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Notes and Comments

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Comments on a Phase of Legal Control of Medical Practice

There can be no doubt that the problems of medical charlatanism and unlicensed medical practice are pressing ones, and that the conditions giving rise to them vitally affect the public health. A recent article[1] has made a substantial contribution to their solution by suggesting to public prosecutors and other interested persons the possibilities and limitations of the various legal remedies in this field. The present writer feels, however, that it is to be regretted that, in so doing, the article has classified among the evils to be eliminated the competent, public-spirited, and law abiding profession of osteopathy.

It is submitted that certain expressions and statements in the article

[1] Heilman, *Legal Control of Medical Charlatanism* (1943) 22 N. C. L. REV. 23.

in question do an injustice to the osteopathic profession, by implying that many if not all osteopathic physicians are imposters, engaged in some way in unlicensed or unlawful practice, and that as a class they are inadequately prepared by education and training to treat the sick. It is felt that, were readers of the article acquainted with the facts as to the educational institutions and processes of the osteopathic profession, and aware of the legal status of its members as licensed practitioners in the several states, they would recognize that these implications are erroneous.

In the third paragraph of the article[2] it is stated that ". . . the health and well being of the general public will be better promoted if there be prohibited the most flagrant forms of charlatanism foisted on the people by self-styled experts with little or no scientific training or even elementary knowledge of anatomy, biology, chemistry, or bacteriology." This statement does not specifically mention osteopathy but subsequent paragraphs make it clear to the reader that osteopathy and its practitioners are intended to be included. The writer has personal knowledge that there are six colleges of osteopathy in the United States approved and recognized by the American Osteopathic Association (which is recognized by most state licensing boards and by the United States Office of Education as the official accrediting agency for osteopathic colleges); and that all of them are non-profit institutions organized for the promotion of the public health through medical education and research, teaching a full four-year course embracing all the subjects taught in reputable and recognized schools granting the M.D. degree, including, of course, the four subjects mentioned in the above quotation.[3]

The classroom and laboratory time devoted to the so-called "medical" subjects in these osteopathic schools is approximately the same as that devoted to such subjects in American medical schools generally. In addition to their full curricula of "medical" subjects, the osteopathic colleges provide approximately 800 hours of instruction in osteopathic principles and practice during the four-year course, bringing the total class room and laboratory hours to about 800 hours in excess of the average of American medical schools. Each of these six osteopathic colleges requires as an entrance prerequisite two years of university or college training, including at least six semester hours each of English, physics and biology, and 12 semester hours of chemistry. The faculties of these osteopathic schools are composed of Doctors of Osteopathy,

[2] *Ibid.*

[3] People v. Schaeffer, 310 Ill. 574, 575, 142 N. E. 248, 249 (1924) (Examples of courses taught at the American School of Osteopathy, Kirksville, Mo., in 1911-15. Courses in drug therapeutics have since been added, and in fact the subject was taught then as a part of the courses in principles and practice.); *cf.* People v. Graham, 311 Ill. 92, 142 N. E. 449 (1924).

Doctors of Medicine, and holders of other advanced professional and scientific degrees in their particular fields. Attached to or connected with each of these colleges is a teaching hospital where upper classmen, graduate students and osteopathic internes observe and take part in the diagnosis and treatment of all conditions of disease and injury. Graduate training in the medical specialties is provided, and research is carried on within the limitations imposed by war-time conditions and by the relative lack, as yet, of philanthropic and government support of these institutions. Osteopathic physicians trained in these schools are serving as public health officers and employees in many cities, counties, and states, and as commissioned officers in the United States Public Health Service.

It seems inaccurate to describe osteopathic physicians thus trained and recognized as ". . . self-styled experts with little or no scientific training or even elementary knowledge of anatomy, biology, chemistry or bacteriology,"[4] or as is done in the following passage from the fifth paragraph of the article: ". . . the unorthodox healer who diagnoses and then attempts to cure by his own pseudo-scientific or cultist method."[5]

The next paragraph of the article contains the following statement: "From the time of Hippocrates to the present the regularly licensed physicians and surgeons have contested for public patronage with the faith healers, osteopaths, napropaths, naturopaths, and other cultists and unorthodox healers of all kinds."[6] Of course, osteopathic practitioners are regularly licensed in every state of the Union and in the District of Columbia, as indeed it is stated by the article. They may also describe themselves and be referred to properly as "physicians" or "physicians and surgeons" as an examination of applicable judicial decisions[7]* and statutes will indicate.

In twenty-eight states, the practice acts under which Doctors of Osteopathy are licensed describe persons licensed thereunder as "physicians" or "physicans and surgeons."[8] In addition, there are ten states

[4] *Supra*, note 1. [5] *Id.* at 24. [6] *Ibid.*

[7]* Howerton v. Dist. Col., 289 Fed. 628 (C. C. D. C. 1923) (Held that the defendant, an osteopathic physician, came within the clause of the Podiatry Act exempting "regular practicing physicians or surgeons."); Towers v. Glider & Levin, 101 Conn. 169, 125 Atl. 366 (1924) (An osteopathic physician was held to be a "competent physician or surgeon" under the Conn. Workmen's Comp. Act.); People ex rel. Gage v. Siman, 278 Ill. 256, 115 N. E. 817 (1917) (An osteopathic physician was held entitled to be registered under the Vital Statistics Act as a "legally qualified physician."); Bandel v. Dept. of Health, 193 N. Y. 133, 85 N. E. 1067 (1908) ("physician"); State ex rel. Kester v. North, 136 Ohio St. 523, 26 N. E. (2d) 1020 (1940) ("licensed physician"); Commonwealth v. Cohen, —— Pa. Super. ——, 15 A. (2d) 730 (1940) ("licensed physician"); In re Opinion of the Justices, 42 R. I. 249, 107 Atl. 102 (1919) ("physicians registered to practice"); State ex rel. Walker v. Dean, 155 Wash. 383, 284 Pac. 756 (1930) (Held that one licensed to practice osteopathy and surgery is "a legally qualified physician" within the meaning of the statute providing for appointment of city health officers.).

[8] ARIZ. CODE ANN. (1939) §§67-2104, 67-2111, 67-2112; CAL. GEN. LAWS

in which osteopathic physicians receive the same license as do the M.D.'s, six of which are not among the group of twenty-eight referred to. In these six states, also, osteopathic physicians may fairly be said to have, by virtue of their license, the right to use the title "physician and surgeon."

Many statutes relating to the public health, such as vital statistics acts, laws governing the control of infectious diseases, laws regulating the distribution, sale and use of drugs, narcotics, prophylactics and the like recognize Doctors of Osteopathy as "physicians" either by express definition or by inclusion generally.[9] In the ten states where the medical and osteopathic physicians receive the same license, express recognition of the latter in public health statutes is usually not found, because it is unnecessary; but in these states Doctors of Osteopathy are eligible to perform all public health functions and occupy all public health offices, generally speaking.

In the course of the article, the author made the following statement: "The staidness, conservativeness, and high professional standards of a learned profession are handicapped in coping with the blatant, self-advertising methods of the charlatan, whose appeal is particularly to the emotions of the ignorant and hopelessly afflicted."[10] Again, osteopathy is not mentioned, but, by clearest inference from the rest of the article, it is intended to be included. I should like to quote at some length from the Code of Ethics of the American Osteopathic Association[11] as bearing upon this point:

(Deering, 1944) act 5727, §§1, 2, 3; Cal. Business and Professions Code (Deering, 1944) §2137; CONN. GEN. STAT. (1930) §2754; DEL. REV. CODE (1935) §931; F. S. A. (1943) §1804; Idaho Code Ann. (1932) §§53-1801, 53-1804; IND. STAT. ANN. (Burns, 1933) §63-1305; IOWA CODE (Reichmann, 1939) §2554.07; ME. REV. STAT. (1930) c. 21, §70; MICH. STAT. ANN. (Henderson, 1938) §14.574; MINN. STATS. (1941) §148.12; MO. STAT. ANN. (1939) §10046; NEV. COMP. LAWS (Hillyer, 1929) §5001; N. J. STAT. ANN. (1940)§45:9-5.1; N. M. STAT. ANN. (Courtright, 1941) §51-809; N. C. GEN. STAT. (1943) §90-134; N. D. COMP. LAWS ANN. (1933) c. 202, §§11, 12, 13; OHIO CODE ANN. (1939) §1274; OKLA. STAT. ANN. (1941) tit. 59, §633; ORE. COMP. LAWS ANN. (1939) §54-824; PA. STAT. ANN. (Purdon, 1941) tit. 63, §268; R. I. GEN. LAWS ANN. (1938) tit. XVI, c. 275, §10; S. D. CODE (1939) §27.0401; S. D. LAWS (1943) c. 108, §1; TENN. CODE (Williams, 1943) §§7004, 7006; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 4510; UTAH CODE ANN. (1943) §§79-9-3, 79-9-6, 79-9-7; WASH. REV. STAT. ANN. (Remington, 1933) 10072; W. VA. CODE ANN. (Michie & Sublett, 1943) §2984.

[9] *E.g.*, ARK. DIG. (Supp. 1944) Part II, *Drugs* §1 (prophylactics); CONN. GEN. STAT. (Supp. 1939) §1315e (premarital examination); IOWA CODE (Reichmann, 1939) §2181(5) (State Dept. of Health), §3169.01(2) (narcotics); MICH. STAT. ANN. (Henderson, 1937) §§18.971-18.1028 (liquor), §18.1007 (narcotics); MICH. STAT. ANN. (Henderson, Supp. 1944) §16.455(k) (Social Security); REV. STAT. MO. (1939) §§9832(2) & (8) (narcotics); ORE. COMP. LAWS ANN. (1939) §58-561 (prophylactics); UTAH REV. STAT. ANN. (1943) §79-12a-1 (prophylactics); ACTS OF VT. (1941) No. 65, §2 (premarital examination), No. 103, §1 (prenatal examination).

[10] Heilman, *Legal Control of Medical Charlatanism* (1943) 22 N. C. L. REV. 23.

[11] DIRECTORY OF OSTEOPATHIC PHYSICIANS, 1944, pp. 260-263 (Published by the American Osteopathic Association, Chicago.).

CHAPTER II.—THE DUTIES OF PHYSICIANS TO EACH OTHER AND TO THE PROFESSION AT LARGE

Article I.—Duties for the Support of Professional Character

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Sec. 6. (a) It shall be considered unethical for a physician to advertise in any manner, regardless of whether there is any consideration represented as payment for such advertisement or not, except as hereinafter provided:

When sanctioned by universally accepted local custom and with specific approval and under mutual agreement with the A. O. A. recognized divisional osteopathic organization concerned, it may be considered ethical to use in printed publications a simple, dignified statement by a general practitioner or institution engaged in general practice; which statement shall list only the name, profession, address, telephone number, office hours, and other necessary information, expressly permitted, such as listing the organs or class of cases, but not the specific diseases treated by the individual or group who limits practice to a specialty only.

(b) It is not compatible with honorable standing in the profession for any individual practitioner or institution to pay, directly or indirectly, for advertising time on the radio, nor for any osteopathic society, osteopathic group, or osteopathic institution, nor for any member of the profession, to advertise professional services or solicit patients over the radio.

(c) It shall be considered unethical for a physician to use literature of any kind for the education of the general public of the facts concerning osteopathy, except as hereinafter provided:

(1) Educational literature as referred to in the above paragraph may be used provided it is published for that purpose by the A. O. A., or if published by any other concern or organization it shall have the approval of the Committee on Ethics and Censorship previous to its use by any physician or group.

(d) Ethical conduct in either advertising or education precludes such practices as the following:

(1) Inviting the attention of persons afflicted with particular diseases.

(2) Publishing cases in the daily press or elsewhere.

