum clearance, urban redevelopment and renewal, and zoning and planning. A very important chapter on municipal police power is included covering over one hundred pages. There seems to be no major division of the law which is omitted.

There was definitely a need for such a book as this, and this book certainly fills that need. Lawyers just being introduced to the law of municipal corporations, lawyers who have worked in the field, and city officials who are not lawyers, all will find that this is a most useful book. The double column pages make the volume easy to read.

Eugene Puett

Legal Consultant
Municipal Technical Advisory Service
Knoxville

TENNESSEE LAW REVIEW

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A CHALLENGE TO YOUNG LAWYERS*

BY CLARENCE KOLWYCK

Some six years ago, by unanimous choice of its national and chapter officials, the Order of the Coif installed its fortieth chapter at the Law College of The University of Tennessee. Charters being restricted to law schools of highest scholastic standing, the significance of this law school being so honored is self-evident.

The constitution of the Order limits individual membership to the top ten per cent of each Senior Class, with reversionary privileges to pre-installation classes. Not being numbered among the favored few from the Class of 1927, then why is the Sergeant's cap, or Coif, to be worn by me after this lapse of time?

The constitution provides that each chapter may annually elect one honorary member who has "attained distinction" in the legal profession. Of course, I make no claim to distinction. But I am reminded of what a great lawyer said to me when I applied to start my career in his office on August 8, 1927. In reply to my statement that despite my unexceptional grades, I was willing to work hard, he said: "Law

*Address prepared for delivery at the Annual Law Day of The University of Tennessee College of Law at Knoxville, May 9, 1958. Mr. Kolwyck was selected for honorary membership in the Tennessee Chapter, Order of the Coif, the honorary citation reading as follows:

> The Tennessee Chapter of the Order of the Coif cites for the only honorary membership which can be awarded in 1958: Clarence Kolwyck, A.B. 1925 and LL.B. 1927, The University of Tennessee; President, 1947, Chattanooga Bar Association, 1947 being the year the Chattanooga Bar Association won the ABA Award of Merit; Member of the House of Delegates, American Bar Association, 1950-52; President, 1956-57, Tennessee Bar Association; member, American Judicature Society; Commander, U.S.N.R.; currently serving as member of the ABA Council on Legal Education and Admission to the Bar; as a member of the ABA Committee on Family Law since 1948; and as Consultant of the United States Department of Health, Education and Welfare on the role of the lawyer in adoption cases; as a member of the State Board of Education; and as a member of the Institute of Judicial Administration.
>
> In view of the above citation of personal achievement, the Tennessee Chapter of the Order of the Coif elects to membership, *honoris causa*, Clarence Kolwyck, Esquire, of Chattanooga, and in token thereof delivers to him a certificate of membership in the ancient and honorable Order of the Coif.

Law students selected for Coif membership for the academic year 1957-1958 were: Jack B. Draper, Mark J. Mayfield, Matthew S. Prince, Donn Southern, William L. Taylor, Jr.

is ninety per cent application and ten per cent ability, good moral character and intellectual honesty. I believe you can qualify. So, hang up your hat and go to work."

For twelve years I worked that ten per cent ability nine times overtime as an associate of the late Sam J. McAllester, alumnus of this University and member of its Board of Trustees. He was a man of the highest moral character and many a demagogue to expediency has felt the sting of his intellectual honesty, even to the profit and prestige of the University. Whether by association, or inclination, some of his philosophy must have become engrafted into my approach to the law. I freely acknowledge my debt of gratitude.

If by working to the limit of my ability; if by striving for the highest ethical standards in the legal profession; if by suggesting the "Golden Rule" in lawyers' daily dealings each with the other; if by exposing chicanery in legal business and advocacy; if by daring to suggest reforms in our system of courts and procedure to keep pace with a growing and changing society; if by trying to live by such philosophy of life and the law, seasoned now by mature years but constantly invigorated by youthful retrospect (and I hope I never grow old); if by these tenets, I am worthy of honorary membership in the Coif, then I accept the honor.

But there is yet another debt I must acknowledge – a debt common to all graduates of this law school, the privilege evidenced by a parchment which conferred on me a degree of "Bachelor of Laws" with "all the Honors, Rights and Privileges to that degree appertaining."

Having started with a course in legal ethics in the basement of Ayres Hall and after having studied law for three years under a faculty with vision and purpose beyond its time, Taylor Cox, at the thirtieth reunion of our Class of '27, summarized our heritage in these words: "We have learned to bear criticism without irritation and censor without anger. We have learned how surely all schemes of evil bring disaster to those who support them, and that the granite shaft of reputation cannot be destroyed by the poisoned breath of slander. We have learned to hate vice, and we delight to stand forth as conquering champions of virtue. We esteem our office of counselor higher than political place or scholastic distinction. We detest unnecessary litigation, and we delight in averting danger and restoring peace by wise and skillful counsel. We have proved that honesty is the best policy and peace pays both lawyer and client better than controversy."[1] If I can qualify only

1. Cox, *A Tribute to Dean Malcolm McDermott,* 25 TENN. L. REV. 36 (1957).

in part as an exponent of that classic creed for lawyers, for all that, and more, I am indebted to this College of Law and its wise faculty.

But I owe more. Down through the years the spirit of this college has served as a two-way bridge, over which I have traveled many times, returning for refreshment in basic legal concepts, for instruction in new laws to fit a changing world and effervescent society, yes, for renewed inspiration to put into practice the creed of this law school as exemplified by the faculty of '27, then and now personified by Dean Wicker and by the outstanding faculty of today. Whatever distinction I may have achieved that would merit this award tonight, I owe in large measure to my continued association with this law school and its faculty and Dean Wicker in particular.

On an occasion of this kind one is usually expected to deliver a scholarly dissertation of profound legal interest. But having disclaimed any ability along that line, I shall not venture an attempt. Intertwined in the above preliminary statement may be found subject matter for wide discussion. But so as to stay within my allotted time, I will try merely to reverse the camera and take a look at our profession as the public sees us through the lens used by Taylor Cox. If it is found that the public does not concur in our estimation of ourselves, we will try to seek out the reasons and suggest remedies, which should challenge the young lawyers of today. And it is largely to them I will direct my remaining remarks.

We proudly, and truthfully, claim that a lawyer drafted the Declaration of Independence; that lawyers predominated in signing the Declaration and as delegates to the Constitutional Convention and the conventions of the various states; that throughout our history a high percentage, at times a majority, of our congressmen and legislators have been lawyers; that ours is a government of laws and not of men— and so it is. We claim that we stand foursquare for equal justice for all, regardless of race or creed, financial status or social position; and that ours is one of the triad of professions, including medicine and the ministry, which stands as an Egyptian pyramid — indestructible, unassailable. Yes, we enshroud ourselves with a cloak of self-righteousness, even as Taylor Cox has pictured the Class of 1927. Granting that we, or even a small percentage of our number, may make just claim to such high idealism, what does it profit our reputation if the public, even in part, regards us in a different light? Just what then is our reputation?

A wholesome innovation of our time has been the advent of polls and surveys, used to great advantage by politicians and perfected to a high degree by business. Sporadic surveys have been conducted by

bar associations and news agencies to find out the public's opinion of the legal profession. Uniformly these surveys have disclosed a high percentage (fortunately not a majority) of people who regard the legal profession with distrust. Individually, we need no survey to be convinced of that fact. How often do our personal friends frankly speak in derogation of individual lawyers and of the profession generally. The question is whether this opinion is justified. Are we so derelict, by malfeasance or misfeasance, that this opinion is justified or that an inference could be so drawn? Of what then does the public complain,and are the complaints justified?

First, and most regrettably, too high a percentage of the people believe lawyers to be dishonest. And this belief is not limited to the uneducated. Some clients want their lawyers to be dishonest, sometimes referring to them as "fixers" – lawyers who will open a back door of escape for criminal conduct or who will manufacture alibis and produce non-existent witnesses. If we are to stand in public esteem along side the medical profession and the ministry, shouldn't we be equally as honest as we expect them to be? Who among us would knowingly call a dishonest doctor or consult a dishonest pastor about a matter of the body or spirit? If a lawyer will enter into a conspiracy for gain on behalf of his client, isn't he just as likely, in that very process, to conspire against his client for additional gain? How may a client know that he will be dealt with honestly, except that he employ an honest lawyer in the first place?

While on the matter of fixers and those who would pervert justice in criminal court, much has been said of late about the lack of fair trial in such cases. The American Bar Association is making a national study of the subject through a committee originally headed by Justice Jackson. I would be the last to deny that this situation prevails, at least in isolated cases, and I would be the first to bemoan the fact. Even so, I think we are overlooking the roots of the trouble. Permit me a personal illustration. As for myself, I could never be a criminal lawyer – in the sense that criminal law is practiced in some jurisdictions in Tennessee. The primary reason is that I can't reconcile the way it is practiced with common honesty. Secondly, the run-of-the-mine practice is not remunerative. Criminal practice may roughly be divided into two categories: organized criminals and petty indigent criminals. There is money to be made in representing the first class, but not so much in defending them as in advising, or conspiring with them, to circumvent the law, in which case the lawyer is just as guilty as the criminal and should receive the same punishment. So, I beg to be ex-

cused from representing the organized variety. I can proudly point to one of Tennessee's most able judges, who, in his early practice, was offered a retainer of $7500.00 to advise with a racketeer in escaping the law. Had he accepted, he would not honor the bench today. The petty criminals are becoming so numerous that lawyers can hardly be expected to represent them in mass. Why not a public defender for them just as a public prosecutor? In that way they would have expert representation instead of half-hearted representation by an inexperienced or dilatory lawyer appointed by the court. Since 1950 serious crimes have increased four times faster than population and organized crime is even more serious.[2] What can we do about it?

But dishonesty in our profession is not confined entirely to criminal practice. Too often in a civil trial witnesses turn up whose pre-existence is a matter of conjecture or mystery. It cannot be denied that some civil cases are won on such testimony. For a lawyer to knowingly use this testimony is to subject himself to severe disciplinary action. But what of the winning lawyer who later learns that he has been a beneficiary in cases of this nature? As an example of proper conduct in both instances, I can cite the experience of a well known lawyer, which has come to my attention. While preparing a pedestrian death case for trial in which there was no known eye witnesses except the defendant, he was approached by a party who, for a consideration, offered to be a favorable witness. The offer was declined and a verdict was directed for the defendant. But that lawyer has since been on good terms with his own conscience. Early in his career, after winning a case he learned that his principal witness had lied. What did he do? He went to the trial judge and asked that a new trial be granted. Other examples can be cited, such as the lawyer who refused to collude in a fraudulent divorce between non-residents and the lawyer who refused to accept a bribe to induce payment on a fraudulent insurance claim. These are only a few examples of the many temptations that beset lawyers. To acquiesce in one is to puncture the dam and destroy a legal career.

Perhaps the greatest menace, both to the bar and public, is the prevalence of solicitation of automobile damage suits. In characterizing this practice I make no distinction between ethics and honesty, for to be unethical is to be dishonest. Why? When a lawyer "pikes" a case he is stealing a potential client of another lawyer and preventing the unwary "client" from exercising his free choice in the selection of counsel. But by the very fact of solicitation this lawyer demonstrates that he is more interested in his own gain than the welfare of the

2. AM. BAR NEWS, No. 4, p. 3 (April 15, 1958).

"client". He will trade one case against another and will play the law of averages by trying all his cases rather than settling doubtful cases or he may spread out the trials for income tax purposes (his own) and deprive clients of needed medical services or their children of much desired Christmas toys. I can cite instances of lawyers making $75,000 to $100,000 out of "piked" damage suits, who could otherwise hardly earn a living.

In these modern times the public is becoming even more critical of the delays in court procedure, to say nothing of mounting costs. Delays are caused largely by laziness and tactical stalling of lawyers. One of the anomalies of the profession is that lawyers will delay trials to the disgust of their clients and actually at a financial loss to themselves. Not the least contributing factor is our archaic procedure and system of courts. In the rural areas of the state where courts only meet three times out of each year dilatory motions can be filed on the first day of the term that can stall the trial from term to term *ad infinitum*. If our multiple system of courts could be merged and circuits shortened, court could be in continuous session in practically every county in the state. Then cases could be tried in thirty to sixty days after filing — I am sure to the delight of litigants. Last year[3] I made so bold as to suggest that all our courts be merged into one system and was especially critical of our anachronistic chancery system, which England saw fit to abolish in 1873 and which all but six states have long since abolished. The response to my suggestion has been overwhelmingly favorable and I repeat that "the Bar awaits only the leadership of the Judiciary to modernize our judicial system and procedure to better serve the public interest in this modern age."

So far as I am informed, criminal cases on the whole are tried with a reasonable degree of promptness, although we all know of outrageous exceptions. In civil cases delays run from six months into years. But it is in chancery court that delay is the normal procedure, even five and six years not being exceptional. The very nature of chancery procedure compels delay. I cite two examples. In general creditors' bills, six months is allowed for filing claims. Why can they not be filed in twenty days? Breach of contract and other types of cases are required to be tried on depositions, entailing endless time and enormous expense. Why can they not be tried thirty days after issue on oral testimony so the court can observe the demeanor of the witnesses and arrive at a prompt and intelligent decision? Under present chancery procedure, through no fault of the chancellors, the delays are so long

3. Kolwyck, *Judicial Administration in Tennessee,* 25 TENN. L. REV. 1 (1957).

and ramified that the litigant often wishes he had never started the case, except that the benefits, if any, might pass to his next of kin. In my thirty-one years of practice I can truthfully say that I have never handled a chancery case in which my client was satisfied, whether he won or lost, nor one in which the fee was proportionate to the work required.

The public is not only critical of delays in bringing cases to trial, but of late has been increasingly critical of our cumbersome and expensive trial procedure. In these days of high industrial wages, we cannot blame witnesses for hiding from the deputy sheriff or prospective jurors for manufacturing excuses for non-service. Most people want to do their civic duty. But they want to know why in a simple damage suit the trial should last a week; why a jury should be demanded in J. P. appeals and other small cases; why a jury of six men cannot try a case just as well as twelve men; why a majority verdict should not be allowed instead of permitting some social misfit to hang a jury; and why the county should have to pay for jury service, small as it is, instead of requiring the loser, or the party who demands the jury, to pay for the cost. Of course, I am referring to civil rather than criminal cases. As an example of how civil jury trials can be simplified, I recently had occasion to file a suit in Florida for a husband and wife residing in Tennessee. Both cases were filed as one at a total cost of $17.00. Upon motion for summary judgment, supported by one page affidavits of the parties, the court determined as a matter of law that the defendant was guilty of negligence, thus leaving only the extent of injuries to be proved. At 9:30 on the date of the trial a jury of six men was impaneled, the injuries were then proven, the case argued, the jury charged and a verdict returned before noon. It so happened that all the witnesses to the facts resided in Michigan and the cost of taking their depositions or bringing them to the trial would have been prohibitive. The trial of this case was also expedited by pre-trial conference where all exhibits were agreed upon and all exceptions to depositions settled. The trial of that case in Tennessee would have consumed at least two days and the costs would have been grossly disproportionate to the extent of injuries.

Time was when court week was a social occasion where spectators crowded the court room with their knitting and whittling sticks, Bruton's snuff and Picnic Twist, and cheered the forensics of lawyers and biblico-legal philosophy of judges. Those times are gone. People just do not have time like that any more. If they go to court, they go as participants, with the hope of getting the unpleasant task behind

them as soon as possible. They have little tolerance for the lawyer who still starts his cross-examination by asking whether the witness has talked to anyone about the case; who browbeats an honest witness; who circumvents the court by asking over and over the same objectionable question in varied form; or who spends an hour objecting to proof as to whether sunset was at 6:05 P.M., a fact which should have been determined at a pre-trial conference. Yes, the public is growing tired of these tactics and will more and more resort to arbitration, or otherwise avoid courts — and lawyers, if we do not mend our ways.

Finally, I want to mention our divorce procedure. In their laudable efforts to prevent divorce, our forefathers enacted that a spouse must be proven "guilty" of one or more of the thirteen "grounds" for divorce before a divorce could be granted. This has come to be known as the ecclesiastical concept of crime and punishment. The modern day sociologist has proven this concept to be erroneous. Why should any couple be divorced unless it be to the best interest of society? Is it not to the best interest of society that two miserably incompatable people be divorced, even though not guilty of any of the statutory "crimes"? Why can we not call on the now well trained social workers to investigate marital rifts in an effort at reconciliation before subjecting the parties, and often their children, to a "swearing match" involving intimate details of their lives, the disclosure of which will forever preclude any effort of reconciliation and may destroy or impair their further usefulness in society? Our divorce laws are illgrounded and outmoded; our lawyers' conduct in divorce cases leaves much to be desired; and our courts, even under present laws, could take a more enlightened approach. When have you heard of a judge calling the parties into his chambers in an effort of reconciliation? How many lawyers would agree to this procedure? But should it not be standard practice? I think the public would welcome a change.

From the above, I hope it cannot be inferred that I am posing as a paragon of virtue, which I am not, or that I can be accused of moralizing, which I hope I am not. By a few examples I have tried to show that honesty is the best policy, in law as in other professions. I do not accuse our profession of dishonesty, but the public thinks some lawyers are not trustworthy and we cannot disprove the accusation. To the extent that lawyers advise with organized criminals, crime will increase accordingly. To the extent that we fail to furnish adequate defense, individual rights will suffer. To the extent that clients are honestly represented by lawyers freely chosen, public respect for our profession will increase.

Although our system of courts and procedure may be no more antequated than in a few other states, it is more antequated than in most. The crying need in Tennessee is for enlightened leadership in the legal profession and judiciary in merging our courts into one system, and eliminating useless and time-consuming procedure and court costs, to the end that justice may be speedy and economical. Having been born in 1901, my life has spanned a period from the horse and buggy and bull-tongue plow to mechanized farming and supersonic speed. But in that period not a single substantial reform has been made in our system of courts and procedure. We are still in the cracker-barrell era. I do not exactly advocate that procedure exceed the speed of sound, but I do venture the observation that fifteen miles per hour would not be too fast.

In the inexorable course of time I am even now headed toward the setting sun. Many honors have come my way, climaxed by the occasion tonight, for which I am deeply grateful. I hope all have been deserved. By custom I can hold no further office in our Bar Association that would afford a rostrum for speaking out for the reforms I have advocated in our profession and judiciary. But I here and now throw at the feet of the younger lawyers the challenge that they take up the fight. Soon the students assembled here tonight will fan out over the state, each to his respective community, to enter upon a legal career. If each will resolve to dedicate his career to honesty in the profession and expeditious and economical procedure in a single court system, as exemplified and inspired by this law school, these reforms will soon come to pass, perhaps even before I cross the bar. Then will we stand photographed to the public in the classic prose of Taylor Cox.

Dean Wicker, to you I owe much. I am indebted to the other members of the faculty of 1927, to the faculty of today, and to those who have gone between. I am indebted to the pervading spirit of this College of Law, as it stands reflected in the beacon from yon "Hallowed Hill." But for all these I would not be the recipient of the "Coif" tonight. I am grateful from the bottom of an overflowing heart.

LAW DAY IS OUR DAY*

BY WALTER CHANDLER**

When the President of the United States proclaims "Law Day" throughout America, it is a significant event. It renews the emphasis on the place and the force of law in a peaceful world and gives you, as students of the Law College of one of our ancient and honorable seats of learning, the opportunity to pay tribute to the affection which each of us is entitled to have for the profession which is ours now and yours to be, and which has contributed more than any other to the development of order and justice.

For your speaker, this is a most agreeable opportunity to recall the small law school of the University of Tennessee of half a century ago. No great imagination is required to see those then 125 year old rooms in Old College where the scholarly Professor Charles Willard Turner, a contemporary of Justice Oliver Wendell Holmes, and Dean Henry Hurburt Ingersoll, the fluent, unorthodox, able, practicing lawyer, held forth in expatiations on the writings of Blackstone and Kent and Cooley and the other great lights too numerous to mention.

And now, after those years, you have a law school which makes it unnecessary to go to one of the large eastern colleges for a law degree. Moreover, the Tennessee Law Review is one of the most useful of the publications of American law schools, and your faculty stands high in quality, learning and teaching ability.

Perhaps, we might well ask ourselves again: What is the Law, and for what does it stand? It is more than an aggregate of statutes and rules and decisions. It is the great unifying and controlling institution, conferring upon each his rights and enforcing from each his obligations. The law cannot create happiness and contentment, but it can create in no small measure the conditions which make for the accomplishment of these blessings.

Basically, it has been said: "There can be no civilization without order. There can be no order without law". In repeating this aphorism, we do homage to religion and its immeasurable part in softening the rude wills of men and pointing the way to eternal life; and we acknowledge our increasing admiration of medical science and the marvelous accomplishments of that profession in ministering to the ills and

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**Of the Memphis Bar.

frailties of humans; and we seek to take nothing from either, but it remains for law to protect and preserve them both.

In glancing backward over the centuries, it is not difficult to observe that progress in the development of our present concepts of law has been slow and tortuous. Indeed, we do not know when the idea of law began, but it must have started with the nature of man, which Pascal calls the "first custom, just as second custom is second nature". Be that as it may, what we call our law today may be described as the choice fruits of thousands of yesterdays. How wondrously the permanent customs and desirable aspirations of people in all generations have been crystallized into law and order principally through the wisdom and persistence of those who, with courage, have loved truth and freedom best of all!

And it must give us hope for the future to know how tenaciously men have clung to their beneficient customs and laws through all the vicissitudes which human society has undergone. Political revolutions still come and go, but the rule of law remains. States nurtured by enlightened concepts of liberty under the law have risen and flourished, but when the mailed fist and the iron heel have become all powerful, misery and poverty and anarchy have followed in their wake. Though we view with concern the encroachments of communism, and would take no chances with any communist, communism essentially is a transitory nightmare, doomed to failure because "its roots are not in order but in chaos; its rule is not born of reason" but of fear and ignorance.

Order and reason, then, remain the unassailable verities of universal law; but along the roads of progress in all ages of civilization men have had to fight and learn, and teach each other, firstly, the principles of self preservation, then the strength of unity, and then the power of discipline – self discipline, which is self-government in essence. By this process, chaos and disorder are forced to their allotted ends, and the rules of reason and order return to lead us onward and upward.

In our time, the people of America are so accustomed to take their government as a matter of course that they probably do not appreciate that the laws with which the courts and lawyers have daily contacts reach into every nook and corner of their national and individual lives and furnish the bases on which all must depend for stability and security and, yes, certainty of life. We like to believe that this apparent lack of interest may mean that the people of the United States have sufficient confidence in the Bench and Bar to entrust to

us the promulgation of benign principles of law and the preservation of tribunals where their justiciable controversies, as well as their rights and privileges and responsibilities, may receive honest and wise and fair treatment.

If this wishful thinking is an explanation of public apathy, then our obligations as lawyers are increasingly vital to the happiness and even the perpetuation of the Nation. We are not foolish enough to think that the people have surrendered their liberties to any group of specialists, however incorruptible and well trained they may be; but the people expect the very best from *us*. This coveted trust being only a revocable delegation of power, requires that the standards of the legal profession and the administration of justice shall be measured by the highest ideals of man. Unfortunately, this is not the yardstick by which people and institutions frequently are measured — quite the contrary. The low in character and conduct too often furnish the standards, and the institutions and those who serve them become subject to suspicion and avoidance.

We hear complaints about the complexity of the law. This we cannot deny, but this criticism loses weight when we reflect on the infinite complexity of human life itself, and the almost inconceivable intricacies of our social and industrial relations.

Whatever its occasional faults may be, the profession of law is an enviable one, and the challenge of the traditions of the bar cannot be met by many. To adopt the words of a high minded public official: "The people rightfully expect of lawyers: (1) utmost personal integrity; (2) knowledge and understanding of the law; (3) rules of procedure and organization of the courts which will bring about prompt, even-handed justice; (4) championship of the right, and leadership against public enemies". Thus, the practice of law requires a combination of the ideal with the intellectual and the practical. The work of Law is never done, and should never be undone in a civilized community. Its spirit and its power must live forever.

What of the Judge, that minister of justice, who, under the burdens of many duties, maintains so well the spirit and traditions of the judiciary? It is he who preserves the confidence in our courts as the great bulwark of our freedoms. It is he who aims only at the ascertainment of truth and the fearless administration of the law as it is. He bows to no suggestion of passing expediency. He yields not to the winds of popular fancy, whatever the direction in which those winds may blow.

The ideal ever before us is that stated by Edmund Burke as "the cold neutrality of an impartial judge". We sometimes like to think of the *warm* neutrality of the impartial judge who, under our law, is so frequently the thirteenth juror, and, if there be any unconscious instinct to lean, it is an instinct not in favor of the strong and wealthy but which tends to lean rather toward those who are weak and poor.

Of course, the Bar does its best to keep the judges from error! But, in spite of the utmost powers of elucidation and persuasion, opinion of counsel in every case seems to be about equally divided on the correctness of the judge's rulings! Of course, the time honored right to "retire to the tavern and cuss the Court" is still our prerogative, but that imaginary trek is always followed by "repentance and forgiveness". We are *supposed* to teach the Judges the law, but not with the effect produced on the Mississippi Justice of Peace who was trying a suit for rescission of a contract for fraud! He recognized the fraudulent representations all right, but denied rescission because, he said, as nearly as he could "make out", the law permitted a reasonable amount of deceit in an arm's length transaction!

It is for us who practice in the courts, and for you who are to follow us, to protect the Judges from "unjust criticism and clamor", as provided by our canons of professional ethics, the Judges being not wholly free to defend themselves. And it is for the Judges to have patience, especially, with you who must have a beginning. Francis Bacon said that "Patience is an essential part of justice". Some of you may be become Judges, and it would be well to keep in mind those words of Lord Chief Justice Fry: "I must remember to give a receptive listening to each side, and, when hearing young counsel, remember how great the pleasure a kind word from the bench has been to me in former years".

Now, the third of the triumvirate – the Lawyer. That the work of the Bar is essential is scarcely to be disputed. Destroy the Bar, and you destroy the security and liberty of a people.

There are exceptions to most all rules, but it is fair to assure the public that there is not a body of men and women with a higher standard of honor than the Bar, and that no profession is marked by a greater absence of jealousy or ill will.

To you who are to practice law, there never was a time when the position of the lawyer was of higher importance or responsibility than today. There never was a period when the profession of the Bar called for greater knowledge or greater intellectual grasp. The

magnitude and intricacy of many of the trials in this decade call for the highest mental capacity and training. And there never was an era when greater courage and higher integrity were required of the legal profession as a whole than now. To quote Sir Arthur Eforde, Headmaster of Rugby:

> To belong to a body of professional men who have their own standards and their own mutual respect for each other is the kind of thing which may help you when you come up against those situations – which all professional men do come up against – where, apart from a clear understanding and mastery of the art, one needs two things: one is courage – for it is not so easy always to stand up to a powerful client – and the other is the sense that, beside one so situated are men who see why courage is a right thing and will stand by the one who has to exercise that courage.

The rise of big business has created in the larger centers an inevitable specialization of the Bar, and has produced what some of our critics have called "law factories". Such firms are very impressive but I have wondered if the spirit of the law is lost in those streamlined offices. I hope not.

In the old times, the lawyer directed the client's course of action, and it was rarely questioned. Now, sometimes, in order to retain a particularly lucrative client, the lawyer finds himself impelled to do what the client insists, although contrary to the best interests of the client eventually, and against the better judgment and wish of the lawyer. The ultimate effect, frequently disastrous to the client and humiliating to the lawyer, tends also to bring into question the integrity and good faith of the profession at large.

An eminent Arkansas lawyer told a story which may be in point. He was representing a large corporation in an Arkansas county, where there was bitter hostility to the client, so he filed a motion for change of venue on account of prejudice, and then proceeded to support it with an array of witnesses who established conclusively that the defendant could not get a fair trial in that county. When the court came to decide the motion, he rolled his eyes around the ceiling and then put on a faraway look out the window – when a judge does those things, you know that something is going to happen – and then he said: "The proof in support of the motion is overwhelming, and the Court is convinced of the prejudice against the defendant; but, it's justified. Motion overruled."

Yes, these three: the Law, the Judge, and the Lawyer! They must maintain the integrity of the Country; and the individual lawyer and

Judge must be vigilant in the protection of the area of which they are a part. Indeed, our responsibilities are that great. People everywhere expect us to show the way. If we yield to sharp practices; if we condone wrongs; if we countenance overreaching; if we fail to fight for the right; if we falter in our public and professional service, we betray the high calling that is ours, and the Country suffers; and if those derelictions become *custom,* life in our beloved land will be an intolerable existence. A strong, upright and independent Bench and Bar are essential to a free people!

So the character of the nation depends in large part on us who are members of a great brotherhood, and, in your turn, on you. Thus, we each must follow the clear and imperative voice of duty. When we join that brotherhood, and hear that voice, and touch the hem of the garment of the "jealous mistress", we must guard with unswerving fidelity the honor of a great profession and the welfare of a noble institution — our Country.

LIABILITY BEYOND POLICY LIMITS

BY FRED D. CUNNINGHAM*

The subject of liability over and beyond the policy limits could more appropriately be paraphrased as tort liability arising out of the insurance contract. The basic principle involved has been stated as follows:

> Ordinarily a breach of contract is not a tort, but a contract may create the state of things which furnishes the occasion for the tort. The relation which is essential to the existence of the duty to exercise care may arise through an express or implied contract. Accompanying every contract is a common law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract.[1]

Dean Leon Green, one of the outstanding authorities in tort law, said, "The area of tort law is always turbulent, never at rest." This statement is particularly apropos to the comparatively new tort we are discussing which arises out of the jural relations under consideration. The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled.[2]

Mr. Justice Holmes said in a classical legal aphorism, "The life of the law has not been logic, it has been experience – the felt necessities of the times, prevalent moral and political theories, ideas of public policy, avowed or unconscious, even the prejudices which the judges share with their fellow man have had a good deal more to do than the syllogism in determining the rules by which men shall be governed."[3] The phrase "even the prejudices which the judges share with their fellow man" is pertinent to the subject of our discussion. As in the case law that is evolving on this question, the personal leanings and prejudices of the judges gained from their practice and trial experience is manifest.

Referring to the external standard by which negligence is to be determined in this comparatively new relationship, the following statement appeared in a recent article:

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*General Counsel, Shelby Mutual Insurance Company

1. 38 AM. JUR. *Negligence* § 20 (1941).
2. Hodges v. New England Screw Co., 1 R. I. 312, 356 (1850).
3. HOLMES, THE COMMON LAW 1 (1881).

> As far as negligence is concerned, we will sooner or later arrive at a norm which will be recognized as constituting due care on the part of a claim supervisor. Possibly this will be established by expert testimony in each case as in malpractice cases. If the conduct of the claims man shall measure up to the norm, it is quite possible that relief will be had from our courts, regardless of the action taken by juries whether such relief be by way of non suit, awarding of a new trial or otherwise.[4]

What the above writer refers to as the norm constituting due care contemplates that fictitious legal character "Mr. Reasonable and Prudent Man under the same or similar circumstances." This external standard referred to by Mr. Justice Holmes[5] has now been tersely defined by the *Restatement of Torts,* §282 as follows:

> Negligence is any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.

The conduct of the fictitious legal character is defined in the *Restatement of Torts,* §283, as follows:

> Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Then in Comment (a) under this section, the qualifications of the Reasonable Man are stated as follows:

> The words 'reasonable man' denote a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests *and the interests of others.* (italics added)

Of the two rules relating to liability beyond policy limits, the bad faith rule is now the majority and the negligence rule is the minority rule. The evolution of the law in this respect is indicated by Mr. Appleman's statement back in 1942 that the bad faith rule was then becoming the minority position, and the negligence rule was becoming the majority view.[6] In fact, the intervening years since this statement was made have firmly established the bad faith rule as the majority rule.

Bad faith is the antonym of good faith and is an indefinite term, but refers to an actual state of mind capable of both direct and circumstantial proof. In contract law, bad faith does not mean the mere

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4. Fargo, *Liability Limits Do Have Some Meaning,* 1958 INS. L. J. 77.
5. HOLMES, THE COMMON LAW 110, 162 (1881).
6. 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4712 (1942).

breach of faith in failing to comply with an agreement, but a designed breach of its terms for some motive of interest or ill will. Bad faith is, to some extent, tinctured with fraud and has been defined as a state of mind, indicated by acts, conduct and circumstances provable by circumstantial as well as direct evidence.[7]

In some jurisdictions the negligence and bad faith rules seem to coalesce and a showing of negligence is considered an element in determining the bad faith issue. In some states both rules apply: the negligence rule to the investigation and handling of the claim, and the good faith rule to the diligence, judgment and discretion in handling the litigation aspect of the claim.[8]

I. The Rule of Negligence

The minority negligence rule is based upon the nebulous external standard of the Reasonable and Prudent Man. In this connection the Retatement of Torts makes a very pertinent and cogent statement relative to the peril of being judged in retrospect in the light of wisdom borne of the event.[9] Mr. Appleman[10] very much deplores this hindsight approach in a field where the technical aspects of bodily injury liability claims are being decided by a prejudiced lay jury. The negligence rule opens up for consideration in retrospect the manner and skill in conducting all aspects of the investigation, correspondence between the insuror and its attorneys, and investigators, medico-legal aspects, discussion and conclusions as to evaluation, as well as consideration of the liability issues, causal relation, proximate cause and, in fact, all matters leading to the decision not to accept the proposed settlement.

There has been a great deal of litigation involving this very controversial issue and there is certain to be continuous evolution of the law in this field. There is also much literature on this subject, and in this article I have tried to condense their conclusions into a pattern of practical procedure as to what has and what has not been held to be negligence or bad faith. In this respect I must plead guilty to Dean

7. Zumwalt v. Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750, 754 (1950); Waters v. American Casualty Co., 216 Ala. 252, 73 So. 2d 524 (1953); discussed in 7 N.C.C.A. 3d 317 (1956).

8. Hilker v. Western Automobile Insurance Co., 204 Wis. 1, 231 N.W. 257 (1930), 235 N.W. 413 (1931); Wilson v. Aetna, 145 Me. 370, 76 Atl. 2d 111 (1950); Waters v. American Casualty Co., 261 Ala. 252, 73 So. 2d 524 (1953); Ballard v. Ocean Accident & Guarantee, 86 F.2d 449 (7th Cir. 1936).