(3) Presenting cases or reports of cases over the radio.

(4) Listing oneself as a specialist when he is really a general practitioner who has developed special aptitude for a sideline.

(5) Promising radical cures.

(6) Advertising free examinations (except in free clinics).

(7) Display advertising of unusual varieties.

(8) Or in any other way trespassing against the dictates of honesty, good judgment, fairness and professional decency and the tenets of the Golden Rule.

Sec. 7. It shall be considered unethical for a physician to hold himself out as a specialist in more than one specialty.

A violation of any of these provisions, as of any other provision of the Code of Ethics, subjects the offending physician, upon complaint to an investigation by the Committee on Ethics and Censorship of the

A. O. A., to censure or expulsion from membership, or both, by the Board of Trustees of the A. O. A. Of the approximately 11,000 practicing osteopathic physicians in the United States, about two-thirds belong to the American Osteopathic Association. In addition, some 1,800 physicians, not members of the A. O. A., are members of state osteopathic associations, having similar codes of ethics and similar provisions for discipline. To be sure, there are renegades in the osteopathic profession, just as there are in every other profession and trade, who cannot be reformed, either by private or by governmental sanctions.

Although there are many other expressions in this otherwise excellent article which are unfortunate when considered in reference to the osteopathic profession, the present remarks will be confined to commenting upon two more statements appearing therein. One is as follows: ". . . these two healing cults (osteopathy and chiropractic) have steadily intruded themselves into the field of medicine."[12] The other reads: "But it is when the osteopath and chiropractor fail to stay in the realm of 'hand manipulation and kneading' and encroach on the licensed physician's prerogative to prescribe and administer drugs and that of the surgeon to use the knife that these cultists and the 'regulars' come into headlong conflict."[13]

I understand the meaning of "prerogative" to be "that which one has a legal right to do"; and the reader would fairly infer from the article as a whole that by "licensed physician" it has reference to holders of the degree M.D. or M.B. who are licensed by government authority to practice their profession, although, as indicated above, it is thought that this view of the meaning of the term "licensed physician" is erroneous.

With these considerations in mind, let us examine what osteopathic physicians "have a legal right to do" in the practice of their profession in the several states, with particular reference to the prescription and administration of drugs and the use of surgical instruments. Osteopathic physicians are licensed to practice *medicine and surgery,* on the same terms as allopathic physicians and with no limitations whatsoever as to practice rights, in the following states: California,[14] Colorado,[15] District of Columbia,[16] Kentucky,[17] Massachusetts,[18] New Hampshire,[19] New Jersey,[20] Ohio,[21] Texas,[22] and Wyoming.[23] In Connecti-

[12] Heilman, *Legal Control of Medical Charlatanism* (1943) 22 N. C. L. REV. 23, 25.
[13] *Ibid.*
[14] CAL. GEN. LAWS (Deering, 1944) act 5727, §§1, 2, 3; CAL. BUSINESS AND PROFESSIONS CODE (Deering, 1944) §2137.
[15] COL. STAT. ANN. (Michie, 1935) c. 109, §6.
[16] D. C. CODE (1940) §§2-109, 2-118, 2-120.
[17] KY. REV. STAT. (Cullen, 1943) §§311.010(2a), 311.030, 311.060.
[18] MASS. ANN. LAWS (Michie, 1942) c. 112, §10.
[19] N. H. REV. LAWS (1942) c. 250, §12.
[20] N. J. STAT. ANN. (1939) §45:9-15.
[21] OHIO GEN. CODE ANN. (Page, 1937) §1274.
[22] TEX. ANN. REV. CIV. STAT. (Vernon, 1940) art. 4501.
[23] WYO. REV. STAT. ANN. (Courtright, 1931) §86-104.

cut they are eligible to receive a license to practice medicine and surgery after a special examination, which examination requires no additional educational qualifications beyond those required for the osteopathic license.[24] Osteopathic physicians have unlimited, or substantially unlimited, practice rights in the following states: Arizona,[25] Delaware,[26] Florida,[27] Maine,[28] Michigan,[29] Missouri,[30] Nevada, [31] New Mexico,[32] Oklahoma,[33] Oregon,[34] Pennsylvania,[35] Rhode Island,[36] Tennessee,[37] Utah,[38] Vermont,[39] Virginia,[40] Washington,[41] and West Virginia.[42]

Osteopathic physicians are legally authorized to prescribe and administer some or all drugs in the following states (in addition to all the states listed above): Indiana,[43] Iowa,[44] Minnesota,[45] Nebraska,[46] New York,[47] North Dakota,[48] and South Dakota.[49] They are licensed to practice all forms of surgery in Indiana,[50] Iowa,[51] and Wisconsin,[52] as well as in the first two groups of states listed above. They are licensed to practice minor surgery in Alabama,[53] Arkansas;[54] Minnesota,[55] New York,[56] North Dakota,[57] South Carolina,[58] and South Dakota.[59]

[24] CONN. GEN. STAT. (1930) §2754.
[25] ARIZ. CODE ANN. (1939) §§67-2101, 67-2115.
[26] DEL. REV. CODE (1935) §931; Op. Atty. Gen., March 13, 1939.
[27] F. S. A. (1943) §§459.01, 459.07. [28] ME. REV. STAT. (1930) c. 21, §64.
[29] MICH. STAT. ANN. (Henderson, 1937) §14.574.
[30] REV. STAT. MO. (1939) §10044.
[31] NEV. COMP. LAWS (Hillyer, 1929) §§4991, 5001.
[32] N. M. STAT. ANN. (Courtright, 1941) §51-809.
[33] OKLA. STAT. ANN. (1941) tit. 59, §§630, 633.
[34] ORE. COMP. LAWS ANN. (1939) §54-821.
[35] PA. STAT. ANN. (Purdon, 1941) tit. 63, §§266, 268.
[36] R. I. ACTS. 970 RESOLVES (1940) Ch. 889.
[37] TENN. CODE ANN. (Michie, 1941) §7007.
[38] UTAH CODE ANN. (1943) §79-9-3(2)(b).
[39] VT. PUB. LAWS (1933) §7477.
[40] VA. CODE ANN. (Michie, Sublett, & Stedman, Supp. 1944) §1609(c).
[41] WASH. REV. STAT. ANN. (Remington, 1933) §§10056, 10069.
[42] W. VA. CODE ANN. (Michie, Sublett, & Stedman, 1943) §2984.
[43] IND. STAT. ANN. (Burns, 1933) §63-1316.
[44] IOWA CODE (Reichmann, 1939) §2554.08.
[45] MINN. STAT. (1941) §148.12.
[46] NEB. COMP. STAT. (1922) §8174. This section granted osteopathic physicians the right to use anaesthetics, antiseptics, antidotes and narcotics in specific language. This specific language has since been removed by amendment, but the right to use these drugs was held to survive the amendment in the case of *State ex rel. Johnson* v. *Wagner & Gable,* 139 Neb. 471, 297 N. W. 906 (1941).
[47] N. Y. EDUCATION LAW §1262.
[48] N. D. SESS. LAWS (1933) c. 202, §5.
[49] S. D. CODE (1939) §27.0405.
[50] IND. STAT. ANN. (Burns, 1933) §63-1316.
[51] IOWA CODE (Reichmann, 1939) §2554.07.
[52] WIS. STAT. (Brossard, 1941) §147.17.
[53] ALA. CODE (1940) tit. 46, §259.
[54] ARK. DIG. STAT. (Pope, 1937) §10766.
[55] MINN. STAT. (Henderson, 1941) §148.12.
[56] N. Y. EDUCATION LAW §1262.
[57] N. D. SESS. LAWS (1933) c. 202, §§1, 5.
[58] S. C. CODE (1942) §§5231-33.
[59] S. D. CODE (1939) §27.0405.

It is believed that the foregoing analysis represents correctly the practice rights of the osteopathic physicians presently being licensed in the states mentioned. It should be noted, however, that there are in some of these states groups of older practitioners licensed under earlier laws whose rights are more limited than are the practice rights of the more recent licensees. Nevertheless, it can readily be perceived that in 38 states and the District of Columbia it is not the sole "prerogative" of physicians who hold the degree M.D. to prescribe and administer drugs and to practice surgery. It is not felt out of place to observe here that the educational training and background of osteopathic physicians practicing in states where their practice rights are limited by law is precisely the same as that of osteopathic physicians in the unlimited practice states; in other words, the only disability of the former group is one imposed by archaic laws and does not indicate inferior professional competence. It is not generally known, perhaps, that almost invariably any proposed modernization of these laws is vigorously, albeit sometimes hypocritically, opposed by organized old school medicine as a "menace" to the public health.

It has been the observation of the present writer, from contact and acquaintance with hundreds of members of the osteopathic profession from all over the United States, that on the average their profession is just as sincere, public-spirited, and disinterested, and just as concerned in extending the boundaries of medical knowledge as is the allopathic or "orthodox" medical profession. It is thought that the epithets applied to the osteopathic profession in the article *Legal Control of Medical Charlatanism* are perhaps an unconscious reflection of the attitude of certain members of the "orthodox" medical profession. It would seem that this attitude, in turn, has its roots in professional jealousy and sometimes in economic self-interest.

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Landlord and Tenant—Emblements and Apportionment of Rent When Life Tenant Lessor Dies before Expiration of Term

What are the rights and liabilities of the parties in interest when the holder of a life estate in real property leases his property for a term of years and dies before the end of the term? The question arises infrequently in our courts, presenting interesting and difficult problems. A study of the law on this point in eleven of our southern states[1] reveals an attempt by the courts and legislatures to determine equitably the rights of all parties in interest.

[1] Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, North Carolina, South Carolina, Tennessee, Virginia. For a more complete study see Note (1920) 6 A. L. R. 1056.

According to the common law, the estate of a life tenant terminates at the time of his death, subject to the tenant's right to emblements, which include the crops raised on the leased premises[2] as well as the privilege of ingress and egress so far as is necessary for due attention to the crops.[3] This right to crops includes all those planted or seeded before the termination of the life estate, but does not include those sowed after the particular estate came to an end.[4] Even though a tenant has plowed and fertilized the land, upon ouster he is not entitled to emblements and loses his labor and materials.[5]

Statutes have been enacted in eight[6] of the eleven states[7] studied in which some attempt is made to apportion the rent between the personal representative of the life tenant and the remainderman. The Georgia statute[8] seems merely to guarantee to the tenant the right to remain in possession of the land until the end of the year in which the life estate terminates, along with the right to emblements, there being no specific mention of an apportionment of rent. In its interpretation of the statute, however, the Georgia Court has seen fit to adopt the principle of apportionment. In *Butt* v. *Story*[9] the life tenant died without collecting the rent or doing any act to which the law could give the effect of a collection. The court declared that the lessee, who is entitled under the statute to possess the premises until the end of the year, is accountable to the remainderman for such a proportion of the rent as the period between the life tenant's death and the end of the year bears to the entire year. It was further held that if the life tenant took a negotiable promissory note for the year's rent and transferred it for value to a third party, this was equivalent to payment, and the lessee could claim the benefit of satisfaction of the indebtedness as against the remainderman. Furthermore, the taking of a non-negotiable note by the life tenant, though it be assigned, was held not to be equivalent necessarily to the collection of the note, since the assignee holds it subject to the existing equities between the two original parties. In an earlier hearing on this case[10] the court held that the lessee had a

[2] Price v. Pickett, 21 Ala. 741 (1852); Hays v. Wrenn, 167 N. C. 229, 83 S. E. 356 (1914); King v. Foscue, 91 N. C. 116 (1884); Thompson v. Thompson, 6 Munf. 514 (Va. 1820).

[3] Humphries v. Humphries, 25 N. C. 362 (1843).

[4] Price v. Pickett, 21 Ala. 741 (1852); Hays v. Wrenn, 167 N. C. 229, 83 S. E. 356 (1914); Thompson v. Thompson, 6 Munf. 514 (Va. 1820).

[5] Price v. Pickett, 21 Ala. 741 (1852).

[6] ALA. CODE ANN. (Michie, 1928) §8831; ARK. DIG. STAT. (Pope, 1937) §8579; KY. REV. STAT. (Cullen, 1943) §§395.350-395.360; MISS. CODE ANN. (1942) §901; N. C. GEN. STAT. (1943) §42-7; S. C. CODE (Michie, 1942) §§8797-99; TENN. CODE ANN. (Williams, 1934) §§8406-07; VA. CODE ANN. (Michie, Sublett, & Stedman, 1942) §5543.

[7] *Supra*, note 1.

[8] GA. CODE ANN. (Park, et al., 1938) tit. 85-606, 85-607.

[9] 5 Ga. App. 540, 63 S. E. 658 (1909).

[10] Story v. Butt, 2 Ga. App. 119, 58 S. E. 388 (1907).

correlative duty to comply with his contract with the life tenant. Should the lessee perform his obligations in a satisfactory manner, he would not be accountable to the remainderman for any portion of the year's rent, though the life tenant died before the crop was sown.

In another Georgia case[11] a life tenant rented land for a year to a lessee who was also the remainderman, taking a negotiable promissory note for rent. He transferred the note to a third person for value and afterwards died during the term without collecting any of the rent. The note was transferred to secure the payment of an indebtedness which the life tenant owed the transferee. In this situation the court declared the transferee could recover the amount of his debt, accounting to the remainderman for the excess. Furthermore, in this controversy the lessee had a right to show these facts with the result that recovery should be limited to the actual amount of the indebtedness.

An Alabama case[12] of interest arose when the holder of a life estate leased her life interest to the remainderman for certain annual installments, payable during her lifetime. Upon the death of the life tenant, the remainderman was held liable for a just proportion of the annual rent for the year in which the life tenant died.

As late as 1900 the Tennessee court recognized the distinction between lands actually planted before the termination of the life estate and those which were only prepared for planting and cultivation. The fact that an interest may be retained by the lessee after the death of the life tenant because of the doctrine of emblements will give the lessee no right to retain other portions of the premises which are included in the lease, but are not planted before the tenant's death. In such instance the statute with respect to apportionment does not authorize a lease to extend beyond the life estate, and recovery for rents due upon the termination of the life interest is the only right possessed by the personal representative.[13] In *Turner* v. *Turner*[14] the court held the remainderman entitled either to disaffirm the lease contract or to ratify it and share the rent *pro tanto*. In this case the remainderman sought to recover possession of the land and also damages or compensation for the use and occupation. Since there was a ratification of the lease, the lessees were entitled to emblements, consisting of the yearly crop of grain which had required an outlay of labor and industry, without payment of any compensation for the use of the land in harvesting of crops. In a much earlier case[15] a husband had a life estate in his wife's lands during coverture and had rented the lands for a year. Upon his death the Tennessee court held that the wife at once became entitled to

[11] Mitchell v. Rutherford, 9 Ga. App. 722, 72 S. E. 302 (1911).
[12] Saint v. Britnell, 206 Ala. 533, 91 So. 310 (1921).
[13] Collins v. Crownover, 57 S. W. 357 (Tenn. Chan. App. 1900).
[14] 132 Tenn. 592, 179 S. W. 132 (1915).
[15] Arnold v. Hodges' Heirs, 29 Tenn. 38 (1849).

the rents; and, if the personal representative of the husband had collected the rents which accrued after his death, the representative would then be liable to the widow therefor. Something of the same sort has emanated from an opinion of the Kentucky court.[16] It was there declared that the lessee's right of possession secured by a lease from a life tenant terminated when the life tenant died. However, the Kentucky statute clearly authorizes an apportionment in such a situation and it is supposed that the law would be the same as that of Tennessee. The amount to which the personal representative is entitled is in proportion to the time the life tenant lived after the term began.[17]

On the other hand, the North Carolina court has said,[18] under the statute[18a] in effect in this jurisdiction, that the lease is continued to the end of the current year in order to enable the lessee to gather his crop, the remainderman being entitled to a part of the rent proportionate to that portion of the year elapsing after the life tenant's death. In one case from this jurisdiction a life tenant rented the land, and the tenant sub-let it at a much higher rent. Upon the life tenant's death during the year's term, the court ruled that the remainderman could only take a proportionate part of the rent reserved in the lease contract and was not entitled to the same proportionate part of the rent actually paid by the subtenant.[19] The lease in such case is continued to the end of the year in lieu of emblements.[20]

A South Carolina statute provides that upon the death of one holding a life interest in land after March 1 in any given year, the crops raised on the land in the occupation of the deceased would be assets in the hands of his administrators.[21] Under this statute it was held in an early case that the lessee's possession of land leased from a life tenant could not be disturbed if the latter died after March 1, the lessee being required to secure to the remainderman that proportion of the rent accruing after the life tenant's death.[22] Another South Carolina statute allows an apportionment of the rent to the respective persons interested where a life tenant dies before the rent is due, permitting a recovery of the amount due by the personal representative, and provides that the lessee, who cannot be dispossessed until the end of the crop year, shall secure the payment of the rent when it comes due.[23] In a case decided under both statutes a husband, in the right of his wife, rented out her

[16] Avey v. Hogancamp, 172 Ky. 675, 189 S. W. 917 (1916).
[17] Haynes v. Harris, 14 Ky. Law Rep. 303 (1893).
[18] King v. Foscue, 91 N. C. 116 (1884).
[18a] N. C. GEN. STAT. (1943) §42-7.
[19] Hays v. Wrenn, 167 N. C. 229, 83 S. E. 356 (1914).
[20] Hays v. Wrenn, 167 N. C. 229, 83 S. E. 356 (1914); King v. Foscue, 91 N. C. 116 (1884).
[21] S. C. CODE (Michie, 1942) §8996.
[22] Freeman v. Tompkins, 1 Strob. Eq. 53 (S. C. 1846).
[23] S. C. CODE (Michie, 1942) §§8797-99.

lands for a year, reserving six acres which he cultivated himself. The wife died March 9, thus terminating her life estate. Under the statutes it was held that the rent owing by the tenant immediately became the property of the remainderman to whom the land had passed and that both the personal representative of the life tenant and the remainderman would have to look to the lessee for remuneration, and not to the husband, who had no control of the crops or responsibility for the rent. In respect to the six acres which were not leased but cultivated by the husband in the right of the wife, the crops raised thereon would then be assets in the hands of the life tenant's executors or administrators, they being entitled to both lands and crops for the year in preference to the remainderman. The court declared that a planting by March 1 was not essential to the exercise of this right by the personal representatives.[24] It was also held that the statute,[25] providing for double rent where a party in possession refused to surrender to the remainderman at the conclusion of the life estate, would not apply to agricultural lands in the above mentioned situation.

A somewhat similar situation arises under the Kentucky statutes.[26] An apportionment is decreed, and the lessee is permitted to remain on the land until the end of the year provided that the life tenant dies after March 1. The emblements of the lands of a person dying after that date shall be assets in the hands of his personal representative; but, if the death occurs before March 1, the emblements growing on the lands shall pass to the remainderman.

The South Carolina court has clarified the meaning of the apportionment statute[27] of that state, holding that the lessee could not be ousted until the end of the year. Under this decision the remainderman would be entitled to compel the lessee to secure the rent for the unexpired portion of the year.[28]

In an Alabama case, possession of previously leased property was taken by a grantee of the life tenant, who—prior to such conveyance—had assigned a rent note taken from the lessee to a third person, to whom the lessee had actually paid the rent. Upon the death of the life tenant during the year for which the note was given, the remainderman sued the grantee for the rent of the land. It was held that the remainderman was not entitled to recover. The issue as to whether he could recover from the lessee was not presented by the record.[29] The statute gives the personal representative the right to recover whatever rent is

[24] Newton v. Odom, 67 S. C. 1, 45 S. E. 105 (1903).
[25] S. C. CODE (Michie, 1942) §8800.
[26] KY. REV. STAT. (Cullen, 1943) §§383.190, 395.340, 395.350, 395.360.
[27] *Supra*, note 23.
[28] May v. Thomas, 94 S. C. 158, 78 S. E. 85 (1913) (The constitutionality of the statute was upheld in this decision.).
[29] Terrell v. Reeves, 103 Ala. 264, 16 So. 54 (1893).

due at the time of the life tenant's death; but, where the life estate terminates before the rent is due, an apportionment is in order.[30]

The Virginia statute allows the lessee to remain on the land until the end of the year and apportions the rent to the representative of the life tenant and the remainderman. If the rent is payable in kind, however, it is to be paid to the personal representative; and he, in turn, is required to pay a reasonable money rent to the remainderman for the period between the death of the life tenant and the end of the current year. This sum is a preferred charge on the rent in kind received from the lessee by the personal representative.[31] The provision concerning the payment of a reasonable rent to the remainderman affirms the holding of the Virginia court in an early case, decided under the common law, that such a sum could be recovered by the remainderman.[32]

Generally, it may be said that these statutes effectively take care of the situation here presented. The injustices of the common law have been eradicated, and the rights of the parties marked out and clarified. Perhaps the term "emblements," when used in these laws, should be given a more definite and positive definition. Nothing so important as the principle of apportionment should be left to judicial interpretation, as was done by the Georgia legislators. All states which do not have such statutes should be urged to adopt laws similar to those discussed herein and draft them with a view to clarity and effectiveness.

CHARLES S. MANGUM, JR.

Chapel Hill, N. C.

Federal Rules of Civil Procedure—Commencement of an Action for Purposes of the Statute of Limitations—Amendment of Complaints

In a recent case[1] before the Circuit Court of Appeals the executor of a deceased partner sued the surviving members of the partnership for an accounting of the deceased's interest in proceeds from the sale of certain jointly owned cattle, the alleged conversion occurring April 1, 1938. The original petition was filed March 8, 1940, but both summons and alias summons were returned unserved because plaintiff's counsel failed to advance the marshal's fees. Upon issue of another alias summons defendant was served more than sixty days after the four-year statute of limitations had run out. On August 3 and December 11, 1942, amended petitions were filed centering around the same transaction alleged in the original petition, but differing from the original in that plaintiff sought accounting of a single defendant. The court

[30] ALA. CODE (1940) tit. 31 §14. The Arkansas and Mississippi statutes resemble the Alabama law closely. See ARK. DIG. STAT. (Pope, 1937) §8579 and MISS. CODE ANN. (1942) §§2179-80.

[31] VA. CODE ANN. (Michie, Sublett, & Stedman, 1942) §5543.

[32] Thompson v. Thompson, 6 Munf. 514 (Va. 1820).

[1] Isaacks v. Jeffers, 144 F. (2d) 26 (C. C. A. 10th, 1944).

held: (1) the running of the statute was interrupted by the filing of the petition,[2*] and (2) the amended petitions related back to the filing of the original.[3*] The dissenting judge argued that the mere filing of the petition within the four year period without diligent service of process was not sufficient.