9. Restatement, Torts § 433(E) (1934).

10. Appleman, *Duty of Liability Insuror to Compromise Litigation*, 26 Ky. L. J. 100 (1938).

Prosser's statement that "Research has been defined as plagiarism on the grand scale."[11]

It has been well said that "Out of the facts the law arises." We also know as lawyers, as Holmes put it, that "The law does not always perfectly accomplish its end."[12] Little would, therefore, be accomplished by a lengthy discussion of the individual cases. If the plaintiff makes a submissible case, the issues are factual, to be determined by the jury under appropriate instructions, depending upon the facts and circumstances of each particular case. Hence, any detailed analysis of State and Federal Court decisions on this question would merely be repetitious. We will, however, review briefly the categories and areas requiring discretion on the part of counsel and company to manifest good faith and diligence toward the insured's interest and exposure.

II. Facts and Circumstances Constituting Bad Faith

Generally speaking, it has been regarded that the insurer must give as much consideration to the interests of the insured as it does his own interest, and any failure to do so is bad faith.[13] Consequently, rejection of settlement proposals which the company knew to be reasonable and which were within the policy limits manifests bad faith towards the insured's interest.[14]

Likewise a circumstance indicative of bad faith is advice from the company to the insured to transfer his property in order to avoid payment of possible excess liability.[15] Furthermore the amount of reserve carried by the company would be competent in the event the reserve was substantially in excess of the settlement value of the case as fixed by the company.[16] There have been instances where the company has been held guilty of bad faith on account of disregarding

11. 67 Harv. L. Rev. 1136 (1954); 1943 Ins. C. J. 35; 1950 Ins. C. J. 178; 1951 Ins. C. J. 342; 1955 Ins. C. J. 56; 1955 Ins. L. J. 525; 1950 Ins. L. J. 734; 1952 Ins. L. J. 192; 1949 Ins. L. J. 799; 1949 Ins. L. J. 107; 1948 Ins. L. J. 947; 1946 Ins. L. J. 130; Notes 7 N.C.C.A. 3rd 306 (1956); 40 A.L.R. 2d 306 (1955); 6 Blashfield, Automobile Law and Practice § 4054, 4060 (1945); 8 Appleman, Insurance Law and Practice §§ 4711-4715 (1942); 5 Couch, Cyclopedia of Insurance Law § 1175F (1929).

12. Holmes, The Common Law 111 (1881).

13. Southern Fire and Casualty Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952); Johnson v. Hardware Mut. Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938); National Mut. Cas. v. Brett, 203 Okla. 175, 200 P.2d 407 (1948), 218 P.2d 1039 (1950).

14. J. Spang Baking Co. v. Trinity Universal Ins. Co., 45 Ohio Abs. 577, 68 N.E.2d 122 (1946); Springer v. Citizens Casualty Co., 246 F.2d 123 (5th Cir. 1957).

15. Maryland Casualty Co. v. Cook-O'Brien Construction Co., 69 F.2d 462 (8th Cir. 1934), *cert. den.*, 293 *U.S.* 569 (1934); Noshey v. American Auto Insurance Co., 68 F.2d 808 (6th Cir. 1934).

16. Lanferman v. Maryland Casualty Co., 222 Wis. 406, 267 N.W. 300 (1936).

recommendations urged by their field adjuster as well as local and trial counsel.[17] The converse of this proposition is that the insurer may not absolve itself from responsibility or bad faith by showing that it acted upon the advice of counsel.[18]

The taking of any arbitrary, capricious, reckless or indifferent action towards the insured's interest has been held to be bad faith. Obviously, the action of the insurer must not be such that there could be any question about the honesty of the position taken by the company.[19]

The company must show willingness to effect such settlement as is arrived at by honest judgment and discretion, and its failing to so act will likely be held to be bad faith.[20] The company must exercise the utmost care and diligence in investigating the case, including the interviewing of witnesses and otherwise ascertaining all facts and circumstances, including visiting the scene of the accident. Failure to do so will be held negligence and have a bearing on the issue of bad faith.[21] The company must not refuse to make a settlement, except in good faith, if it knows that it has no more than an equal chance of winning the case and if the case is lost, the verdict against the insured will exceed the policy limits. In this respect, there is a shifting degree of care commensurate with the hazard to the insured's interest and his exposure.[22] A company must use good faith, skill and diligence in timing its settlement negotiations and unduly delaying an endeavor to affect a settlement or submit a settlement counter proposal may be held to be bad faith.[23]

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17. Maryland Casualty Co. v. Cook-O'Brien Co., 69 F.2d 462 (8th Cir. 1934); *cert. den.*, 293 U.S. 569 (1934); Royal Transit v. Central Surety & Ins. Co., 168 F.2d 345 (7th Cir. 1948); *cert. den.*, 335 U.S. 844 (1948); Johnson v. Hardware Mutual Casualty Co., 108 Vt. 269, 187 A. 788 (1936).

18. Dumas v. Hartford Accident and Indemnity Co., 94 N.H. 484, 56 A.2d 57 (1947); Douglas v. U.S. Fidelity and Guaranty Co., 81 N.H. 371, 127 A. 708 (1928); Highway Underwriters v. Lufkin-Beaumont Coaches, 215 S.W.2d 904 (Texas 1948).

19. Royal Transit Ins. v. Central Surety and Insurance Corp., 168 F.2d 345 (7th Cir. 1948); Hart v. Republic Mutual Insurance Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949).

20. American Mutual Liability Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932), *cert. den.*, 289 U.S. 736 (1933).

21. American Mutual Liability Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932), *cert. den.*, 289 U.S. 736 (1933); Bollard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952); Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933); Southern Fire & Casualty Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

22. National Mut. Cas. Co. v. Brett, 203 Okla. 175, 200 P.2d 407 (1948), 218 P.2d 1039 (1950); Attleboro Mfg. Co. v. Frankfort, 240 Fed. 573 (1st Cir. 1917).

23. Vanderbilt University v. Hartford Accident and Indemnity Co., 109 F. Supp. 565 (D.C. Tenn. 1952).

A company must necessarily develop sufficient information to arrive at an intelligent evaluation of the claim and attempting to arrive at such conclusion without adequate investigation, both factual and medico-legal, may be material on the issue of bad faith.[24] The medico-legal aspect of negligence cases is becoming increasingly important. A company must be able to show that it used reasonable care and prudence in doing everything possible to inform itself about the injuries sustained and the probable extent of permanent impairment, if any, likely to follow the injuries.[25]

Any indication that the company disregarded the potentiality of the claim by reason of the race or nationality of the injured person whereby its conduct was discriminatory will be evidence of bad faith.[26] Moreover, it will likely be held bad faith or an indication of bad faith for a company not to inform its counsel of all facts and information that has come to its attention.[27] Failure on the part of the company and counsel to inform the insured of his possible excess liability or to disclose to him the status of settlement negotiations and definite offers of settlement may be indicative of bad faith.[28]

In a number of older cases it was regarded as evidence of bad faith when the company refused to settle unless the insured would make a contribution, even though the amount of settlement was within the policy limit. This, of course, would still be the case today, but I doubt if companies are now indulging in this practice. Where there is clear liability on the part of the insured, it may evince bad faith if an earnest and prompt attempt is not made to settle the case for its reasonable value, depending upon the nature and extent of the injuries.[29]

A word of caution to counsel, as well as to home office counsel, is indicated by some of the decisions where the court subpoenaed the home office file which contained correspondence showing no willingness on the part of the company to give adequate consideration to the

24. Hilker v. Western Automobile Insurance Co., 204 Wis. 1, 235 N.W. 413 (1931).

25. Radcliffe v. Franklin National Ins. Co., 298 P.2d 1002 (Ore. 1956); Roberts v. American Fire and Casualty Co., 89 F. Supp. 827, *aff'd*, 186 F.2d 921 (6th Cir. 1951); Southern Fire and Casualty Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

26. Roberts v. American Fire and Casualty Co., 89 F. Supp. 827, *aff'd*, 186 F.2d 921 (6th Cir. 1951).

27. Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 127 Atl. 708 (1924).

28. American Casualty Co. v. Glorifield, 8 C.C.H. FIRE & CAS. CASES, 488 (9th Cir. 1954); Waters v. American Casualty Co., 261 Ala. 252, 73 So.2d 524 (1954).

29. J. Spang Baking Co. v. Trinity Universal Ins. Co., 45 Ohio Abs. 577, 68 N.E.2d 122 (1946); National Mutual Casualty Co. v. Brett, 203 Okla. 175, 200 P.2d 407 (1948), 218 P.2d 1039 (1950).

insured's exposure, by use of language such as, "What do we have to lose", or, "Our policy limit is thus and so".[30]

In the recent case of *Farmers Mutual Insurance Company vs. Hammond*,[31] decided by the Court of Appeals of Tennessee, the court emphasized that the counsel for the company had told the plaintiff's attorneys in their negotiations, "There is no reason for us to settle this case with you. You are demanding the policy limits – we have nothing to lose". And on another occasion the company counsel had said, "We can't lose. You are asking all the coverage". In that case there was other evidence that the company and their counsel were not in good faith considering the insured's excess exposure, along with their own interests, hence excess liability on the theory of bad faith was affirmed, with one dissenting opinion. In this connection, both the trial and home office counsel must be constantly alert to the possibility that their file will be subpoenaed, and that any language contained in the correspondence showing an indifference or inadequate consideration to the insured's interest could have a very adverse effect on the issue of excess liability.

This point is illustrated by the recent case of *Henke v. Iowa Home Mutual Casualty Company*, decided by the Iowa Supreme Court, cited in 13 C.C.H. AUTO CASES 2d 686. The company felt that this correspondence was privileged under the attorney and client and work product rules. The court, however, applied the two-client-for-same-cause rule and held the communications were not privileged. The far reaching effect and implications of this opinion are a bit startling, and demonstrates emphatically that your claim organization should be very careful in correspondence not to say anything that could be construed as bad faith or lack of diligence toward the insured's interest and exposure to excess loss.

An indication that the company has a substantial part of the risk reinsured and therefore does not stand to lose any more than their retention will likewise be regarded as indicative of bad faith.[32]

III. BAD FAITH NOT SHOWN

There are also numerous cases where the conduct on the part of the insurance company has been insufficient to establish bad faith. Thus mere indiscretion or impolitic conduct, without more, is not sufficient

30. American Casualty v. Glorifield, 8 C.C.H. FIRE & CAS. CASES 488 (9th Cir. 1954).

31. Tennessee Farmers Mutual Ins. Co. v. Hammond, 306 S.W.2d 13 (Tenn. App. 1958).

32. J. Spang Bakery Co. v. Trinity Universal Ins. Co., 45 Ohio Abs. 577, 68 N.E.2d 122 (1946).

to establish bad faith.[33] This requires more than a showing of inadvertence or mistake of judgment.[34]

If the insured's misrepresentations in any way influence the insurer's omission to settle, then the insured will not be able to show bad faith.[35] Where there is no clear and definite evidence that the claim could have been settled within the policy limits, or for a reasonable figure, or that the proposal of the claimant was merely conditional, the insurer cannot be held liable for refusal to settle within the policy limits.[36] Likewise the mere failure to inform the insured of an opportunity to settle, standing alone, does not constitute bad faith.[37]

An honest error of judgment, or mere omission, is not alone sufficient to establish bad faith, because an insurer or its counsel are not required to be clairvoyant or have a gift of prophecy. If experienced lawyers generally might differ as to the law applicable to the facts and circumstances, or if different inferences could be drawn as to the probabilities concerning the jury's conclusions, a mere election to defend the case, either on the facts or law, is not bad faith, even though an adverse decision results.[38]

If the company has exercised good faith in its dealings with the insured, and if the settlement proposal has been fully and fairly considered and decided against, based upon an honest belief that the action could be defeated, or the judgment held within the policy limits, with the aid of the honest opinion of local counsel, the company cannot be held liable even though there is a mistake of judgment in arriving at a conclusion.[39]

33. Levin v. New England Casualty Co., 101 Misc. 402, 233 N.Y. 631, 135 N.E. 948 (1922).
34. Berk v. Milwaukee Auto Ins. Co., 245 Wis. 597, 15 N.W.2d 834 (1944); Georgia Cas. Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777 (1932); City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929); Norwood v. Travelers Insurance Co., 204 Minn. 595, 284 N.W. 785 (1939); Henry v. Nationwide Insurance Co., 7 C.C.H. AUTO CASES 2d 888 (N.C. 1956).
35. State Auto v. York, 104 F.2d 703 (4th Cir. 1939), *cert. den.*, 308 U.S. 591 (1939); Hall v. Preferred Accident Ins. Co., 204 F.2d 844 (5th Cir. 1953); Home Indemnity v. Standard Accident, 167 F.2d 919 (9th Cir. 1948); Ohio Cas. Co. v. Gordon, 95 F.2d 605 (10th Cir. 1938).
36. Jones v. Highway Underwriters, 253 S.W.2d 1018 (Tex. Civ. App. 1952).
37. Norwood v. Travelers Insurance Co. 204 Minn. 595, 284 N.W. 785 (1939); Kleinschmit v. Farmers Mut. Hail Ins. Co., 101 F.2d 987 (8th Cir. 1939); Strode v. Commercial Cas. Co., 102 F. Supp. 240, 202 F.2d 599 (6th Cir. 1953).
38. Best Building Co. v. Employees Liability Insurance Co., 247 N.Y. 451, 160 N.E. 911 (1928); Georgia Casualty v. Mann, 242 Ky. 447, 46 S.W.2d 777 (1932); Blue Bird Taxi Co. v. Fidelity and Casualty Co., 26 F. Supp. 808 (E.D.S.C. 1939).
39. Christian v. Preferred Accident Ins. Co., 89 F. Supp. 888 (N.D. Calif. 1950); Burnham v. Commercial Casualty Co. 10 Wash.2d 624, 117 P.2d 644 (1941); Hoyt v. Factory Mutual Liability Ins. Co., 120 Conn. 156, 179 A. 842 (1935); Cowden v. Aetna Cas. & Surety Co., 389 Pa. 459, 134 A.2d 223 (1957).

Neither is it bad faith if a company and attorney conclude there is a fighting chance to defeat the claim or keep the verdict within the policy limits, in the situation where the demand is conscientiously considered as excessive. A decision to try the case rather than settle will not then be regarded as bad faith.[40]

IV. Precautionary Suggestions and Methods

The following suggestions are made to show good faith and diligence. The company should conduct a prompt, thorough and complete investigation covering the facts and physical circumstances of the accident. Take photographs, visit the scene of the accident, obtain surveys and make every reasonable effort to locate witnesses and to establish the accident facts as definitely as possible. The medical facts also are of vital importance, since it is estimated that seven out of ten cases are decided upon the medical issues. The nature and extent of the injuries and medical history of the claimants should be ascertained. Only after a development of the accident and medical facts can the issues of liability and evaluation be adequately considered and determined. The more complicated the accident and medical facts, the more diligent the investigation must be.

When suit is brought, the insured should be notified promptly, especially in the event the damages sought are in excess of the policy. In writing the excess letter, *care should be taken that no expression is made that it is very likely or very probable* that the verdict may exceed your policy limits. Such words and phrases have been held damaging to the company.[41] The insured should be invited to retain their own counsel at his own expense. He should also be informed that the company will be very glad to cooperate with any counsel he may retain. As the litigation progresses, the insured should be fully informed of the developments and particularly the progress of settlement demands and negotiations. If there is a reasonable opportunity to settle the matter in excess of the policy limits, the insured should be notified so that he may have the opportunity of contributing the excess, if that course appears advisable.

Always use moderation in discussing settlement negotiations. Do not take any arbitrary attitude unless compelled to do so by similar conduct on the part of plaintiff's counsel. Always keep an open mind

40. Wilson v. Aetna Cas. & Surety, 145 Me. 370, 76 A.2d 111 (1950); New Orleans v. Maryland Cas. Co. 114 La. 153, 38 So. 89 (1905).

41. Royal Transit Ins. v. Central Surety & Insurance Corp. 168 F.2d 345 (7th Cir. 1948).

to learn of any new information which may have an influence on your previous conclusions.

Previous indication has been made that the home office reserves would likely be competent on the issue of evaluation. If a substantial reserve is maintained beyond the amount offered in settlement, this circumstance could be very damaging in a subsequent excess suit.

The company should be very careful to procure from its trial counsel a complete analysis of the case, from a factual, legal and damage evaluation standpoint. There should be a very close working arrangement between the trial counsel and the company representatives to see that the suit is kept alive until the case is set for trial. It is possible that the trial counsel and the company might be held liable for negligence in defending the suit, irrespective of bad faith, if diligence is not used to keep in contact with witnesses and with medical evidence of changes in the claimants condition so that when the case comes on for trial, there are no surprises or evidence not reasonably contemplated.[42]

In all discussions with the insured, inform him of his right to be represented by counsel during the negotiations as well as at trial; and in the event he does retain counsel, be sure to keep his counsel fully informed of all developments. Also attempt to obtain a commitment or comment from the insured's own counsel as to his views of the liability and an evaluation of the case from a settlement standpoint. All conversations, whether personally or by telephone and, of course, all communications with the insured or his counsel, should be carefully recorded. It is recognized that attorneys are exceedingly busy and it is not expected they will be able to remember the intimate details of developments of a number of cases in their offices. It is, therefore, suggested that the habit be formed of making a memorandum of all conferences pertaining to the case, as well as all telephone conversations, so that in the event of litigation and subpoena of the file, the file will speak for itself as to diligence and care manifested by the counsel in his handling of the case on the company's behalf.

Care should be taken not to make any expression in your correspondence with the company, or in discussion or correspondence with the insured or his attorney or the claimant's counsel, that the company has nothing to lose by not accepting the settlement demand. Instead, emphasis can be made on the questionable liability and any

42. Roberts v. American Fire & Casualty Co., 89 F. Supp. 827, 186 F.2d 921 (6th Cir. 1951).

demand being made which seems inconsistent with reasonable evaluation on the merits of the claim.[43]

In difficult and close cases where the advisability of settlement and evaluation turns upon both questions of law and medical testimony, it would be consistent with reasonable prudence and care that all of the papers in the matter excepting those relating to policy limits be referred to other competent counsel, and that their opinion sought on the possibility of successfully defending the case from a liability standpoint, or minimizing the recovery. This conduct, of course, is only recommended in serious cases likely to result in a substantial verdict, or where there is a very close question as to what course should be taken.

When the case goes to trial, a company representative should be available to keep in touch with the developments at the trial, with settlement authority. If this is not practicable, then the company should keep in touch with the trial attorney to reappraise the case in the light of developments at the trial, and of any settlement opportunities which it might be timely to consider.[44]

V. Mitigation of Damages

The evolution of this question has produced a new technique on the handling of bodily injury claims and suits. In practically every case where the injuries are at all serious, at some time in the handling of the suit a notice that the suit can be settled within the policy limits, accompanied by a demand that settlement should be effected, will be received. This notice will either be given orally or in writing, or both. In some instances the notice will be given by an attorney for the insured appearing in the case for the first time, or by letter signed by the insured. In reading the content and style of the letter, purporting to have been written by the insured, it becomes apparent that an Ethiopian is lurking in or around the woodpile. Upon receiving this notice, what then do we do? This is the time when some attorneys seem to get a good case of the jitters.

As mentioned before, this procedure has almost become uniform. Our office has worked out a procedure which is not novel or original with us, and I am sure each of you do something similar. Originally,

43. Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933); American Casualty v. Glorifield, 8 C.C.H. Fire & Cas. Cases 488 (9th Cir. 1954) (home office telegram).

44. American Mutual Liab. Insurance Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932); *cert. den.*, 289 U.S. 736 (1933); Radcliffe v. Franklin National Ins. Co., 208 Ore. 1, 298 P.2d 1002 (1956); Waters v. American Casualty Co., 261 Ala. 252, 73 So. 2d 524 (1953).

I received the suggestion from Mr. F. B. Baylor of Lincoln, Nebraska. Up to now we have not had the opportunity of determining whether there is any efficacy in this method. I can say, however, that the method has been very effective in bringing about settlement in many instances, and it may have discouraged the bringing of actions for excess liability when a verdict in excess of the policy resulted. This procedure has to do with the question of the mitigation of damages, [with which rule we, as lawyers, are all familiar.] That doctrine does have some application in these cases, but to what extent has not been worked out as yet in the cases. In the case of the *Southern Fire and Casualty Company,* previously cited, it was contended that the plaintiff should not recover because he failed to mitigate his damages by paying the $2,000 which, added to the $10,000 the defendant was willing to pay, would have enabled him to accept the offer to settle for $12,000. In this connection the court, stated as follows: "We think this would be a valid defense if it should appear that plaintiff was in such financial condition that he could have done so". Reference is also made to this doctrine in the case of *Noshey v. American Automobile Insurance Company.*[45] The application of this mitigation rule evolves from the insured's right to settle his excess liability above the policy limits, or perhaps I should say, his duty to do so, in order to mitigate damages.

To derive full benefit from this rule and also lay down a helpful record, we send to the insured a letter, which we modify to apply to the particular case. In the letter we state what has and is being done in the matter to protect adequately the insured's excess interest, and we again invite and urge the insured to associate his own attorney to collaborate in the handling of the matter and state that we are ready and willing to discuss this matter in detail with his personal attorney. We also request the insured to point out, if he cares to, what has been done thus far in the handling of the matter, or was omitted to be done, which has in any way impaired or prejudiced his interest or position in the litigation. He is requested to submit his suggestions as to anything else that can or should be done. Then, in some cases, we inform the insured that if he is apprehensive as to his excess liability, we will, insofar as his excess interests are concerned, waive our exclusive right to negotiate settlement and defense and will relinquish this to the insured to negotiate as to his excess liability and effect any settlement that in his judgment seems prudent. The only condition we attach to this is the request that we be kept informed of his separate settlement

45. 68 F.2d 808 (6th Cir. 1934).

negotiations so that any conflict with our efforts may be obviated. Also, the form of any release is submitted to our counsel for approval.

As stated before, I do not know how legally effective such procedure may ultimately be. Practically, however, we believe it has been effective in counteracting the efforts of the insured and his counsel and in showing an interest in the settlement of the excess liability. This usually brings about a discussion of the settlement, and up to now somewhere in the different stages of the litigation a satisfactory settlement to all concerned has evolved in connection with cases that should be settled.

VI. Must Insured Pay Excess Judgment as Condition to Claiming Excess Liability?

Another question which has not been settled judicially is whether the insured must pay the excess portion of the verdict or whether the insured must actually suffer a pecuniary or financial loss as a condition precedent to his accrual of action for excess liability.[46]

Some cases hold that payment is not essential, and indicate, even though it may be dictum, that if the question should arise squarely, they would follow the majority rule that a judgment having been entered against the insured, which he is liable to pay, he has sustained a loss even though the judgment has not been paid or is not in a financial condition to pay the judgment.[47]

There also are decisions to the contrary.[48] The authorities are reviewed in the recent case of *Wessing v. American Indemnity Company*,[49] decided by District Judge Whitaker, now Mr. Justice Whitaker of the United States Supreme Court. That case held, with the majority rule, that the mere existence of the liability as established by the judgment sufficiently proves the damages or obligation to pay as imposed by law and that payment of the judgment is not a prerequisite to recover from the insurer.[50]

VII. May Claimant Recover Against the Company?

The question has also been raised as to whether the claimant or judgment creditor has a legal right to recover directly against the in-

46. Schwartz v. Norwich Union, 212 Wis. 593, 250 N.W. 446 (1933); Dumas v. Hartford Accident & Indemnity Co., 92 N.H. 140, 26 A.2d 361 (1942); State Auto. Mut. Ins. Co. v. York, 104 F.2d 730 (4th Cir. 1939).
47. Southern Fire & Casualty Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).
48. 67 Harv. L. Rev. 1173-1177, 1182 (1954).
49. 127 F. Supp. 775 (W. D. Mo., 1955).
50. Universal Automobile Ins. Co. v. Culberson, 126 Tex. 282, 54 S.W.2d 1061, 86 S.W.2d 727 (1935). Entry of judgment sufficient: Tennessee Farmers Mutual Insurance Co. v. Hammond, 306 S.W.2d 13 (Tenn. App. 1957).

surer for that part of the judgment which exceeds the policy limits. Some plaintiffs attorneys even try to get into the act and notify the company that they will recover any judgment in excess of the policy limit direct from the company if such excess liability should result from the company's declining to accept the proposed settlement.

There has been little discussion of this aspect of the problem. A distinction is recognized, however, in the right of the judgment creditor to recover on the policy as a matter of contract in most states after judgment, as provided for by the policy provision permitting an action on the policy and, on the other hand, the right of action in tort accruing to the insured by reason of a breach of duty arising out of the contract and the relationship thereunder. As to the latter situation, questions might arise in some jurisdictions as to the assignability of a tort action and also the question of when the action accrues, as the assignment of an inchoate action would be no more mature in the hands of an assignee. The view is also taken that the claimant is a stranger to the relationship between the insured and the insurer, and hence no duty is owing to the claimant which would give rise to a cause of action.[51] In the decision in the case of *Douglas v. American Indemnity Company*[52] where the judgment creditor brought an action to obtain a declaration as to excess liability of the company to the judgment creditor, Justice Whitaker stated as follows:

> This action does not seek to reach the 'insurance' or the 'insurance money' — as that has been paid. . . . No case that I have found holds that there can be an 'actual controversy', or 'justiciable controversy', between, and only between, a judgment creditor and a liability insurer in a case, like this, to recover damages for a refusal to settle, before trial, within the policy limits. Here, the excess liability asserted arises out of the relationship between the defendant, the insurer, and its insureds. Mrs. Douglas was a stranger to that relationship. The defendant owed her no duty at all, hence I fail to see how it could be liable to her in tort, for a breach of duty, for it owed her none.

It was decided recently in the case of *Paul v. Kirkendall*,[53] a decision by the Utah Supreme Court, that a judgment creditor having received payment of the policy limit could not garnish the insurance company, based on alleged excess liability due to bad faith of the company in failing to settle the tort claim within the policiy limits. Furthermore in the case of *Spencer v. State Farmer Mutual Automobile Insurance Com-*

51. 67 HARV. L. REV. 1175 (1954).
52. 127 F. Supp. 775 (W. D. Mo., 1955).
53. 6 Utah 2d 256, 311 P.2d 376 (1957).

pany,[54] the California Court of Appeals held there was no duty owing to a third party arising out of the insurance contract, hence an action directly against the insurer by the plaintiff seeking to establish excess liability would not lie. From these authorities it would appear that a third party has no privity of contract with the insurer, and that the company owes no duty in tort to third parties arising out of the insurance contract.

VIII. Insuring Both Parties to Accident

A difficult situation sometimes develops where the company insures both parties to an accident. In the case of *Tully v. Travelers*,[55] the company decided in view of its insuring both parties, to let a jury decide the issue of liability. The injured plaintiff in the tort action offered to settle for $9,000. The policy limit was $10,000. The settlement was refused and the jury returned a verdict of $15,000. The court held the evidence supported the plaintiff's claim that defendant was negligent because of his bad faith in failing and refusing to settle the injured claim merely because they insured both parties.

There are other aspects of this case of unusual interest in that the counsel for defendant in submitting the settlement proposal recomended that the offer not be accepted. The court held that this did not aid the company in view of their previously maintained position they would not settle the claim because they insured both parties. Another interesting aspect of this case is that correspondence between company and counsel was introduced in evidence. As previously stated, care should be taken in correspondence between the home office and counsel or the home office and its branch claim office not to use language which could be used to impale the company on the issue of bad faith or negligence.

The case of *American Casualty Company v. Howard*,[56] is interesting in several respects. The District Court held that "Only a foolish optimism would prompt the refusal of such an offer of settlement" and held the company liable. The Court of Appeals reversed holding that "Lawyers representing liability insurers of motor users are not required to be prophets who can accurately foretell the results of litigation in personal injury cases, nor does a mere mistake of judgment by these lawyers impose liability on these insurers beyond the policy limits. If these lawyers act reasonably, in good faith, and without negligence in refusing the proffered settlements, they, and the insurers they represent, have fully lived up to duties imposed upon them." The court then

54. 11 C.C.H. Auto Cases 2d 1394 (Cal. D. C. App. 1957).
55. 118 F. Supp. 568 (N.D. Fla. 1954).
56. 187 F.2d 322 (4th Cir. 1951).

stated: "It should be remembered that the premium on such policies varies with the insured's maximum limit of liability under the policy. Accordingly, when the insurer fully lives up to its duty there is no right in the insured to compel the insurer to offer the amount of its maximum limit in order to effect the amicable settlement of a claim against the insured and to protect the insured against a possible judgment in excess of the policy limit. Insured can readily secure all needed protection by purchasing and paying for a policy with a high limit of liability on the insurer."

A rather unusual case, *Ivy v. Pacific Automobile Insurance Co.*,[57] was decided recently by the California Court of Appeals. It appeared that devious means were used to try to bring in another carrier. As a part of the scheme, the attorney representing the company and the insured stipulated to a judgment against the insured substantially in excess of the policy and then sought to avoid liability for the insured by a covenant not to execute. The court was quite critical of the attorney's duplicity and pointed out the obligation of good faith which devolves upon both the company and the attorney where there is dual representation.

Another interesting sidelight to this subject is that the reinsurer may be held liable to its reinsured for a portion of the excess loss sustained by the original insured where the reinsurer participates in the settlement negotiations and declines a settlement within the policy limit under circumstances indicating bad faith. A court so held in the case of *Inland Mutual Insurance Company v. Peerless Insurance Company*.[58]

It has also been decided that a company may take an appeal from an excess judgment without being guilty of bad faith. The court did point out, however, the additional hazard to the insured as follows:

> We believe that where the company is the only one that can profit from a successful appeal, which if successful would subject its insured to another trial, the facts for reversal must be very strong. Under such conditions the chances of success must be correspondingly greater than the chances of failure. Not only must the circumstances be such as to point strongly to a reversal but, more important, they must be such that there is a great possibility that upon a second trial in any event a judgment will not be returned in excess of the coverage of the policy. *Hazelrigg v. American Fidelity and Casualty Company*.[59]

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57. 13 C.C.H. AUTO CASES 2d 713 (Cal. D. C. App. 1958).
58. 152 F. Supp. 506 (S.D.W.Va. 1957).
59. 10 C.C.H. AUTO CASES 2d 657 (Okla. 1957).

IX. SUMMARY

Lawyers especially understand how a course of conduct in the investigation, intensive preparation, and the heat of trial might appear advisable or worthy of the chance, whereas in retrospect the fortuitous or untoward development shows the course to have been inadvisable. This leaves room for second-guessing or the application of the cheapest wisdom – wisdom borne of the event. It is, therefore, much easier to establish negligence on the part of the company or counsel than bad faith. Thus it behooves the company and counsel to be especially circumspect and cautious in handling claims and suits in the states following the negligent rule. On the other hand, the bad faith rule is more reasonable and equitable of application. It permits errors of judgments and honest mistakes in areas of good faith discretion in the handling of various aspects of bodily injury claims and suits.

To avoid an undue extension of this discussion, quotations will be made from only a few of the leading decisions on this subject. Inasmuch as the language of the court in the case of *Hilker v. Western Automobile Insurance Company*,[60] so tersely states and circumscribes a course of conduct showing diligence and good faith, the following is quoted from the court's opinion:

> It is the right of the insurer to exercise its own judgment upon the question of whether the claim should be settled or contested, but because it has taken over this duty and because the contract prohibits the insured from settling, or negotiating for settlement, or interfering in any manner except upon the request of the insurer, such as assisting in the securing of witnesses, etc., its exercise of this right should be accompanied by considerations of good faith. Its decision not to settle should be an honest decision. It should be the result of weighing of probabilities in a fair, honest way. If upon such consideration it decides that its interest will be better promoted by contesting than by settling the claim, the insured must abide by whatever consequences flow from that decision, He has so agreed, but, as already stated, such decision should be an honest and intelligent one. It must be honest and intelligent if it be a good faith conclusion. In order that it be honest and intelligent, it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon knowledge of the nature and extent of the injuries as far as they can reasonably be ascertained.
>
> This requires the insurance company to make a diligent effort to ascertain the facts upon which an intelligent and good faith judgment may be predicated. If it exhausts the sources of infor-

60. 204 Wis. 1, 235 N.W. 413 (1931).

> mation open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good faith judgment may be exercised. But we do not go so far as to say that, in order to characterize its judgment as one of good faith, it is necessary that it should absolutely exhaust all sources of information. We go only so far as to say that it should exercise reasonable diligence as the great majority of persons use in the same or similar circumstances.

The recent case of *Larsen v. Anchor Casualty Company*,[61] decided by the Minnesota Supreme Court, is a very good one to study in many respects. It is quite apparent from the court's opinion that the Anchor Casualty Company was diligent in every respect. It conducted a prompt and thorough investigation, kept its insured apprised of developments and the opportunity to associate counsel. The policy limits were $10/20,000. The accident was a two-car head-on collision of cars topping a rise in the road. The preponderance of evidence was that the insured was to the right of the center. Carriers for both parties contributed towards a settlement of a guest case in the insured's car. The insurer for the adverse car paid the property damages and settled the personal injury claim of the insured of the Anchor Casualty Company. Larsen, the insured, consistently denied any blame for the accident. The demand was $8500 on a $10,000 policy, which the company declined. The jury returned a verdict for $62,500.00. This case is also a good one to study from the standpoint of a statement we all have heard trial lawyers of many years' experience make: "You can't ever tell what a jury will do". From the evidence as reported in the case, the preponderance seemed heavy in favor of the Anchor Casualty Company's insured and it appeared almost incredible that a jury should have returned a verdict for $62,500 under the circumstances.

In this respect, we can sympathize with the defendant's counsel when he wrote to the company relative to the outcome of the trial:

> It is difficult, if not impossible, for me to understand the action of the jury in this case, as the trial turned out much more satisfactory from a defense standpoint than I anticipated at the beginning of the trial. We had no surprises during the trial; there were no witnesses called by the plaintiff that we did not anticipate, with one possible exception, that being the brother-in-law of the plaintiff; and the witnesses of the defendant developed to be far better witnesses than I had anticipated prior to the trial.