Before the adoption of the new Federal Rules of Civil Procedure,[4] an action was deemed to be commenced in a Federal equity court by the filing of a bill with a *bona fide* intent to prosecute the suit *diligently,* provided there was no detrimental or unreasonable delay in the issuance or service of process.[5] To stay the statute of limitations there must also have been a *bona fide* attempt to serve the process after it had come into the hands of the serving officer,[6] which, if unsuccessful, was required to be followed by timely proceedings or reasonable diligence to procure service through further or additional process.[7] As late as January, 1938, the above proposition was expounded as the rule applied by the federal courts in determining when a civil action was deemed to be commenced.[8*] However, the *bona fide* attempt to serve did not require that every means by which service might be accomplished should have been exhausted; thus it was held sufficient if the officer in good faith, or with a real intent to serve, made reasonable effort to accomplish his purpose.[9*] But the *bona fides* require the effort to proceed according to law, and that the means prescribed thereby be employed.[10*]

Since the new Federal Rules have become effective—September

[2*] 28 U. S. C. A. §723c (1941), Rule 3: "A civil action is commenced by filing a complaint with the court."

[3*] *Id.* Rule 15(c): "Whenever the claim or defense asserted in the amended pleading arouse out of the conduct, transaction, or occurrence set forth . . .in the original pleading, the amendment relates back to the date of the original pleading."

[4] 28 U. S. C. A. §723c (1941).

[5] Linn & Lane Timber Co. v. U. S., 236 U. S. 574, 35 Sup. Ct. 440, 59 L. ed. 725 (1915); U. S. v. Hardy et al., 74 F. (2d) 841 (C. C. A. 4th, 1935); Ben C. Jones & Co. v. West Pub. Co., 270 Fed. 563 (C. C. A. 5th, 1921), *writ dismissed,* Ben C. Jones & Co. v. West Pub. Co., 270 U. S. 665, 46 Sup. Ct. 208, 70 L. ed. 789 (1925) (There must be a bona fide intention that the process be served at once.); Armstrong Cork Co. v. Merchants Refrigerating Co., 184 Fed. 199 (C. C. A. 8th, 1910).

[6] U. S. v. Amer. Lum. Co., 85 Fed. 827 (C. C. A. 9th, 1898).

[7] U. S. v. Miller et al., 164 Fed. 444 (C. C. D. Ore. 1908).

[8*] U. S. v. Adams et al., 92 F (2d) 395 (C. C. A. 5th, 1938) (The filing of the complaint to be effectual as the commencement of suit must have been with good faith intent to prosecute it, and must have been followed reasonably with the issuance and service of process.); *accord,* N. Y., N. H., & H. R. Co. v. Pascucci, 46 F. (2d) 969 (C. C. A. 1st, 1931) (Rule denoted to be uniform practice of federal courts.).

[9*] U. S. v. Miller et al., 164 Fed. 444 (C. C. D. Ore. 1908) (That the marshal used the telephone in attempt to locate defendant, rather than going in person to make direct inquiry, cannot be assigned as a lack of diligence.).

[10*] U. S. v. Amer. Lum. Co., 85 Fed. 827 (C. C. A. 9th, 1898) (It does not aid the *bona fides* of the attempt to serve that the plaintiff's counsel erroneously thought that the subpoenas could be served by the persons to whom they were sent.).

16, 1938—the courts, in applying them, have almost entirely ignored the above stated principles. The requirement that the suit be diligently prosecuted after the filing of the complaint seems to have been sidetracked by the simple statement of Rule 3: "A civil action is commenced by filing a complaint with the court."[11*] As a consequence, the following questions have presented themselves: Since the adoption of the rules, may a suit be deemed commenced by the mere filing of a complaint with the court for purposes of the statute of limitations? Must there not be a *bona fide* effort, on the part of the plaintiff, to have service on the defendant and to prosecute the suit diligently?

Similar questions, of the same import, were presented to the Advisory Committee, but were left unanswered, the committee being of the opinion that the ". . . requirement of Rule 4(a) that the clerk shall *forthwith* issue the summons and deliver it to the marshal for service . . . (would) reduce the chances of such a question arising."[12] *(Italics ours.)* Upon a consideration of the committee's statement, it has been suggested ". . . that the filing of the complaint conditionally suspends the running of the statute of limitations, provided the summons is issued *forthwith* and served within a *reasonable* time thereafter."[13] *(Italics ours.)* Likewise, it has recently been held by a United States District Court, while recognizing and applying the Federal Rules, that the ". . . modern Federal rule is that an action in equity is commenced by the filing of a complaint with a *bona fide* intent to prosecute the suit diligently, provided there is no unreasonable delay in the issuance or service of the subpoena."[14] This proposition would seem to be impliedly recognized in the principal case, for it was there said: "There is nothing in the record from which a legal conclusion of lack of good faith in the prosecution of the action . . . can be inferred," and that the plaintiff's action, or non-action, ". . . does not in itself constitute lack of due diligence. . . ."[15] It is submitted by the writer that in determining when a civil action is commenced, for purposes of the statute of limitations, Rule 3 should be construed in the light of the rules propounded by the earlier decisions, *i.e.*, that the filing of the complaint

[11*] Reynolds v. Needle, 132 F. (2d) 161 (App. D. C. 1942); O'Leary v. Loftin, 3 F. R. D. 36 (E. D. N. Y. 1942) (No longer is a suit commenced by service of a summons and complaint.); Schram v. Costello et al., 36 F. Supp. 525 (E. D. Mich. 1940) (Filing a complaint with the court, the issuance of summons and delivery thereof to the marshal, tolls the statute of limitations.); Gallagher et al. v. Carroll et al., 27 F. Supp. 568 (E. D. N. Y. 1939) (Issuance of summons is the required *ministerial act.*); C. F. Simonin's Sons, Inc., v. Amer. Can Co., 26 F. Supp. 420 (E. D. Pa. 1939) (Until the complaint has been filed, no action has been commenced.).

[12] *Notes to the Rules of Civil Procedure for the District Courts of the United States,* 75th Cong., 3d Session, House Document No. 588 (1938).

[13] Rotwein, *Pleading and Practice Under the New Federal Rules—A Survey and Comparison* (1939) 8 Brooklyn L. Rev. 188, 193.

[14] U. S. v. Spreckels et al., 50 F. Supp. 789, 790 (N. D. Cal. 1943).

[15] Isaacks v. Jeffers, 144 F. (2d) 26, 28 (C. C. A. 10th, 1944).

should be followed by a *bona fide* attempt to have service on the defendant and to prosecute the suit with due diligence.

In *Maier* v. *Independent Taxi Owner's Assn.*[16] the statute was held to be tolled where the complaint was filed within time, but service was not had on defendant until after the statute had run because plaintiff's counsel failed to advance marshal's fees. The court there stated that ". . . upon a proper showing that the circumstances which could not have been reasonably foreseen delayed payment, proof of reasonable diligence thereafter is sufficient to prevent operation of the statute."[17]* It is interesting to note that in the *Maier* case the court suggested that the obligation of delivering the summons to the marshal included prepayment of the marshal's fees.[18] It was later held in *Schram* v. *Koppin,*[19] where the complaint was filed before the statute of limitations expired, but service on defendant was delayed until fifteen months thereafter because the latter avoided servers, that the filing of the complaint and the issuance of the original writ started the suit. But the court decided, impliedly recognizing the doctrine of the *Maier* case, that the equities on the question of due diligence were in favor of the plaintiff.[20] However, where the marshal's fees were not prepaid, resulting in service after the statute had expired because plaintiff had difficulty in finding security for such fees, it has been held that an honest effort was made under the circumstances to procure the service in due time.[21]*

By application of the above decisions to the case under consideration, it would seem that plaintiff made no diligent or *bona fide* effort to prosecute the suit. The court merely stated on this point that the ". . . trial court evidently failed to find such conduct (lack of due diligence), because it concluded that the statute of limitations was no bar to the prosecution of the action."[22] Indeed, not only did plaintiff's counsel fail on two occasions to provide marshal's fees, although requested, but service was not had on defendant until more than two

[16] 96 F. (2d) 579 (App. D. C. 1938).

[17]* *Id.* at 582 (Plaintiff's counsel was unexpectedly called out of town, but paid fees immediately upon his return when he found his assistant had failed to do so, in violation of his orders.).

[18] *Ibid.*

[19] 35 F. Supp. 313 (E. D. Mich. 1940).

[20] *Id.* at 314; *cf.* Farbwerke Vormals Meister L. & B. v. Diarsenal Co., Inc., et al., 21 F. (2d) 588 (W. D. N. Y. 1927); Comen v. Miller, 41 F. (2d) 292 (M. D. Pa. 1930) (It was held that there was nothing to show the contrary of a *bona fide* intention).

[21]* Cisco et al. v. Looper, 236 Fed. 336 (C. C. A. 8th, 1916); *cf.* Ben C. Jones v. West Pub. Co., 270 Fed. 563 (C. C. A. 5th, 1921), *writ dismissed,* Ben C. Jones v. West Pub. Co., 270 U. S. 665, 46 Sup. Ct. 208, 70 L. ed. 789 (1925), (Where a delay of five years six months in service supervenes, the running of the statute is not stopped by the filing of the complaint.).

[22] Isaacks v. Jeffers, 144 F. (2d) 26, 28 (C. C. A. 10th, 1944).

years after the filing of the original complaint and more than four years after the cause of action accrued.

From the second proposition expounded by the court in the principal case, the further question is presented as to when the amended complaint will relate back to the time of original filing. It is generally held that where an amendment introduces a new or different cause of action and makes a new or different demand, not before introduced or made in the pending suit, it does not relate back to the original filing so as to stop the running of the statute; but where the amended complaint merely varies or expands the allegations in the cause of action already propounded, it will relate back to the commencement of the action, and the running of the statute of limitations is arrested at that point.[23*] To determine whether a new cause of action is stated in the amendment it has been stated that a ". . . fair test . . . is whether evidence tending to support the facts alleged (in the amended complaint) could have been introduced under the former pleadings."[24] Thus an original complaint, alleging that the injury was caused due to defendant's manhole not being "flush" with the sidewalk, was not allowed to be amended by the allegation that the accident was caused by negligently constructed corrugations on the manhole.[25] Although other strikingly similar tests have been propounded,[26*] it would seem that the one above stated is of greater value, since it is easier to apply to

[23*] Kan. Gas & Elec. Co. v. Evans, 100 F. (2d) 549 (C. C. A. 10th, 1938), *cert. den.*, 306 U. S. 665, 59 Sup. Ct. 790, 83 L. ed. 1061 (1938); Wabash Ry. Co. v. Bridal, 94 F. (2d) 117, 121 (C. C. A. 8th, 1938), *cert. den.*, 305 U. S. 602, 59 Sup. Ct. 63, 83 L. ed. 382 (1938), ("It is now the generally accepted rule, 'when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and * * * that a liberal rule should be applied.'"); S. H. Kress & Co., Inc., v. Reaves, 85 F. (2d) 915, 916 (C. C. A. 4th, 1936), *cert. den.*, 299 U. S. 616, 57 Sup. Ct. 322, 81 L. ed. 454 (1937), (Amended complaint held merely to amplify the original, where the original claimed damages caused by defendant's excavations and amended complaint alleged further that the excavations were done without ascertaining in advance the nature and character of the ground); Factors & Finance Co., Inc., v. U. S. 56 F. (2d) 902 (Ct. Cl. 1932), *cert. granted*, 287 U. S. 582, 53 Sup. Ct. 16, 77 L. ed. 509 (1932), *aff'd.*, 288 U. S. 89, 53 Sup. Ct. 287, 77 L. ed. 633 (1933); Hovland v. Farmers' State Bk. of Christine, N. D., et al., 10 F. (2d) 478 (C. C. A. 8th, 1926) (The allegations of the original pleading must be sufficiently specific to enable the court to identify the cause of action therein sought to be set up and to determine whether or not the original and amended pleadings refer to the same cause of action.); Saylers et al. v. U. S., 257 Fed. 255 (C. C. A. 8th, 1919) (Where the plaintiff, having two causes of action, has stated but one of them in his original complaint, although the amount demanded is large enough to cover both, an amendment setting up the second cause of action will not relate back to the date of the original petition); Dittgen v. Racine Paper Goods Co., 164 Fed. 85 (C. C. E. D. Wis. 1908).

[24] Kan. Gas & Elec. Co. v. Evans, 100 F. (2d) 549, 552 (C. C. A. 10th, 1938), *cert. den.*, 306 U. S. 665, 59 Sup. Ct. 790, 83 L. ed. 1061 (1939).

[25] *Ibid.*

[26*] Saylers et al. v. U. S., 257 Fed. 225 (C. C. A. 8th, 1919) (Whether the same evidence will support both; and whether a judgment against one will bar the other.); Hall v. Louisville & N. R. Co., 157 Fed. 464 (C. C. N. D. Fla. 1907) (Does the amendment introduce a new right or new matter?); Overfield v. Penn-

each case as it arises. Thus it has been held that the cause of action is not changed where the amended complaint alleges that the plaintiff sues under the authority and for the benefit of a third person, instead of for his own benefit as evidenced by the original complaint.[27*] Then, too, where the amended complaint changes the allegation of the capacity in which the defendant is sued, and seeks application of different principles of law to the same facts upon which the former declaration was based, it does not introduce a new cause of action.[28*] It is also generally recognized by the Federal courts, that a new cause of action is not stated where the amendment sets forth the statute applicable to the situation in replacement of an inapplicable statute pleaded in the original complaint.[29*]

Accordingly, by the process of "evolution," the ". . . emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim."[30*] Thus by the application of Rule 15(c),[31*]

road Corp. et al., 39 F. Supp. 482, 485 (E. D. Pa. 1941) ("The important question is whether or not the allowance of the amendments would work an injustice upon any of the parties.").

[27*] Middlesex Banking Co. v. Smith, 83 Fed. 133 (C. C. A. 5th, 1897). *But cf.* Hall v. Louisville & N. R. Co., 157 Fed. 464 (C. C. N. D. Fla. 1907) (An amended declaration changing the beneficiary of the action is in effect the bringing of a new suit.).

[28*] Clinchfield Ry. Co. v. Dunn, Admrx., 40 F. (2d) 586 (C. C. A. 6th, 1930), *cert. den.*, 282 U. S. 860, 51 Sup. Ct. 34, 75 L. ed. 761 (1930), (Original complaint alleged against defendant as corporate successor of Car., Clinchfield & Ohio Ry. Co., whereas the amended complaint alleged defendant as "lessee" of said company.).

[29*] Mo., Kan. & Tex. Ry. Co. v. Wulf, 226 U. S. 571, 575, 33 Sup. Ct. 135, 137, 57 L. ed. 355 (1913) ("The pleader was not required to refer to the federal act, and the reference actually made to the Kansas Statute no more vitiated the pleading than a reference to any other repealed statute would have done."); Williams v. Wm. B. Scaife & Sons Co., 227 Fed. 922 (D. N. J. 1915) ("The reference in the first complaint to the New Jersey statute was mere surplusage, and no more vitiated that pleading than a refernce to any other matter which was surplusage would have done. What has been done . . . is to eliminate . . . mere surplusage. . . ."). *But cf.* De Valle De Costa v. Southern Pac. Co., 167 Fed. 654 (C. C. D. Mass. 1909), *cert. den.*, 217 U. S. 606, 30 Sup. Ct. 696, 54 L. ed. 900 (1909) (Where an amended declaration is based on a statute of another state, not counted on in the original declaration, the suit was not commenced until the filing of the amended declaration.); *cf.* Union Pac. Ry. Co. v. Wyer, 150 U. S. 285, 15 Sup. Ct. 377, 39 L. ed. 983 (1895) (Since the first petition proceeded under the general law of master-servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas Statute, it was a departure from law to law, and therefore a different cause of action.).

[30*] White v. Holland Fur. Co., Inc., 31 F. Supp. 32, 34 (S. D. Ohio 1939); *accord*, Oil Well Supply Co. v. First Nat. Bk. of Winfield, Kan., 106 F. (2d) 399 (C. C. A. 10th, 1939) (A departure from law to equity, or vice versa, resulting from amended petition, is not the test as to whether a new cause of action is stated.); Overfield v. Pennroad Corp. et al., 39 F. Supp. 482 (E. D. Pa. 1941) (Controversies should be determined on the merits and not on procedural niceties, if there will be no prejudice to the defendant.); *cf.* Midland Valley R. Co. v. Jones, 115 F. (2d) 508 (C. C. A. 10th, 1940).

[31*] 28 U. S. C. A. §723c (1941), Rule 15(c): "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading."

of the new Federal Rules, it is generally held that an amendment will not state a new cause of action if the facts stated show ". . . substantially the same wrong with respect to the same transaction . . . although the form of liability asserted or the alleged incidents of the transaction may be different."[32] By application of this principle to the case at hand, the result reached by the court seems unavoidable. The plaintiff sought no relief against the partnership in his original complaint, but both the original and amended complaints were directed against the conduct of the individual defendant.

JAMES G. HUDSON, JR.

White Slave Traffic Act—Intent and Purpose within the Meaning of the Act

Defendants operated a house of prostitution in Nebraska. They took a vacation trip to Utah, carrying two prostitutes employed in their house. It was undisputed that the trip was planned as a vacation, the respective parties bearing individual expenses. Upon their return with the defendants, the girls re-entered the defendants' employ. The United States Supreme Court held that there was no violation of the "White Slave Traffic Act" by the defendants, for they did not transport the girls with the intent or purpose to facilitate prostitution within the meaning of the Act. Furthermore, the fact that the girls resumed their immoral practice did not operate to inject a retroactive illegal purpose into the trip.[1] This case raises the interesting question: What constitutes "intent and purpose" within the meaning of the "White Slave Traffic Act?"

The "Mann Act," most often called the "White Slave Traffic Act," provides that "Any person who shall knowingly transport or cause to be transported . . . in interstate commerce . . . any woman or girl for the purposes of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce; entice; or compel such woman or girl to become a prostitute or to give herself up to debauchery, or engage in any other immoral practice . . . shall be deemed guilty of a felony. . . ."[2] Thus, it appears from the reading of the statute that there are two requisites to a conviction: (1) knowingly transporting in interstate commerce (2) for the purpose of prostitution, debauchery, or any other immoral purpose.[3] Under the statute there is no distinction between "intent" and "purpose." If the transportation

[32] Brown v. N. Y. Life Ins. Co., 32 F. Supp. 443 (D. N. J. 1940); *accord,* White v. Holland Fur. Co., Inc., 31 F. Supp. 32 (S. D. Ohio, 1939).

[1] Mortensen v. U. S., —— U. S. ——, 64 Sup. Ct. 1037, —— L. ed. —— (1944).

[2] 36 STAT. 825 (1910), 18 U. S. C. §398 (1927).

[3] U. S. v. Lewis, 110 F. (2d) 460 (C. C. A. 7th, 1940), *cert. den.,* 310 U. S. 634, 60 Sup. Ct. 1077, 84 L. ed. 1404 (1940); Shama v. U. S., 94 F. (2d) 1 (C. C. A. 8th, 1938).

was for the *purpose* of an unlawful intercourse, it must have been with the *intent* to have unlawful intercourse or to engage in some immoral purpose.[4] The offense is complete the moment a woman or girl is transported in interstate commerce with the requisite intent;[5] while the immoral conduct and relations of the parties, consummation of purpose,[6*] and immoral purpose[7*] of the woman transported are in no sense parts of the offense.

The Act attempts to curb illicit relations in three fields:

(1) Prostitution. In a restricted sense, prostitution is the practice of a female in offering her body to indiscriminate intercourse with men.[8]

(2) Debauchery. Under the statute "debauchery" is not limited to the meaning of seduction, which would require proof that the defendant procured the transportation in order that he might more surely and readily induce the woman to yield to his wishes. Rather, the term includes a purpose to expose her to such influence as will naturally and inevitably so corrupt her character as to lead her to acts of sexual immorality.[9]

(3) Other Immoral Practices. This all-inclusive term was adopted as an attempt to include any immoral relations not covered specifically in prostitution and debauchery. Thus, there have been convictions under this section of the statute where women were transported to manage houses of prostitution,[10] participate in nude dances,[11] entice men to enter houses of prostitution,[12*] and to work in low-class dance

[4] Carey v. U. S., 265 Fed. 515 (C. C. A. 8th, 1920); U. S. v. Otero, 5 F. Supp. 201 (W. D. Ky. 1933).

[5] Wilson v. U. S., 232 U. S. 563, 34 Sup. Ct. 347, 58 L. ed. 728 (1913); Ellis v. U. S., 138 F. (2d) 612 (C. C. A. 8th, 1943); Neff v. U. S., 105 F. (2d) 688 (C. C. A. 8th, 1939).

[6*] Wilson v. U. S., 232 U. S. 563, 34 Sup. Ct. 347, 58 L. ed. 728 (1913) (The solicitor later refused to accept the services.); Malagna v. U. S., 57 F. (2d) 822 (C. C. A. 1st, 1932); U. S. v. Brand, 229 Fed. 847 (S. D. N. Y. 1916); U. S. v. Long, 16 F. Supp. 231 (E. D. Ill. 1936) (Accused hired girls supposedly for ticket agents, but later informed them that they were to participate in a "hootch show." The girls rebelled.).

[7*] Hart v. U. S., 11 F. (2d) 499 (C. C. A. 9th, 1926), *cert. den.*, 273 U. S. 694, 47 Sup. Ct. 92, 71 L. ed. 84 (1926) (The government does not have to prove an immoral purpose on the part of the woman transported in order to sustain a conviction.).

[8] People v. Demouset, 71 Cal. 611, 613, 12 Pac. 788, 789 (1887); State v. Godwin, 33 Kan. 538, 542, 6 Pac. 899, 901 (1885); State v. Brow, 64 N. H. 577, 579, 15 Atl. 216, 217 (1888); Carpenter v. People, 8 Barb. 603, 610 (N. Y. 1850).

[9] Van Pelt v. U. S. 240 Fed. 346, 348, L. R. A. 1917E, 1135, 1137 (C. C. A. 4th, 1917).

[10] Simpson v. U. S., 157 C. C. A. 470, 245 Fed. 278 (C. C. A. 9th, 1917), *cert. den.*, 245 U. S. 667, 38 Sup. Ct. 133, 62 L. ed. 538 (1917).

[11] U. S. v. Lewis, 110 F. (2d) 460 (C. C. A. 7th, 1940), *cert. den.*, 310 U. S. 634, 60 Sup. Ct. 1077, 84 L. ed. 1403 (1940).

[12*] Beyer v. U. S., 163 C. C. A. 289, 251 Fed. 39 (C. C. A. 9th, 1918) (Accused hired girls as entertainers for a Mexican dance hall. The girls were under contract not to act as prostitutes; but were instructed to state, if asked, that other girls were available. The court held that although there was no debauchery contemplated by the accused in transporting the girls, the purpose was ultimately brought within the statute; the luring of men to a house of prostitution is as essential as a manager would have been.).

halls.[13*] It appears that if a female is transported for the purpose of having her engage in acts which tend to lead ultimately to that form of debauchery or immoral conduct consisting of sexual acts, there is a transportation for the "purpose of prostitution, debauchery, or other immoral purpose"; and whether or not the accused intended to debauch the girls is entirely immaterial.