Here are some pertinent excerpts from the court's opinion:

> We have kept in mind the rule, and given due recognition to

61. 82 N.W.2d 376 (Minn. 1957).

> it, that it is the duty of the insurance company to exercise good faith toward the insured, both in the investigation under a liability policy and in the defense of the law suit and in the payment of its obligations under the insurance contract. We cannot, however disregard Anchor's right to defend an action where reasonable and probable cause for making the defense exists.

The court then quoted from the recent case of *Frank B. Connet Lumber Company v. New Amsterdam*,[62] decided by the Eighth Circuit. The following is quoted from that opinion:

> It may be that a liability insurer's negligence, misjudgment or lack of foresight in failing to settle, and in defending against, a personal injury claim, may be so inexcusable as to justify a finding of bad faith, but we think there was an inadequate evidentiary basis for such a conclusion in this case. Under the evidence in the Reimers case the jury could have found that Reimers was guilty of contributory negligence. One reasonably could not be convicted of bad faith for believing and asserting that, on a clear, bright day, the operator of an automobile properly equipped with brakes and steering gear who collided with a truckload of lumber being backed slowly into the street, was exercising reasonable care. The inaccuracy of a prophecy as to what a jury will do in the trial of a personal injury case where the evidence is conflicting or gives rise to conflicting inferences does not, in our opinion, justify a finding of bad faith.

The court in the *Larsen* case also quoted from *Farm Bureau Mutual Automobile Insurance Company v. Violano*,[63] as follows:

> So long as it acts in good faith, considering the interests of the insured as well as its own interests, and not capriciously, an insurer cannot be required to settle a case rather than to litigate a doubtful issue, nor to bear the financial burden imposed upon the insured if ultimate liability should exceed the policy limit.

The court then quoted pertinently from the case of *Southern Fire and Casualty Company v. Norris*,[64] as follows:

> The insurer is under no duty to compromise a claim for the sole benefit of its insured if to continue the fight offers a fair and reasonable prospect of escaping liability under its policy or getting off for less than the policy limit. The insured surrendered to the insurer the right to investigate and compromise or contest claims, knowing that, in the event of claim the insurer will have its own interest to consider. But an insured also has a right to assume that his interests will not be abandoned merely because the insurer faces the prospect of a full loss under the policy.

62. 236 F.2d 117 (8th Cir. 1956).
63. 123 F.2d 692 (2nd Cir. 1941).
64. 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

> The relation is one of trust calling for reciprocity of action. The insured owes the duty of full cooperation — the insurer the duty of exercising good faith and diligence in protecting the interest of the insured.

In *Georgia Casualty v. Mann*,[65] the court in its opinion used some realistic and pertinent language:

> The gift of prophecy has never been bestowed upon ordinary mortals, and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case.

So we could go on ad infinitum. In essence, as in all tort cases, as you lawyers know so well, each case has to be considered on its own particular facts, circumstances, color and drama. The precedents pro and con are merely roadsigns along the way and guideposts for our conclusions.

65. 242 Ky. 447, 46 S.W.2d 777 (1932).

ESTATE PLANNING TECHNIQUES: CHARITABLE GIFTS AND OWNERSHIP OF FOREIGN PROPERTY*

BY GEORGE D. WEBSTER**

There are many fringe benefits of charitable giving (not related to estate planning) which I do not propose to discuss, such as the recent assertion by an insurgent stockholder of a large and well-known U. S. corporation. He declared that through the means of the 5% corporate deduction several members of the 20 man Board of Directors, by making appropriate and selective gifts out of the corporate "till", had become trustees of their respective alma maters.

The first and major portion of my talk relates to inter vivos and testamentary charity which saves income, estate and gift taxes. In this connection, it should be made clear that while I do not intend to impugn basic charitable motives, it is still entirely permissible and desirable to channel charitable inclinations along lines which will be to a taxpayer's financial advantage. One writer has referred to this area as the Treasury Department's "bargain counter."[1] The other side of the picture is, however, that the charitable deduction is designed to encourage voluntary gifts to private charity and to limit government controlled and financed charity.[2]

Throughout this entire discussion in respect to charitable giving, two basic facts should be kept in mind:

(1) You cannot make money by giving it away, except in the few remaining instances where it is possible to obtain a so-called double deduction by charitable giving. The more usual question is: a gift to charity assumed, how can I give it with greatest personal tax advantage?

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1. Koch, *The Treasury's Bargain Counter: Contributions,* 33 TAXES 249 (1955). See also, Murphy, *Taxes and Sweet Charity,* 29 N.Y. STATE BAR BULL. 404 (1957); POMONA COLLEGE, ESTATE PLANNING AND EDUCATION (1958); Smith, *Income Tax Planning for Charitable Gifts,* 1953 ILL. L. FORUM 601 (1953); Chommie, *Federal Income Taxation: Transactions in Aid of Education,* 58 DICK. L. REV. 189 (1954); Wellen, *The Unlimited Deduction for Charitable Contributions,* 7 S. W. L. J. 38 (1953); Brandis, *Tax Saving by Means of Charitable Gifts,* 27 N. CAR. L. REV. 69 (1948); COMMUNITY CHESTS, WISE GIVING IS GOOD BUSINESS (1952); Dryes, *Testamentary Gifts of Income to Charity,* 13 TAX L. REV. 49 (1957).

2. See generally, Reiling, *Federal Taxation: What Is a Charitable Organization?* 44 A. B. A. J. 525 (1958).

(2) Legislative and administrative changes are needed in this area. There is no consistent or uniform statutory pattern for charitable exemptions and deductions in the income, estate and gift tax areas. It is an area that has been neglected, and this is, in part, explanatory of its piecemeal and special nature. The special nature of the legislation is well demonstrated by such amendments as that made this year by P. L. 85-367[3] for the benefit of Deerfield Academy. This change amending Section 512(b) of the Internal Revenue Code of 1954, excludes from the definition of "unrelated business income" the income of certain testamentary charitable trusts derived as a limited partner. So far as is known the only application is to the estate of the late Mr. Merrill of Merrill Lynch, Pierce, Fenner and Smith which has a continuing interest in the brokerage firm, an interest now in trust for Deerfield. It is difficult to oppose this type of legislation because opposing charity in any form is like opposing George Washington at a DAR convention even though much of the legislation relates to "pulling somebody's chestnuts out of the fire."[4]

Administratively, the situation has been difficult since this area generally has not attracted as much good personnel in the Internal Revenue Service as has been the case with Subchapters C and J. The last year, however, has brought several encouraging improvements.

Basic Requirements for Deduction

Initially, we should note briefly the basic requirements for deduction. The contribution must be to a corporation, trust or other formal organization. The organization must be on the cumulative list, on which there are now some 30,000 organizations.[5] Whether the organization should properly be on the list is of course a separate and real problem; the Service has made some strong public statements in this regard, with insubstantial private action.

An individual's deduction for federal income tax purposes is limited under Section 170 to 20% of adjusted gross income, with the additional 10% allowance for churches, regular schools, hospitals and medical

3. Pub. L. 367, 85th Cong., 2nd Sess. (April 7, 1958).

4. A piece of special legislation exempting a single foundation was passed in 1955—Private Law 490, applicable to Cannon Foundation.

5. The Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1954 (revised to June 30, 1957), published by the Internal Revenue Service contains approximately 30,000 organizations. See also, American Foundations Informations Service, American Foundations and Their Fields XIII (1955).

research organizations.[6] There is no carryover from one year to another. In this connection it should be noted that the change in 1952 of the basic rate from 15 to 20% and the addition of the 10% provision in 1954 were made to encourage private contributions.[7] Whether this incentive has been provided is questionable since in a recent year the contributions for the brackets under $100,000 averaged between 3 and 4% in most of such brackets.[8]

This additional 10% must be "to" and not merely for the use of a charity. Left open in the Treasury Regulations[9] under Section 170 is whether arrangements whereby charitable organizations act as trustees, pay the grantor the trust income for life, and receive the remainder upon his death qualify under this special 10 per cent rule. More broadly, there is the question whether a remainder interest following any trust could qualify as a gift "to", not for the use of, the remainderman for purposes of the 10 per cent rule. Certainly a present income interest in trust does not so qualify. There is a question as to whether the presence of a trust arrangement similarly taints the remainder.

There are two basic qualifications to this 20%-30% rule:

(1) Under Section 170(b) (1) (c), if during the taxable year and 8 out of 10 preceding years, the contributions exceed 90% of taxable income for each of such years, a taxpayer is entitled to a deduction for 100% of his contributions. The 1939 Code contained a similar provision except that the 90% requirement had to be met for each of the ten preceding taxable years. In 1956, the 8-out-of-10-year rule was extended

6. INTERNAL REVENUE CODE OF 1954 § 170. "Medical research organizations" were added to the special 10% provision by Pub. L. 1022 (Aug. 7, 1956). A number of bills now pending in Congress propose to increase this 10% group. See UNITED STATES HOUSE OF REPRESENTATIVES, LEGISLATIVE CALENDAR, April 5, 1958.

7. As to the 1952 change, the Senate Finance Committee stated (S. Rep. 1584, 82nd Cong., 2d Sess. (1952)):

> Your Committee is of the opinion that by increasing the 15 per cent limit to 20 per cent, such needed relief will be given to colleges, hospitals, and other organizations. . . . Many of the smaller colleges whose alumni have not sufficient means to make adequate contributions are able to continue their existence only through gifts or contributions received by one or two prominent families in their community.

See also S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954), p. 29.

8. SURREY AND WARREN, FEDERAL INCOME TAXATION 277 (1955 ed.) state:

> The increase, however, can provide an incentive for only a few individuals. In 1948, the contributions in the brackets under $100,000 averaged between 3% and 4% in most brackets, rising to 7% in the $1,000,000 bracket and 15% in the $5,000,000 bracket.

9. T.D. 6285, issued March 14, 1958, promulgating the regulations under Section 170.

to all taxable years to which the 1939 Code applies.[10] In the recent case, *Kress v. U.S.*,[11] the Court of Claims decided that the term "net income" (and thus "taxable income" under the 1954 Code) as used in this provision, does not include the entire amount of long-term capital gain but only the percentage of such capital gain as is taxable as income.

(2) The two year trust to be discussed later also increases the limitation in excess of 30%.

There is no limitation as to the charitable deduction for purposes of the federal estate and gift tax.[12] However, there are limitations under state law as to the amount which may be given to charity for certain periods prior to death.[13]

Almost any type of property transfer is sufficient; this factor is only relevant in respect to the amount of the contribution. If the contribution is in other than money, the basis for calculation of the amount thereof is the fair market value of the property at the time of the contribution. For instance, in Rev. Rul. 57-293,[14] an individual transferred to a museum a 3 months a year use of an art object, reserving the right to possession during the remainder ¾ of the year. Thus the donor was entitled to a deduction of ¼ the present value of the art piece.[15]

The Service takes the position that the value of contributed services is not deductible; this includes the value of legal aid or voluntary defender work by a lawyer or the furnishing of advertising space by a newspaper.[16] However, I am not completely convinced as to the correctness of this position; if a Certified Public Accountant should make a contract with a charity for a three year period to do 10 hours of accounting work a month, such a contract right would be an item of

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10. Pub. L. 408, 84th Cong., 2nd Sess. (Feb. 15, 1956), amending Section 120 of the Internal Revenue Code of 1939.
11. *Kress v. U.S.*, 159 F. Supp. 338 (Ct. Cl. 1958).
12. I.R.C. (1954), §§ 2055 and 2522.
13. See FLA. STAT. § 731.19 (1957 Supp.); GA. CODE § 113-107.
14. 1957 — 26 I.R.B. 13.
15. See *Tax Rulings Eased on Gifts of Goods*, N. Y. Times, June 1, 1958, p. 4F, col. 3. Also discussed therein is the practice of buying a work of art (sometimes marked down because it was going to be contributed), having it appraised independently and then contributing it and taking the appraised (and thus higher) amount as a charitable deduction.
16. O. D. 712, 3 C.B. 188. The fair market value of blood given to a blood bank is not deductible since the Service considers this a service. Rev. Rul. 162, 1953 — 2 C.B. 127, noted in 97 J. OF ACCTY. 364 (1954). A similar result has been reached by the Service in respect to the contribution of advertising space by a newspaper. Rev. Rul. 57-462, 1957-42 I.R.B. 20.

value, and such value should be deductible.[17]

When a charitable bequest is contested, a compromise amount paid to the heir is not deductible as a charitable contribution, since it is received by the heir as an "inheritance", not as income. On the other hand, an indefinite or contingent bequest to a charity may be deductible where a legatee or donee of a power disclaims in favor of the charity. Section 2055 (a) now provides that the disclaimer must be made before the date for the filing of the estate tax return.[18]

Three other relevant items in respect to charitable contributions of property should be considered. In Rev. Rul. 55-138,[19] and in the proposed regulations under Section 170, certain adjustments were to be made to the value of contributed property; costs and expenses of acquiring the property, incurred in the year of contribution, were made non-deductible. In addition, to the extent there had been such costs and expenses in a prior year, the amount of deduction was to be reduced. In the final regulations, the Service has retreated from this position. Costs and expenses incurred in the year of contribution are still to be considered non-deductible. But costs and expenses of prior years need not go to reduce the amount of the deduction, except to the extent they are reflected in the cost of goods sold in the year of contribution.[20]

An indefensible item is contained in the final section 170 regulations.[21] There is contained an example which may restrict the creation of charitable trusts with stock of closely held corporations, whose fiscal policies are "controlled" by the family group. The example given in the regulations is a situation where there is no "adequate guarantee" that the charity will receive the funds in question. But there will be difficulties in determining what constitutes "control" or an "adequate guarantee". This provision is significant and should be carefully considered if the making of charitable gifts of closely held stock is being considered.

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17. The issue was presented in *Joseph P. Monaghan,* 16 T.C.M. 159 (1957), but the deduction was denied for failure of proof. Judge Bruce stated:

> . . . Petitioners' witness, Father O'Connor, was unable to testify with certainty that petitioners performed the services in 1948. Other evidence was apparently available but was not offered. Accordingly, even if the value of legal services in such circumstances would be deductible (see Mertens' Law of Federal Income Taxation, Vol. 5, sec. 31.05) the deduction must be disallowed for failure of proof.
>
> However, the unreimbursed expenses of attending a church convention as a delegate are deductible. Rev. Rul. 58-240.

18. Cf. *Estate of James M. Schoonmaker,* 6 T.C. 404 (1946).
19. 1955 — 1 C.B. 223.
20. Treasury Regulations issued under Section 170.
21. *Ibid.*

Another relevant factor is the situation where income for a stated period, for instance ten years, is being given to charity in trust. The Treasury Tables used in calculating the value of such a contribution are based on a 3½% return. Therefore there is more advantage in transferring property with a low income rate to a charitable trust. Thus if you contribute $10,000 par value 2½% bonds for ten years, the Treasury Tables would show a deduction of $2,900 even though the total interest that could be received is only $2,500. There is a possibility that the Service might refuse to use the 3½% tables where the actual return is substantially less than 3½%.[22]

APPRECIATED PROPERTY[23]

Section 170 affords the taxpayer an opportunity to make a charitable contribution of appreciated property in such a manner that the after-tax yield is greater than that which would have resulted from the sale of such property. There has been no direct legislative attack on this since 1937.

A taxpayer must of course be in a very high surtax bracket before his outright charitable contribution produces more in the way of tax saving than he would realize from the sale after the 25% alternative tax. The bracket required to produce such a tax saving will depend also on the amount of appreciation in the property donated.

The formula set forth in a recent article[24] is as follows:

$$B = X \div .75\ Y \qquad (X = \text{cost})$$
$$X \div Y \qquad (Y = \text{appreciation})$$

"B" is the breakeven bracket, i.e., the point when the charitable contribution is worth more dollarwise than the sale proceeds after payment of capital gains tax. If the property has doubled in value, then the breakeven figure is 87.5%. If the property has gone up ten times in value, the breakeven figure is 77.3%.

Somewhat more profitable charitable giving is possible where the taxpayer instead of giving the appreciated property outright to a charity, makes a bargain sale of the security at his cost to the charity

22. See R.I.A., TAX PLANNING REPORT, *Making the Most of Contributions and Gifts* (October, 1957).

23. A method of giving not discussed in this paper is by an installment sale. This enables a taxpayer to give a piece of property which more than absorbs his maximum charitable deduction in a single year. Cf. *Andrus v. Burnet,* 50 F.2d 332 (C.A.D.C. 1931). Recently, the Service has ruled that the transfer of an undivided ⅔ interest in real estate is deductible. Rev. Rul. 58-261. Similarly, where the owner of a patent contributes an undivided present interest, the fair market value of such interest is deductible. Rev. Rul. 58-240.

24. Palmer, *Tax Saving Through Charitable Giving,* 36 TAXES 40 (1958).

and deducts as a charitable contribution the difference between the fair market value and the bargain sale price.

Where the gain on the outright sale of the property would be taxed at the tax rate of 25%, the breakeven bracket will be 75%, regardless of the amount that the security has appreciated. At that rate, the after tax sale proceeds and the tax-saving value of the deduction are obviously the same. Similarly, where the gain on the outright sale of the property would be fully taxable as a short term gain, the breakeven bracket will be 50% in all cases.

There are few cases dealing with the charitable deduction obtained as the result of a bargain sale to a charity. In *John M. Coulter,*[25] the taxpayer had sold real estate to a charity for $30,000. He filed no gift tax return but later claimed that he was entitled to a charitable deduction for the difference between the fair market value of the property sold and the sale price. The Tax Court found as a fact that the fair market value of the property was not in excess of the sales price and added by way of dictum (p. 250) that

> . . . there is no evidence that the sale would have been any the less consummated if the available purchaser had not been a charitable or educational institution or that the donative purpose formed any significant or impelling component of petitioner's motivation. . .

Accordingly, if a bargain sale is to be made, it should be perfectly clear to the purchaser that it is making the purchase at a price below the market value of the asset and that the seller has the express intention of making a contribution to the charity of the difference between the market and sale prices.

The greatest tax savings resulting from charitable donations of appreciated property may be obtained where a taxpayer donates his equity in collateralized property. Assuming a borrowing of 70% of the fair market value of the appreciated property, when the property has doubled in value, the breakeven point equals 58.3%. When the appreciation has been tenfold, the breakeven bracket equals 24.2%. Whether the technique of borrowing on appreciated property and then donating the equity therein to a charity will stand up, is not as clear as the bargain sale situation.

The first step is to borrow on the security in excess of its basis. It has been clearly established that such borrowing is not a taxable event and that no gain is realized at that point. The gift of the donor's equity is another matter. To find a sale, it is necessary to equate the

25. 9 T.C.M. 248 (1950).

assignment of the donor's equity subject to his indebtedness with the assignment of the donor's equity and the assumption of his indebtedness.

In *Herff v. Rountree,* [26] the taxpayer borrowed some $99,000 on his $110,000 home and had then given the home to Southwestern University (Memphis), subject to his debt, but reserving a life estate for himself and his wife. The taxpayer after the gift of the house gave $24,000 in cash to Southwestern. The Commissioner sought to treat the $24,000 as income to the taxpayer when it was used as part payment on the taxpayer's mortgage debt. The Court rejected this argument stating that if the taxpayer had been compelled to pay the debt, he would have had the right to obtain reimbursement against the remainder interest.

The *Herff* case instructs that the taxpayer who plans to assign his equity must make it clear to the charitable donee that the pledged property is the primary source for the satisfaction of the donor's debt, and, to the extent he is personally liable, he retains his right to have recourse against the property as surety. The Internal Revenue Service informally takes the position that the gift of collateralized securities does result in income to the donor.

A gift of appreciated securities may have another use, i.e., to avoid the application of Sec. 16 (b) of the Exchange Act of 1934 which precludes so-called "insider" profits. In *Truncale v. Blumberg,*[27] the plaintiff sought to recover certain profits under Section 16 (b) on the theory that a corporate insider who had bought securities at one price and donated them to charity (in this six months' period) at a time when their value exceeded their cost had realized a "profit." The Court rejected this argument. Accordingly, charitable-giving is a method of taking advantage, as an officer or director, of inside information and being able to dispose profitably of such appreciated "hot" stock. The Section 16 (b) penalties are considerably more penal than the Section 306 penalties of the Internal Revenue Code of 1954.

Gift Annuity and Life Income Contract

The use of annuity agreements by charitable organizations to raise funds is not of recent origin. The American Bible Society was the pioneer. Pomona College, the Salvation Army and all churches have been

26. 140 F. Supp. 201 (M. D. Tenn. 1956).
27. 80 F. Supp. 387 (S.D.NY. 1948). Judge Medina stated (p. 389):
> On the face of the matter it seems nothing short of absurd to consider these gifts as "sales" within the meaning of Section 16 (b). The notion that gifts to charity might result in "profits" to the donor seems equally fanciful.

active in this area. These are in two transfer forms – the gift annuity and the life income contract.[28] A cash or property transfer in exchange for a stipulated annuity is often made. The excess in value of the property transferred to a charity over the value of the annuity to be paid by the charity is a contribution to the charity, regardless of the form of the transaction. The life income contract is merely a retained life income interest in the property donated. There are several factors to consider in determining which method is preferable: (1) The return from a life income plan will generally exceed that from a gift annuity. (2) The charitable deduction is generally higher on a life income plan. (3) The donor who wishes to avail himself of the additional tax feature obtained by transferring appreciated property to a charitable organization and receiving a charitable deduction based on the fair market value of the property must use a life income contract or be subject to a capital gains tax. (4) The partial taxability feature of gift annuity may be desirable. (5) A gift annuity is a hedge against inflation.

One unpublished ruling of particular interest has been issued by the Service in this area: The Presbyterian Foundation ruling.[29] This is the situation where securities have appreciated in value and if sold, a capital gains tax will be payable. Rather than pay the tax on this gain, the taxpayer makes a gift of the appreciated securities to the foundation. The securities are then sold by the foundation without tax and the proceeds are placed in tax-exempt securities. The income therefrom is paid for life to the donor-taxpayer, who at the time of the gift receives a charitable deduction and who has a larger principal sum in the tax-exempts. The difficulty with this ruling is that the foundation may be making the sale of the securities as agent for the taxpayer; the capital gains tax may be payable by the donor. Other organizations are currently experiencing difficulty in obtaining this same ruling.

Life Insurance

Life insurance is the means of making a charitable contribution without impairing working capital and without working an injustice to one's own family. In the usual situation, the donor insures his own life and names a charitable organization as the beneficiary. For purposes of obtaining the income tax deduction, the insured-donor cannot reserve the right to change the beneficiary or surrender for cash. Accordingly, the organization can be named as beneficiary under an irrevocable designation or the donor can give full ownership in the

28. For a full discussion of this type of giving, see 1957 Wash. Univ. L. Q. 150.
29. See Announcement by The Foundation of the Presbyterian Church in the U.S.A.

insurance. In effect, under the irrevocable designation, the insured and the beneficiary would act jointly if it became necessary to exercise policy rights, such as loan and surrender rights. Since the insured does have some incidents of ownership the proceeds are includible in the gross estate of the decedent.

Thus, under both the irrevocable designation and the outright ownership arrangements, the insured can carry a policy for charitable purposes at low cost during his lifetime. Under each he gets the right to deduct premiums paid from his current income. But at death, the irrevocable arrangement results in the marital deduction being increased by an amount equal to one-half of the proceeds of the policy.[30] The net effect is that estate taxes are reduced and cash is conserved for the family. Of course the surviving spouse must receive outright property at least equaling the allowable marital deduction.

GIFTS OF REMAINDERS, CONTINGENT INTERESTS AND USE FOR TERM

The value of a vested remainder devised to a charity is determined as of the date of death in accordance with the mortality tables applicable to any intervening interests. In the valuation of a remainder subject to a prior life estate, the question has been raised whether the life estate should first be valued and then subtracted from the value of the total charitable corpus at the date of death, or whether the charitable remainder should be valued directly. The actuarial "curtate" factor causes the direct computation to produce the smaller charitable deduction.[31] In the situation where a remainder is to take effect upon the death or remarriage of a widow, it has been held that the valuation may be made on the basis of the "American Remarriage Table."[32]

The Supreme Court has held that no deduction is allowable if the charitable remainder is contingent. The decision involved contingencies of marriage and childbearing, which were not considered susceptible of valuation.[33] It is open to the estate, however, to prove the practical impossibility of defeating a charitable remainder.

A variation of the contingent bequest problem is created by remainder interests subject to invasion by the life beneficiaries. It may be shown in this situation that the trust income is reasonably sure to cover specific annuities or other bequests.[34] If some invasion is likely,

30. See Meir, *Charitable Bequests and Life Insurance,* 11 C.L.U.J. 331 (1957).
31. *Betty Dumaine,* 16 T.C. 1035 (1951).
32. *Commissioner v. Maresi,* 156 F.2d 929 (2nd Cir. 1946).
33. *Humes v. U.S.,* 276 U.S. 487 (1928).
34. *Commissioner v. Upjohn's Estate,* 124 F.2d 73 (6th Cir. 1941).

but if the amount can be ascertained with reasonable accuracy based upon income yields and life expectancies, then the deduction should be allowed.

The problem becomes more difficult where the invasion is not dependent upon a precise monetary standard, but is measured instead by unknown future circumstances. Such contingencies do not necessarily defeat the deduction. Thus where the right to invade corpus is conditioned upon the need of the life tenant, the estate may demonstrate the extreme improbability of such need. Acceptable standards have been held to be "support and maintenance"[35] and "comfort and support".[36] Unacceptable standards have been held to be "use and benefit,"[37] "happiness" of life tenant,[38] and "comfort and convenience."[39]

In connection with remainders, one recent piece of special legislation should be noted, Sec. 2055 (b) (2).[40] If the decedent's spouse is over 80 years of age at the decedent's death, is entitled to the life income of a testamentary trust, and has power of appointment over the remainder to charity, then she or he may execute an affidavit within one year after the decedent's death specifying what charities she or he intends to appoint to. In such case the remainder is subject to deduction in the decedent's estate.

Use for Term

When an individual creates a charitable trust, he normally obtains a present deduction for the value of his contribution to the trust, in addition to relieving himself of future taxable income from the contributed property. Thus under the pre-1954 Clifford regulations, it was ruled that where the taxpayer placed property in trust to pay the income to a charity for more than ten years, with the reversion to the grantor, he was entitled to a deduction for the present value of the ten-year income right, even though such income would not be taxable.

The 1954 *Code* made two changes in this basic rule, as follows:

(1) The 10 year requirement is waived in the case of a two year trust, in which the income for two years goes to one, 30% charity: a church, regular school or hospital.[41] Therefore, a taxpayer may deflect his income for two years without any percentage limitation. There is no deduction upon the creation of

35. *James M. Schoonmaker Estate,* 6 T.C. 404 (1946).
36. Rev. Rul. 54-285, 1954 — 2 C.B. 302.
37. *Newton Trust Co. v. Commissioner,* 160 F.2d 175 (1st Cir. 1947).
38. *Merchants National Bank v. Commissioner,* 320 U.S. 256 (1943).
39. *Louis Schumacher Estate,* 2 C.T.M. 1018 (1943).
40. Added by Pub. L. 1011, 84th Cong., 2nd Sess. (Aug. 6, 1956).
41. I.R.C. § 170 (b) (1) (D) (1954).

the trust but the income is not taxable to the grantor. The Mills Bill (H.R. 8381)[42] originally sought to delete this two-year provision, but the opposition from the colleges was too strong and it was not part of the bill as it passed the House.

(2) No deduction is allowed for the value of any transfer to a charity (even to a trust for ten years) if the grantor has a reversionary interest which exceeds more than 5%.

It is to be noted that this restriction upon the grantor's deduction is broader than the exemption of his income under the Clifford provisions. Thus the grantor is denied deduction for a reversionary five-year trust for a charity and remains taxable upon the trust income. Similarly, he is denied deduction for a reversionary 11 year trust, even though such a trust is outside the old Clifford limits.

Section 9 of H.R. 8381[42a] would extend the provisions of Section 170(b)(1) to prohibit the charitable deduction for gifts in trust when the donor's spouse, ancestors or descendants have a remainder interest in the property worth more than five per cent. This is one of the few places where the donor is better off financially (at least to the extent of more spendable income) by giving money away than keeping it. Assume a taxpayer in the 72% bracket who owns certain property worth $100,000 which returns $4,000 a year in income. The estate plan calls for the ultimate gift of that property to the children. A trust is set up with the income to go to a charity for the next three years. If the taxpayer were to hold on to the property and collect $4,000 a year for the three years, there would be left after three years only 28% of the $12,000 or $3,360. But by putting the property in trust, a charitable deduction of $9,800 may be taken in the first year which will save $7,056 in the first year in income taxes. Thus by making the transfer in trust, the after-tax income is increased from $3,360 to $7,056, and this higher amount is received in the first year rather than over a three-year period.

There is strong opposition from the colleges to this proposal.[43] One argument used against it is that this is a piecemeal method of deleting the full deduction for gifts of appreciated property. Another stated objection in the public hearings before the Senate Finance Committee

42. Passed by House of Representatives and now pending in the Senate.

42a. This provision was deleted by the Senate Finance Committee as it reported the bill out.

43. See Hearings before the Committee on Finance, United States Senate, on the Technical Amendments Act of 1958, 85th Cong., 2d Sess., pp. 144 *et seq.* At p. 146 a representative of the American Cotton Manufacturers Institute added: "To us it seems a discrimination against the owner of a closely held family corporation as against other persons."

was that this would preclude a deduction for a gift to a church with remainder to a wife, but allow the deduction if the remainder was to a mistress.[44]

One more item about Section 170 and Sec. 9 of the Mills Bill should be noted. Both in terms apply only to transfers in trust. Apparently, then a charitable deduction would be available (even assuming enactment of Sec. 9) for the value of a legal life estate or term for years transferred to charity, where the transferor retains or gives to his spouse, ancestors or descendants a remainder interest in property exceeding 5%.

TESTAMENTARY DISPOSITIONS TO CHARITY

A bequest must be fixed or readily ascertainable. Some of the problems here are largely of draftsmanship. In a general charitable bequest, the words to be used are "the executor shall distribute the bequest." The key phrase is "shall distribute", for a general bequest is deductible only where the duty of the executor to distribute the funds among charitable organizations or for charitable purposes is sufficiently clear to be enforced in a court of law. A simple grant of authority to the executors to make the distribution is not enough. For example, where a bequest is left to the executors or to third persons with the hope expressed by the testator that the bequest will be used for charitable purposes, no deduction is allowable even though the funds are promptly turned over to eligible exempt donees.

A divided First Circuit[45] has held that the will itself must make the bequest which gave the executors discretion to select the beneficiaries, even though a separate memorandum from the decedent was sufficient to create a constructive trust. The Second Circuit[46] has disagreed with this result. The Service has ruled[47] that the will must specify the organizations and amounts, but the facts presented for that ruling apparently involved complete discretion in the executor even as to the aggregate amount of charitable gifts.

Generally, a state death tax is not deductible from the gross estate, but is allowable as a credit. Nevertheless, if such tax is payable out of a charitable bequest, the executor may elect to deduct that tax if the resulting tax benefit inures to a charity.[48] For example, if a state imposes a tax on a charitable bequest, then the tax must be paid from the

44. *Ibid.*, pp. 162 *et seq.* (Statement of Mr. Clinton Davidson).
45. *Delaney v. Gardner* 204 F.2d 855 (1st Cir. 1955).
46. *Marine Midland Trust Co. v. McGowan,* 223 F.2d 408 (2nd Cir. 1955).
47. Rev. Rul. 55-335, 1955 — 1 C.B. 455.
48. I.R.C. § 2053(d), (1954) added by Pub. L. 414, sec. 2, 84th Cong., 2nd Sess. (Feb. 20, 1956).

charitable bequest. The estate tax charitable deduction would be limited to the amount of the bequest less the state tax paid from the bequest and the federal estate tax would be increased by the corresponding increase in the taxable estate of the decedent. This used to be the rule in the District of Columbia. There were cases arising under that rule where there was no estate tax until the inheritance tax was paid, at which time, the gross estate was increased sufficiently to create an estate tax. In any event, under Sec. 2053 (d), a deduction from tax is now provided, so that such a result is no longer possible.

Testamentary Gift of Income

Like the inter vivos gift to charity of income from property, the testamentary gift of income, gains, in effect, a double tax deduction. The present value of the gift is an estate tax deduction. As the income is received by the tax-exempt charity and not by the testator's taxable beneficiaries, no income tax is payable thereon.

Assume that the will of a testator disposing of a $1,000,000 estate contains a bequest of $10,000 to charity. The testator alters his will to provide for a bequest of income to charity, which according to the Treasury Tables, will be equal in value at date of death to $10,000. If he selects ten years for the duration of the charity's interest, he will have to set aside principal in the amount of $34,355 to obtain a $10,000 deduction. His beneficiaries will receive $24,355 less at his death, but $10,000 more ten years later. This is equivalent to a tax-exempt yield of 3.5% compounded for ten years on the $24,355.[49]

Family Foundation

The family foundation may be used to retain control of a business, either by the use of gifts of common stock to the foundation or by gifts of Section 306 preferred stock (retaining the voting control in the family). The gift of 306 stock is more advantageous than the gift of appreciated securities since by this method the ordinary income tax and not merely the capital gains tax is avoided. The relevant considerations involved are discussed in full elsewhere.[50]

There is one further problem in respect to retaining control of the foundation. Such control is usually preserved by setting up self-perpetuating trustees or directors, the survivors selecting new directors to replace others where necessary. Draftsmen have exercised remarkable

49. For a full discussion, see Dryes, *Testamentary Gifts of Income to Charity*, 13 Tax L. Rev. 49 (1957).

50. *E.g.*, Casey, *Estate Planning by the Donor: Perpetuating Control; Provision for Family*, in Second Biennial Conference on Problems of the Charitable Foundation 131 *et seq.* (1955).

ingenuity in drafting foundation charters to provide family control. The members of the foundation should be confined to lineal descendants and other members of the founder's family. A charter may provide that voting rights be issued according to the contributions to the foundation. Such voting rights may be transferred by gift during life as well as at death.