Interstate transportation as denounced by the Act must have unlawful intent for its primary purpose, or be a means of effecting or facilitating sexual relations in order to sustain a conviction.[14*] There must be convincing evidence of the intention to transport the woman in question for immoral purposes, and such intent must be formed before the woman in question reached the state to which she was being transported.[15*]

If the sexual relations were not the purpose of the trip, but rather were incidental thereto, there is no violation of the statute. The mere fact that an immoral act was committed on an interstate trip does not

[13*] Athanasaw v. U. S., 227 U. S. 326, 33 Sup. Ct. 285, 57 L. ed. 528 (1913) (Accused employed an innocent country girl for the stage. It appeared that the theatre was a place where the employees drank, cursed, and smoked excessively. There was evidence of an intent on the part of the accused that he had engaged the girl, possibly with an intent to debauch her later. The court held this employment to be an efficient "school of debauchery," leading to illicit intercourse ultimately.).

[14*] Drossos v. U. S., 16 F. (2d) 833 (C. C. A. 8th, 1927) (Defendant transported a married woman and her child at the woman's request. Counsel for the defendant requested the court to instruct the jury that if the defendant—who appeared to be very ignorant—believed that he could marry the woman in another state and intended to do so before he cohabited with her, the verdict should be not guilty. Upon the refusal of the District Court to do so, the Circuit Court of Appeals reversed, saying that whether the defendant intended to defraud the woman was a question of fact for the jury; and the defendant was not guilty if he had no intentions of having sexual relations with the woman unless and until he might lawfully marry her.); Corbett v. U. S., 299 Fed. 27 (C. C. A. 9th, 1924) (Defendant paid for the transportation of a woman, with whom he was having sexual relations, from one state to another, where she visited her children. Then he paid the fare for her return trip. The Court held intent to be a jury question.); Sloan v. U. S., 287 Fed. 91 (C. C. A. 8th, 1923) (Evidence showed that the woman was transported for the purpose of securing employment. Intercourse was had frequently before and after the trip.); Fisher v. U. S., 266 Fed. 667 (C. C. A. 4th, 1920); Welsh v. U. S., 136 C. C. A. 370, 220 Fed. 764 (C. C. A. 4th, 1915) (Accused delivered a message from the woman's aunt, requesting her to return. The court held that, in order to sustain a conviction, it was essential to show that the trip would not have been made unless such trip was made by the woman at the instance of the accused; and the mere fact that the accused had in mind the probability or expectation of again possessing the woman is immaterial, if she made the trip for other reasons.).

[15*] Alpert v. U. S., 12 F. (2d) 352 (C. C. A. 2d, 1926); Gillette v. U. S., 149 C. C. A. 405, 236 Fed. 215 (C. C. A. 8th, 1916) (State investigator invited a prostitute from a house which he was investigating to dine with him in another state. After the meal they became intoxicated, and sexual relations resulted. The court held that the trip was not made with the intent and purpose of debauchery.); U. S. v. Oriolo, 49 F. Supp. 226 (E. D. Pa. 1943) (Defendant informed a woman whom he was transporting that she would have to resume prostitution. This declaration occurred while the train was moving between New Jersey and Pennsylvania. The court held the time when the defendant formed the intention was a question for the jury.).

of itself constitute the essential elements of the offense, for such act may have been without forethought or anticipation at the time the journey was begun.[16*] In those cases where the accused freely had intercourse with the woman transported prior to the trip, the courts are inclined to treat such intercourse as incidental to the primary purpose of the trip.[17] But it should be noted that if one of the defendant's purposes, among others, in transporting a woman in interstate commerce is to engage in illicit intercourse, it is sufficient to warrant a conviction.[18*]

Although a man can be convicted of transporting his wife for the purposes covered by this Act,[19] a bigamous marriage performed in a state other than the "home" state of the parties—nothing else appearing—will not constitute a violation.[20*] However, if the parties cohabit as man and wife after the bigamous marriage in another state, there is an offense within the meaning of the statute.[21]

From the secrecy surrounding the crime committed, it is virtually impossible to obtain direct evidence to prove intent. Therefore, intent, purpose, or motive must rest ofttimes in inference.[22] In determining the existence of such intent and purpose on the part of the accused, the jury is privileged to consider the conduct of the parties within a reasonable time before and after the transportation, and such evidence is not to be rejected because it might prove another crime against the parties.[23*] But the conduct must be sufficiently significant in character and near in point of time to afford a presumption that the element sought to be established existed at the time of the commission of the

[16*] U. S. v. Grace, 73 F. (2d) 294 (C. C. A. 2nd, 1934) (Girl accompanied a bishop on a trip for the sole purpose of playing the piano.); Ghadiali v. U. S., 17 F. (2d) 236 (C. C. A. 9th, 1927), *cert. den.*, 274 U. S. 747, 47 Sup. Ct. 660, 71 L. ed. 1328 (1927) (Employer transported his secretary on business.); Biggerstaff v. U. S., 260 Fed. 926 (C. C. A. 8th, 1919) (Defendant accompanied a woman on a journey, though not voluntarily, and during the journey had sexual relations.).

[17] *See* Yoder v. U. S., 80 F. (2d) 665 (C. C. A. 10th, 1935); Van Pelt v. U. S., 153 C. C. A. 272, 240 Fed. 346, L. R. A. 1917E, 1135 (C. C. A. 4th, 1917).

[18*] Carey v. U. S., 265 Fed. 515 (C. C. A. 8th, 1920) (Accused furnished prosecutor with money to make an interstate trip to discuss her pregnancy and to have illicit relations with her.).

[19] U. S. v. Mitchell, 138 F. (2d) 831 (C. C. A. 2nd, 1943), *cert. den.*, 321 U. S. 794, 64 Sup. Ct. 785, 88 L. ed. 699 (1943).

[20*] Gerbino v. U. S., 293 Fed. 754 (C. C. A. 3rd, 1923); U. S. v. Smith, 52 F. Supp. 610 (E. D. Pa. 1943). In both of these cases the accused induced a girl to enter interstate commerce for the purpose of marrying him. After the bigamous marriage the "husband" and "wife" returned immediately to their respective homes.

[21] Burgess v. U. S., 54 App. D. C. 71, 294 Fed. 1002 (D. C., 1924).

[22] U. S. v. Renegelli, 133 F. (2d) 595 (1943); U. S. v. Oriolo, 49 F. Supp. 226 (E. D. Pa. 1943).

[23*] Tedesco v. U. S., 118 F. (2d) 737 (C. C. A. 9th, 1941) (Introduced a prostitute to show the defendant's knowledge as to the kind of place he was taking the woman transported.); U. S. v. Oriolo, 49 F. Supp. 226 (E. D. Pa. 1943) (Woman worked for the defendant as a prostitute in one state. He paid her fare into another. Evidence was admissible to show intent.).

offense. The limit is largely within the discretion of the judge in each particular case.[24] Such evidence as the immaturity and inexperience of the girls transported;[25] the circumstances of employment, conditions of contract, and supervision of the girls transported;[26] prior illicit relations of the parties;[27] letters;[28] the diary of the accused's wife;[29] character of the accused's wife and his attitude toward her;[30] as well as the fact that he entered her into a bawdy-house;[31] the fact that the accused brought other women into the state for the purpose of prostitution;[32] and conversation dealing with the "attractive" life of a prostitute has been held admissible to prove intent.[33] Furthermore, even though the woman transported vigorously denies that the accused induced her to make the trip,[34*] or testifies that the idea of going into another state originated with her and the accused was opposed to it,[35] still it is for the jury to determine what was the purpose of the accused.

In the principal case the majority of the Supreme Court relied on the case of *Hansen* v. *Haff*[36] in holding insufficient intent was present to sustain a conviction. In this case an alien woman, who was employed as a domestic servant in California, made a trip to Europe with her paramour to visit her parents. Upon her return to America with him, she continued to have relations on the trip to California. During the trip across the continent she was arrested and ordered to be deported by the Secretary of Labor under an immigration statute providing for deportation of alien prostitutes. The Supreme Court reversed the order, saying that her paramount object in returning was to resume a legitimate occupation, and that such illicit acts were incidental to the trip.

The dissent in the principal case relied on the case of *Lapina* v. *Williams*,[37] wherein the defendant, an alien prostitute, made a temporary trip to Russia to visit her parents. Upon her return to America, she represented that she was the wife of an American citizen in order that she might gain admission. There was evidence that the primary purpose of her return was to re-enter her profession, which she did immediately upon her return. The court sustained a deportation order.

[24] *See* Neff v. U. S., 105 F. (2d) 688, 691 (C. C. A. 8th, 1939).
[25] U. S. v. Lewis, 110 F. (2d) 460 (C. C. A. 8th, 1939).
[26] Ghadiali v. U. S., 17 F. (2d) 236 (C. C. A. 9th, 1927).
[27] Ammerman v. U. S., 262 Fed. 124 (C. C. A. 8th, 1919).
[28] Shama v. U. S., 94 F. (2d) 1 (C. C. A. 8th, 1938).
[29] U. S. v. Mitchell, 138 F. (2d) 831 (C. C. A. 2nd, 1943).
[30] Suslak v. U. S., 213 Fed. 913 (C. C. A. 9th, 1914).
[31] Cohen v. U. S., 120 F. (2d) 139 (C. C. A. 5th, 1939).
[32] Kinser v. U. S., 146 C. C. A. 52, 231 Fed. 856 (C. C. A. 8th, 1916).
[33] Suslak v. U. S., 213 Fed. 913 (C. C. A. 9th, 1914).
[34*] U. S. v. Barton, 134 F. (2d) 484 (C. C. A. 2nd, 1943) (It appeared that the girl transported entertained "guests" when called for that purpose by the accused, and later divided her earnings with the accused.).
[35] U. S. v. Renigelli, 133 F. (2d) 595 (C. C. A. 3d, 1943).
[36] 291 U. S. 559, 54 Sup. Ct. 494, 78 L. ed. 968 (1933).
[37] 232 U. S. 78, 34 Sup. Ct. 196, 58 L. ed. 515 (1913).

From an analysis of the cases, it appears that the principal case is distinguishable from the *Hansen* case, *supra,* for in that case the defendant intended to return to a *legitimate* occupation. In the *Lapina* case, *supra,* as in the principal case, there was an intent to return to an *illegitimate* occupation, and in this respect the cases are in point. However, upon closer analysis, it appears that the principal case is distinguishable from both cases relied upon by the court. Even though the return trip was made to resume activities in an illegal profession, still such return trip was a part of a larger planned journey, made with no intent to facilitate the purposes of prostitution, debauchery, or other immoral purposes. The primary objective of the entire trip was to enjoy a vacation, and the return to the house of prostitution was merely an incident thereto. It is submitted that the Supreme Court reached the correct result.

CECIL J. HILL

Constitutional Law—Right of Women to Serve on Juries*

The defendant was convicted for violations of the Prohibition laws by a jury consisting of ten men and two women. At the impaneling of the jury in the trial court, the defendant objected to the two women on the jury, but this objection was overruled. The defendant appealed on the ground of disqualification because of sex; and, in a 5-2 decision, the Supreme Court of North Carolina granted a new trial and ruled that women were not eligible to serve on juries in this state.[1]

The majority based its decision on these points: (1) Constitutional provisions regarding trial by jury[2*] are to be construed according to their meaning at the time of the adoption of the Constitution in 1868, at which time a common law jury excluded women *propter defectum sexus.*[3] (2) Even prior to the adoption of the Constitution, the statute,[4]

*This topic has been discussed in many periodicals. The following formed part of the bibliography for this note: Miller, *The Woman Juror* (1922) 2 ORE. L. REV. 30; NOTES (1932) 12 B. U. L. REV. 122, (1925) 13 CALIF. L. REV. 155, (1939) 18 CHI-KENT REV. 103, (1932) 32 COL. L. REV. 134, (1925) 25 COL. L. REV. 376, (1926) 11 CORN. L. Q. 533, (1930) 18 GEO. L. J. 393, (1928) 22 ILL. L. REV. 777, (1926) 21 ILL. L. REV. 292, (1927) 2 IND. L. J. 566, (1922) 7 IOWA L. BULL. 190, (1928) 32 LAW NOTES 124, (1923) 26 LAW NOTES 224, (1921) 19 MICH. L. REV. 662, (1927) 12 MINN. L. REV. 81, (1921) 6 MINN. L. REV. 78, (1921) 5 MINN. L. REV. 318, (1930) 74 SOL. J. 510, (1937) 12 ST. JOHN'S L. REV. 172, (1927) 12 ST. LOUIS L. REV. 138, (1932) 6 TULANE L. REV. 324, (1937) 71 U. S. L. REV. 75, (1921) 69 U. of PA. L. REV. 386, (1920) 68 U. of PA. L. REV. 398, (1926) 12 VA. L. REV. 661, (1921) 8 VA. L. REV. 139, (1926) 35 YALE L. J. 887, (1919) 28 YALE L. J. 515, (1918) 27 YALE L. J. 423.