An example of where this was not followed is in the recent example of the Kress Foundation. There, the control of the foundation is now out of the hands of the family; and the foundation controls the corporation in owning 42% of the stock of the corporation.[51] One other facet of the Kress problem earlier this year was whether the corporation could use its tax-exempt funds to engage in a proxy fight for control of the corporation. By the turn in events this became unnecessary, but it may be that this is not a proper function for a charitable organization.

There is another advantage in charitable giving through the vehicle of the family foundation. An individual can receive a charitable deduction only if the recipient is a U. S. organization. However, an individual can give the same money to his U. S. foundation, and the U. S. foundation can then in turn give the same amount to a foreign charity, and this is permissible under the federal tax laws.[52] I know of at least one foundation that was set up for this purpose. In this connection, it should also be noted that Section 2055 contains no requirement like Sec. 170 that the recipient be organized in the U.S. Thus bequests or devises to a fund organized in a foreign country may be deductible for estate tax purposes, but inter vivos gifts to the same organization will not be deductible for income tax purposes.

The Service gives some indication of tightening up on the deductibility of contributions to organizations which function abroad. The proposed regulations under Section 170 permitted the deduction by an individual to a domestic charitable organization, even though some or all of the funds might be used in a foreign country. The final regulations have stricken the words "or all". To what extent this indicates a tighter policy is at this time conjectural.

Tax treaties also affect this area. Under the Canadian treaty amendment effective for 1957, a deduction is allowable for contributions to a Canadian organization if it otherwise satisfies charitable requirements, but the deduction is limited to a percentage of the taxpayer's income from Canadian sources.[53]

51. See N.Y. Times, March 2, 1958.
52. This factor was considered by the Reece Committee in 1954.
53. Tax Convention, Art. XIII D.

APPLICABLE STATE LAWS

The income tax deductions for charitable contributions vary in the several states.[54] Certain states do not permit an inheritance tax exemption for a bequest made to a recognized charity unless the institution receiving the bequest is located within the state. However, many states in recent years have enacted a reciprocal provision which permits the charitable exemption to institutions located in certain other states which likewise have a reciprocal provision.

FOREIGN REAL ESTATE

In *MacDonald v. U. S.*,[55] it was held that the gift of Canadian real estate was subject to the gift tax. The estate tax expressly excludes foreign real estate, but the taxpayer unsuccessfully argued that the estate and gift tax should be construed in *pari materia*.

As is well known, real property situated outside the U. S. is not includible in the gross estate for federal estate tax purposes.[56] This provision dates from the Revenue Act of 1934, although the Attorney General ruled under the first estate tax provisions in 1916 that the exemption was necessarily implied.[57] The Code defines "outside the U. S." to mean outside the 48 states, Alaska, Hawaii and the District of Columbia.[58] This of course accounts for the fact that it is a seller's market for islands in the West Indies area. For instance, in New Providence and in some of the "out" islands of the Bahamas, real estate prices have been greatly inflated since World War II. The avoidance of United States estate taxes has been a factor; apparently a more significant factor has been the avoidance of British death duties.

Of course there is always the practical question of the stability of real estate values in a non-stable foreign country. The only real tax question that arises on this point is the question as to whether an interest is one in real property. In the *Laird* case,[59] renewable timber leases in Canada were treated as real estate. They had previously been so treated by the Canadian taxing authority under Canadian law. In the *Fair* case,[60] certain documents were considered as mortgages in Cuba and the court held that they were an interest in real property.

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54. There is also the prohibition in several cases against stated amounts of charitable gifts at stated periods prior to death.
55. 139 F. Supp. 598 (Mass. 1956).
56. I.R.C. § 2031 (1954).
57. 31 Op. Atty. Gen. 287 (1918).
58. I.R.C. § 7701 (a) (10) (1954).
59. *Laird v. U.S.*, 115 F. Supp. 931 (W.D. Wisc. 1953).
60. *Fair v. Commissioner*, 91 F.2d 218 (3d Cir. 1937).

In *Estate of de Perigny*[61], it was held that the value of a 999 year leasehold interest in land situated in Kenya colony, British East Africa, should be treated as foreign real estate. Stock in a corporation owning real estate is not exempt.[62]

The American Law Institute[63] is making a current effort to take this exemption out of the estate tax law; however, the position of the Treasury is not yet indicated. The American Law Institute's position is generally as follows: "This exemption permits an undesirable escape from the present estate tax law since under it an individual may invest in foreign real estate (including oil developments) shortly prior to death and thereby leave the property free of United States estate taxes." Until I saw this proposal, I had thought that there were no more constitutional questions in federal taxation. One state cannot levy an inheritance tax on real property in another state. It would seem that the same rule should apply as between countries, and apparently the A.L.I. is aware of this since it speaks of measuring the tax by the value of foreign real estate.

Another and more practical approach to the same problem has been made by Professor Mortimer Caplin of the University of Virginia Law School.[64] He suggests that the step-up in basis for foreign real estate passing on death should be denied. The gross estate includes all personal property; this is so even though legal title may be in a non-resident trustee.

Relevant also in this connection is the question of foreign citizenship as a means of avoiding the federal estate tax. The two difficulties here are that there are some taxes in all countries, and second, it takes a number of years to become a citizen. For instance, the waiting period in the Bahamas is 5 years.

Foreign residence is generally not a way of saving federal estate taxes. The single exception is the Virgin Islands. In *Estate of Arthur S. Fairchild,*[65] the decedent, a lifetime citizen of the U. S. domiciled for over 12 years and at the time of his death in the Virgin Islands, was held not a citizen of the U. S. under the estate tax provisions. It would seem that as long as the Virgin Islands are under the control of the U. S., they will have a stable government. And of course even here,

61. *Estate of de Perigny,* 9 T.C. 782 (1947).
62. *James M. B. Hard Estate,* 9 T.C. 57 (1947).
63. AMERICAN LAW INSTITUTE, FEDERAL INCOME, ESTATE AND GIFT TAX STATUTE, § X2007.
64. Hearings on General Revenue Revision, House Committee on Ways and Means, Pt. 3, p. 2455 (1958).
65. 24 T.C. 408 (1955).

there were some inheritance taxes to pay to the Virgin Islands. Approximately $19,000 (as compared to the $101,000 in estate taxes) was asserted against the taxpayer.

Puerto Rico also offers an advantage, but in order to obtain it an individual must become a citizen of Puerto Rico as well as the United States. In such a case, he is not subject to the estate tax.[66]

CONCLUSION

Charitable giving has become an important adjunct of estate planning. The ownership of foreign real property is a less significant but sometimes constitutes an appropriate aspect of estate planning. The decision as to the latter is usually clear from the tax standpoint and is accordingly controlled by other than tax considerations. On the other hand, the decisions as to charitable giving are usually dictated by the relevant tax factors. Accordingly, such giving should be informed and well-considered so that both the taxpayer-donor and the charitable-recipient benefit to the extent possible.

66. *Estate of Albert DeCaen Smallwood,* 11 T.C. 740 (1948); *Commissioner v. Rivera's Estate,* 214 F.2d 60 (2nd Cir. 1954).

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COMMENTS

ANIMAL LEX

I. CANINES

Since the beginning of time, man has had at his side that hero of song and story, his ever faithful canine companion.[1] And as befitting a being of such importance in our affairs, dogdom is the subject of a considerable body of law, particularly statutory enactments in more recent times. In addition to state code provisions governing the care and conduct of these animals, almost every city has a dog ordinance.

By way of background, let us first look into the common law liability attached to dogs. If an animal belonged to the class of "mansuetae naturae", a domestic animal, its keeper was held not liable for damages inflicted unless he was proved to have had notice of that particular mischievous trait which in fact led to the injury.[2] Knowledge of a propensity to do some other kind of harm, as where a dog was known to kill goats, does not fulfill the *scienter* requirement.[3] It is not necessary, however, that the animal have inflicted a previous like injury if it has exhibited a tendency to do that type of harm. That is, every dog is not entitled to one bite, nor every horse to one kick, if its master knows it has already shown an inclination to do that kind of injury.[4] It has also been held that the master was liable under a statute imposing liability for harm to any person injured by a dog, where the dog did not in fact bite the plaintiff, the dog being muzzled at the time. The dog, in running past the plaintiff, merely struck his leg causing him to fall to the pavement.[5]

The common law rule requiring the owner to have knowledge of the animal's vicious propensities seems to have found favor on our own state courts. One early case said that if the owner of a dog knows the animal to be vicious and suffers him to go at large, the owner will be liable for injury sustained by a person bitten by the dog, though the party aggrieved was, at time of injury, committing a technical trespass on the premises of the defendant.[6] Furthermore, where the owner

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1. George Vest's *Eulogy on the Dog*, delivered in Johnson County Circuit Court, Warrensburg, Mo. is worthy of note here: "The one absolutely unselfish friend that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. A man's dog stands by him in prosperity and in poverty in health and in sickness."
2. 3 RESTATEMENT, TORTS, § 509, comment a (1938); Fink v. Miller, 350 Pa. St. 193, 198 Atl. 666 (1938).
3. Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921).
4. Andrews v. Smith, 324 Pa. 455, 188 Atl. 146 (1936).
5. Conovan v. George, 292 Mass. 245, 198 N.E. 270 (1935).

has knowledge of the vicious propensity, his liability is not limited to negligence in custody of the animal; he is bound at his peril to keep the animal from doing mischief.[7] Tennessee does not seem to follow the so-called "one bite" rule: In one case, *Goens v. Jones*,[8] the owner knew his dog had bitten a girl's dress, that the dog was in the habit of running up to people in a threatening manner as though he would bite, and that the ice-man would not come into the yard when the dog was loose. These traits were held sufficient indication to the owner of the dog's disposition.

The result in the *Goens* case would, no doubt, be following correctly the statement made by a much earlier Tennessee case that the habit of an animal is a continuous fact to be shown by proof of successive acts of similar character.[9] And a more recent case states that generally the owners or keepers of domestic animals are not liable for injuries to third persons unless the animal was accustomed to injure persons or had an inclination to do so and the vicious disposition of the animal was known to the owner or keeper.[10] But the owner is liable for injuries occasioned because of the wild or vicious nature of the animal, though the animal at the time is under the control of a servant, stableman, or keeper selected with utmost care.[11] In an action for injuries sustained by plaintiff when bitten by a dog on defendant's premises, evidence of ownership of a dog, its dangerous proclivities, and *scienter* was sufficient for the jury.[12] However, some dangerous domestic animals such as bulls and stallions are a customary incident of farming and the slightly added risk due to their dangerous character is counterbalanced by the desirability of raising livestock.[13]

It would seem that the price of dog-bites has risen along with the general cost of living. Recently in Tennessee, a state not noted for high verdicts, a $19,000 judgment was rendered in Chattanooga as the result of a little girl's being attacked by a neighborhood dog.[14] Testimony in

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6. Sherfey v. Bartley, 36 Tenn. 58 (1856).
7. Missio v. Williams, 129 Tenn. 504, 167 S.W. 473 (1914). See also RESTATEMENT, TORTS § 509 (1938).
8. 1 Tenn. App. 294 (1925).
9. Lebanon & Sparta Turnpike Co. v. Hearn, 87 Tenn. 291, 10 S.W. 510 (1889).
10. Henry v. Roach, 293 S.W.2d 480 (Tenn. App. 1956). Two Missouri cases emphasize the fact that damages were allowed on the basis of nuisance where a dog bit a person after the defendant had knowledge of the vicious propensity of the animal. Both cases emphasize the keeping of the dog *after knowledge*. Speckman v. Kreig, 79 Mo. App. 376 (1899) (plaintiff bitten by dog while delivering chickens at defendant's barn in accord with defendant's instructions). See also Patterson v. Rosenwald, 222 Mo. App. 973, 6 S.W.2d 664 (1928).
11. Austin v. Bridges, 3 Tenn. Civ. App. 151 (1912).
12. See Henry v. Roach, 293 S.W.2d 480 (Tenn. App. 1956).
13. 37 MICH. L. REV. 1181, 1184, n. 6 (1939).
14. Knoxville News-Sentinel, Mar. 5, 1958, p. 23, col. 2.

the suit was to the effect that the dog had attacked other children on previous occasions. The suit charged that the defendant family did not take due care in keeping the dog secured in the light of earlier attacks.

Let us now turn to the considerable mass of statutory regulations concerning dogs. Mr. Dogowner, are you familiar with these rules set up to guide your shaggy friend, and, more than incidentally, yourself? A typical city ordinance, of recent vintage is entitled:

> An ordinance providing for the licensing of dogs within the corporate limits of the city of Norris; requiring the confinement of female dogs in season; providing for a dog pound; giving procedure for seizure, impoundment and redemption, and providing for the sale and disposition of dogs so impounded; also providing for the abatement of nuisance; and providing a penalty for violation of this ordinance.[15]

In this Norris city ordinance,[16] "at large" is defined to mean off the premises of the owner and not under the control of the owner or a member of his immediate family over the age of twelve. A "vicious dog" is defined as one "which has maliciously and without provocation attacked and bitten a human being." On the general proposition that a person is liable for damages when he suffers his vicious dog to go at large and cause damage, this city ordinance seems to be a little more stringent by requiring that the dog have previously bitten someone.[17]

Like most other municipalities, the City of Norris provides that all female dogs within the city, shall, upon coming in season, be kept in a securely closed building or under the control of the owner by the use of a leash, for a minimum period of 28 days, beginning the first day that evidence of attraction is noticeable. Any dog not so kept shall be a nuisance which shall be abated according to the Tennessee Code.[18] However, as evidence that Norris is truly concerned about its canine inhabitants, the city has also created a dog pound, which facilities are available to owners of unspayed female dogs for the purposes of confining them during the heat season, with a minimum fee of 25¢ per day.[19]

While the ordinance does not directly require a rabies vaccination, it does so indirectly since a license is required for every dog over six months old, and one of the prerequisites to a license is that the owner must present satisfactory proof of the anti-rabies inoculation within three months of the beginning of the license period.

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15. City of Norris, Tenn., Ordinance 33 (Mar. 13, 1951).
16. *Ibid.*, Section 1. of the ordinance.
17. See Note 8, *supra.*
18. TENN. CODE ANN. §§ 44-1410, 44-1411 (1956).
19. Section 3. of Norris ordinance, cited in Note 15, *supra.*

A query present in the writer's mind concerns Section 8 of the ordinance, entitled *Abatement of Nuisance.*[20] This section provides that the dog owner can be brought, by summons, before the city clerk upon a complaint by any person by affidavit that the dog howls, barks, is vicious, or otherwise constitutes a nuisance whereby the peace and quiet of the complainant is disturbed. Upon appearance before the city clerk, the dog owner will be informed to correct the cause of the complaint within ten days. If the owner fails to appear before the clerk, the clerk can cause him to be arrested and upon a finding by city court that the complaint is true, the owner is to remove the dog from the corporate limits or surrender him to police to be impounded, and upon failure to do either, the owner can be fined. And what is that fine? From $5.00 to $10.00! So, for a price, the howling owner can have his howling dog, but a redeeming feature is that each day shall be a separate offense. This separate offense provision is typical of that in other cities. The City of Rogersville ordinance states that each day's, or part of a day's, violation shall constitute a separate offense.

One further observation will cover the typical city dog ordinance. One section[21] of the Norris ordinance restates the prevailing common-law view that all dogs are personal property and are subjects of larceny. Another noteworthy provision[22] is that city council shall have the power to declare quarantine periods of definite reasonable duration, whenever such quarantine seems necessary or desirable for the control of epidemic dog diseases.

The Norris code which we have discussed in some detail follows very closely the NIMLO model code.[23] The model code of course was drafted for large as well as small cities and with this in mind, one model section provides for no running at large during certain times of the day and year, regardless of the dog's sex and regardless of whether licensed or not. Such a strict requirement is probably not imperative in smaller towns. However, the NIMLO model code does contain a clause which provides that if any dangerous, fierce, or vicious dog so found at large cannot be safely taken up and impounded, such dog may be slain by any policeman. This provision is sure to bring a wave of protest from dog fanciers, but the writer submits that an out-

20. See Note 15, *supra.*
21. Section 6-A, of Norris ordinance, cited in Note 15, *supra.*
22. *Ibid.*, Section 9.
23. The National Institute of Municipal Law Officers (NIMLO) from time to time furnishes model ordinances on selected subjects. These and other ordinances collected from cities throughout the United States are available to city officials from the University of Tennessee, Municipal Technical Advisory Service, Knoxville, Tenn.

right expression of city council approval for this drastic action where warranted is still the best approach.[24]

Many ordinance provisions are merely repetitious of statutory law as set out in the Tennessee Code. For example, Code § 39-403 provides that any person willfully, wantonly, or knowingly killing, dismembering, disfiguring any domestic animal or exposing it to poison with the intent that it be taken and some shall be taken, shall be guilty of a misdemeanor and shall pay for the animal to the owner. It has been held that a dog is a domestic animal within the meaning of the Act.[25] Further, under this statute, it is unnecessary that the indictment charge the manner and means of killing.[26] Although the killing of domestic animals is not an offense unless the animal has some value,[27] an indictment merely alleging the animals to have been "coon dogs" imports a value to the dog killed and meets the requirement of the law as to sufficiency of allegation.[28]

A question arises whether the killing of a dog about to do harm is a willful killing within the meaning of the statute. It is presumed that since "willful and wanton" also imply malice or at least unreasonableness, the act would not bar the usual rule allowing reasonable force to protect life and property. It should be noted that in the *White* case,[29] it was also decided that the fact that the dogs were trespassing on the killer's property does not bar the owner from recovering their value. This was not a situation, however, where the killing of the dogs was necessary to prevent the doing of some potential harm.

In further point with the words "wanton and willful" requiring malice, it has been held that stabbing implies malice,[30] and that malice toward a bailee will be sufficient, though there was no malice toward the real owner.[31] As to just which animals these sanctions against maiming and the like apply, the Tennessee Code is clear:

> Animal or dumb animal includes every living creature; the words torture, torment, or cruelty shall be held to include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted; but nothing herein shall be construed as prohibiting the shooting of birds

24. Where a dog is ordered impounded and destroyed, the owner may appeal from the decision of the justice of the peace in "forma pauperis." Cornell v. Sheppard, 156 Tenn. 544, 3 S.W.2d 661 (1928).
25. White v. State, 193 Tenn. 631, 249 S.W.2d 877 (1952).
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. State v. Council, 1 Tenn. 305 (1808).
31. Stone v. State, 59 Tenn. 457 (1871).

or game for the purpose of human food, or the use of animate targets by incorporated gun clubs.[32]

As to rabid dogs, there is an interesting Code section[33] which provides a penalty ($10-$50) for keeping rabid dogs; however, killing within six hours after notification of the rabid condition is a defense. Notification by whom, is the next question. And how can the owner know the dog is rabid unless it is destroyed and clinically tested? Is a notification of suspected rabies enough? What if the information turns out to be erroneous, or not even ascertained in good faith? A valuable dog has been killed needlessly. If the report is erroneous, does any liability attach to the reporter? The writer has been unable to find any case law answering such questions.

Although the law is definite in providing penalties for maiming or killing ordinary domestic animals[34] it should be pointed out that by statute, there is no liability for killing or crippling a proud bitch running at large.[35] As for the forbidding of animals' being at large,[36] they may be at large when hunting, going to or from a hunt, or when guarding live-stock,[37] but the foregoing exemptions shall not apply unless all damages done by dogs therein exempted, to person or property of another, shall be paid or tendered to the person so damaged within 30 days after the damage is done. This provision was enacted in 1901,[38] and again in 1903.[39] The words "not allow animals at large" have a special significance, since in a case where a dog was killed by a train while the dog was running at large on the railway tracks without the knowledge, consent, fault, or connivance of the owner, the owner could recover for its wrongful death.[40]

Also in connection with the state statute forbidding animals to run at large, it was held that the duty to keep animals from running loose on the streets is governmental, the negligent performance of which does not render the town liable for the death of another animal occasioned thereby.[41] It is to be noticed that a dog does not necessarily have to be on a leash to prevent its being at large. Where a dog was killed while accompanying the boys owning it across the street, it was not "at large" within the meaning of this Code section so as to bar re-

32. TENN. CODE ANN. § 39-401 (1956).
33. *Ibid.*, § 39-417.
34. *Ibid.*, § 39-403.
35. *Ibid.*, § 44-1411.
36. *Ibid.*, § 44-1408.
37. Dalton v. Dean, 175 Tenn. 620, 136 S.W.2d 721 (1940).
38. Tenn. Pub. Acts 1901, c. 50, sec. 1.
39. Tenn. Pub. Acts 1903, c. 419, sec. 1.
40. Southern Ry. Co. v Oliver, 3 Tenn Civ. App. 408 (1912).
41. Town of Gainesboro v. Gore, 131 Tenn. 35, 173 S.W. 442 (1915).

covery for its killing on the ground that it was running at large in violation thereof.[42]

From the standpoint of protecting the dog-owner from loss, examination of a few pertinent situations clearly indicates that dogs are accorded the same protection as other valuable chattels. Where the jury convicted the defendant of wantonly and willfully killing dogs, the fact that the dogs were trespassing upon the property of the defendant would not bar their owner from recovery of their value.[43]

As evidence that even the stern minions of the law will unbend in favor of a boy and his dog, let us examine more closely the case of *Dalton v. Dean*[44] where two youngsters and their pet dog went across the street to a neighbor's yard for the purpose of catching grasshoppers to feed the pet horned toad of another neighbor. The boys returned to their side of the street and as their dog followed them, it was struck and killed by the defendant's automobile. There was material evidence tending to show that the defendant was guilty of some negligence in the operation of his car, but he claimed recovery should be barred because of contributory negligence, relying on Tennessee Code Annotated § 44-1408 (formerly § 5086). This section provides that it would "be unlawful for any person to allow a dog belonging to him to go . . . upon a highway or public street, provided however that this section does not apply to a dog on a hunt or a chase, or on the way to or from a hunt or chase, nor to a dog being moved from one place to another by a person owning or controlling the dog." The circuit court awarded a judgment to the plaintiff for $25. In affirming, the Court of Appeals expressed the opinion that the dog and its owners were taken out of the ban of the statute by the exception in favor of a "dog on a hunt or chase, or on the way to or from a hunt or a chase." The court thought that a hunt or chase was still a hunt or chase although the object of the quest was only a grasshopper. The Supreme Court, with equal breadth of vision observed: "without expressing any opinion as to the foregoing [the reasoning of the Court of Appeals], we are satisfied that this dog was not on the street in violation of Section 5086 since that section excepts a dog being moved from one place to another, by a person owning or controlling a dog."

II. CATTLE

Turning from canines, let us consider the law in Tennessee regarding cattle. Under the common law, owners of cattle were bound at their

42. See Note 37, *supra*.
43. See Note 25, *supra;* TENN. CODE ANN. § 39-403 (1956); see sec. 6-A of Norris ordinance cited in Note 15, *supra*.
44. See Note 42, *supra*.

peril to keep cattle off the land of other persons.[45] A more recent case states that the owners of lands are under no obligation to keep their premises safe for trespassing animals belonging to others, but the owners of animals must at their peril keep them off the lands of others; whether such lands are enclosed or not is immaterial.[46] The court went on to hold that the owner of land was not liable where cattle strayed in and ate deleterious matter left there without any malicious intent.

The following statement from the general authorities states the common-law rule succinctly: At common law every man was bound at his own peril to keep his cattle off the land of others, and was liable for any damage done by them whether or not he was negligent in permitting their escape from his premises.[47] It should be pointed out that originally the damage in an action of cattle trespass was confined to damage to the surface. By successive steps, damages were extended to disease and injury to cattle and in 1954 recovery was allowed for personal injury.[48] In that case, defendant's well-behaved cattle escaped without the negligence of the defendant, and entered plaintiff's grounds. While plaintiff, without doing anything to frighten them, was trying in the dark to prevent their getting into her garden, one of the cattle moved about and knocked plaintiff down and injured her. The court allowed recovery, saying it could find no prior case in which damages for injury to persons had been allowed, but since one can recover for injury to his animals, he should also be allowed recovery for injuries to himself naturally resulting from the trespass.

The Tennessee legislature, in 1947, passed "an act to make it unlawful for stock to run at large in this state and to provide penalties and remedies therefor."[49] Briefly, this act provided that it would be unlawful for the owners of any livestock to *willfully* allow them to run at large, and that for any damages done by the stock running at large, the person damaged would have a lien on the stock. This is somewhat different from the aforestated common law rule where the owner of the cattle was liable when they escaped without his negligence. The owner was liable even where the cattle were released by the wrongful

45. Nelson v. White, 20 Tenn. App. 604, 102 S.W.2d 531 (1937). A related general rule of tort law applicable here is that of Rylands v. Fletcher, L.R.Ex. 265, aff'd L.R. 3 H.L. 330 (1866): a person who brings on to his land and keeps there anything likely to do harm if it escapes, must keep it in at his peril and is liable for all damage which is the natural consequence of its escape.
46. Louisville & Nashville R.R. Co. v. Gillespie, 26 Tenn. App. 390, 172 S.W.2d 1015 (1943).
47. 3 C.J.S., *Animals*, § 185, p. 1291 (1936); 2 AM. JUR., § 103 p. 763 (1936); Light v. U.S. 220 U.S. 523 (1911).
48. Wormald v. Cole, 1 All E.L.R. 683 (1954).
49. Tenn. Pub. Acts 1947, c. 52.

act of a stranger.[50] It seems that the Act of 1947 does not go quite that far, since the Act speaks of *willfully* permitting animals to run at large. Willfully is usually regarded as synonymous with "knowingly."[51] So probably the Act does not restore the common law in Tennessee completely. It would follow that there can be no recovery in such cases where the owner of the stock is guilty of no negligence.[52]

The true common law rule was abolished in Tennessee more than a hundred years ago by statutes requiring planters to fence against the livestock of others which is running at large.[53] Then the Public Acts of 1899, ch. 23 came into being. Its purpose was to abolish the necessity of fencing in certain populous counties and made it unlawful to knowingly allow cattle to run at large in the areas to which it applied. This, in effect, repealed the earlier fencing statutes in the applicable counties since the necessity for the fencing of lands was purely statutory.[54]

In all probability the Act of 1947 was not intended primarily to protect planters, but to keep livestock off the highways. The Act of 1899 contained the statement that it was to prevent the necessity of fencing [by planters] whereas the Act of 1947 does not mention fencing or the necessity for fencing. Since the Act concerns persons who willfully allow livestock to run at large and gives a lien for any damages, it would seem that the fencing statutes are repealed by implication and that fencing by the planter is not a condition precedent to recovery under the Act.[55]

If, as previously suggested, the real reason for the 1947 legislation was to prevent animals from straying onto the highway, what is the situation today in Tennessee when a non-negligent motorist runs upon a stray animal on the highway at night and the motorist suffers damage? While at common law the owner of animals was under a duty to keep them off the land of others, he was under no duty to restrain them from going upon the highways unattended and in fact while driving the cattle on the highway, he enjoyed immunity to any casual trespass on adjoining lands by the way.[56] But this privilege extended only to property immediately abutting on the highway, and not to any lands

50. Noyes v. Colby, 30 N.H. 143 (1855).
51. Pappas v. State, 135 Tenn. 499, 188 S.W. 52 (1916); Erby v. State, 181 Tenn. 647, 184 S.W.2d 14 (1944); willfully implies that the act is done knowingly, Ousley v. State, 154 Miss. 451, 122 So. 731 (1929).
52. Wilson v. White, 20 Tenn. App. 604, 102 S.W.2d 531 (1936).
53. TENN. CODE §§ 1682, 1685 (1858) incorporated in TENN. CODE §§ 5202, 5203, 5208 (1932).
54. Falkner v. Whitehurst, 144 Tennessee 62, 229 S.W. 146 (1920).
55. Codified in TENN. CODE ANN. §§ 44-1401, 44-1402 (1956).
56. Boutwell v. Champlain Realty Co., 89 Vt. 80, 94 Atl. 108 (1915).

removed from it, upon which the cattle may trespass once they have strayed from the road.[57] Today under the 1947 Act, it would seem to be a clear case of strict liability where there is no fence and the owner lets his animals stray onto the highway to the detriment of the innocent motorist. There is little, if any, litigation on this particular point.

Suppose the owner does have his cattle fenced in, but the animal escapes onto the highway and causes injury to the motorist. Can the cattle-owner provide a complete defense by a showing of an adequately constructed fence as required by the statute? Or would the case be a *res ipsa* situation, thus allowing it to go to the jury? A Pennsylvania case[58] allowed recovery to an injured motorist when the tort-feasor horse escaped from a fenced lot. The jury inferred negligence from the fact that horses which are properly confined ordinarily do not escape. The opinion cited the *Restatement of Torts,* § 518 (1) as being the rule today: ". . . one who possesses or harbors a domestic animal which he does not have reason to know to be abnormally dangerous but which is likely to do harm unless controlled, is subject to liability for harm done by such animal if, but only if, (a) he fails to exercise reasonable care to confine or otherwise control it, and (b) the harm is of a sort which it is normal for animals of its class to do." The court went on to point out that an unattended horse on the highway is in obvious danger of being involved in a collision with a carefully driven automobile.

While Tennessee Code Ann. § 44-1401 (1956) speaks of livestock as it is generally known, not being permitted to run at large, § 44-1403 specifically singles out jacks or stallions over 15 months old as not being allowed to run at large and in this specific case, the punishment for violation is a little more damaging, at least from the animal's standpoint. Code § 44-1405 give a justice of the peace the right to have the animal gelded at the owner's expense, after a sufficient advertisement and subsequent lack of claim for the animal within three months.

Tennessee has very extensively regulated stray animals.[59] Any stray horses, mules, sheep, or swine found wandering any time of the year and neat cattle[60] between 1 November and 1 May, the owner being unknown, may be taken up as strays,[61] by a freeholder or householder.[62]

57. Wood v. Snyder, 187 N.Y. 28, 79 N.E. 858 (1907).
58. Bender v. Welsh, 344 Penn. 392, 25 Atl.2d 182 (1942).
59. See TENN. CODE ANN. §§ 44-1501 to 44-1527 (1956).
60. For the benefit of the urban reader, "neat cattle" are defined as oxen or heifers, BLACK, LAW DICTIONARY 1181 (4th ed. 1951).It includes cows, bulls, and steers, but not horses, mares, geldings, colts, mules, jacks, or jennies, goats, hogs, shoats, or pigs. State v. Swager, 110 Wash. 431, 188 P. 504 (1920).
61. See Note 59, *supra,* § 44-1501.
62. TENN. CODE ANN. § 44-1502 (1956).

Within ten days after taking up, unless a sheep, the taker has it appraised by two freeholders. If the stray is a sheep, taker must first advertise in the neighborhood five days before appraisal.[63] Although ownership of the animals has not at this time been established, any person killing, selling, concealing, or making way with such stock shall be guilty of larceny.[64]

After the appraisers have valued the animal, the taker makes affidavit that he will deliver same to the county ranger.[65] The ranger will then advertise the strays on the first day of each quarterly session of the county court.[66] The owner of a stray has 12 months after the appraisement to claim his property and he must pay all fees including the ranger's and the expense of the taker-up.[67] Unless the stray is claimed within 12 months or, in case of a hog, within 6 months, the property will be vested in the taker.[68] Further, when the property vests, the taker must pay half of the value of the stray to the ranger, but the taker is not chargeable with any stray which dies or escapes within said period unless it was occasioned by the taker's negligence or ill usage.[69] The taker can use the stray, but not before it is appraised.

Let us now examine some of the general statutory law in Tennessee governing the care and custody of animals in general and cattle or horses in particular. The Code provides that killing or wounding horses, mules, or jacks, of a value over $10 is a crime.[70] It carries a penalty of one to five years imprisonment and the wrongdoer must pay the owner the worth of the animal. Does this mean that there is no liability attached to killing or wounding an animal less than $10 in value? Or would the analogy of the "coon dog" case[71] prevail and allow the court to read into an allegation of loss that any horse is worth over $10? The question just raised, of course, presumes that the animal is not doing harm or is not an immediately potential harm-doer. Such a situation as that has been discussed previously.

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63. *Ibid.*, § 44-1504.
64. *Ibid.*, § 44-1506.
65. *Ibid.*, § § 44-1507 and 44-1508.
66. *Ibid.*, § 44-1510. For entertaining reading concerning the duty to impound and advertise for stray stock, the reader is referred to the case of Mincey v. Bradburn, 103 Tenn. 407 (1899). Judge Wilkes starts his opinion thusly: "This is a lawsuit arising out of the unlawful act of a disorderly mule. He was found loitering about the streets of Knoxville, without any apparent business, no visible means of support, and no evidence of ownership, except a yoke on his neck." The opinion proceeds in like vein throughout.
67. TENN. CODE ANN. § 44-1513 (1956).
68. *Ibid.*, § 44-1517.
69. TENN. CODE ANN. § 44-1518 (1956).
70. *Ibid.*, § 39-402.
71. See Note 28, *supra*.

In keeping with the provisions forbidding the killing or maiming of animals is another humane provision making it a misdemeanor to overdrive or buy or sell any horse or mule unfit for labor. This Code section does not, however, prevent humane societies from humanely killing such animals.[72] Actually the humane societies are a sort of quasi-official group having considerable statutory authority in Tennessee. To interfere with humane society members when they are going about their duties constitutes a misdemeanor.[73] Their members are entitled to make arrests for any violation of those Code sections generally governing the humane care of animals. Their jurisdiction for such arrests is confined to the county within which they operate. They can destroy diseased or abandoned animals if two reputable citizens say the animal is beyond repair. However, one need not carry this humane aspect to its farthest extreme. One case stated that catching a depredating dog in a steel trap is permissible, on the theory that these statutes were not intended to deprive one of the right to protect his property.[74] The owners of sheep-killing dogs are looked upon with about the same legal distaste as our mothers looked upon the neighborhood "aig-suckin' hound."

In Tennessee it is a misdemeanor to keep a sheep-killing or a sheep-chasing dog, after having been notified of such tendencies. A fine of $5-$25 may be imposed and the owner imprisoned in the discretion of the court till he gives security for the fine and costs.[75] The owner of the sheep, however, cannot maintain joint action against different owners of dogs that unite in depredation of his sheep, but must sue each owner separately for damages done by his dog.[76]

III. Cats

The early common-law rule, and apparently still the law, is that cats, although tame and of *mansuetae naturae,* are of such base nature that they cannot be the subject of larceny, though they can be reclaimed.[77] Since the cat has the legal status of an animal *mansuetae naturae,* its owner may safely keep it and will not be liable for its trespasses and injuries unless he had knowledge of its vicious nature.[78]

The case of *Helsel v. Fletcher*[79] was an action to recover the value of a Persian cat killed by the defendant. Though cats may not properly

72. Tenn. Code Ann. § 39-304 (1956).
73. *Ibid.,* § 39-412.
74. Hodge v. State, 79 Tenn. 528 (1883).
75. Tenn Code Ann. § 39-410 (1956).
76. Dyer v. Hutchins, 87 Tenn. 198, 10 S.W. 194 (1889); Swain v. Tenn. Copper Co., 111 Tenn. 430, 78 S.W. 93 (1903).
77. Thurston v. Carter, 112 Me. 361, 92 Atl. 295 (1914).
78. Goodwin v. E. B. Nelson Groc. Co., 239 Mass. 232, 132 N.E. 51 (1921).
79. 98 Okla. 285, 225 P. 514 (1924).

be subjects of larceny, its owner may nevertheless enforce his rights in a civil proceeding. It was decided that the defendant would be justified in killing if the cat had been stealing the defendant's chicks and was a chicken-stealing cat, especially where defendant found it about the barnyard in which his fowl were kept. In a 1918 English case[80] there was a charge against three boys to the effect that they had maliciously killed two cats contrary to the Malicious Damage Act, which was similar in wording to Tennessee Code Annotated § 39-403 (1956). The magistrate who refused to convict was reversed and it was held that cats, ordinarily kept for domestic purposes, were within the protection of the statute.[81]

IV. Bees

It seems clear that while bees may not be generally classified as tame or domestic animals, the owner of bee-hives can recover for their loss or destruction, as for example by poisonous crop-dusting where there is negligence.[82] Even though bees are *ferae naturae,* it has been said that they are so useful and common as to be all but domesticated.[83] In this connection it may be said that until bees are reduced to possession, reclaimed, and hived, the only property in them is *ratione soli.*[84] The finding of bees in a tree standing on another man's land gives the finder no right to the bees; for the property of the landowner *ratione soli,* although qualified and of a precarious nature, cannot be changed or terminated by the act of a mere trespasser.[85]

Bees may be sold as any other chattel. *Simpson v. Parks*[86] says that bees are the subject of bargain and sale, and an action will lie for the recovery of the purchase price of bees sold. Likewise an action will lie for breach of warranty in a sale of bees.[87] Beehives and honey, the property of a person, are the subject of larceny,[88] but confining wild bees in a skep in the top of a tree in which they have swarmed is not such a reduction of them to possession as to make them the subject of larceny.[89]

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80. Nye v. Niblett, [1918] 1 K.B. 23.
81. Annotated in 33 A.L.R. 796 (1924); there seems to be a dearth of material since that time.
82. Lenk v. Spezia, 95 Cal. App.2d 296, 213 P.2d 47 (1949); Miles v. Arena & Co., 23 Cal. App.2d 680, 73 P.2d 1260 (1937); S. A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933). Discussed in Annot. 12 A.L.R.2d 433, 439-440 (1950) under the annotation heading of "Damages to Crops by Spraying." In the same annotation are cases where the spray caused damage to stock.
83. Parsons v. Manser, 119 Iowa 88, 93 N.W. 86 (1903).
84. 2 Bl. Comm. 392; Rexroth v. Coon, 15 R.I. 35, 23 Atl. 37 (1885).
85. Rexroth v. Coon, 15 R.I. 35, 23 Atl. 37 (1885).
86. 23 Ont. Week. Rep. 837 (1912).
87. Sampson v. Penney, 151 Minn. 411, 187 N.W. 135 (1922).
88. Harvey v. Corun, 64 Va. 941 (1847).
89. Wallace v. Mease, 3 Binn. 546 (Penn. 1811).

It is a general rule that no recovery may be had against the owner of bees for injuries inflicted by them, except on grounds of negligence, since he does not keep them at his peril.[90] In *Parson v. Manser*[91] it was held that since bees are more like domesticated animals than wild animals, the rule of absolute liability for injuries by wild animals ought not to be extended to them. A similar holding is found in Mississippi.[92] But the owner of bees was liable for injuries by them which resulted from his negligence in *O'Gorman v. O'Gorman*.[93] In *O'Gorman* case, it was held to be actionable negligence for the defendant to keep bees on his premises in such numbers as to be dangerous to those in the immediate neighborhood. In a case where the defendant kept 150 swarms of bees on lots within 100 feet of the plaintiff's premises, it was held that an injunction would lie as a remedy for nuisance, since in the spring and summer, the bees annoyed plaintiff, stung him, his guests and servants, and soiled articles of clothing exposed on the premises.[94] In a recent Pennsylvania case[95] the defendant kept hives of bees which repeatedly crossed to the adjoining property of the plaintiff and stung and harassed him so as to inconvenience and deprive him of reasonable enjoyment of his property. The court there held that the keeping of bees was not a nuisance *per se* but that the keeping of an unreasonable number in an unreasonable place may be.

V. Nuisance By Attracting Animals

Lastly we will consider one particular area of law, about which there is little litigation. In fact most of the principles in this area come from a discussion of one particular case, *Andrews v. Andrews* which arose in North Carolina.[96] There the owner of a farm created a small pond 400 feet from the adjoining property. He placed tame wild geese, food, and bait on the pond, hoping to attract other wild geese. He was so successful that by the third year he attracted 3,000 wild geese in that year alone. In their foraging, the geese destroyed some of plaintiff's crops. The plaintiff sued on a private nuisance theory; the case was tried on demurrer and resulted in an order to abate the nuisance.[97]

A cause of action was clearly made out since it was shown that the plaintiff had a property right in the use interfered with and that the

90. Petey Mfg. Co. v. Dryden, 21 Del. 166, 62 Atl. 1056 (1904).
91. Parsons v. Manzer, 119 Iowa 88, 93 N.W. 86 (1903).
92. Ammons v. Kellog, 137 Miss. 551, 102 So. 562 (1925).
93. O'Gorman v. O'Gorman [1903] 2 Ir.R. 573.
94. For the most recent annotation on this, see 39 A.L.R. 351 (1925).
95. Holden v. Lewis, 33 Del. Co. 458 (Pa. 1945), citing Arkadelphia v. Clark, 52 Ark. 23 (1889).
96. 242 N.C. 382, 88 S.E.2d 88 (1955).
97. See 104 Penn. L. Rev. 1004 (1956).

invasion was substantial and intentional or unreasonable.[98] One question which may arise is whether defendant's acts can be said to have been the proximate cause of plaintiff's injury. It could be argued that the wild geese caused the harm and defendant might be absolved on the ground of a superseding cause.[99] However, one line of authority holds that the intervening act of a human or an animal which is a normal response to the situation created by defendant is not such a superseding cause.[100] North Carolina in the *Andrews* case was definitely following its own precedent since it had previously held a defendant liable for negligently creating a situation in which mosquitoes could breed, thereby being the proximate cause of plaintiff's contracting malaria.[101]

On the other hand there is a doctrine that one who neither owns, controls, nor harbors an animal *fera naturae,* is not responsible for an injury done by it. The Court of Appeals Seventh Circuit so held in *Sickman v. United States,*[102] a situation very similar to the *Andrews* case. The United States was maintaining a game preserve adjacent to the injured farmer but it was held that there was no ownership, control, or possession of the wild geese which could impose liability for their trespasses. Even assuming this test was valid, the *Sickman* case could better have reached the same result by holding that the utility of the government's owning a game preserve outweighed the harm done to plaintiff and was therefore reasonable. In the *Andrews* case the plaintiff successfully relied on the ancient maxim, *sic utere tuo ut alienum non laedos*: so use your own as not to injure another.

ROBERT L. BADGER

COVENANTS TO REPAIR

Just as the lease of real property from one person to another is a creature of antiquity, so too, the subject of leasehold repairs is not one of recent vintage. The very nature of a lease renders to the subject of repairs greater materiality than mere passing concern both to the lessor and to the lessee. The lessor parts with a significant incident of ownership, *viz.*, possession for a period of time with the expectation

98. 4 RESTATEMENT, TORTS § 822 (1939); Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 103-106, 66 N.E.2d 334 (1956); PROSSER TORTS 392 (2d ed. 1955).
99. 2 RESTATEMENT, TORTS § 44 (1939); Superior Oil Co. v. Richmond, 172 Miss. 407, 420, 159 So. 850 (1935) (dicta).
100. 2 RESTATEMENT, TORTS § 443 (1939); Chicago, Mo., St. P. and Pac. Ry. v. Goldhammer, 79 F.2d 272 (8th cir. 1935), *cert. den.* 296 U.S. 655 (1936) (dicta); Loftin v. McCramic, 47 So. 2d 298, 301-302 (Fla. 1950) dictum.
101. Godfrey v. W. Carolina Power Co., 190 N.C. 24, 128 S.E. 485 (1925); see Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S.E. 844 (1909).
102. 184 F.2d 616 (7th Cir. 1950), *cert. den.* 341 U.S. 939 (1951).

invasion was substantial and intentional or unreasonable.[98] One question which may arise is whether defendant's acts can be said to have been the proximate cause of plaintiff's injury. It could be argued that the wild geese caused the harm and defendant might be absolved on the ground of a superseding cause.[99] However, one line of authority holds that the intervening act of a human or an animal which is a normal response to the situation created by defendant is not such a superseding cause.[100] North Carolina in the *Andrews* case was definitely following its own precedent since it had previously held a defendant liable for negligently creating a situation in which mosquitoes could breed, thereby being the proximate cause of plaintiff's contracting malaria.[101]

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COVENANTS TO REPAIR

Just as the lease of real property from one person to another is a creature of antiquity, so too, the subject of leasehold repairs is not one of recent vintage. The very nature of a lease renders to the subject of repairs greater materiality than mere passing concern both to the lessor and to the lessee. The lessor parts with a significant incident of ownership, *viz.*, possession for a period of time with the expectation

98. 4 RESTATEMENT, TORTS § 822 (1939); Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 103-106, 66 N.E.2d 334 (1956); PROSSER TORTS 392 (2d ed. 1955).
99. 2 RESTATEMENT, TORTS § 44 (1939); Superior Oil Co. v. Richmond, 172 Miss. 407, 420, 159 So. 850 (1935) (dicta).
100. 2 RESTATEMENT, TORTS § 443 (1939); Chicago, Mo., St. P. and Pac. Ry. v. Goldhammer, 79 F.2d 272 (8th cir. 1935), *cert. den.* 296 U.S. 655 (1936) (dicta); Loftin v. McCramic, 47 So. 2d 298, 301-302 (Fla. 1950) dictum.
101. Godfrey v. W. Carolina Power Co., 190 N.C. 24, 128 S.E. 485 (1925); see Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S.E. 844 (1909).
102. 184 F.2d 616 (7th Cir. 1950), *cert. den.* 341 U.S. 939 (1951).

that upon an appointed day he will receive back the premises in what he trusts will be a satisfactory condition. Since his ownership and use of the property is to continue after the termination of the lease, the lessor is vitally interested that the leasehold be not surrendered in a state of dilapidation. On the other hand, the primary concern of the lessee, who realizes that his occupancy is limited, is to realize optimum enjoyment with minimum financial outlay for repairs. Although many other factors and considerations are present, it would appear that these are the most fundamental.

Considering leasehold repairs generally, it would be well to note that the subject is of greater significance in the case of commercial property leases and long term residential leases than in short term leases. In the latter, the lease agreement is more often than not a mere oral understanding resulting from response to a newspaper advertisement, a quick survey of the premises by the prospective lessee, and the striking of a bargain as to the amount of rent. In such cases, it seems by the nature of things, that the parties merely assume that in the event the lessee encounters any difficulty, he will merely advise the lessor to handle the problem. In all probability, the lessee may barely have the financial wherewithal to meet the periodic rent payments.

The most common way of solving the problem as to what repairs shall be made, when, and by whom, is to spell out such matters in the lease agreement and create therein a duty of performance by a contract stipulation or covenant. Since an express covenant to repair is a contractual undertaking, such agreement may assume any one of an innumerable variety of forms. As a preface to a survey of some of the most common forms of covenants to repair, it would appear beneficial to briefly consider the lessee's duty with respect to repair at common law separate and apart from any covenant.

The common law duty of a lessee with respect to leasehold repairs was interrelated to the duty of not permitting or committing waste.[1] Chief Justice Waite, speaking for the Supreme Court of the United States, in the case of *United States v. Bostwick*[2] phrased the concept thus:

> But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it . . . .

1. Co. LITT. § 67 (1812); 1 TIFFANY, REAL PROPERTY, § 102, p. 155 (1939); 32 AM. JUR., *Landlord and Tenant*, § § 779, 780, p. 666, 667 (1941).

2. 95 U. S. 53 (1876).

Subsequently in the opinion,[3] referring to this obligation, Chief Justice Waite said:

> The implied obligation is not to repair generally, but to so use the property as to make repair unnecessary as far as possible. It is in effect a covenant against voluntary waste and nothing more.

It appears somewhat questionable whether there existed at common law a liability on the part of a tenant for years for permissive waste. The Statutes of Marlbridge[4] and Gloucester[5] were apparently construed to provide actions for both permissive and voluntary waste against tenants for a term of years.[6] Subsequent English decisions ignore or repudiate any idea that a tenant for years is liable for permissive waste save through the existence of a covenant creating such liability.[7]

Any further consideration of the common law actions for waste as a descriptive device to define the tenant's duty to repair would be of little profit. Numerous specific examples of what a tenant was bound to do, gleaned from the writings of Coke, could be cited, but it would be impossible to reduce them to some generalized statement which would delimit the tenant's duty to repair.[8]

The term "wind and water-tight" has been used to describe the extent of the tenant's duty to repair apart from any covenant.[9] As the term implies, the duty is limited to those minor or general repairs as will prevent the leasehold from falling into a state of decay and dilapidation, ordinary wear and tear excepted.[10] Included within the orbit of this general definitive statement is a duty of replacing doors and windows broken during the term, replacing a fence, restoring boards to the side of a building, and repairing a leaking roof.[11] The

3. 95 U. S. 53, 68 (1876).
4. St. 52 Hen. 111, c. 23 (1267).
5. St. 6 Edw. 1, c. 5 (1278).
6. BLACKSTONE, COMMENTARIES, Book III, p. 225, so explained: If the particular tenant who was answerable for waste at common law, or the lessee for life or years who was first made liable by the statutes of Marlbridge and of Gloucester commits or suffers waste, it is a manifest injury to him that has the inheritance . . . .
7. See *Camden Trust Co. v. Handle*, 132 N. J. Eq. 97 (1942) wherein the court collects a number of cases and considers at length the effect of the Statutes of Marlbridge and Gloucester.
8. As an extreme example, Coke suggests the sad plight of a tenant who suffers his house to be wasted and then cuts timber to repair with the result that he finds himself liable for double waste. Co. LITT. § 67 (1812).
9. Patton v. U. S., 139 F. Supp. 279 (1955); Sanders v. Eckman, 17 Pa. Dist. & Co. 67 (1933); Niland v. Niland, 154 Wis. 514 (1913).
10. AMERICAN LAW OF PROPERTY. § 3.78 (1952); 1 TIFFANY, REAL PROPERTY, § 102 (3 ed. 1939); 32 AM. JUR. *Landlord and Tenant*, § 780, p. 667 (1941); 51 C.J.S. *Landlord & Tenant* § 366 (b) p. 1076 (1947).
11. Van Wormer v. Crane, 51 Mich. 363, 16 N. W. 686 (1883); 1 AMERICAN LAW OF PROPERTY, § 3.78 (1952).

tenant is under a duty to repaint the premises only to preserve them from deterioration, and not for the purpose of maintaining appearance or market value.[12] The tenant clearly has no duty to make substantial repairs, to rebuild, or to restore any substantial part of the premises damaged through casualty or ordinary wear.[13] The tenant is likewise not obligated to correct defects existing when his term began, nor is he liable for any permanent damage that may result from such pre-existing defect.[14]

Many courts, in defining the tenant's duty to make repairs, choose to ignore any common law concept of waste, or the irregular line of demarcation between minor and substantial repairs as such, and simply fix the limits of the duty by way of a standard of conduct, *viz.,* the tenant must exercise ordinary care in the use of the premises so as not to cause any material or permanent injuries.[15] Whether this standard of conduct more concretely describes the tenant's duty appears doubtful.

It is interesting to note that there exists some doubt as to whether the modern day tenant should have a duty to effect any repairs including those of a minor nature. In a leading treatise on the subject, we find this thought advanced:

> The rule that the tenant must make repairs was probably fair when applied in an agrarian economy where the materials for repairs were simple at hand, and the tenant capable of making them himself. At least as concerns the actual making of repairs, the rule seems archaic and completely out of harmony with the facts when applied in a complicated society to urban dwellings occupied by persons on salary or weekly wages. Common experience indicates that the tenant in such cases seldom makes or is expected to make repairs even of the minor type covered by the common law duty. It would seem that the lessor is in a better position, from the viewpoint of economic situation and interest, to make repairs, and that the tenant ought to have no duty in the absence of a specific covenant.[16]

As has previously been suggested, the foregoing in all probability does describe the relationship between the short term lessee and his

12. 2 WALSH, COMMENTARIES, LAW OF REAL PROPERTY, § 161 (1947).
13. 1 AMERICAN LAW OF PROPERTY, § 3.78 (1952); U. S. v. Bostwick, 94 U. S. 53 (1876); Hatch v. Stamper, 42 Conn. 28 (1875); Van Wormer v. Crane, 51 Mich. 363, 16 N. W. 686 (1883); Suydam v. Jackson, 54 N. Y. 450 (1873); Coke described the common law duty of the tenant in approximately the same terms, but noted a specific exception with respect to damage caused by Nature *viz.*: "If the house be discovered by tempest, the tenant must in convenient time repair it". Co. LITT. § 67 (f) (1812).
14. *Supra,* Note 12.
15. See a collection of cases to this effect in 10 A.L.R. 2d 1012, 1014 (1950).
16. From Lesar, *Commentary on Landlord and Tenant, in* 1 AMERICAN LAW OF PROPERTY, § 3.78 (1952).

lessor. In a great many situations it would be reasonable to assume that the landlord would just as well have the tenant vent his "do-it-yourself" tendencies on his own property and leave the leased premises to be repaired by one more qualified along such lines.

We will now direct our attention to a topic of greater significance: the tenant's duty to repair under an express covenant. As was stated at the outset the covenant to repair, being a contractual undertaking, may vary in scope depending upon the wishes and desires of the contracting parties. While any attempt to review the various forms of the covenant would admittedly not be completely exhaustive, an attempt will be made here to analyze and to determine the scope of the more common of these covenants.

Probably the simplest form of covenant is the covenant to keep the leased premises "in repair". Most courts are in agreement as to the scope of this covenant. As stated by the Tennessee Supreme Court in *Taylor v. Gunn*[17]:

> A covenant to keep in repair imposes on the tenant an obligation merely to keep the premises in as good repair as they were when the agreement was made.

While this statement may suggest that only incidental or trivial repairs will be necessary, the simplicity of the covenant makes it susceptible of a construction which would impose upon the tenant a rather broad duty to repair. For example a majority of courts have held that a covenant to repair without making specific exceptions imposes upon the tenant a duty to rebuild if the building is destroyed even though its destruction be not his fault. Illustrative of this is the case of *Bradley v. Holliman*[18] decided by the Arkansas Supreme Court. The lessee covenanted, *inter alia* "to keep the machinery in as good working order as when he takes possession". No exceptions were mentioned. During the term of the lease an unusual flood practically destroyed the leased premises and the machinery located therein. The court held that the lessee's failure to replace or rebuild was sufficient cause for the lessor to cancel the lease and retake possession. Actually the court had little trouble in reaching its decision as is evidenced by a closing remark:

> There was no exception in the contract against accident by flood.

This analysis appears completely unreasonable and its defense untenable if we pay any heed whatsoever to the real intentions and matters within the contemplation of the parties. Several states including

17. 190 Tenn. 45, 227 S.W.2d 52 (1950).

18. 134 Ark. 588, 202 S.W.469 (1918). For a number of cases to the same effect see 1 AMERICAN LAW OF PROPERTY, § 379, p. 350. n. 11 (1952).

Tennessee have statutorily relieved the tenant from such a harsh result.[19] Some courts even in the absence of such exculpatory statutes have refused to hold the tenant liable to rebuild simply because the use of the term "repairs" does not contemplate a duty to "rebuild".[20] Under the general covenant to repair, the lessee has been held liable to correct defects or damages which result from the acts of third persons.[21]

Another very common form of repair covenant is expressed in terms of "keeping the premises in good repair." While the covenant appears very similar to the one just considered, there may well be a significant difference in the contractual duty assumed by the tenant. Walsh in his treatise on real property has this to say of the covenant:

> A covenant to keep the premises in good repair is construed as necessarily involving a covenant to put them in good repair if such is not their condition at the beginning of the term, since they cannot be maintained in good repair unless they are first put in that condition.[22]

Some courts in construing the extent of the tenant's duty under a covenant to keep in good repair, have not gone quite so far in specifically obligating the tenant to make initial repairs. However, by not negativing the possibility, it would appear that such duty could still be insisted upon as a reasonable implication. In *William A. Doe Company v. City of Boston*[23] the Massachusetts Supreme Court reasoned that a covenant to keep the demised premises in good repair and condition created a duty upon the tenant:

> . . . to make all ordinary repairs which reasonably would be required to keep the premises in proper condition.

Certain later decisions are contrary, flatly holding that there is no duty to first put the premises in good repair when the tenant covenants to "keep" them in such condition. In *Kates v. Hotel Brooks Corp.*,[24]

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19. TENN. CODE ANN. § 64-703 (1956): **Covenant to leave in good repair.** Nor, in such event [referring to Sec. 64-702 which includes leased property destroyed or so injured by the elements, or any other cause so as to be untenantable] shall a covenant or promise by the lessee to leave or restore the premises in good repair have the effect to bind him to erect or pay for such buildings as may be so destroyed, unless in respect of the matter of loss, or destruction there was neglect or fault on his part, or unless he has expressly stipulated in writing to be so bound.
20. 1 AMERICAN LAW OF PROPERTY § 3.79, p. 351, n. 12 (1952).
21. Container Co. v. United States, 90 F. Supp. 689 (Ct. Cl. 1950); 1 TIFFANY REAL PROPERTY, § 102, p. 156 (3d ed. 1939).
22. 2 WALSH, COMMENTARIES, LAW OF REAL PROPERTY, § 162, p. 208-9 (1947). See also Miller v. McCardell, 19 R. I. 304, 33 A. 445 (1895); Facopoulos v. Levenson, 200 App. Div. 918, 193 N.Y.S. 61 (1922); Arnold-Evans Co. v. Harding, 132 Wash. 426, 232 Pac. 290 (1925).
23. 262 Mass. 458, 160 N. E. 262 (1928).
24. 118 Vt. 324, 109 A. 2d 265 (1954); 32 AM. JUR. *Landlord & Tenant*, § 789, p. 674 (1941).

the lessor brought an action of ejectment for an alleged breach by the lessee of his covenant "to keep the premises in good and proper repair." In holding that such a covenant created no duty upon the tenant to first put the premises in repair if necessary, the Vermont Supreme Court said:

> The lessee's duty to the lessor under the covenant is to be measured by the condition of the property when taken.

As has been repeatedly suggested these covenants can be the subject of every conceivable modification. In *Yakima Valley Motors, Inc. v. Webb Tractor & Equip. Co.*,[25] the covenant was "to maintain said building in a good condition as the same now is, and in as good condition as the same may be placed in after the completion of said changes, alterations, and repairs to be made thereto by the lessee and herein contemplated". The building in question was in a state of dilapidation at the commencement of the lease. The tenant made suitable restoration but when the lease expired, certain portions of the premises had fallen into a state of disrepair. The Washington court found that the tenant had clearly breached his covenant and pointed to the fact that:

> While the premises were probably in as good condition as respondent had found them, they were not in the condition that it put them.

What is the effect of an express statement in a lease agreement that the premises are admitted to be in a good state of repair when in fact they are extremely deteriorated? In *Codman v. Hygrade Food Products Corp. of New York*,[26] the Massachusetts court considered, *inter alia*, the significance of a lease provision: "keep . . . the said premises . . . in such repair as the same are in at the commencement of said term . . . the same being admitted to be in good condition at the time of the execution of these presents . . ." The Massachusetts court in considering this admission said:

> The standard that is set is the actual state of repair, whether good or bad, in which the premises were at the time of letting . . . .

Oftimes the tenant may seek to restrict further his duty of repair by expressing his agreement in terms of "necessary repairs". An interesting case involving such a covenant is *Dolid v. Leathercraft Corporation*,[27] recently decided by the Superior Court of New Jersey, Appellate Di-

25. 14 Wash.2d 468, 128 P. 2d 507 (1942).

26. 295 Mass. 195, 3 N. E. 2d 759 (1936).

27. 39 N.J. Super. 194, 120 A. 2d 617 (1956). In support of defendant's contention as to the nature of the covenant, see Marcy v. Syracuse, 199 App. Div. 246, 192 N.Y. Supp. 674 (1921) and other cases collected in Annot. 45 A.L.R. 12 (1926).

vision. The defendant corporation there made the following covenant relative to the making of repairs:

> The lessee shall make all necessary repairs, interior and exterior, in and about the leased premises at its own expense; but shall not be required to make any structural repairs or alterations.

An alleged breach of this covenant was the basis of the landlord's action to recover possession of the premises. The trial judge's charge included the following language which defined the nature of the covenant:

> This whole controversy appears to resolve around the meaning of the phrase 'necessary repairs'. Necessary for what? Necessary to preserve the building against waste, against the elements, necessary to keep it in repair for the use of the tenant.

In appealing an adverse judgment, the defendant lessee was critical of the above-cited portion of the charge and insisted that its duty extended only to such repairs as it, the lessee, deemed necessary for its use of the leased premises. The appellate court showed no hesitancy whatsoever in placing its stamp of approval on the disputed portion of the charge, and, in pointing out the weakness of the lessee's position rhetorically asked:

> In need of repair, states the plaintiff are the broken windows and chains, the stair treads, the floors in front of the elevator shaft, and the roof covering. Can it be reasonably concluded that it was contemplated by the parties that repairs of such a nature and character were to be classified as structural and thus beyond the reach of the defendant's covenant?

Apparently the covenant to make necessary repairs does not obligate the tenant to remedy structural defects, especially where the defect predated the commencement of the term.[28]

The phrase, "repairs sufficient to satisfy city and state regulations or ordinances", is often used to define the tenant's liability for repairs. Such a covenant is generally construed to embrace all repairs which are directed by the authorities with the exception of additions, improvements, or structural changes.[29] A provision, such as the one presently being considered, is quite often attached to the tenant's other contractual undertakings to repair as in *Liphro Realty Corp. v. Eichler*[30]

28. Barrow v. Culver Bros. Garage, 78 So. 2d 69 (La. App. 1955); Thompson Street Holding Corp. v. Sherwin-Williams Co., 234 App. Div. 409, 255 N.Y.S. 299 (1932); see also Annot. 45 A.L.R. 12, 24 (1926), and 20 A.L.R. 2d 1334, 1338 (1951).

29. Fenham, Inc. v. Safeway Stores, Inc., 76 N.Y.S. 2d 308 (1947); Sullivan v. New York United Realty Co. 250 App. Div. 286, 293 N.Y.S. 957 (1937); In Kaiser v. Magis, 120 N.Y.S.2d 510 (App. Term 1st Dept. 1953) the tenant a second floor resident was given a key to bathroom on the first floor. The court held that his covenant "to make own repairs or improvements to comply with city and state regulations" did not obligate him to install plumbing fixtures on second floor.

30. 207 Misc. 839, 140 N.Y.S.2d 369 (1955).

where the tenant agreed to make interior, exterior, and even structural repairs, and to comply with all laws, orders, and regulations relative to the condition of the premises. The latter portion of the covenant obligated the tenant to effectuate all structural changes directed by law, and was not limited to conditions created by the tenant.

Yet to be considered is the covenant to repair in terms of the condition of the premises at the expiration of the lease. Quite obviously, the lessor is singularly interested in the condition of the premises at the expiration of the term for at such time he must reassume possession himself or bargain with new tenants. The basic distinction between a covenant to repair and a covenant to surrender the premises in a given condition is that in the former there exists a duty to make repairs periodically during the term, whereas in the latter the covenant is not breached so long as sufficient repairs are effected, even on the last day of the term, as will place the premises in the required condition.[31] Under the latter type of covenant, the tenant must, however, determine and make all necessary repairs before the expiration of the term.[32]

The covenant to surrender the premises in a designated condition is frequently coupled with an undertaking to maintain the premises in a given state of repair during the term. In such instances, the covenants will be read and construed together.[33] By joining these two common forms of covenants to repair, one obvious advantage inures to the benefit of the lessor: he is not obligated to suffer the continued occupancy by a tenant who has allowed the premises to fall into substantial disrepair, and who in all probability will not fulfill his duty of restoration at the end of the term. When the covenant is defined solely in terms of surrendering the premises in a given condition, with no express duty of interim repair, it is readily apparent that such covenant cannot be breached until there is a failure to deliver up the premises in the required condition at the end of the term.[34]

The type of covenant presently being considered usually binds the tenant to surrender the premises in the same condition as received, or to surrender the premises in good order or condition. To both these undertakings the parties normally except natural wear and deterioration. The Massachusetts Supreme Judicial Court had occasion to consider the scope of such a covenant in the case of *Crawley v. Jean*[35] where the tenant undertook "to quit and deliver up the premises to the lessor . . .

31. Avelez Hotel Corp. v. Milner Hotels, Inc., 87 So. 2d 63 (Miss. 1956); Griffin Grocery Co. v. McBride, 217 Ark. 949, 235 S.W.2d 38 (1950).
32. Ghisolberti v. Lagarde, 146 So. 763 (La. App. 1933).
33. Edwards v. Allen Restaurant Corp., 198 Misc. 853, 98 N.Y.S. 2d 815 (1950).
34. Griffin Grocery Co. v. McBride, 217 Ark. 949, 235 S.W.2d 38 (1950).
35. 218 Mass. 263, 105 N.E. 1007 (1914).

at the end of the term, in as good order and condition, reasonable use and wear thereof, fire and unavoidable casualties excepted, as the same now are". The court, in defining the scope of the covenant, pointed out that it did not require the premises to be delivered up in the same shape and condition, nor in like condition, nor in the same state, but rather held that the covenant bound the lessee to make whatever repairs may be necessary in order that at the end of the term the estate may conform to the standard at the time fixed in the lease. Under such a covenant, the tenant is generally not required to put the premises in repair at the beginning of the term, nor is he obliged to make any repairs which will put the premises in better condition at the expiration of the term than when the tenancy began.[36] In this connection, it has been held that under a covenant to restore the premises to the same condition that existed at the beginning of the lease, the tenant is not liable in damages for his failure to remove improvements which substantially increased the value of the leasehold. In considering this unusual claim for damages the United States Court of Claims had this to say:

> Mark Twain once said that the difference between a dog and a man is that if you pick up a starving dog and make him prosperous, he will not bite you. We suppose it is as natural for a human institution to look after its own interests as it is for the sparks to fly upward, but in order to justify recovery in this case the plaintiff must show actual damages by virtue of the breach of the contract which, in our judgment, it has not shown.[37]

The examples and illustrations which have been considered in this comment are suggestive of the scope of the tenant's undertaking and the innumerable variations in the form of the covenant which may significantly modify his duty to make repairs. In the final analysis, it would appear that the court will, as in other contractual relationships, look to the intent of the parties, rather than afford inflexible meanings to the terms most commonly employed in drafting covenants to repair. Frequently the covenant to repair is included in the lease agreement as a "standard" provision. These so-called "standard" provisions are quite often inappropriate and inadvisedly agreed upon, resulting in misunderstanding and possible litigation when the parties discover the exact extent of the rights and obligations. The inordinate amount of litigation in this field should be a sufficient condemnation of this practice.

JACK DRAPER*

36. 2 WALSH, COMMENTARIES, LAW OF REAL PROPERTY § 162, p. 207 (1947); 32 AM. JUR., *Landlord and Tenant* § 806, p. 686 (1941).

37. Realty Associates, Inc. v. U.S. 138 Fed. Supp. 875 (Ct. Cl. 1956).

38. 322 Mass 299, 77 N.E.2d 399 (1948).

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IN REM ACTIONS — ADEQUACY OF NOTICE

The typical statutory prescription as to in rem actions provides for notice by publication in a local newspaper for a designated number of times and at designated intervals. Attacks upon in rem judgments when the sole notice to the defendant was by publication have been successful in certain situations under the Due Process Clause of the Fourteenth Amendment. It is the intended scope of this Comment first to consider the leading United States Supreme Court decisions which have cast considerable doubt upon the adequacy of publication as a sole means of notice; and secondly, to explore their application to Tennessee law. A consideration of the possibilities of attacking judgments where there has been inadequate notice, and suggestions as to appropriate legislative changes will be presented. Although similar consideration as to adequacy of notice are applicable to in personam actions, this Comment will be limited to in rem actions.

It is readily apparent that notice is more apt to be inadequate in an in rem action than in an in personam action which usually is preceded by personal service. In passing, however, it may be noted that the Supreme Court of the United States in determining the adequacy of notice has refused to make controlling the distinction often relied on by the state courts as to whether the action is in rem or in personam. For instance, in *Mullane v. Central Hanover Bank and Trust Co.*[1] the Court declared:

> Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of the law, or on other issues, or the reasoning which underlies them, we do not rest the power of the state to resort to constructive service in this proceeding upon how its courts or this Court may regard this historical antithesis.

I. The Position of the United States Supreme Court

It should suffice for the problem at hand to determine the minimum requirements of due process without delving into the numerous definitions of due process of law. The following statement in the leading authority, the *Mullane* case, may be helpful as an introductory observation:

> Many controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudgment be preceded by notice and opportunity for hearing appropriate to the nature of the case.[2]

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1. 339 U.S. 306, 312 (1950).