[1] State v. Emery, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

[2*] "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." N. C. CONST. Art. I, §13. "No person ought to be . . . deprived of his . . . liberty or property, but by the law of the land." N. C. CONST. Art. I, §17. "In all controversies at law respecting property, the ancient mode of trial by jury . . . ought to remain sacred and inviolate." N. C. CONST. Art. I, §19.

[3] 3 BL. COMM. *352.

[4] N. C. GEN. STAT. (1943) §9-1.

which authorizes the jury list to be selected from the names of (a) any such *persons* as have paid the taxes assessed against them for the preceding year, and (b) who are men of good moral character and sufficient intelligence; and the statute[5] which holds that ". . . every word importing the masculine only shall extend and be applied to females as well as males unless the context clearly shows to the contrary . . .", were not pertinent because the Constitutional provisions showed a contrary intent. (3) If women were allowed to serve on juries, it would lead to an innovation in the practical administration of both state and federal courts which ". . . might endanger or prevent this excellent institution of the jury system from its usual course."[6] (4) The Nineteenth Amendment to the United States Constitution eliminated discrimination in the rights of citizens to vote because of sex, but has no bearing on the right to jury service. (5) The statute[7] which declares, ". . . juror . . . shall when applied to the holder of such office, or occupant of such position, be words of common gender and they shall be a sufficient designation of the person holding such office or position, whether the holder be man or woman," deals only with titles or designations and not with the qualifications of the offices or positions mentioned therein. (6) No decisions to the contrary have been found where there are similar constitutional and statutory provisions to those of North Carolina.

Justice Devin dissented on the grounds that: (1) The word "men" used in the Constitution should be interpreted in the generic sense to include women. (2) The statute,[8] which was in force at the time of the adoption of the Constitution, can be imputed to the knowledge of the framers of the Constitution. (3) The language of the Constitution should be given an elastic interpretation in keeping with the progress of human thought and the changing social conditions. (4) The Legislature, following the giving of equal suffrage to women, declared that the word "juror," as used in the stautes, included women;[9] and the Attorney General, (the present Mr. Justice Seawell), later handed down an opinion stating women were not disqualified for service on juries.[10*]

[5] *Id.* §12-3 (1).
[6] State v. Emery, 224 N. C. 581, 587, 31 S. E. (2d) 858, 862 (1944).
[7] N. C. GEN. STAT. (1943) §12-3(13).
[8] See note 5 *supra.* [9] See note 7 *supra.*
[10*] Memorandum to Hon. J. Clyde Stancill, County Attorney, Charlotte, N. C., October 5, 1937. *Eligibility of Women to Serve on Juries of North Carolina.* "It is believed that the legislative history of North Carolina with respect to the importance of the civil and political status of women, and the peculiar integration and sequence of our constitutional provisions relating to suffrage, office holding, and citizenship, through which the 19th Amendment directly operates, will fully justify our court in holding that women are now eligible for jury service (without any further statutory enactment), thus removing the last vestige of political inequality with men." (p. 2). "To say that when our statute was enacted the word 'person' meant a 'male person' is not accurate. It never meant that, there or elsewhere. All that could be said is that on account of constitutional inhibitions,

As a result of this, women served on juries in North Carolina; and, if it were so held in this case, it would effect no change but would rather give added authority to a practice already grown up.

Justice Seawell reiterated in part the opinion of Justice Devin and added the following points: (1) The Constitution did not plainly say a jury of males as it did in conferring the right of suffrage, which suggests that ". . . if there was any ideology on the subject, it was activated only in the common law, not in the Constitution, and should disappear when the disqualifications finding expression in the common law had been removed."[11] (2) Many courts and many states by statute have now made women eligible for jury duty, and this has been accomplished generally without constitutional amendment.

Legislation on the subject of women jurors falls into three classifications: (a) those that expressly exclude women, (b) those that expressly include women, and (c) those that are ambiguous and need interpretation.

Thirteen states and the Territory of Hawaii expressly exclude women by statute.[12*] All of these, except New Hampshire, declare that only a "male" citizen is qualified to be a juror. New Hampshire words its statute, as follows: "The burden of jury duty shall not be imposed upon women, and their names shall not be put in the lists by town officers."[13]

Eighteen states, the District of Columbia, and the Territory of Alaska allow women to serve on juries by express statutory provision.[14*]

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it could not be made at any time applicable to women. Of course, if one desired to lay a ghost or remove a mere mental obsession, the law might plainly state that females are included. The word 'person,' however, has a continuing life and must be construed to mean women as well as men when other parts of the law permit this common sense application to be made: and, in this instance, there is no occasion for placing the word 'person' in a legalistic straight jacket." (p. 12).

[11] State v. Emory, 224 N. C. 581, 595, 31 S. E. (2d) 858, 867 (1944).

[12*] ARIZ. CODE ANN. (1939) §37-102; COLO. STAT. ANN. (Michie, 1935) c. 95, §1; FLA. STAT. ANN. (1943) §40.01 (Failure to allow women to be jurors has denied the plaintiff equal protection of law as given by the 14th Amendment. Hall v. State, 136 Fla. 644, 187 So. 392 (1939).); MISS. CODE ANN. (Rice & Etheridge, 1942) §1762; MO. STAT. ANN. (1932) p. 4690, §8746; N. H. REV. LAWS (1942) c. 375, §29; N. MEX. STAT. ANN. (1941) §30-101; OKLA. STAT. ANN. (Supp. 1944) tit. 38, §10; S. D. CODE (1939) §32.10; TENN. CODE ANN. (Williams, 1934) §10006; VA. CODE ANN. (Michie, Sublett & Stedman, 1942) §5984; W. VA. CODE ANN. (Michie, Sublett & Stedman, 1943) §5261; WYO. REV. STAT. ANN. (Courtright, 1931) §61-201 (McKinney v. State, 3 Wyo. 719, 30 Pac. 292 (1892) upheld the constitutionality of this statute.); HAWAII REV. LAWS (1935) §3710.

[13] N. H. REV. LAWS (1942) c. 375, §29.

[14*] CONN. GEN. STAT. (Supp. 1939) §1401e; DEL. REV. CODE (1935) §4721-2: "All persons qualified to vote at the general election shall be liable to serve as jurors. . . ." "Whenever any Grand or Petit Jury in this state shall be composed of both men and women and shall retire from the Court room for deliberation, the Court shall appoint two bailiffs. . . ."; IDAHO SESSION LAWS (1943) c. 158 (Prior to this statute, State v. Kelley, 39 Idaho 668, 229 Pac. 659 (1924), con-

Five states by judicial decision have construed their statutes to be applicable only to men. In Georgia a statute reads: ". . . selection of the most experienced . . . men to serve as grand jurors . . . as traverse jurors."[15] The Georgia Supreme Court ruled that the statute was not unconstitutional and that women could not be jurors.[16] In Idaho "A person is competent to act as a juror if he be: (1) A Citizen of the United States and an elector of the county. . . ."[17] It was held that the use of the pronoun "he" controlled over the broader term "persons," thereby excluding women.[18] A Massachusetts statute provides: "A person qualified to vote for representatives to the general court . . . shall be liable to serve as jurors. . . ."[19] The Court held that these words were broad enough to include women; but, when connected with the history of the times and system, it would seem that it was not so intended.[20] Ten years later the case of *Commonwealth* v. *Welosky*[21] substantiated this opinion. In South Carolina a constitutional provision says: "The Petit jury of the Circuit Courts shall consist of twelve men

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strued a previous statute, which said a jury was a body of men, to include women.); ILL. ANN. STAT. (Smith-Hurd, Supp. 1942) c. 78, §25 (People v. Traeger, 372 Ill. 11, 22 N. E. (2d) 679 (1939) upheld the constitutionality of this statute. A previous statute passed in 1929 was declared unconstitutional in People v. Barnett, 344 Ill. 62, 176 N. E. 108 (1931); *accord,* People v. Schraeberg, 347 Ill. 392, 179 N. E. 829 (1932).); LA. GEN. STAT. ANN. (Dart., 1939) §1938 (Women must file applications for jury duty. State v. Bray, 153 La. 103, 95 So. 417 (1923); State v. Davis, 154 La. 295, 97 So. 449 (1923).); ME. REV. STAT. (1930) c. 120, §2; MINN. STAT. (Henderson, Kennedy & Scott, 1941) § 593.02; Mont. Session Laws (1939) c. 203; Neb. Laws (1943) c. 45, legis. bill 82 (Women are permitted to serve on juries provided the presiding district judge shall certify that the accommodations and facilities of the court house of each county are such as to permit women to serve, and such service shall be compulsory except for good cause shown.); N. J. STAT. ANN. (1939) §2: 85-1 (*cf.* State v. James, 96 N. J. L. 132, 114 Atl. 553 (1921).); N. Y. Cons. Laws (McKinney) Civil Rights Law (Supp. 1944) §13 (Gerry v. Volger, 252 App. Div. 217, 298 N. Y. Supp. 433 (4th Dep't 1937); *cf.* In Re Grilli, 110 Misc. 45, 179 N. Y. Supp. 795 (1920).); N. D. COMP. LAWS ANN. (Supp. 1925) §814; ORE. COMP. LAWS ANN. (1940) §14-107 (State v. Chase, 106 Ore. 263, 211 Pac. 920 (1922).); PA. STAT. ANN. (Purdon, 1930) tit. 17, §913: ". . . there shall be provided . . . a separate room or rooms at or adjoining the court house . . . for the comfort . . . of women jurors. . . ." (Commonwealth v. Valotta, 279 Pa. 84, 123 Atl. 681 (1924); Commonwealth v. Garletto, 81 Pa. Super. 271 (1923).); R. I. Acts (1939) c. 700, §37: "Whenever the jury commissioner shall determine that the accommodations and facilities of the superior court houses in any county are such as to allow of the service of women as jurors, he shall certify of such facts to the secretary of state and shall include women in the drawings made by him. . . ."; Vt. Laws (1941) no. 31, §6; WASH. REV. STAT. ANN. (Remington, 1932) §89: "A jury is a body of men. . . ." §95: ". . . women . . . shall not be compelled to serve as jurors . . . Provided further, that any woman desiring to be excused from jury service may claim exception by signing a written or printed notice thereof. . . ."; D. C. CODE (1940) tit. 11, §11-1418; ALASKA COMP. LAWS (1933) §1819 (Tynan v. U. S., 297 Fed. 177 (C. C. A. 9th, 1924), held this act constitutional.).

[15] GA. CODE ANN. (Park, Stillman & Strazier, 1936) tit. 2, §2-4502.

[16] Powers v. State, 172 Ga. 1, 157 S. E. 195 (1931).

[17] IDAHO CODE ANN. (1932) §2-201.

[18] State v. Kelley, 39 Idaho 668, 229 Pac. 659 (1924).