2. *Ibid.*

In the *Mullane* case, the bank was trustee of a common trust fund in which there were 113 participating trusts, approximately one-half inter vivos and one-half testamentary. Fifteen months after the trust was established, action was brought by the bank to judicially settle its accounts as provided by the New York banking law. The minimum notice authorized by statute was given, — publication in the local paper once a week for four weeks, naming the trust, giving the name and date of the trust, and listing the participating estates, trusts or funds. Further, at the time the first investment was made, a letter incorporating the statutes pertaining to notice was sent to each known person of full age and sound mind who was entitled to share in the fund.

Mullane, the special guardian for unknown persons not otherwise appearing in the accounting suit, appealed from a decision of the New York Court of Appeals affirming the accounting. The United States Supreme Court affirmed in part and reversed in part. The notice was deemed sufficient as to those beneficiaries who were unknown or whose addresses were unknown and as to persons with undetermined future or conjectural interests; but the notice was found insufficient as to those beneficiaries whose names and addresses were known or could be easily determined in the ordinary course of business. Adopting a realistic view, the Court recognized that notice by publication does not ordinarily reach the person entitled to notice.[3] But the Court, weighing the interest of the state against the individual's interest sought to be protected by the Fourteenth Amendment, said:

> This court has not hesitated to approve of resort to publication in a customary class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.[4]

Thus, resting on the unreasonableness in requiring the bank to search for the unknown persons and the probable futility of such a search, the Court held that publication notice was sufficient as to them.[5] On the other hand, the bank had the names and addresses of many beneficiaries. Letters had been sent to them when the first investment

3. It has been reported that in all of the vast Tennessee Valley Authority condemnation cases in only one did publication actually notify the landowner of the proceeding.

4. 339 U.S. 306, 317 (1950).

5. Justice Burton dissented on the ground that it is within the discretion of the state whether additional notice is required.

was made. Reasonableness and fair play demanded that they be notified at least by letter sent to the last known address.

More recently the Supreme Court has considered afresh the problem of reasonable notice requirements in connection with in rem proceedings. Thus in *Walker v. Hutchinson City*,[6] the city brought an action to condemn part of appellant's land for public use under a statute providing for notice by publication or in writing ten days before suit was brought. Publication was made. The Supreme Court held that the publication notice did not meet the requirements of due process since appellant's name was on the official records of the city, and a letter more likely would have notified him of the suit than the newspaper publication. Referring to the *Mullane* case, the Court commented:

> That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests.[7]

The plaintiff apparently must at least search his own records for the names and addresses of defendants and notify them by letter. This is not an unreasonable burden. The Court refused to lay down a rigid formula for the notice which must be given. Each case must stand on its own facts, or possibly each individual type of situation must stand on its own characteristic facts.

Hulling v. Kaw Valley R.R.[8] on which the plaintiff relied heavily in the *Walker* case was distinguished by the Court. There, the railroad proceeded to condemn land under a statute which provided for notice by publication. The exact route of the track was not determined at the time the condemnation suit was brought, and the notice consisted of letting the people in the general vicinity know that some land would be condemned. The Court assumed that everyone in the county could not be given personal notice and held that publication, therefore, stood in its place. As to the appellant, a non-resident of the state, the Court stated:

> It is the duty of the owner of real estate who is a non-resident, to take measures that in some way he should be represented when his property is called to requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune and he must abide by the consequences. Such publication is "due process of law" as applied to this class of cases.[9]

6. 352 U.S. 112 (1956).
7. 352 U.S. 112, 115 (1956).
8. 130 U.S. 559 (1889).
9. 130 U.S. 559, 564 (1889).

Although the Court in the *Walker* case was presented an excellent opportunity to consider the effect of *Mullane* on the old *Hulling* case, it chose to avoid that course and said:

> Decided in 1889, that case [the *Hulling* case] upheld notice by publication in a condemnation proceeding on the ground that the landowner was a non-resident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which *Mullane* may have undermined the reasoning of the *Hulling* decision.[10]

But it appears that the *Hulling* case is now questionable and possibly extinguished as authority.

In *Nelson v. New York City*[11] the United States Supreme Court considered the counterpart of the state tax lien foreclosure statute which was operative in New York City. The city had foreclosed on two tracts of appellant's land for arrearages in water taxes. Notice had been given by posting, publication, and mail. The contention of the appellants was that their trusted bookkeeper had concealed from them the nonpayment of the water charges and the letter giving notice. In addition, they contended that the trustee had been careless in overlooking notices of arrearages on the annual tax bills. The court held that due process did not demand that the city be responsible for the letter actually reaching the appellants. It was enough that it reach their agent, and the loss for the agent's wrongdoing fell upon the appellants.[12]

Once again the distinction between actual knowledge and procedures reasonably calculated to give notice is clear. Due process never requires the former. It generally requires the latter.

An interesting and unusual problem is posed by another recent case, *Covey v. Town of Somers*.[13] The town judicially foreclosed on the appellant's property to satisfy delinquent taxes. The statute provided for notice by mail, publication and posting. These requirements were complied with, but appellant was known by the town officials to be mentally incompetent. They also knew that she had no one to care for her affairs and that she possessed adequate wealth to pay her

10. 352 U.S. 112, 116 (1956).
11. 352 U.S. 103 (1956).
12. In *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884) it was said:
> The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

Furthermore, *Wagenberg v. Charleston Wood Products*, 122 F.Supp. 745 (E.D. S.C. 1954) held that the mail did not have to be registered.
13. 351 U.S. 141 (1956).

taxes. Five days after delivery of a deed to the city, appellant was adjudged mentally incompetent and committed to an institution. Suit was brought by her guardian to recover the property. The city contended that a mentally incompetent person was not entitled to more notice than a sane person. But the Supreme Court held that the notice given did not satisfy due process and quoting from the *Mullane* case, admonished the city:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.[14]

The result is that peculiar facts within the knowledge of the sender may prevent a letter from being adequate notice.

Moreover, the application of due process to the adequacy of notice is not limited merely to the form of the notice. It also applies to the substance of the notice. Even a personal letter to a competent person may not satisfy the due process concept if it is not received in time for the defendant to prepare an adequate defense. In an often cited case, *Roller v. Holly*,[15] notice of a foreclosure action in Texas was sent to the defendant in Virginia. The letter was received five days before the suit and at that time at least four days of constant travel would have been necessary to reach the location of the the trial. This left only one day, a Sunday, for the defendant to prepare his case. The Supreme Court held that the notice was insufficient under the Due Process Clause.

A few years earlier, the distinction between requirements of notice as to known and unknown claimants was further illustrated. In *Standard Oil Co. v. State of New Jersey*,[16] the state proceeded under an escheat statute to claim property, owned by unknown persons, but held by the oil company. The company claimed that it was deprived of property without due process of law because the publication notice which had been given was inadequate and did not protect it from subsequent liability to claimants of the property. The Supreme Court followed that part of the *Mullane* case pertaining to unknown parties and held that the notice was sufficient. This was merely another application of the rule that where the names and addresses of the defendants are not known, publication notice is just as apt to reach them as any other kind of notice.

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14. 351 U.S. 141, 146 (1956).
15. 176 U.S. 398 (1889).
16. 341 U.S. 428 (1951).

In *City of New York v. New York, N.H.&H. Railway Co.*[17] the city imposed liens on the railway's real estate for street and other improvements. Subsequently, reorganization of the railway was begun pursuant to the Bankruptcy Act. The District Court issued an order requiring creditors to file claims by a certain date or be barred. The railway was directed to mail copies of the order to mortgagee trustees or their counsel and to all creditors who had already appeared in court. Other creditors, including the city, received notice by publication only. The District Court held that the city's liens were barred by failure to file in time; this was affirmed by the Court of Appeals. The Supreme Court reversed, holding that the city had been denied the required notice. It was so held even though the city had had actual knowledge of the reorganization of the railway in court:

> But even creditors who have knowledge of a reorganization have a right to assume that the statutory reasonable notice will be given them before their claims are forever barred.[18]

Furthermore the Court observed:

> The statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights.[19]

Thus failure to comply with the statutory procedure for giving notice may provide a ground of attack upon a judgment even though the defendant had actual notice of the proceeding. He is entitled to the statutory notice. This case is probably only a case requiring a federal court to obey a notice statute but the Supreme Court cited the constitutional decisions in support of its decision.

Additional notice other than by publication may not be necessary where there is an *attachment* of tangible property or *legal entry* upon real property *at the time the suit is brought.* There is no recent decision holding this, but the *Mullane* decision referred to a line of cases, including *Roller v. Holly*,[20] which indicate that attachment plus publication notice will give the owner sufficient notice. The assumption is either that the owner placed someone in charge of the property who is under a duty to inform him that it is in danger, or that the owner has abandoned it. Justice Jackson carefully distinguished the facts of the *Mullane* case from that situation; the caretaker (the bank) was in fact an adversary of the owner and its duty to inform the owner was limited by statute to publication. A similar point would seem to be involved in the *Standard Oil Co.* case. Giving notice to the debtor

17. 344 U.S. 293 (1953).
18. 344 U.S. 293, 297 (1953).
19. *Ibid.*
20. 176 U.S. 398 (1889).

may be one way of attaching an intangible so that, at least as to unknown claimants, publication notice is sufficient.

Although the *Mullane* case indicates that attachment or legal entry *at the time of suit* might satisfy due process, caution would dictate that a letter be sent as a safeguard in addition to publication notice. Actual attachment may be required in the case of a purely in rem action. Two earlier cases, *Pennoyer v. Neff*[21] and *Cooper v. Reynolds,* [22] insisted on attachment when there was no pre-existing lien. Thus, it may well be that in the case of a quasi-in rem proceeding an actual attachment is required, while in a pure in rem action where there is a prior lien established by action of the owner, an actual attachment may be dispensed with. However, the cases making this distinction so antedate the development of the due process concept that they cannot be deemed authoritative today.

Before discussing individually some typical Tennessee statutes and decisions in this field, it may be noted that the state courts elsewhere have not met the *Mullane* decision and its companions with complete favor. Thus in a Washington case, *N.Y. Merchandise Co. v. Stout,*[23] a creditor attacked the Washington nonclaim statute in a probate proceeding on the ground that the only notice required was by publication. The creditor relied on the *Mullane* case, but the court refused to consider the question of due process and held that the *Mullane* decision applied only in a trusteeship proceeding.

II. Tennessee Case Law and Legislation

Before considering the Tennessee statutes specifically there are two situations which should be discussed.

First, where a statute does not provide for notice, may the defect in the statute be remedied by giving notice, *e.g.,* by letter? Several possibilities exist. In *Woolard v. Nashville,*[24] the Tennessee condemnation statutes were attacked as violating due process on the ground that notice was not specifically required in the statute. Notice was actually given, however. The court held that the necessity of notice could be *implied* from the statute and that in the instant case notice would be implied from the fact that the statute provided the landowner a right of appeal from an award made by the commissioners appointed to

21. 95 U.S. 741 (1878).
22. 77 U.S. 308 (1870).
23. 43 Wash.2d 825, 264 P.2d 863 (1953); See Comment, *Adequacy of Notice — Due Process,* 32 Wash. L. Rev. 165, 178 (1957).
24. 108 Tenn. 353, 67 S.W. 801 (1902).

assess damages.[25] This result is not objectionable. The court remedied the defect in the statute by its decision.

Wuchter v. Pizzutti,[26] although based on in personam jurisdiction is of particular interest in this connection. There a non-resident motorist statute provided for service on the secretary of state but it neglected to require that he notify the defendant. Irrespective of the fact that the defendant was given actual notice, the United States Supreme Court held that the Due Process Clause had been violated. The statute must provide for notice. But the lower court had not attempted to remedy the defect by holding that notice was necessarily implied. If the lower court had held that notice was implied, the result might have been different.

Second, suppose the statute provides for notice only by publication and the facts of the case at hand indicate that another form of notice is necessary to afford the adversary adequate notice. May the defect in the statute be remedied by giving the most reasonable notice? Though no case authority has been found, this problem is closely related to the previous question. It is in this field that many of the Tennessee statutes may be open to attack. With these situations in mind, let us consider some of the Tennessee statutes and the circumstances in which the question of adequate notice may arise.

Legislative enactments in the state vary widely in their requirements as to notice. Some provide for notice solely by publication; others provide for written notice for residents, and publication for non-residents; others provide further variations.

Decedents' Estates: In the case of decedent's estate the clerk must give the creditors notice by publication within thirty days after the issuance of letters testamentary. The creditors must then file their claims within nine months or be forever barred.[27] The adequacy of this type of notice was questioned in *Commerce Union Bank v. Gillespie*.[28] The Tennessee Supreme Court refused to consider the point, however, because the assignment of error was too broad.

A related situation exists where there is an insolvent estate. There the claims must be filed before a day set by the clerk which is not less than two months nor more than four months following the publication notice.[29]

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25. See I MERRILL, NOTICE § 511 (1952). The weight of authority is that the provision for notification may be read into the statute.
26. 276 U.S. 13 (1928).
27. TENN. CODE ANN. § 30-509-513 (1956).
28. 178 Tenn. 179, 156 S.W.2d 425 (1939).
29. TENN. CODE ANN. § 30-704 (1956).

Where the creditor's name is known to the administrator or where his name is on the records of the decedent, all of the United States Supreme Court cases cast considerable doubt upon the adequacy of notice by publication. It appears that the creditor is entitled to a letter informing him of the proceedings before his claim can be barred. Unless a change in the Tennessee statute is forthcoming, future litigation in this field can be expected.

On the other hand, as suggested by Overton in his article, *Broadening the Bases of In Personam Jurisdiction*,[30] it can be argued that the creditor has *consented* to publication as a means of notice by engaging in transactions with the decedent after the legislation was enacted, in addition to consenting to the exercise of the power to discharge the claim.

Ex Parte Divorces: Such divorces based on publication notice, would seem at first impression to provide fertile ground for attack. The Supreme Court cases recognize that there must be adequate notice in divorce proceedings,[31] but there has not been a case holding that publication alone is insufficient notice. It should be remembered, however, that divorces have been treated uniquely by the law. Originally divorces were legislative. Thus, requirements of judicial jurisdiction and notice were not applicable. Even today divorces are afforded unique treatment under the full faith and credit concept.[32] Therefore, the same requirements of notice may not apply to divorce actions as are applicable to other types of in rem actions.

Tax Sales: Statutes pertaining to the sale of personal property to satisfy delinquent taxes provide for notice by publication.[33] It is also provided that the officer shall have the personal property present when sold.[34] This last provision may provide sufficient notice to satisfy due process since there would necessarily be a *seizure* of the property. The uncertainty in this situation was referred to previously.

Notice of the sale of real property to satisfy delinquent taxes under a decree of court is provided for by Tennessee Code Ann. § 67-2018.[35] Publication or handbills are the authorized means of notice. There does not have to be a seizure or legal entry upon the property. The Supreme Court cases discussed previously indicate that proceedings under this statute rest on questionable grounds since the owner's name and

30. 22 TENN. LAW REV. 237 (1952).
31. William v. North Carolina, 317 U.S. 298 (1942).
32. Williams v. North Carolina, 325 U.S. 226 (1945).
33. TENN. CODE ANN. § 67-1306 (1956).
34. TENN. CODE ANN. § 67-1307 (1956).
35. TENN. CODE ANN. § 67-2018 (1956).

address are generally on the tax rolls and a letter would notify him of the proceeding.

Eminent Domain: Upon a casual reading of the Tennessee statute such proceedings would, at least as far as non-residents are concerned, seem to violate due process. Under Tennessee Code Ann. § 23-1405:

> Notice of this petition shall be given to the owner of the land or rights, or, if a non-resident of the county, to his agent, at least five days before its presentation. If the owner is a non-resident of the state or unknown, notice shall be given by publication, as provided in this Code in similar cases in chancery.[36]

However, the last clause "as provided in this Code in similar cases in chancery" probably protects these proceedings. The general chancery section provides that where publication is made for a non-resident, the clerk shall immediately after the first publication mail a copy of the newspaper to each of the non-resident defendants.

Slum Clearance: As a model statute for notice in in rem proceedings the Tennessee Slum Clearance statute should not be overlooked. It provides:

> Complaints or orders issued by a public officer pursuant to an ordinance adopted under this chapter shall be served upon persons either personally or by registered mail, but if the whereabouts of such persons is unknown and the same cannot be ascertained by the public officer in the exercise of reasonable diligence, and the public officer shall make an affidavit to that effect, then the serving of such complaint or order upon such persons may be made by publishing the same once a week for two (2) consecutive weeks in a newspaper printed and published in the municipality, or in the absence of such newspaper, in one printed and published in the county and circulating in the municipality in which the dwellings are located. A copy of such complaint or order shall be posted in a conspicuous place on premises affected by the complaint or order. A copy of such complaint or order shall also be filed for record in the register's office of the county in which the dwelling is located, and such filing of the complaint or order shall have the same force and effect as other lis pendens notices provided by law.[37]

The most reasonable forms of notice in descending order are provided in this statute. Even the publication notice is calculated to be that most likely to reach the defendant.

Conclusion

Although a definite framework has not been provided, the United States Supreme Court has recognized in some instances the inadequacy of the means of notice traditionally accepted in in rem proceedings.

36. Tenn. Code Ann. § 23-1405 (1956).
37. Tenn. Code Ann. § 13-1205 (1956).

The requirement that a known defendant be notified at least by an ordinary business letter increases immeasurably his chances of receiving notice. The burden thus placed on the plaintiff is not great compared with the benefit derived by the defendant.

If the *Mullane* case and its Supreme Court companions are accepted with favorable interpretation by the Tennessee courts, a revision of some of Tennessee's statutes will be necessary. From the enactment of the comparatively recent statute concerning notice in slum clearances which provides for adequate forms of notice to suit the particular situation at hand it is evident that the Tennessee legislature has recognized the scope of the problem. What remains to be accomplished is considerable statutory revision along similar lines in other areas where adequacy of notice may be questioned.

ROGER F. BLEY*

UNKNOWN MECHANICAL DEFECTS — DRIVER'S LIABILITY

This discussion is intended to deal with the effect of unknown mechanical defects on liability of the driver of a motor vehicle for injuries caused by the mechanical failure. The determinative issues in most of the cases are whether the defendant acted negligently and whether the defect was the proximate cause of the injury or death.[1] The subject will be considered under the following headings: Non-liability for unknown defects; Negligence per se and proximate causation; Emergencies and unavoidable accidents; Bailor's liability; and Liability to guests.

I. NON-LIABILITY FOR UNKNOWN DEFECTS

If the mechanical defect is unknown and could not reasonably be discovered, and if no other cause of the injury appears, then the driver (and/or owner) of the vehicle will not be held liable for the injury. However, a "pure" case of injury caused by an unknown defect alone is rare. One early decision involved a near-perfect example of the rule in this situation. In *Sweet v. Capps*,[2] the defendant was driving on a country road behind a wagon pulled by horses. Defendant was traveling about ten miles an hour and the plaintiff's wagon about eight miles an hour. A car approached from the other direction. When the defendant tried to apply his brakes, the rear axle broke on his automobile. He tried to apply the hand brake, but this did not stop his car from running into the wagon. The wagon was not damaged, but the plaintiff was thrown from the wagon and injured. The court held

*LL.B. Dec. 1957. Former member, Editorial Board, *Tennessee Law Review*.

1. Annot., 170 A.L.R. 613 (1947).

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that the defendant was not liable since he was guilty of no act of negligence. The court pointed out that the automobile was manufactured by one of the largest and most reputable producers in the country, that it was about two years old, and had been driven only three or four thousand miles. On these facts it was concluded that the defendant would have no reason to suspect or discover a defective rear axle.

Although such a clear-cut case would be difficult to duplicate in the complex highway situation of today, a similar occurrence did take place in more recent years. The defendant was driving his automobile down a straight two lane concrete highway in a prudent manner and at a moderate rate of speed. The front end of the car suddenly dropped to the paving, the car overturned and plaintiff's decedent was killed. The court said:

> We are constrained to the conclusion that this accident was caused by a latent defect in the front part of the defendant's auto that could not have been discovered by an ordinary inspection and was not discovered when the defendant had his car inspected by mechanics shortly before the accident and was not known to the defendant.[3]

The defendant was held not liable for the death of his passenger, and the court of appeals upheld the lower court's directed verdict for the defendant.

It will be noted that several elements are present in these cases where the defendant is not liable for the injury or death. In each case there was a clear mechanical failure which was the proximate cause of the accident and resulting injury;[4] the defendant did not know and could not reasonably have been expected to discover the defect; and there were no other acts by the defendant which reasonably could have been construed as negligent conduct.

II. Negligence Per Se and Proximate Causation

A recent case held that violations of statutory regulations[5] regarding brakes and other equipment on motor vehicles constituted negligence per se. The court reasoned that it was best to place the burden on the operator of the vehicle rather than on the party innocently hurt. This was held to be the rule even though the operator did not know of the defect.[6] The nature of this burden was explained in *Purser v. Thompson,* where the court of appeals said that once the proof

3. Sloan v. Nevil, 33 Tenn. App. 100, 113, 229 S.W.2d 350 (1949).
4. Proximate causation is, of course, a question for the jury. This point will be discussed below.
5. Tenn. Code Ann. §§ 59-916, 59-917 (1956).
6. Hammonds v. Mansfield, 296 S.W.2d 652, 658 (Tenn. App. 1955). See also Coop v. Williamson, 173 Fed. 2d 313, 315 (6th Cir. 1949).

showed a violation of the statute, the violator should affirmatively remove any imputation of negligence in failing to discover the defect.[7]

There are two basic areas in which the jury can find actionable negligence where a mechanical defect is involved. The first involves failure to discover the defect; the second relates to further acts of negligence on the part of the defendant which would have caused the accident apart from the defect. The court in the *Purser*[8] case held that the jury could find the defendant guilty of negligence in not discovering a latent defect, if its existence could have been discovered by the exercise of reasonable care. The injury in this case was caused by brake failure due to a flaw in the master cylinder. Since the evidence showed that the brake pedal had to be "pumped" the court felt that the jury could find that the latent defect might be discovered by the exercise of reasonable care.

Assuming that the jury finds the defendant blameless in not discovering the defect, the defendant still may be liable if he was otherwise negligent, and this negligence was the proximate cause of the injury. Where the brakes on an automobile locked, causing it to skid on gravel and plunge down an embankment, the court of appeals said that whether the driver lost control of the automobile because of a mechanical defect, and whether the defect was the proximate cause of the accident, were questions for the jury.[9] It sometimes happens that the jury must determine the age-old question of the chicken and the egg. Did the defect cause the accident, or did the driver's negligence cause the defect? Where the driver's negligence causes the accident the jury may find that there was no pre-accident defect at all. So in *Coppedge v. Blackburn*[10] the highway on which the accident occured contained a sizeable ridge of gravel down the center. The defendant cut across the gravel to pass another car, and when he turned back across the ridge a tire blew out and the car overturned. The court said that the jury was to decide whether the blowout caused the wreck and the injury, or whether the manner in which the defendant drove the automobile across the ridge caused the wreck.

The facts in the mechanical defect cases, as in others, are often complex and variable. The circumstances frequently involve conduct on the part of the defendant which supersedes the mechanical defect as the proximate cause of the accident. In one case the defendant did not attempt to use his hand brake after the foot brake had failed and the

7. Purser v. Thompson, 31 Tenn. App. 619, 219 S.W.2d 211 (1949).
8. *Ibid.*
9. Lively v. Atchley, 36 Tenn. App. 399, 256 S.W.2d 58 (1952).
10. Coppedge v. Blackburn, 15 Tenn. App. 587 (1932).

plaintiff pedestrian was injured. The court held that even though the defect was unknown and the defendant blameless on that count, the jury could find that his failure to utilize the hand brake was the proximate cause of the accident.[11] In another brake failure case the court stated that the jury could find negligence which proximately caused the injury in the defendant's steering of his automobile toward the plaintiffs after his brakes unexpectedly failed.[12]

In other cases the defect, though brought out in evidence, is of no consequence. So in *Jackson v. LaFollette Hardware and Lumber Co.* the defendant apparently was attempting to pass on the brow of a hill and struck the oncoming plaintiff.[13] The trial judge said that the driver handled his car in such a manner that he was guilty of negligence which was the sole and proximate cause of the collision and resulting injuries, whether he had to swerve to avoid striking the plaintiff's car or whether defective brakes caused him to swerve, since he was attempting to pass an automobile on the hill.

It thus appears that a case is rarely decided on the presence of an unknown defect alone. The outcome usually turns on the question of whether the driver was negligent in not discovering the defect, whether he was guilty of other conduct which proximately caused the accident and whether the mechanical defect was of any consequence whatsoever.

III. Sudden Emergency and Unavoidable Accidents

Situations involving unknown mechanical defects readily lend themselves to implication of the doctrines of sudden emergency and unavoidable accident. In a case where the evidence showed that the steering mechanism could have locked, the court of appeals said that if such was the case and the driver or owner was guilty of no negligence or wrongful act in failing to detect the defect or in the operation of the car, then the accident could be classed as unavoidable, and no liability would attach to the owner or driver.[14] The court was careful to point out that if the machine just prior to and at the time of the accident was being run at an excessive rate of speed, then the claim of unavoidable accident would fail. "In other words, negligence in running the auto at an excessive rate of speed may bar the claim of unavoidable accident."[15] The same reasoning applies to the related doctrine of sudden emergency.

11. Purser v. Thompson, 31 Tenn. App. 619, 219 S.W.2d 211 (1949).
12. Hammonds v. Mansfield, 296 S.W.2d 652 (Tenn. App. 1955).
13. Jackson v. LaFollette Hardware and Lumber Co., 101 F.Supp. 916 (E.D. Tenn., 1950), *aff'd* 193 Fed. 2d 647 (6th Cir. 1951).
14. Baskin and Cole v. Whitson, 8 Tenn. App. 578 (1928).
15. *Ibid.*, 8 Tenn. App. 578, 587 (1928).

A sudden, unknown mechanical failure could easily place one in an emergency situation. The rule under such circumstances is that a motorist should not be held guilty of negligence if he fails to take as wise a course of action as a man of ordinary prudence would have taken if he had time for deliberation.[16] The doctrine cannot, however, be invoked if the emergency was brought about through the negligence of the motorist.[17] There is at least one other type of case in which the emergency doctrine cannot be invoked although an emergency situation exists. This is the case where the driver pursues a course of action which is not only unwise but which in fact is negligent even under the circumstances. That is what happened in *Hammonds v. Mansfield,*[18] where, when his brakes failed, the defendant left the normal course of the driveway and guided his auto straight toward the plaintiffs on the steps of a schoolhouse.

Bailor's Liability

The liability of a bailor for letting a defective motor vehicle for use is not founded upon an extension of the bailor-bailee contract, but on the attendant obligation imposed by law that one should not knowingly put forth an instrumentality for general use with defects calculated to injure persons who come in contact with it.[19] The bailor must either repair the defect, if known, or tell the bailee and have him contract to make the machine safe before using it in public.[20] The rules governing the bailor's negligence or lack of same in discovering unknown defects are the same as in situations not involving bailment. In *Alexander v. Walker and Isaacs,* the subject of the bailment was an automobile about six months old which had been driven less than four thousand miles. It developed a "shimmy" which resulted in a wreck and injuries to the plaintiffs. The court said that the defendant bailors were not bound to take the car apart to discover the defect, and that they would not be guilty of negligence if there was no proof that they knew or should have known of the defect.[21]

An important question in the bailment cases concerns the effect of the bailee's knowledge on the liability of the bailor. It has been held that the bailee's knowledge or ignorance of the defect is immaterial, since the defendant bailor could foresee that the defect (assuming it was known or should be known to him) would cause an accident, and that

16. McClard v. Reid, 190 Tenn. 337, 345, 299 S.W.2d 505 (1949); Stanford v. Holloway, 25 Tenn. App. 379, 157 S.W.2d 864 (1941).
17. Stanford v. Holloway, 25 Tenn. App. 379, 157 S.W.2d 864 (1941).
18. 296 S.W.2d 652 (Tenn. App. 1955).
19. Vaughn v. Millington Motor Co., 160 Tenn. 197, 22 S.W.2d 226 (1929).
20. *Ibid.*
21. Alexander v. Walker and Isaacs, 15 Tenn. App. 388 (1932).

even though the bailee should discover the defect, still this accident was within the reasonable range of the risk.[22]

V. Liability to Guests

The owner of a motor vehicle is not liable for the injuries to a guest caused by a defect of which the owner had no knowledge.[23] One who invites another to ride in his automobile is not bound to furnish a vehicle free from defects, and the one who is invited accepts the machine as he finds it, subject only to the limitation that the driver must not contribute to the injury of the guest by failure to disclose the existence of a known defect.[24] Liability does attach to the driver if he is guilty of active negligence in the operation of the car which proximately causes the accident, although a defect unknown to him also contributes to the accident.

Conclusion

The owner or driver of a motor vehicle is not liable for injuries proximately caused by unknown defects in the vehicle. Liability to persons other than guests will attach if the owner knew or by the exercise of ordinary care could have discovered the defect. Liability also can be found if the driver is guilty of some additional act of negligence which, along with the mechanical defect, proximately causes the accident and resultant injury. Finally, situations arise in which the mechanical defect is of no consequence whatsoever, where the driver has placed the vehicle in such a situation that the injury would have resulted whether the defect was present or not.

Matthew S. Prince

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22. Coop v. Williamson, 173 Fed. 2d 313. Cf. Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1945), involving an accident after the purchaser of a car was warned of the defect and provided with the means of correction.
23. Coppedge v. Blackburn, 15 Tenn. App. 587; Lively v. Atchley, 36 Tenn. App. 399, 256 S.W.2d 58 (1932).
24. Lively v. Atchley, 36 Tenn. App. 399, 403-404, 256 S.W.2d 58 (1932).
25. Coppedge v. Blackburn, 15 Tenn. App. 587 (1932).

CASE NOTES

LABOR LAW — PUBLIC EMPLOYEES — RIGHTS TO STRIKE AND TO BARGAIN COLLECTIVELY

The rights of public employees to strike and to bargain collectively have been considered for the first time in Tennessee in two recent decisions. Each case involved striking and picketing in an attempt to compel a governmental unit to recognize and bargain with the union as the agent of certain employees of the electrical distribution systems of a county and of a municipality. In neither case was violence or intimidation present. In each case a permanent injunction was granted against the striking and picketing. In one of the cases, *Weakley County Municipal Electric System v. Vick*,[1] the chancellor further held that a county, even though acting in a proprietary capacity in operating a public utility, has no authority to bargain collectively with employees engaged in the performance of that work in the absence of express statutory authorization. But in the other case, *City of Alcoa v. International Brotherhood of Electrical Workers Local Union* 760, *AFL-CIO*,[2] the chancellor decreed that the union could negotiate and bargain with the City of Alcoa. On appeal in the *Weakley County* case, the Tennessee Court of Appeals, Western Section, upheld the chancellor's decree. On appeal in the *City of Alcoa* case, the Tennessee Supreme Court affirmed the chancellor's holding, declaring such striking and peaceful picketing by public employees, even though engaged in a proprietary capacity in operating the electric system, is unlawful and enjoinable as violative of public policy. Subsequently the Tennessee Supreme Court denied certiorari in the *Weakley County* case, citing the *City of Alcoa* case as controlling, but recognizing that the issue there was somewhat narrower.[3]

Though the question of jurisdiction was not raised in the *Weakley County* case, the union contended in the *City of Alcoa* case that the chancellor had no jurisdiction over the issues involved[4] because of the federal pre-emption doctrine of *Garner v. Teamster's Local Union No.* 776.[5] The union further contended that the two recent cases of *P. S. Guss v. Utah Labor Relations Board*[6] and *Amalgamated Meat*

1. 309 S.W.2d 792 (Tenn. App. 1957), *cert. den.* by Tennessee Supreme Court, February 6, 1958.
2. 308 S.W.2d 476 (Tenn. 1957).
3. 41 L.R.R.M. 2639 (1958) (per curiam opinion by Tennessee Supreme Court).
4. Appellant's brief before the Tennessee Supreme Court.
5. 346 U.S. 485 (1953).
6. 353 U.S. 1 (1957).

Cutters v. Fairlawn Meats[7] "put to rest any dispute concerning the doctrine of pre-emption"[8] by holding that state power has been displaced by national power, save in cases of violence or threats of violence, when the state may act to protect its citizens or property. The union's position in the *City of Alcoa* case was that the National Labor Relations Board had exclusive jurisdiction.[9] The Tennessee Supreme Court, however, found that the National Labor Relations Act expressly excludes municipal corporations.[10] This conclusion seems clear under the language of the act which defines "employer" as not including "any State or political subdivision thereof"[11] and further defines "employee" as not including "any individual employed . . . by any other person who is not an employer as herein defined".[12] The court also concluded that the National Labor Relations Board would have refused to exercise jurisdiction had the *City of Alcoa* case been brought before the Board, on the ground that the city was not an employer within the meaning of the act.[13] Thus, according to the Tennessee Supreme Court, the jurisdiction of labor disputes involving public employees lies in the state courts rather than in the National Labor Relations Board.

The general attitude of the courts toward collective bargaining and striking by public employees is perhaps best illustrated by the following statement of the late President Franklin D. Roosevelt, who certainly was not an enemy of organized labor, which has been quoted with approval by several courts, and which was quoted by the Tennessee Supreme Court in the *City of Alcoa* case as follows:[14]

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7. 353 U.S. 20 (1957).
8. Appellant's brief before the Tennessee Supreme Court.
9. The union further cited Lodge Mfg. Co. v. Gilbert, 195 Tenn. 403, 260 S.W.2d 154, 156 (1953) where it was held that the Supreme Court of Tennessee had no authority to determine whether an employer is guilty of an unfair labor practice, or if any strike is lawful or unlawful.
10. 308 S.W.2d 476 (Tenn. 1957).
11. 29 U.S.C.A. § 152 (2).
12. 29 U.S.C.A. § 152 (3).
13. 308 S.W.2d 476 (Tenn. 1957). The court cited two cases wherein the National Labor Relations Board had refused to exercise its jurisdiction where the employer involved was a municipality or other political subdivision of the state: In Matter of New Jersey Turnpike Authority, Case no. 4-RC-2245, decided April 16, 1954, 33 L.R.R.M. 1528; Matter of City of Anchorage, Alaska Case No. 19-RC-1300, decided August 17, 1953, 32 L.R.R.M. 1549.
14. The statement was made by the late President Roosevelt in a letter to Luther C. Steward, President of the National Federation of Federal Employees, Aug. 16, 1937, and cited in *City of Springfield v. Clouse,* 356 Mo. 1239, 1247, 206 S.W.2d 539 (1947); Norwalk Teachers' Association v. Board of Education of City of Norwalk, 138 Conn. 269, 83 A.2d 482, 484 (1951); State v. Brotherhood of Railroad Trainmen, 37 Cal.2d 412, 232 P.2d 857 (1951); Annot., 31 A.L.R.2d 1132, 1171 (1953).

> All government employees should realize that the process of collective bargaining as usually understood, cannot be transplanted into public service.
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> . . . Upon employees in the Federal Service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operation of Government until their demands are satisfied. Such action looking toward the paralysis of the Government by those who have sworn to support it is unthinkable and intolerable.

Despite this prevailing attitude, the courts of other jurisdictions have been called upon several times to determine the right of public employees to strike. The Tennessee Supreme Court in the *City of Alcoa* case[15] cited with approval the following comment on the present state of the law:

> Although there have been many strikes by public employees, very few of them have reached the courts, or at least, very few have been reported. Usually, temporary restraining orders are granted by the courts, the strikers' demands are met and the strike settled. However, in every case that has been reported, the right of public employees to strike is emphatically denied.[16]

The usual basis of the legal restrictions on the right of public workers to organize is that such action is against "public policy". This was the reason given by the court in both the *Weakley County* and *City of Alcoa* cases. The foundation of this "public policy" seems to be the fear that to permit the organization of government employees would increase the possibility of a strike against the government.

A survey of more than a thousand strikes of government employees indicates that these strikes were caused by the same economic factors which motivate strikes in private industry: a lag between wages and cost of living, demands for shorter hours, and miscellaneous discriminatory conditions of employment.[17] In view of this, it would seem that the possibility of a strike could best be overcome by allowing collective bargaining and eliminating at the outset any possible future friction.

There is no question but that a threat of a strike by government employees is completely undesirable from the point of view of the social necessity for uninterrupted public service. It would seem the same impairment of vital services would likewise result from a strike

15. 308 S.W.2d 476, 481 (Tenn. 1957).
16. Annot., 31 A.L.R.2d 1132, 1159 (1953).
17. ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES (1940).

by the employees of any public utility, even though privately operated. The courts, however, have refused to declare strikes in public utilities unlawful for that reason alone, and have treated them, in most instances, no differently from other strikes.[18]

The argument most frequently advanced by public employees against restrictions on union activities is that a government employee engaged in a proprietary function is not a public employee and therefore not subject to the restrictions inherent in such employment. One difficulty with this position is that there is no established rule for the determination of the distinction between governmental and proprietary functions.[19] With reference to some activities, however, such as the furnishing of electric power involved in the principal cases under discussion, the distinction seems well established in other jurisdictions[20] and in Tennessee.[21]

In the *City of Alcoa* case the court expressly found that the city was operating the electric unit in its proprietary or ministerial capacity rather than in its governmental capacity, but said:[22]

> It is generally recognized that all functions performed by public authorities are public, in so far as labor relations between public employers and employees are concerned, and therefore the question whether public authorities are engaging in functions classified as "governmental" or "proprietary" is immaterial.

Thus it is clear that the basic argument of the public employee is rejected emphatically by the Supreme Court of Tennessee.

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18. See cases to this effect in Annot., 22 A.L.R.2d 874 (1952).

19. RHYNE, MUNICIPAL LAW § 4-6, p. 69 (1957):
> The Supreme Court of the United States has on various occasions held that the distinctions are hopelessly indefinite and inadequate for the determination of questions involving intergovernmental tax immunity, are too entangled in expediency to serve as a dependable legal criterion, and have been applied by the courts to escape difficulties, in order that injustice may not result from recognition of technical defenses based upon the governmental character of a municipality.

20. As the court stated in the *Weakley County* case, 309 S.W.2d 792, 800 (Tenn. App. 1957):
> The law seems to be well settled that, generally speaking, when a municipal corporation is engaged in the business of furnishing and delivering electricity, light, or power to itself or its inhabitants, such business is done in its proprietary, business, private, or quasi-private capacity, and not in its governmental capacity, or as a governmental function. 37 Am. Jur., Municipal Corporations, Section 115, page 729; Corpus Juris Sec., Municipal Corporations, Sec. 1052(2), page 673; McQuillan on Municipal Corporations, Vol. 12, Sec. 35, page 678.

21. Saulman v. City Council of Nashville, 131 Tenn. 427, 433, 175 S.W. 532, 534 (1914); Memphis Power and Light Co. v. City of Memphis, 172 Tenn. 346, 112 S.W.2d 817 (1936); Nashville Electric Service v. Luna, 185 Tenn. 175, 204 S.W.2d 529, 532 (1946).

22. 308 S.W.2d 476 (Tenn. 1957), citing with approval 31 A.L.R.2d 1132, 1149 (1953).

Collective bargaining in public employment is often said to be an anomaly, since the real employer of the public servant is the legislature, the representative of all the people, and ordinarily a grievance against the legislature is expressed by ballot. However, several jurisdictions have recognized the right of public employees to bargain, to a limited extent, even though denying the right to strike.[23] Certainly prohibition of a strike by public workers is a legitimate exercise of the police power, and, as pointed out by the court in the *City of Alcoa* case, this view seems to be universally supported by the courts in this country. The right of union affiliation and collective bargaining in governmental employment, however, seems to be in a state of development and has given rise to many conflicting opinions. It would seem that these latter issues should be settled by the legislature, but until legislation is passed, the courts will have to determine these matters of whether there is a right to union affiliation and collective bargaining with reference to governmental employees.

D.L.S.

TORTS — DUTY TO LICENSEE — ASSUMPTION OF RISK LAST CLEAR CHANCE

Plaintiff ordered some mixed concrete from defendant, Limestone Ready Mix Company. When defendant's truckdriver, also a defendant herein, turned into a field to make the delivery, the truck became mired in the soft ground. Upon observing this condition, plaintiff placed some rocks where the ground was soft, and then voluntarily stepped on the left running board of the truck to assist and direct the driver in proceeding into the field. As the truck started up the field embankment, the engine unexpectedly stopped causing the truck to roll back to the edge of the road and the front end to rear up. Plaintiff was thrown off, breaking his leg. At the conclusion of plaintiff's proof, the trial court sustained the defendant's motion for peremptory instructions. On appeal, *held,* there was no implied invitation to ride on the running board; plaintiff was a volunteer or licensee; the doctrine of last clear chance did not apply. *Smith v. Burks,*[1] 305 S.W.2d 748 (Tenn. App. 1957).

Although the "entry" involved in the instant case was the mounting of the running board of a truck owned and operated by the defendants, the court seems to regard the factual situation presented as closely analogous to one involving an entry on the real property of

23. RHYNE MUNICIPAL LAW § 8-30, p. 162-165 (1957), and cases cited therein.

1. Certiorari was denied by the Tennessee Supreme Court.

another. The first question to be determined then, is whether the plaintiff was a licensee, an invitee, or a trespasser.

A licensee is a person whose entry or use of the premises is permitted by the owner or person in control thereof, or by operation of law, so that although he is not a trespasser he is without any express or implied invitation from the owner or occupant.[2] The purpose of his entry is a personal one,[3] and the owner or occupant considers his presence merely as a tolerated one. As discussed *infra,* should his presence be for a purpose beneficial to the owner or occupant, his legal status on the premises would be that of an invitee and not a licensee.

The importance of the distinction between a licensee and an invitee lies in the duty owed to each. Although many courts take the position that, as to active operations on the land, the occupier must exercise reasonable care for the protection of the licensee, the Tennessee courts accept the view that no duty is owed to a licensee, even while carrying on activities, except to refrain from willfully or wantonly injuring him.[4] It appears, however, that in *Heaton v. Kagley,*[5] the court attempted, apparently without success, to reverse the traditional Tennessee concept by requiring the owner or occupant to use reasonable or due care toward a mere licensee as to active operations on the land. It has been noted that the language used in that opinion suggests a limitation of the due care requirement to cases where the licensee's presence is known.[6] Although the *Heaton* case[7] apparently deviated from the traditional Tennessee concept, it is apparent from the principal case[8] that the duty owed a licensee remains that of simply refraining from willfully or wantonly injuring him.

It is well recognized that the duty which the owner or occupant of real property owes to an invitee or business guest is to exercise ordinary care and prudence so as to render the premises reasonably safe for the visit.[9] The basis of the due care requirement to an invitee stems

2. Texas Co. v. Haggard, 23 Tenn.App. 475, 134 S.W.2d 880, 884 (1939).
3. 24 TENN. L. REV. 265 (1956).
4. Hatcher v. Cantrell, 16 Tenn.App. 544, 65 S.W.2d 247 (1933); Worsham v. Dempster, 148 Tenn. 267, 255 S.W. 52 (1923); Westborne Coal Co. v. Willoughby, 133 Tenn. 257, 180 S.W. 322 (1915). See 24 TENN. L. Rev. 265, 266 (1956).
5. Heaton v. Kagley, 198 Tenn. 530, 281 S.W.2d 385 (1955), noted in 24 TENN. L. REV. 265 (1956).
6. Note 3, *supra,* at 267.
7. Note 5, *supra.*
8. Note 1, *supra.*
9. Cherry v. Sampson, 34 Tenn.App. 29, 232 S.W.2d 610 (1950). Reference is made to Chattanooga Warehouse & Cold Storage Co. v. Anderson, 141 Tenn. 288, 210 S.W. 153 (1918); Worsham v. Dempster, 148 Tenn. 267, 255 S.W. 52 (1923).

from the fact that an invitee's purpose on the premises is for the benefit of the owner or occupant.

Any person who enters upon real property in response to an invitation, express or implied, is an invitee[10] in the situation where, as here, an economic rather than a social benefit to the invitor is involved. Where such an invitation is express, the problem of licensee versus invitee does not arise. The difficulty arises when the court is requested to infer from a factual situation an implied invitation to enter upon the premises to aid the invitor. The court in the principal case was confronted with this very problem.

Several tests have been employed to determine whether the person entering the premises was a licensee or an invitee by implication. One test employed is stated as follows:

> Invitation by the owner or occupant is implied by law, where the person going on the premises does so in the interest or for the benefit, real or supposed, of such owner or occupant, or in the matter of mutual interest, or in the usual course of business, or where the person injured is present in the performance of duty, official or otherwise.[11]

Another test frequently used, which is particularly important in the principal case, is phrased as follows:

> An invitation may be implied where the entry on the premises is for a purpose which is, or is *supposed to be,* beneficial to the owner or occupant, and *certainly this is true when the person enters with the knowledge of the owner or occupant for the manifest purpose of assisting him and no objection is made.* (Italics added.)[12]

There was no doubt in the principal case as to the driver's knowledge of the plaintiff's presence on the running board, since he was on the side next to the driver and was attempting to direct him. The real issue, therefore, is whether the plaintiff was acting "for the manifest purpose" of assisting the driver. In this connection, the plaintiff testified that he boarded the running board of the truck for the specific purpose of assisting and directing the driver in driving up into the field. He also admitted that the driver had said nothing to him constituting an invitation. The court emphasized this admission and stated that common experience and common sense would indicate that the plaintiff could have been of more assistance to the driver by staying on the ground

10. Lange v. St. John Lumber Co., 115 Ore. 337, 237 P. 696 (1925). The instant opinion cites this case.

11. Chattanooga Warehouse & Cold Storage Co. v. Anderson, 141 Tenn. 288, 294, 210 S.W. 153 (1918). The court quotes this definition as taken from SHEARMAN & REDFIELD, NEGLIGENCE 706 (6th ed., 1913).

12. Hatcher v. Cantrell, 16 Tenn.App. 544, 549, 65 S.W.2d 247, 249 (1933).

rather than by riding on the running board. The court also felt that by being on the running board, the plaintiff constituted something of an obstruction to the driver and was therefore more of a hindrance than a help. This conclusion does not seem entirely clear. Since there was substantial evidence that the plaintiff's actual purpose was to assist the driver, who had knowledge of his presence, it would appear that had the plaintiff been a hindrance rather than a help, the driver might well have objected to his presence on the running board. As the driver made no objection, could not a reasonable inference be drawn that the plaintiff's presence was at least "supposed to be beneficial", that is was with the knowledge of the driver and for the manifest purpose of directing and assisting the driver? If so, there would seem to be an implied invitation under the test above quoted.

As indicated *supra,* the instant opinion treats the case as though it were governed by the principles of law applicable to a licensee on real property. The question arises as to whether in fact such principles would have application to a licensee on a vehicle. Categorically speaking, at common law the majority of the courts have treated a guest in a private vehicle as analogous to a person who entered upon the land of another by permission.[13] If the guest paid for the ride, or was present for the business advantage of the driver, he acquired the status of a business visitor. The gratuitous passenger, however, was treated as a mere licensee.[14] Though a passenger may have been labeled a mere licensee, a majority of the common law courts required that the driver exercise ordinary care toward him.[15] A number of states have since enacted guest statutes limiting the duty owed a gratuitous passenger to refraining from willfully and wantonly injuring him.[16] Tennessee, however, does not have such a guest statute. Therefore, under the rule of *Sandlin v. Komisar,*[17] the duty owed to a mere licensee in a vehicle is ordinary care. The court in that opinion stated the rule as follows:

> The prevailing and the sounder rule, adopted by the great majority, is that the operator of an automobile owes the duty of ordinary or reasonable care to a guest — whether he be an invitee or a licensee, a degree of care and diligence which a man of reasonable prudence would exercise for his own protection and the protection of his family and property under like conditions.[18]

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13. PROSSER, TORTS 451 (2d ed. 1955).
14. *Ibid.*
15. *Ibid.;* Gammon, *The Automobile Guest,* 17 TENN. L. REV. 452, 455 (1942).
16. Gammon, *The Automobile Guest,* 17 TENN. L. REV. 452, 457 (1942).
17. Sandlin v. Komisar, 19 Tenn.App. 625, 93 S.W.2d 645 (1936).
18. *Ibid,* 19 Tenn.App. 625, 628 (1936).

Under the above quoted rule, it would appear to be immaterial that the guest's presence in the vehicle was for a purpose other than to confer an economic benefit upon the owner or occupant. His mere presence in the vehicle requires the exercise of ordinary care in the operation of the automobile. Although the above rule would appear to control, the court in the instant opinion applied principles applicable to a licensee on land.

In the latter part of the opinion of the principal case, the court considered the doctrine of voluntary assumption of risk. The court stated that in any event, it was a matter of which judicial notice could be taken that the running board of a truck was not a proper place for the plaintiff to ride. The court also stated that such a position on a moving vehicle, even if on smooth ground, is fraught with some hazard which the plaintiff must have realized. Perhaps this is the point on which the court principally based its decision, since it clearly felt the plaintiff must have known of the risk involved in his voluntary act of boarding the running board, and that he consented to assume that risk.

The court next considered the possible application of the last clear chance doctrine. Prior to the *Hale v. Rayburn* case,[19] it had been suggested that the last clear chance doctrine was limited to railroad cases and that the discovered peril doctrine applied in all other instances.[20] The *Hale* case,[21] involving automobile negligence, dispelled this view and expressly accepted the last clear chance doctrine.[22] It has been noted that the Tennessee courts have never expressly limited this doctrine to railroad cases, but that non-railroad cases prior to the *Hale* case have warranted an application of the discovered peril doctrine.[23] The court in the principal case, however, applied the discovered peril doctrine and stated that to allow recovery under such a doctrine ". . . the evidence must show that the peril of the plaintiff was discovered by the defendant and after its discovery the defendant failed to exercise reasonable care to prevent the injury". The court felt that liability could not be predicated on this doctrine as the facts indicated that the rearing up of the front of the truck was a totally unexpected event which the driver did not anticipate.

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19. Hale v. Rayburn, 37 Tenn.App. 413, 264 S.W.2d 230 (1954), noted in 23 TENN. L. REV. 916 (1955).
20. 20 TENN. L. REV. 288 (1948).
21. Note 19, *supra*.
22. 23 TENN. L. REV. 916 (1955).
23. *Ibid.*

TORTS—EMPLOYER'S DUTY TO DISCLOSE EMPLOYEE'S ILLNESS

In 1944, plaintiff was hired by defendant's predecessor as a plant guard at Oak Ridge and, as an employee, was required to submit to periodic examinations which included an x-ray of the lungs. From the time of his hiring in 1944, through 1947 when the defendant, Union Carbide took over, until February, 1952, fourteen x-rays were taken of plaintiff's lungs which were interpreted by the medical department as showing a "spot" as being an arrested case of pulmonary tuberculosis. A doctor testified that throughout the eight year period, frequent discussions between the plaintiff and herself had disclosed these facts to him. Plaintiff denied this but conceded that the doctor had mentioned a spot on his lung that did not appear to be growing worse but denied the use of the word *tuberculosis* and claimed he assumed the "spot" to have been an old wound received by him as a result of a mustard gas attack in World War I. About a year after the last x-ray, plaintiff, on February 19, 1953, left work because of illness. An x-ray by a private physician disclosed that plaintiff was suffering from acute pulmonary tuberculosis which in time rendered him totally and permanently disabled. An x-ray was not made sooner, allegedly because plaintiff relied on the x-ray examinations he had undergone as an employee. Plaintiff sued defendant for its negligence in failing to disclose the tubercular condition. On appeal from a judgment for plaintiff on a jury verdict, *held,* where employer undertook to have its employees medically examined, it had a duty to inform the employee of hidden dangers which were disclosed in the examination and unknown to the employee; failure to so warn was negligence rendering employer liable for the resulting injury to the employee. *Union Carbide & Carbon Corp. v. Stapleton,* 237 Fed.2d 229 (6th Cir. 1956).

An employer has certain duties and liabilities that arise from the relation with the employee. The employer must provide a safe place for the employee to work,[1] and furnish safe machinery and appliances.[2] The employer must also warn the employee of any dangers that are by their nature not obvious.[3] These duties along with certain others are considered as non-delegable on the part of the employer and he is liable for his negligence in their execution. It has also been

1. Knoxville Iron Co. v. Pace, 101 Tenn. 476, 48 S.W. 252 (1898); Mebane v. Baptist Memorial Hospital, 179 Tenn. 281, 166 S.W.2d 622 (1938); McGinnis v. Brown, 30 Tenn. App. 179, 204 S.W.2d 334 (1947).
2. Guthrie v. Louisville, 79 Tenn. 372 (1883); Jessie v. Chattanooga, 173 Tenn. 536, 121 S.W.2d 557 (1939).
3. Moon v. Chattanooga, 10 Tenn. App. 82 (1914); Brown v. Tennessee Consolidated Coal Co., 19 Tenn. App. 123, 83 S.W.2d 568 (1935).

held that when one is engaged in the work of his master and receives injuries, whether or not due to the negligence of the employer, the employer must put such medical care in the reach of the employee so that he may save his life or avoid further bodily harm.[4] Likewise it has been held that an employer has an affirmative duty to rescue a seaman who has fallen overboard through no negligence of the employer.[5] The fundamental rule of tort law that one is not liable for nonfeasance but is liable for misfeasance has not been adhered to strongly in situations where there is a special relationship such as employer-employee.[6] In such relations a special duty to act has been raised by the courts where social policy has seen fit to hold a party liable for failure to act.

In the principal case the court extends liability for nonfeasance to injuries incurred from reliance on a physical examination undertaken by the employer. A series of examinations and diagnoses were performed without negligence.[7] However, in the opinion of the court, there was negligence in failure to disclose the results of the examination to the employee,[8] and this negligence was that of the employer in failing to disclose the diagnosis and not that of the doctor. In discussing the inapplicability of fraudulent concealment in tolling the statute of limitations the court said, ". . . the failure to disclose in this case was itself the gist of the lawsuit."[9] In so holding, the court needed no doctrine of respondeat superior[10] to charge the master since the medical department was not negligent in the first instance.[11] Since it made no difference to the court whether the doctor was a servant or not, the fellow servant defense [12] did not need to be hurdled before liability could be found. If there had been negligence in the examination or diagnosis of the illness by the doctor and no negligence by the

4. Szabo v. Pennsylvania R. Co., 132 N.J.L. 331, 40 A.2d 562 (1945).
5. Harris v. Pennsylvania R. Co. 50 Fed.2d 866 (4th Cir. 1931).
6. PROSSER, TORTS § 38, p. 182 (2d. ed. 1955); HARPER & JAMES, LAW OF TORTS § 18.6, p. 1048 (1956).
7. Instant opinion, 237 Fed.2d 229, 232 (1956).
8. *Ibid.*
9. Instant opinion, 237 Fed.2d 229, 233 (1956). See also 25 TENN L. REV. 284 (1958) containing a discussion of the Statute of Limitations in such situations.
10. See Prosser's discussion of vicarious liability and respondent superior, PROSSER, TORTS § 62 *et. seq.*, p. 350 (2d.ed. 1955).
11. *Supra*, Note 7.
12. Louisville & Nashville Railroad v. Jackson, 106 Tenn. 438, 61 S.W. 771 (1901), where the court said at p. 441: ". . . an employee cannot recover for injuries caused by the negligence of a fellow-servant . . . where the parties are engaged in one common work in the same department of employment, but where the employment is for separate and distinct purposes, although employed by the same person . . . , they would not, in the contemplation of law, be fellow-servants." This defense still applies in common law actions, TENN. CODE ANN. § 50-913 (1956), but has been abolished in Workman's Compensation cases, TENN. CODE ANN. § 50-911 (1956).

master in failing to disclose the condition to the employee, the court would have been faced with a different problem. In view of the *Quinn* decision[13] holding that a doctor employed to treat employees is an independent contractor and that therefore no vicarious liability for his acts exists on the part of the master, it is submitted that the court, as an extension of certain hospital liability cases,[14] would overrule or ignore the *Quinn* decision and hold that a company doctor is a servant and that therefore the master is liable for his negligent acts. It must be noted here again, however, that in the instant case no negligence was found on the doctor's part but rather that the employer himself was negligent in failing to disclose the condition.

The duty of the employer in the instant case could perhaps be based on a theory of misfeasance as well as nonfeasance. That is, having undertaken to medically examine the employee, though not legally required to do so, the employer must exercise due care in the performance of the examination. That rule clearly would lead to liability for any harm negligently done to the employee in the course of the examination, assuming that the doctor is regarded as an employee. It is not entirely clear, however, where the examination is primarily for the benefit of the master, that this principle would extend to failure to disclose results of the examination to the employee. It has been held in a private doctor-patient relationship that a duty to disclose results of examination exists.[15] To hold that an equal duty to disclose exists on the part of a company doctor or the company would seem to raise a duty without noting the differences of the purposes of each type of examination. It may be, however, that the professional duty of the physician would be to disclose the diagnosis[16] regardless of who is paying for the examination. If that is the case, the company could be liable for the doctor's misfeasance on grounds of respondeat superior if the doctor is regarded as an employee rather than an independent contractor.

The court places this case on a level with those calling for affirmative action on the part of a landowner with superior knowledge of hidden defects,[17] stating, "As Stapleton's employer became aware that

13. Quinn v. Kansas City, M. & B. Ry. Co., 94 Tenn. 713, 30 S.W. 1036 (1895).
14. Sepaugh v. Methodist Hospital, 30 Tenn. App. 25, 202 S.W.2d 985 (1946), where an intern was held to be an employee of the hospital. See 2 VAND. L. REV. 660 (1949), and cases there cited.
15. Hunt v. Bradshaw, 242 N.C. 517, 88 S.E.2d 762 (1956).
16. GRADWOHL, LEGAL MEDICINE 116 (1954).
17. The instant case at p. 232 cites the following: Westborne Coal Co. v. Willoughby, 133 Tenn. 257, 180 S.W. 322 (1915); Illinois Cent. R. Co. v. Nichols, 173 Tenn. 602, 118 S.W.2d 213 (1938); Phillips v. Harvey Co., 196 Tenn. 174, 264 S.W.2d 810 (1954).

Stapleton had tuberculosis through its voluntary physical examination of him. [sic] It then became the appellant's duty in the exercise of ordinary care to inform him of his condition."[18] Here the court seems to be thinking in terms of an affirmative duty that arises from the special relation of employer-employee, of a liability for nonfeasance. The court also seems to have in mind, however, the concept of malfeasance, when it goes on to state that "By remaining silent, the appellant permitted Stapleton to rely upon a tacit assurance of safety despite its knowledge of the existence of the danger . . . . Stapleton was entitled to and did rely on the expectation that he would be told of any dangerous condition actually disclosed by that examination."[19] The duty thus seems to be based on both the voluntary examination and on the employer-employee relationship.

Admittedly, it would have been but a simple task for the employer to have notified the employee of his tubercular condition, but should this be a basis for imposing liability? The Workman's Compensation Act[20] has gone far in aiding the employee to recover from the employer for his injuries by imposing a strict liability. A clearer indication of the basis of liability by the court in the instant case would aid both employee and employer to determine exactly how far the court has extended the employer's duty in a non-workman's compensation situation.

R. L. J.

TORTS — NUISANCE — CONTRIBUTORY NEGLIGENCE

Plaintiff, an 88 year old man, slipped and fell while crossing a street at a point approximately seven feet from the marked crosswalk. At the place where he started to cross, some earth was piled up almost level with the curb and extending out about one foot. Situated some twenty inches from the curb was a ditch, about one foot wide, which had been refilled to within 1½ to 2 inches of the surface of the street. There was no direct testimony as to what caused the plaintiff to fall. The plaintiff appealed from a jury verdict for the defendant city. In affirming the lower court, the Court of Appeals, *held,* first, that the ditch was not an excavation within the meaning of the Nashville City Code so as to require a signal or barricade; second, that the condition of the street did not constitute a nuisance per se, and that the plaintiff's action was based on negligence; third, that in crossing the street at a place other

18. Instant opinion, 237 Fed.2d 299, 234 (1956).
19. Instant opinion, 237 Fed.2d 229, 232 (1956).
20. TENN. CODE ANN. § 50, Chapters 9 through 12 (1956).

than the marked cross walk, the plaintiff was negligent per se, and that this negligence proximately caused the accident. *Murray v. City of Nashville,* 299 S.W.2d 859 (Tenn. App. 1956).[1]

Perhaps the most interesting aspect of the instant case is the plaintiff's attempt to found his case on the theory of nuisance per se or, as it is sometimes called, absolute nuisance. The Tennessee courts, like those in other jurisdictions, have traditionally distinguished so-called absolute nuisances from ordinary nuisances.[2] The material difference between the two seems to be that an ordinary nuisance is founded on negligence, whereas in the case of an absolute nuisance the presence or absence of negligence is immaterial.[3] In the latter type the courts impose strict liability, because the defendant's conduct, as distinguished from its consequences, is usually intended.[4] Thus where the defendant stored large quantities of explosives in a warehouse located in a heavily populated area, the court held that such conduct amounted to a nuisance per se.[5] To the contrary, there may be no nuisance in the case of a sewer[6] or rubbish pile[7] except during periods when the enterprise is negligently operated. Insofar as this classification is concerned, the principal significance lies in the fact that the contributory negligence of the plaintiff ordinarily is not a bar if the nuisance is deemed absolute.[8] Even then, however, recovery will be denied if the plaintiff either assumes the risk or acts with complete indifference to the peril.[9]

On the other hand, if the nuisance has its origin in negligence, then general tort principles apply and ordinary contributory negligence bars

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1. Certiorari denied by the Tennessee Supreme Court, April 1, 1957.
2. Llewellyn v. City of Knoxville, 33 Tenn. App. 632, 232 S.W.2d 568 (1950); Johnson v. City of Alcoa, 24 Tenn. App. 422, 145 S.W.2d 796 (1941); Brown v. Barber, 26 Tenn. App. 534, 174 S.W.2d 298 (1943). The latter two cases cite and discuss the leading case on this subject, McFarlane v. Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928). For cases in other jurisdictions, see PROSSER, TORTS § 70 (2d ed. 1955).
3. This distinction is set forth in Llewellyn v. City of Knoxville, 33 Tenn. App. 632, 649, 650, 232 S.W.2d 568 (1950). The other Tennessee cases cited in Footnote 2 also bear out this distinction.
4. Ducktown Sulphur, Copper & Iron Co. Ltd. v. Barnes, 60 S.W. 593 (Tenn. 1900).
5. Cheatham v. Shearon, 31 Tenn. 213 (1851).
6. Mayor of Knoxville v. Klasing, 111 Tenn. 134, 76 S.W. 814 (1903); Kolb v. Knoxville, 111 Tenn. 311, 76 S.W. 823 (1903).
7. City of Nashville v. Mason, 137 Tenn. 169, 192 S.W. 915 (1916).
8. Llewellyn v. City of Knoxville, 33 Tenn. App. 632, 232 S.W.2d 568 (1950); Johnson v. City of Alcoa, 24 Tenn. App. 422, 145 S.W.2d 796 (1941); Brown v. Barber, 26 Tenn. App. 534, 174 S.W.2d 298 (1943).
9. Thus in Brown v. Barber, 26 Tenn. App. 534, 174 S.W.2d 298 (1943), where plaintiff disregarded warnings about a dangerous dog, he was barred from recovery on the theory of assumption of risk.

recovery.[10] In the instant case, the court used the latter principle as one basis for the denial of recovery since it had been found that there was no absolute nuisance and that plaintiff was chargeable as a matter of law with contributory negligence.

The principal difficulty in dealing with the concept of absolute nuisance lies in determining its dimensions. As indicated previously, the finding of an absolute nuisance may often be crucial to the plaintiff's case, for if such a nuisance is established the plaintiff may recover notwithstanding his own contributory negligence. In the more common type of absolute nuisances where, as in *Ducktown Sulphur, Copper & Iron Co. v. Barnes*,[11] the plaintiff's land is harmed by the emission of large volumes of harmful fumes (smoke, and the like), there is little opportunity for contributory negligence. It is only when the facts relate to situations less obvious in their nature that the difficulty of classification arises.

Two hypothetical cases will best illustrate this difficulty. Suppose, for example, that a railroad car is intentionally allowed to block a street crossing, and that the plaintiff negligently collides with it. In the second situation let us assume that the facts are the same except that the railroad's conduct is merely negligent instead of intentional. According to dicta in at least two Tennessee cases the plaintiff could recover in the first situation because the defendant had created an absolute nuisance.[12] That is to say, the defendant had intended to bring about the conditions, although not necessarily the consequences, which in part at least caused the accident. In the second case, however, the plaintiff's identical conduct would bar recovery because the nuisance is based on negligence.[13] Although the risk created is the same in both cases, some courts allow recovery simply by calling the first situation an absolute nuisance.

This rule recently has undergone careful analysis and criticism by Seavey, a leading tort scholar.[14] The principal basis of this criticism is that "even when one does an act which he knows to contain risk, including acts which he knows violate the law, he is not necessarily guilty

10. McFarlane v. Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928) where Judge Cardozo said: "Whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of nuisance." As indicated by the cases cited in Footnote 8, Tennessee has followed this reasoning, although the language in the *Llewellyn* and the *Johnson* cases was only dicta.
11. 60 S.W. 593 (Tenn. 1900).
12. Llewellyn v. City of Knoxville, 33 Tenn. App. 632, 232 S.W.2d 568 (1950); Johnson v. City of Alcoa, 24 Tenn. App. 422, 145 S.W.2d 796 (1941).
13. *Ibid.*
14. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984 (1951-52). See also for a general discussion, 2 HARPER AND JAMES, TORTS, § 22.8 (1956); PROSSER, TORTS, § 70 (2d ed. 1955).

of more than ordinary negligence."[15] So if the nuisance results from what is essentially negligent conduct, it is asserted that the presence of contributory negligence ought to preclude recovery regardless of whether the condition causing the harm was intentionally or merely negligently created. Furthermore, as Seavey suggests, where the conduct falls within the general definition of negligence, it leads only to confusion to describe it as a nuisance. Thus when the nuisance creates a risk of harm, the concept of negligence merges with the concept of nuisance; and unless the risk created is extreme, the plaintiff should be barred by his own negligence.

Returning to the illustration in the preceding paragraph, it will be seen that under Seavey's analysis the plaintiff could not recover in either case. Such a result seems sound. When the conduct is actionable only because it creates an unreasonable risk, the conscious violation of a duty resulting in an unintended accident would not seem to afford a valid basis for disregarding the legal effect of the plaintiff's own negligence.

The plaintiff in the principal case assigned as error the ruling of the lower court that the condition of the street was not a nuisance per se and that the action was based on negligence. However, since there was obviously no nuisance per se, the court correctly submitted the issue of negligence to the jury. The issues of fact are the same regardless of whether the action is based on ordinary negligence or on a nuisance based on negligence.[16] In either event contributory negligence is a bar.

It is well settled in Tennessee that a violation of a statute or ordinance is negligence per se and if the violation is the proximate cause of an injury the violator is liable.[17] The accepted rule now is that a viola-

15. Seavey, *supra* note 14, at 993.

16. See Llewellyn v. City of Knoxville, 33 Tenn. App. 632, 649, 232 S.W.2d 568, where a situation similar to the one in the principal case arose. The plaintiff alleged negligence in the first count and a nuisance (based on negligence) in the second count. The trial court submitted the negligence issue to the jury but directed a verdict on the nuisance count. On appeal the court said: "We think however this is harmless error for the reason that the same issues were involved on both counts and the answer had to be the same on both [the negligence and nuisance issues]."

17. Wise & Co. v. Morgan, 101 Tenn. 272, 48 S.W. 971 (1898) (druggist failed to label a bottle of drugs "poison"); Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 S.W. 428 (1906) (violation of statute requiring fire escapes); Carroll Blake Const. Co. v. Boyle, 140 Tenn. 166, 178, 203 S.W. 945 (1918); City of Nashville v. Black, 142 Tenn. 397, 219 S.W. 1043 (1919) (violation of a statute against turning around in middle of block); Tile & Marble Co. v. Hall, 4 Tenn. App. 307 (1927) (violation of traffic regulation); Rose v. Abeel Bros., 4 Tenn. App. 431 (1927) (violation of statute prohibiting piling of rubbish, grease, etc. on sidewalks); National Funeral Home v. Dalehite, 15 Tenn. App. 482 (1932) (violation of speed law); Brown v. Brown, 16 Tenn. App. 230, 64 S.W.2d 59 (1933); American National Bank v. Wolfe, 22 Tenn. App. 642, 125 S.W.2d 193 (1938) (violation

tion of a statute or ordinance by the plaintiff is to stand on the same footing as a violation by the defendant.[18] Having violated a city ordinance, the plaintiff in the instant case was, therefore, deemed guilty of contributory negligence as a matter of law. The plaintiff however, argued that the ordinance was intended to protect against the hazards of traffic on the street and that there was therefore no connection between plaintiff's injury and the purpose for which the statute was enacted.[19] The court rejected this contention, stating that the statute was designed to direct the orderly movement of people across the street and not merely to protect against traffic hazards.

It remains to discuss briefly another aspect of the instant case dealing with the function of the court and jury in cases involving absolute nuisances. The lower court had ruled as a matter of law that the ditch was not an absolute nuisance. Quoting from an earlier Tennessee case,[20] the court said:[21]

> What constitutes a nuisance is a question of law for the Court, but whether an act, not a nuisance per se is a nuisance in fact is for the jury.

While somewhat ambiguous, this statement seems to imply that in cases concerning an absolute nuisance there is only a question of law for the court. There is little direct authority on this point in Tennessee, besides the instant case and the case cited therein.[22] However, in a fairly recent Connecticut case, the court in effect stated that the question of the existence of an absolute nuisance is one for the jury to determine.[23] This latter rule would appear to be sound in principle. Even in the typical case of an absolute nuisance, as where a factory is emitting smoke and fumes, there is still a question as to whether the invasion of the plaintiff's rights is substantial and unreasonable. There may also be a question of proximate causation.[24] Thus where

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of statute requiring hand rail); Donaho v. Large, 25 Tenn. App. 433, 158 S.W.2d 448 (1941) (plaintiff walking on the wrong side of the road); Green v. Crescent Amusement Co., 32 Tenn. App. 554, 223 S.W.2d 201 (1949). Proximate causation, as noted, is always essential.

18. Carroll Blake Const. Co. v. Boyle, 140 Tenn. 166, 179, 203 S.W. 945 (1918); City of Nashville v. Black, 142 Tenn. 397, 219 S.W. 1043 (1919); PROSSER, TORTS § 34 (2d ed. 1955).
19. RESTATEMENT, TORTS § 286 (1934).
20. Davidson County v. Blackwell, 19 Tenn. App. 47, 82 S.W. 2d 872 (1934).
21. Murray v. City of Nashville, 299 S.W.2d 859, 863 (Tenn. 1956).
22. But see, Signal Mountain Portland Cement Co. v. Brown, 141 F. 2d 471 (1944) (issue of permanent or temporary nuisance for the jury); Pilcher v. Hart, 20 Tenn. 524 (1840) (issue of whether a wharf-boat was a nuisance was for the jury).
23. DeLahunta v. Waterbury, 134 Conn. 630, 59 A.2d 800 (1948).
24. RESTATEMENT, TORTS § 822 (1939). There the elements for recovery in the case of a private nuisance are set forth. While an absolute nuisance is usually a public nuisance, it would nevertheless seem that the above factors are still necessary for the plaintiff's recovery.

the evidence regarding these elements is conflicting, the jury would necessarily be called upon to decide the fact issues. Or if there is doubt as to whether the nuisance is absolute or merely arises from negligence then again the issue would be for the jury to decide.[25]

Perhaps the correct rule is that the existence of an absolute nuisance involving the component issues of unreasonableness, causation and substantiality of injury becomes a question of law only under the rules governing directed verdicts.[26] In the situation where the court has thus found an absolute nuisance as a matter of law, the jury must be instructed that to prevent plaintiff's recovery something more than contributory negligence is required. On the other hand, where as in the instant case, the court has ruled that there is no absolute nuisance as a matter of law, the jury must be instructed that contributory negligence is a defense. It seems clear that under the rules governing the directed verdict the court was correct in ruling that the ditch in the principal case was not an absolute nuisance.[28]

J. B. R.

WORKMEN'S COMPENSATION — LIABILITY OF COMPANY DOCTOR AS THIRD PARTY

Plaintiff, injured during the course of his employment, was treated by defendant physician who was in the employment of plaintiff's employer. An injection of tetanus antitoxin serum caused adverse reactions and permanent injury. Plaintiff received workmen's compensation payments and then brought an action for malpractice against the physician. On appeal from the trial court's sustaining of the defendant's plea in abatement, *held,* the employee was not precluded from maintaining the malpractice action against the third-party wrongdoer, under Tennessee Code § 50-914 which required the third party to be someone "other than the employer". *Garrison v. Graybeel,* 308 S.W.2d 375 (Tenn. 1957).

In 1949, the Tennessee legislature amended the workmen's compensation statute to allow the employee to receive not only the benefits

25. Warren v. City of Bridgeport, 129 Conn. 355, 28 A.2d 1 (1942); Brown v. Nichols, 337 Mich. 684, 60 N.W.2d 907 (1953); the latter case quotes from 66 C.J.S., *Nuisance,* § 153 (1950).

26. Patterson v. Peabody Coal Co., 3 Ill. App.2d 311, 122 N.E.2d 48 (1954).

27. Delaney v. Philhern Realty Holding Corp., 280 N.Y. 461, 21 N.E.2d 507 (1939).

28. See Riddell v. Great A. & P. Tea Co., 192 Tenn. 304, 241 S.W.2d 406 (1950). This case shows that under no theory could the plaintiff recover. "A recovery will not be allowed because of the existence of trivial holes or depressions. Rye v. City of Nashville, 25 Tenn. App. 326, 156 S.W.2d 460 (1941)."

under the statute but also to maintain an action against a third party whose acts caused the injury.[1] Prior to this amendment the employee had the option of either claiming the benefits under the Act or proceeding against the third-party wrongdoer, or proceeding against both; but he was limited to one recovery.[2] This amendment is not in conflict with Code § 50-908[3] which provides that the employee's remedy under the statute shall exclude all other rights and remedies of the employee, for the latter section seems limited to common law actions against the employer himself.[4]

The issue raised in the principal case is whether the physician employed by the common employer is a third-party wrongdoer. In other words, is the physician, in the language of Code § 50-914, "some person other than the employer"? The determination of who is a third party under the Act, in the absence of express statutory language, is largely a question of judicial interpretation. In most jurisdictions, the concept of "third persons" against whom common law actions may be brought for compensable injuries, includes all persons other than the injured person's own employer; that is, it includes co-employees, and company physicians whose malpractice aggravates the compensable injury. Sometimes, however, by statute or judicial decision the class of persons amenable to third party actions has been narrowed so as to exclude co-employees, and persons working on the same project, and in some instances all employers and employees who themselves are within the compensation system.[5]

Of the thirty jurisdictions that have considered judicially the suability of physicians who have aggravated a compensable injury by malpractice, twenty-three have in some form recognized that a suit

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1. TENN CODE ANN. § 50-914 (1956):
When the injury or death for which compensation is payable under the Workmen's Compensation Law was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured workman . . . shall have the right to take compensation under such law and said injured workman . . . may pursue his or their remedy by proper action in a court of competent jurisdiction against such other person. In the event of recovery from such other person by the injured workman . . . by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the amount paid or payable under such law, and shall have a lien therefore against such recovery. . . .
2. Tenn. Pub. Acts 1919, Ch. 123, § 14.
3. TENN. CODE ANN. § 50-908 (1956).
4. See Bristol Tel. Co. v. Weaver, 146 Tenn. 511, 243 S.W. 299 (1921); Copeland v. Cherry, 20 Tenn. App. 122, 95 S.W.2d 1275 (1936); Napier v. Martin, 194 Tenn. 105, 250 S.W.2d 35 (1952); 22 TENN. L. REV. 976 (1953).
5. 2 LARSON, WORKMEN'S COMPENSATION § 72.00 (1952).

would lie. Of these, eighteen treat the third party liability of the physician on broadly the same terms as that of any other third person.[6]

The leading case in Tennessee involving third party actions, and interpreting the phrase "other than the employer" under Code § 50-914 is *Majors v. Moneymaker*.[7] There the employee received workmen's compensation payments from her employer for injuries arising out of an accident involving an automobile in which she was a passenger and which was being operated in the scope of business by the employee's fellow employee, who was also injured and received compensation payments from the common employer. The employee brought a third-party suit against her fellow employee under Code § 50-914 alleging that the fellow employee was a person "other than the employer". The Tennessee Supreme Court rejected the employee's contention on the ground that the negligence of the fellow employee was clearly chargeable to the employer, and created a legal liability against her employer. Since the Act specifically limits the action to "circumstances creating a legal liability against some person other than the employer" the court considered that the action would not lie.

It was felt that to allow such a recovery would flood the courts with claims never intended by the statute and that "the statute was never designed to permit the employer and his insurance carrier to sue employees for damages for negligent injuries arising out of and in the course of the employment." The court accepted the defendant's argument that an anomalous situation would result if it allowed the employee to recover from a negligent fellow employee. The court said in that connection that the negligent employee would recover the meager compensation allowed under the Act and then the non-negligent employee could recover unlimited damages from his negligent fellow employee, and the employer or his insurance carriers would then be subrogated to this recovery to the extent of the compensation paid to the injured employee.[8] This was considered to be a result not within the intent of the Workmen's Compensation Act.

In the principal case, the court does not overrule the *Moneymaker* decision[9] but attempts to modify its effect and distinguishes it on the grounds of dissimilarity between the employees involved in the two cases,

6. 2 LARSON, WORKMEN'S COMPENSATION § 72.61 (1952).

7. 196 Tenn. 698, 270 S.W.2d 328 (1954); 23 TENN. L. REV. 1084 (1955).

8. Under TENN. CODE ANN. § 50-914 (1956) the employer is subrogated to the recovery had in the third party action to the extent of the amount paid the injured employee.

9. Sturkie v. Bottoms, 310 S.W.2d 451 (Tenn. 1958), reaffirming the *Moneymaker* decision.

that is, the carpenter versus the physician, in the principal case, and two employees engaged in the same type of work in the *Moneymaker* decision. The court thought that the physician's employment was only remotely related to the employer's business. There was no mention of the fact that in the principal case, just as in the *Moneymaker* case, the circumstances created a legal liability against the employer. And, inconsistently, the court did not infer from this, as it did in the *Moneymaker* case, that since the act specifically limits the action to "circumstances creating a legal liability against the employer", an action would not lie. Probably the main reason back of the *Moneymaker* ruling was the court's reluctance to arrive at a decision under which one of the injured employees engaged in the same work would receive compensation provided by the act while the other would be left with a considerable liability. This seemed to the court contrary to the general purpose and intent of the Act. When defendant was a professional physician engaged in work quite different from that of the plaintiff carpenter, allowance of the plaintiff's action would undoubtedly seem much less disruptive of the general purposes of the Act.

Whatever the soundness of the *Moneymaker* decision, the result in the principal case seems sound and in accord with the weight of authority holding a physician, though employed by the common employer, liable for the aggravation of a compensable injury.[10] It should be noted that the principal case does not involve some of the objections raised in the *Moneymaker* case. Here the physician was not injured and thus received no compensation from the employer which would lead to the anomalous situation feared by the court in the *Moneymaker* case. Nor would the courts be flooded with litigation not intended by the Act if all employees whose injuries were aggravated by malpractitioners were allowed to assert their rights in the courts.

A peculiar difficulty involved in third-party malpractice actions arises upon the distribution of the proceeds of the suit. In the usual third party case, the wrongdoer is regarded as having caused the entire injury. In a third party suit based on malpractice, the defendant physician has caused only the aggravation of the original injury. To illustrate the difficulty, suppose the original injury is compensable under the Act in the amount of $3000. The injury after aggravation by the physician is compensable in the amount of $5000. Under the

10. 2 LARSON, WORKMEN'S COMPENSATION § 72.61 (1952); Keen v. Allison, 166 Tenn. 218, 60 S.W.2d. 158 (1933) allowed employee to recover from the physician under the former Code section even though the employee settled with the employer, reserving his right against the physician; the employer had waived the right to subrogation.

Tennessee Act, the employer is liable to the employee for the total amount since he is liable for the injury and all aggravation. Upon suit and recovery by the injured employee against the physician for malpractice, is the employer subrogated to the extent of $5000 of the recovery or simply to the extent of $2000, the amount which he paid out on account of the aggravation, which is the basis of the third party suit? The Act provides that the employer is subrogated to the extent of the compensation payments made to the employee. This seems inequitable since only $2000 should be received by the employer to reimburse him for the extra expenditure due to the aggravation attributable to the malpractitioner, which alone is the basis of the third party suit. The other $3000 should go to the employee. This result should be reached since the employer should bear the cost of the original injury for which the plaintiff has recovered nothing in the third party suit. The inequitable result which could be reached under the Tennessee Act is especially apparent when we assume that perhaps the original injury was due to the employer's negligence for then, if the employer is allowed to recover the full amount of the compensation paid the employee, he is actually using the employee's money to reimburse himself for his own wrong. To remedy this situation New York allows the employee to recover in the malpractice action first for the entire damage due to the malpractice, then recover compensation from his employer for the injury before the aggravation.[11] In California the court read into the statute, which is similar to the Tennessee Act, the separability of distribution which would seem necessary,[12] and it may well be that the Tennessee courts would arrive at the same result, but there is no indication in the principal case as to just what the employer's rights should be.

R. W. F., JR.

WORKMEN'S COMPENSATION — TESTIMONY OF GENERAL PRACTITIONER VERSUS THAT OF SPECIALISTS

In an action under the Tennessee Workmen's Compensation Statute[1] there was testimony of a general practitioner that petitioner had silicosis. On the other hand there was testimony of numerous other doctors "who were called experts" that he did not have silicosis. The chancellor found that the employee suffered total and permanent disability from silicosis upon which was imposed tuberculosis. On appeal

11. Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935).
12. Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658 (1947).

1. TENN. CODE ANN. § 50-901, *et.seq.* (1956).

by the employer to the Tennessee Supreme Court, *held,* the question of who was the best doctor and whose testimony was to be given credit was for the trial court. *General Shale Products Corp. v. Casey,* 303 S.W. 2d 736 (Tenn. 1957).

It is well settled in Tennessee that in workmen's compensation cases the finding of fact by the trial court will not be disturbed on appeal if supported by any material evidence.[2] The instant case presents the interesting question of whether there is any material evidence to support an award which is based upon the testimony of a general practitioner when the testimony of several "experts" is to the contrary.

Cases in several other jurisdictions have dealt with this problem. A court in Texas took the same view as did the court in the principal case. There, a general practitioner testified that the plaintiff was totally and permanently disabled, but an orthopedist who performed surgery to correct the plaintiff's injury testified that the plaintiff could resume work with a 10% to 15% disability. The jury found total disability. On appeal, the defense urged that a consideration of the testimony of the orthopedist and of his qualifications when compared with the testimony of the general practitioner and his qualifications demonstrated that the jury finding of permanent total incapacity was without support in the evidence. The court rejected this contention and upheld the judgment of the trial court.[3]

Language in several of the cases seems to indicate that the testimony of a specialist is entitled to more weight than that of a general practitioner. The Louisiana Court of Appeals, upholding the trial court's finding in a workmen's compensation case, said that the testimony of an orthopedic specialist was entitled to greater consideration than the testimony of an older physician who was more experienced in general practice but who had not specialized.[4] In a later Louisiana case for workmen's compensation benefits in which the plaintiff had suffered a back injury, there was also conflicting medical testimony. Two orthopedic surgeons testified for the defendant that the plaintiff was able to return to his work, but two other doctors, one an osteopath and one a general practitioner, testified for the plaintiff that he was totally disabled. The court of appeals upheld the trial court's finding for the defendant and said:

> Medicine is a scientific profession which readily lends itself to specialization, and for knowledge and treatment of certain dis-

2. Milne v. Sanders, 143 Tenn. 602, 228 S.W. 702 (1920).
3. Travelers Insurance Company v. Carter, 298 S.W.2d 231 (Tex. Civ. App. 1956).
4. Harmon v. McDaniel, 41 So.2d 249 (La. App. 1949).

> abilities we have learned it is best to consult a specialist whom we concede to have, by reason of training and experience, special knowledge and skill in his chosen field.

The court then quoted from Malone in his work on the Louisiana Workmen's Compensation Law:[5]

> The specialist and the physician with considerable experience may be preferred over the general practitioner or the newcomer.[6]

These statements do not mean, however, that testimony of a general practitioner is not substantial evidence even though contradictory to that of specialists. In at least one case, the court affirmed the finding of the trial court based on the testimony of the general practitioner.[7]

The Tennessee Supreme Court has held in numerous cases that upon review of the trial court's action in cases presented under the compensation statute, the view most favorable toward petitioner's claim must be accepted.[8] This "most favorable view" for the plaintiff has resulted in great liberality in finding substantial evidence to support the judgment of the trial court. In one Tennessee case, plaintiff brought an action under the compensation statute for a back injury received in the course of employment. Both doctors testified they thought the plaintiff was able to go back to work wearing a brace. Plaintiff himself testified, however, that he was not able to do any work that required physical labor and this was "corroborated" by several of his neighbors who stated that plaintiff had not walked well nor had they seen him do any work after the accident. The trial court found for the plaintiff and the supreme court affirmed on appeal in the following language:

> The Trial Judge, however, was not bound to accept the statements of the doctors in this regard; he was entitled to determine from all of the evidence in the case, *both expert and non-expert,* the extent of the disability . . . .[9] (Emphasis added.)

In a later case, *Hamlin & Allman Iron Works v. Jones,*[10] the supreme court upheld the trial court's verdict for a 50% disability which was based upon the petitioner's testimony that he was 75% disabled after he had previously described his physical condition in detail, even though there was adverse testimony of the doctors.

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5. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 286, p. 368 (1951).
6. Rider v. R. P. Farnsworth Co., 61 So.2d 204 (La. App. 1952).
7. Travelers Insurance Company v. Carter, 298 S.W.2d 231 (Tex. Civ. App. 1956).
8. Vester Gas Range Mfg. Co. v. Leonard, 148 Tenn. 665, 257 S.W.395 (1923).
9. Bush Bros. & Co. v. Williams, 197 Tenn. 334, 273 S.W.2d 137 (1954).
10. 292 S.W.2d 27 (Tenn. 1956).

Observed in the light of the announced principle of the court to take the most favorable view of the petitioner's claim under the workmen's compensation statute on review, and considering the cases from other jurisdictions, the holding of the principal case was to be expected. It may reflect some further extension of the policy of liberality in finding material evidence to support the conclusion of the trial court in workmen's compensation cases, but in view of the mandate of the act that it is not to be strictly construed[11] this extension probably is in accord with the legislative intent. The decision does not mean, however, that in all fields of medicine, the testimony of a general practitioner would be regarded as more substantial evidence when opposed by the testimony of all the specialists.

T.G.M., JR.

11. TENN. CODE ANN. § 50-918 (1955).

BOOK REVIEWS

TENNESSEE WORKMEN'S COMPENSATION, By Steven C. Stone and Ralph Roger Williams. Chattanooga: Tennessee Law Publishing Company, 1957. Pp. 313 pages. $22.50.

This is a compact, readable, one-volume work on the Tennessee Workmen's Compensation Law. It should be particularly useful to new practitioners. It is detailed enough and well enough annotated to be of value to experienced practitioners.

The authors state that the object of the book is to furnish a complete text statement of the scope and operation of the Tennessee Workmen's Compensation Law including interpretations thereof by the Supreme Court of Tennessee, together with appropriate pleading and practice forms suitable for use in the trial and appeal of a workmen's compensation case in the Tennessee courts. With this objective in mind, the authors deal with the background of our Compensation Act, the election and rejection of coverage, the regulation of insurance carriers, compensable cases, non-compensable cases, occupational diseases, employees' coverage by the Act, employers and employees exempt from the Act, the rights and duties of employers, the payment of compensation, settlements and agreements, medical and surgical treatment, burial expenses, the determination of dependency, together with court procedure and suggested pleading forms.

The chapter on background information plainly points out the change from the early day strict construction of the Act to the present day liberal construction in favor of the employee to effectuate the humane purposes of the Act. The chapter on Conflict of Laws is brief, but accurate. One problem that frequently arises is the enforcement in Tennessee of the compensation act of another state. The authors set out that the Tennessee courts may properly enforce the compensation act of another state even though the contract of employment was entered into in the other state and the employer's place of business was in the other state. The writer had hoped this chapter would deal with the problem where the other state has what is called a "State Fund", there being no practicable method to this lawyer's knowledge by which employees' rights can be enforced in such an instance except by proceeding in the other state.

The chapter on compensable cases is clearly written and particularly well annotated. The sections on heart attack and cerebral hemorrhage might be dealt with in more detail but the annotations, if read carefully, provide an up-to-date review of the law on this particular subject. These heart attack cases are of growing importance in the compensation law and this book would certainly be helpful to a lawyer with such a case. The sections on occupational diseases are concise and should be helpful in this field where many factors are still somewhat uncertain. The problem here that frequently besets the lawyer is the statute of limitations. Here again the text is brief but the annotations are fairly inclusive so that a perusal of the annota-

tions will be of material assistance to the searcher who has a statute of limitations feature in his occupational disease case.

The chapter on non-compensable cases is perhaps the most interesting chapter in the volume. The employee's right to benefits when injured while going to and from work and on or off the employer's premises will often present a knotty question. The principles discussed in this volume should enable the attorney to evaluate better the realities of his position. The section on minors, particularly the part on illegally employed minors, is likewise of importance in compensation practice since such situations occasionally arise.

The chapter on employers and employees exempt from the Act is largely a reiteration of the statutory exemptions. The section on casual employment, while setting out the meaning of the statutory exemptions, is hardly detailed enough to make clear the principles determinative of casual employment.

The chapter on the rights and duties of employers is largely a resumé of the statutory requirements. An interesting feature that might have been discussed is a situation arising with increasing frequency where one employee is involved in an automobile accident with a fellow employee under circumstances where the negligent fellow employee is covered by liability insurance. In the case of an employee riding as a guest in an automobile driven by a fellow employee on company business, the Compensation Act is held to be the sole and exclusive remedy so as to bar an action at common law by one employee against the other employee. A discussion of these cases where the Compensation Act is held to be the sole and exclusive remedy would have made a worthwhile addition to the volume.

The chapter on payment of compensation is largely an account of the various schedules of payments and the statutory provisions. The second injury fund is discussed, along with contribution of compensation from two or more employers, the procedure in both being clearly set out in the statute. The portion of the chapter that has to do with payments to dependents and the determination of dependency likewise is clearly set forth in the statute. The section on medical and surgical treatment discusses at some length the obligation on employees to accept an operation and refers to the recent decisions on this point.

One of the best features of this entire volume, aside from the chapter on pleading forms, is the chapter on court procedure. This chapter also has a section on the statute of limitations. One of the best indications that the authors went to a lot of pains in preparing this volume is their inclusion here of an obscure point, that the mere issuance of a summons, without being accompanied by the filing of a petition, does not toll the statute of limitations. This is a pitfall the new lawyer should remember. The authors take a compensation case from the occurrence of the accident and compensable injury and discuss logically and in proper order the various steps to be taken in securing the employee's rights. This is immediately followed by Chapter 10 on pleading forms which illustrate in concrete form the various suggestions in the text.

Several examples of petitions are set out, along with forms for use by way of joint petitions for the court's approval of settlements, and suggested forms of various answers. There are also several briefs covering recently reported cases. These briefs furnish a good example of the important issues to be stressed in briefing a compensation case. There are several examples of judgments and various other pleading forms.

The last two chapters on court procedure and pleading forms should be read carefully and should find wide use by new lawyers in their first compensation cases. For lawyers with more experience, the volume will be a handy source of information and authority for most any compensation case that may arise.

Member of Knoxville Bar — RICHARD STAIR

THE BILL OF RIGHTS. By Learned Hand. Cambridge: Harvard University Press, 1958. Pp. 82. $2.50.

In February of this year, in the Court Room in Austin Hall at Harvard University Judge Learned Hand gave three lectures as the Oliver Wendell Holmes Lectures. The Harvard Law School Bulletin for April reports that "during these talks there was a quality of excitement and heightened interest in the Law School community which equalled or surpassed anything we can remember." Outside the hall "the scene reminded us of the entrance to a big theatre where a hit was playing".

In closing his last lecture Learned Hand paid tribute to his professors at Law School so many years before. He concluded "The memory of these men has been with me ever since. . . . In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none. Go ye and do likewise". The famous jurist and scholar has earned as great a place in the affection of those who revere character and learning, as his preceptors earned in his affections.

The lectures examine particularly the place of judicial review in our system; its justification, and its proper limits. Judge Hand admits what some hesitate to concede, that no express words in the Constitution, or anywhere else, sustain the doctrine of judicial review, and that it is at least doubtful whether the "Founding Fathers" would have incorporated such a provision had it been proposed. But he concludes, as it is deemed all reasonable men must, that a final arbiter was necessary and that the courts are the best "Department" in which to vest such power. "It was not a lawless act to import into the Constitution such a grant of power". In other words, in construing any document "it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking". Or to say it in words not from Hand's text, the power is necessary if we are to have the kind of constitutional government we conceive of ourselves as having. Legislative or executive supremacy can produce a sort of constitutional government, but not the sort we know we want.

In the progression from this point, the traditionalist will have more

trouble accepting the final judgment of the great jurist. He would limit the power more than the judiciary has itself limited it. He would draw a distinction between the frontiers of power of a "Department' and the propriety of the choices by a "Department" within those frontiers.

Within the frontiers, Judge Hand would not permit the courts to deal with the choice that the legislature has made. He feels that the normal expressions of the rules requiring a reasonable necessity for regulation, and the lack of undue oppressiveness in operation, make the courts a "third legislative chamber". He admits that "Due Process" includes substance as well as procedure, yet finds it amazing that "such a patent usurpation should have remained unchallenged for as long as it did." Nor does he concede the validity of the "favored position doctrine" of Justice Stone. He feels that there is no difference in the qualifications of a legislature to choose between "personal" or "economic" values. His conclusion is that the courts are not warranted in "annulling any legislation because they disapprove of it on the merits". The dilemma is real, of course, since there is no hard and fast line between stepping over a frontier, and acting unreasonably within a frontier. It is clear that Judge Hand believes that he would exercise the power of judicial review much more restrictedly than it has been and is being exercised.

Nor does Judge Hand feel that the current emphasis upon Freedom of Speech is justified, in that he feels that the legislatures are possessed of more right to make a choice than many decisions of the courts have allowed. Most would agree that the "clear and present danger test" is not capable of being applied with accuracy, but this reviewer thinks that the author has failed to see the point about freedom of speech. It is submitted that the necessity argument which Judge Hand applies to the doctrine of judicial review, namely that our system would be defeated without judicial review, is equally applicable to Freedom of Speech. If we are to have our sort of democracy, then the choices of the legislatures must have some limits. The unpopular idea must often be expressed even if it is contrary to the choice of the legislature.

Of course one will admit that no liberty is absolute, and that some restrictions can be placed upon any right. Further, it is clear that experimentation is necessary, and that no one can be dogmatic about the effect of certain choices. Still mere honesty of choice on the part of the law maker is not sufficient to maintain a democracy, for the law maker may not honestly believe in democracy. Judge Hand admits that in the case of speech those who urge review on the merits "have the better argument", and this seems in a sense to answer his own objections to the so-called "favored position" doctrine.

When a great man, and a great judge writes one expects close reasoning, great clarity and great modesty. These things one finds in *The Bill of Rights*. Learning plus wisdom added in such full measure produce a small gem-like volume worthy of preserving for the "grandchildren".

The University of Tennessee ELVIN E. OVERTON

GIBSON, SUITS IN CHANCERY. Fifth Edition, revised by Arthur Crownover, Jr. Charlottesville: Michie Company, 1955. 2 vol. $45.00.

More than any other text book, *Gibson* is the law in Tennessee. Foolhardy – and foolish – indeed would be the chancellor who would not follow Gibson on any matter of chancery practice or substantive equity unless fortified by the express terms of a contrary statute. *Pritchard on Wills* and *Caruthers History of a Lawsuit* are eminent authorities in Tennessee, but *Gibson* is regarded by the Bench and Bar as almost inspired.

This respect is intermingled with pride, of course, for Tennessee is one of the last remaining jurisdictions having separate equity courts. Their flourishing condition here is due in large measure to the excellence of *Gibson*. Those of us who cherish our equity courts are proud of the book which contributes so largely to their continued existence.

Since the printing of Chambliss' edition in 1929, *Gibson* has been unobtainable except for the period immediately following 1937 when the 4th edition appeared. A whole generation has appeared at the bar, many of whom have never had an opportunity to purchase the book indispensable to the chancery lawyer. To these younger men, then, as well as to all members of the bar, the appearance of the fifth edition is an event of importance.

Wisely, Mr. Crownover has made few changes of substance in the text, and has retained intact most of the original forms. The footnote citations have been supplemented by later decisions in many instances. Citations to the statutes include references to the new *Tennessee Code Annotated.*

Because of a change in paper, the new edition is printed in two volumes, which detracts from its easy portability. The 3rd edition was printed on thin India paper, and was much handier than any of the others. Perhaps the next publisher will find it possible to return to the older, more convenient format.

Despite this criticism, no lawyer who practices in chancery court will omit the purchase of the new edition. Mr. Crownover is due the thanks of the profession for the labor of love in making *Gibson* available again.

Of the Nashville Bar — LOUIS FARREL, JR.

THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS. By Welcome D. Pierson. Indianapolis: The Bobbs-Merrill Company, Inc. 1956. Pp. 390. $15.00.

Up to now the plaintiffs' lawyers have had pretty much of a corner on the "how to do it" books. For that reason Mr. Pierson's volume comes as a welcome (no pun intended) addition to the shelves of those who spend their time on what he quite properly characterizes as the "hot side of the table." For while defense tactics, like all procedures designed to maintain and preserve the status quo, are not as susceptible of dramatic treatment as are those of the plaintiff, still there are a num-

ber of basic rules which, if adhered to, will bring the most belligerent (pun intended) opponent up short. Mr. Pierson derives these rules from more than thirty years of actual courtroom practice, and so when he speaks you can be sure it is with authority.

The increasing size of verdicts in personal injury cases has become a matter of concern to defense lawyers and to judges in all parts of the country. Regardless of the individual case, a disproportionate rise in the statistical average of recovery in this type of case may have a profound effect upon the country's economy, as an undue increase in any item of expense may have. For in certain types of business, such as insurance and public transportation, the handling of claims is a regular operating charge which must be taken into account in order to determine the cost of doing business and from it determine the rate at which that business can be profitably conducted. Of course, as the courts of this and many other states have recognized, juries should take into account the descending trend of the value of the dollar, and the size of verdicts should keep pace with rising wage scales and cost of living indices. But in recent years there has been a tendency for them to outstrip these economic pace setters. As a result, business in which personal injury claims are an unavoidable incident to operation are being forced into an untenable competitive position, which in turn is being reflected in higher rates to the public for their services.

The attitude of the courts towards these conditions varies. All seem to deplore them; but some give the juries a free hand, on the theory of let the blows fall where they may and the devil take the hindmost, while others attempt to exercise some measure of control over the size of verdicts through remittiturs and the ordering of new trials. While the latter is a salutary interim measure, it can never be a satisfactory ultimate answer, for it is not only expensive and time consuming, but if carried to extremes results in a deprivation of the guaranteed right of jury trial.

A permanent solution can only be found by getting at the crux of what causes this new attitude towards the monetary value of personal injuries. Of course the basic fallacy lies in the assumption that such intangible elements as pain and suffering can be measured in terms of dollars and cents at all. And yet this difficulty has existed from time immemorial without the size of verdicts getting out of hand; so it is apparent that some new force must have come into play which causes juries to undertake the impossible and make the plaintiff so financially happy that he cannot be physically sad. The proponents of the "more adequate award" would have us believe that it is their new trial techniques which have accomplished this, but this seems extremely doubtful. At most, these techniques have acted as a catalyst in the presence of which this phenomenon occurs, not as one of the active ingredients. On the contrary, it appears that the true conditioning factor which brings about large verdicts is the average American citizen's well developed lack of respect for money, especially other people's money. All about him, in government, in industry, in business, he sees men of impeccable standing and authority dealing with other ptople's money in

large amounts and without a thought of the consequences or the future. He himself buys on credit a house, an automobile, and any number of appliances and gadgets which he never really intends to pay for in full, but will trade in on other houses, automobiles, appliances and gadgets long before their useful life is exhausted, simply because new models appear on the market. He labors under an individual debt which could not possibly be paid off in a single lifetime, and a national debt which could not even be materially reduced in the foreseeable future. Is it any wonder that in this atmosphere of getting and spending, when some clever plaintiff's lawyer evaluates the loss of an arm with a dollar an hour for the rest of the loser's life, the jury frequently says let's make it a dollar and a half!

It may seem a far cry from all this to Mr. Pierson's book, but it is not as far as it seems. The only person who can put a curb upon this runaway aspect of our economy is the defense attorney and the only means by which he can do it is through the use of basic defense tactics. Every dollar that is given to a plaintiff is taken away from some defendant, and the idea that because almost all defendants have had the foresight to protect themselves through insurance they deserve no consideration is vicious. As Mr. Pierson says, "A Trial Attorney is a salesman. He is selling an intangible product — his client's case. If he follows the sound rules of salesmanship he will quite likely be able to sell his case to the jury." But in these enlightened days he must first sell the jury on the idea that it is just as important to a defendant not to lose a case as it is to a plaintiff to win one.

It may be that things have been made too easy for the defense in the past and that this is simply the reaction setting in. If so, we cannot wait for the pendulum to swing the other way again. We must, as the plaintiffs' attorneys have done, take stock of the tools and means available to us, and to this end Mr. Pierson's book is a valuable aid. There is little that is new in it, but much that is worthy of review. And sometimes it is more valuable to relearn the old than to experiment with new techniques.

Of the Memphis Bar WALTER P. ARMSTRONG, JR.