[19] MASS. ANN. LAWS (Michie, 1932) c. 234, §1.

[20] In re Opinion of the Justices, 237 Mass. 591, 130 N. E. 685 (1921).

[21] 276 Mass. 398, 177 N. E. 656 (1931).

. . . Each juror must be a qualified elector. . . ."[22] In *State* v. *Mittle*[23] it was decided that, although each juror must be an elector, not every qualified elector could be a juror. The Nineteenth Amendment to the Federal Constitution did not give women the right to serve on juries. In a Texas case,[24] a statute saying "All men over twenty-one are competent jurors . . . ,"[25] was construed as not using the word "men" in the generic sense.

The status of four states apparently is still questionable. The Alabama Constitution states: ". . . the accused has a right to . . . a speedy, public trial by an impartial jury . . ."[26] and the Code section on challenges to the jury speaks of a juror as a "person."[27] In Arkansas, a statute states: "A jury of twenty-four men, to be known as the petit jurors . . . shall be the regular jurors for trial of all jury cases. . . ."[28] The Arkansas court[29] refused to consider the competency of an indictment rendered by a grand jury on which there were two women, because of a statute prohibiting the quashing of an indictment on the grounds of qualifications of jurors. No interpretations have been found on either the Maryland or Wisconsin statutes. The Maryland statute says: "No person shall be selected and placed upon a panel as a juror who shall not have arrived at the age of twenty-five years."[30] The Wisconsin provision is that: "All citizens of the United States who are qualified electors of this state . . . who are men of good character . . . shall be liable to be drawn as jurors."[31]

Justice Seawell in his dissent in the instant case laid down a challenge to students of the law to investigate and contradict the statement made by the majority that: "We have found no case, however, in a state with constitutional and statutory provisions similar to ours, where a contrary conclusion has been reached. . . ."[32] Such investigation has yielded three states whose decisions would apparently tend to contradict the statements made by the majority. Not all of these states have exactly the same wording as the pertinent Constitutional and statutory provisions in North Carolina, but all are *substantially* similar.

In Iowa the Constitution provides that trial by jury shall remain inviolate and that trial by jury of less than twelve men may be authorized.[33] The statutory provision is that "All qualified electors . . .

[22] S. C. CONST. Art. V, §21.
[23] 120 S. C. 526, 113 S. E. 335 (1922).
[24] Tremont v. State, 96 Tex. Crim. 572, 259 S. W. 583 (1924); *accord,* Glover v. Cobb, 123 S. W. (2d) 794 (Tex. Civ. App. 1938).
[25] TEX. ANN. REV. CIV. STAT. (Vernon, 1925) tit. 42, §2133.
[26] ALA. CONST. Art. I, §6. [27] ALA. CODE ANN. (Michie, 1940) §55.
[28] ARK. CIV. CODE ANN. (Crawford, 1934) §342.
[29] Dickerson v. State, 161 Ark. 60, 255 S. W. 873 (1923).
[30] MD. ANN. CODE (Flack, 1939) Art. 51, §1.
[31] WIS. STAT. (1941) §255.01.
[32] State v. Emery, 224 N. C. 581, 588, 31 S. E. (2d) 858, 868 (1944).
[33] IOWA CONST. Art I, §9.

are competent jurors . . .";[34] yet decisions of the courts of that state have held that women were eligible to be jurors since women were now electors, despite the fact that the Constitution used the word "men."[35*] Here is seen a parallel conflict to that of North Carolina with the exception that Iowa uses the broad term "electors" in its statute while North Carolina uses "persons" who have paid the taxes assessed.[36]

The Michigan Constitution mentions that trial by jury shall be inviolate[37] and that a jury should consist of twelve men.[38] A statute of that state provides that persons having the qualification of electors shall be jurors;[39] and, despite the use of the word "men" in the Constitution, women can serve on juries in that state. In *People* v. *Barltz*[40] the court said that the word "men" loses its significance and becomes that of "juror."

Ohio follows Michigan in similarity both as to Constitutional[41] and statutory provisions,[42] which have been interpreted to include women.[43]

The situation in six other states[44*] might be cited also in support

[34] IOWA CODE (Reichmann, 1939) §10842.

[35*] State v. Hathaway, 224 Iowa 478, 276 N. W. 207 (1937); State v. Walker, 192 Iowa 823, 185 N. W. 619 (1921); *accord,* U. S. v. Roenig, 52 F. Supp. (N. D. Iowa 1943) (Where the court held that the federal courts of the district must follow the same jury system as the highest court of the state in which the district lies.).

[36] N. C. GEN. STAT. (1943) §9-1.

[37] MICH. CONST. Art. II, §13.

[38] *Id.* §28.

[39] MICH. STAT. ANN. (Henderson, 1938) §27.246.

[40] 212 Mich. 580, 180 N. W. 423 (1920); *accord,* People v. Merhige, 219 Mich. 95, 188 N. W. 454 (1922).

[41] OHIO CONST. Art. I, §1, Art. X, §5.

[42] OHIO GEN. CODE ANN. (Page, 1937) §11419-9.

[43] Cleveland, C. C. and St. L. Ry. Co. v. Wehmeier, 33 Ohio App. 475, 170 N. E. 27 (1929).

[44*] CALIFORNIA CONST. Art. I, §7: "The right of trial by jury shall be secured to all . . . the jury may consist of twelve . . ."; and two statutes are: "A trial jury is a body of persons . . ." and ". . . a person is competent to act as juror if he be: (1) a citizen of the United States. . . ." CAL. CODE CIVIL PROC. (Deering, 1937) §§193, 198. Yet these provisions have been interpreted to include women. U. S. v. Ballard, 35 F. Supp. 105 (S. D. Cal. 1940); People v. Parman, 14 Cal. (2d) 17, 92 P. (2d) 387 (1939); Ex Parte Mana, 178 Cal. 213, 172 Pac. 986 (1918). However, it is to be noted that the California Constitution does not use the word "men" in reference to jury trial, as does the North Carolina Constitution, although the California statute uses the male pronoun "he" in conjunction with the word "persons," thereby imputing the same idea as used in N. C. GEN. STAT. (1943) §9-1. The majority in the instant case cited People v. Lensen, 34 Cal. App. 336, 167 Pac. 406 (1917) as expressing the California view; but Justice Seawell in his dissent pointed out that there were later California cases on the matter.

The CONSTITUTION OF INDIANA Art. I, §20 provides that jury trial shall remain inviolate, and a statute says that a person must be a resident voter to be a juror. IND. STAT. ANN. (Burns, 1933) §4-3317. Indiana cases have held that women are jurors since the suffrage amendment. Johnson v. State, 201 Ind. 264, 167 N. E. 531 (1929); Moore v. State, 197 Ind. 640, 151 N. E. 689 (1926).

The KANSAS CONSTITUTION Art. I, §5 protects the inviolate right to trial by jury, and the code provides for selection of jurors from persons having the qualifications of electors. KAN. GEN. STAT. ANN. (Corrick, 1935) §43-102. The Kentucky Constitution has the same provision as Kansas (BILL OF RIGHTS §7) and a

of Justice Seawell's dissent; however, they are not quite as closely parallel to the North Carolina situation.

It is to be noted that these three states, Iowa, Michigan, and Ohio, with constitutional and statutory provisions similar to North Carolina, have reached a conclusion contrary to that of the Supreme Court of North Carolina without the benefit of two such enlightening provisions as are found in the North Carolina statutes: ". . . every word importing the masculine gender only shall extend and be applied to females as well as to males unless the context shows to the contrary"[45] and "juror" should be a word of "common gender."[46]

However, if these decisions are not of sufficient weight to have controlled the case of *State* v. *Emery*,[47] as the instant case suggested, the responsibility now lies upon the Legislature to instigate the appropriate action to place North Carolina among those states which have women on juries.

Judge Florence Allen, of the Circuit Court of Appeals, has aptly summed up the view of the progressive states when she said: "Educated women have more leisure, unless they have young children, than business men, and therefore we find them less apt to evade jury duty than men of the same class. This means that in calling women to serve as jurors new sources of intelligence are opened, and intelligence is surely needed on a jury. The women on a jury follow the evidence as well and are usually conscientious in the verdict. It is the general verdict based upon their years of service that they will never 'play cards nor throw dice' to decide their vote. The women are not particularly sentimental. Neither are they heartless. They are much like men in their usual reactions to evidence, but they are marked by a notable desire for law enforcement. For my part, I believe that in the future we shall owe much to the woman juror because of her respect for law and her conscientious demand that society be protected and the rules of civilized conduct upheld."[48]

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statute which says jurors are "persons." KEN. REV. STAT. (1944) §29.030. But cases in both states have held that exemption clauses do not render women incompetent to serve on juries if they choose to waive the privilege of exemption. Moore v. Cass, 10 Kan. 220 (1872); Smith v. Rose, 224 Ky. 154, 5 S. W. (2d) 901 (1928).

NEVADA CONST. Art. I, §24 says that trial by jury shall remain inviolate, and it is provided by statute that a juror must be a qualified elector. NEV. COMP. LAWS (Hillyer, 1929) §8476. Here it has been held that the statute includes women. Parus v. Dist. Ct., 42 Nev. 229, 174 Pac. 706 (1918); *cf.* Nev. Comp. Laws (Hillyer, Supp. 1941) §8479 for when women can be exempt.

Utah is similiar to Kansas and Kentucky. UTAH CONST. Art. I, §24; UTAH CODE ANN. (1940) §48-0-10.

[45] N. C. GEN. STAT. (1943) §12-3(1).

[46] *Id.* §12-3(13).

[47] 224 N. C. 581, 31 S. E. (2d) 858 (1944).

[48] Note (1923) 26 LAW NOTES 224.

Workmen's Compensation—Accidents Arising Out of and in the Course of Employment of Traveling Employees

The question of the extent of coverage afforded traveling employees under workmen's compensation laws was raised in the recent case of *Hartford Accident & Indemnity Co.* v. *Thornton.*[1] The decedent, a traveling salesman, had registered at an Athens hotel and had made several business visits in the city before returning thereto. As was his custom when in Athens, he ate at a cafe several doors from the hotel on the opposite side of the street. Due to a rainstorm the street surface was slippery; and deceased, in returning to the hotel, fell and sustained injuries from which he died. The Court of Appeals reversed the superior court's affirmation of an award by the industrial board to the deceased's widow. The reversal was based on the conclusion that the deceased had finished his day's work at the time of the accident and was returning from a mission of his own, so that he was not engaged in fulfilling any of the duties of his employment or doing anything incidental thereto, and the accident causing death could not be said to have arisen "out of and in the course of the employment."

As difficult of application and definition as are the terms "out of" and "in the course of" when measuring the propinquity of the ordinary worker to the pursuit of the objects of his employment, even more ethereal become unqualified instances of application when the claimant's occupation is that of traveling employee. The discretionary powers granted such employees and the extended area in which they conduct their activities give to them certain characteristics smacking of the nature of independent contract. However, having concluded that these employees are encompassed by the act, the courts have assumed the burden of making the ultimate finding of whether, as a matter of law, the specific employee is injured in an accident "arising out of and in the course of the employment." These findings, even when weighed by the variant wording of the different statutes, have not always been consistent.

Granting that the traveling salesman, while in his own home and pursuing none but his own ends, is outside the act, and assuming that his intention in undertaking a journey is to do an act in furtherance of his employer's business, the question arises as to the point in the journey at which the act will undertake to give protection. In *Green* v. *Hiestand Bros.*,[2] compensation was allowed by the Pennsylvania court where the employee was found dead in his private garage of monoxide poisoning, the circumstances showing that he had been repairing his car preparatory to calling on customers. The decedent

[1] ——Ga. App. ——, 31 S. E. (2d) 115 (1944).
[2] 103 Pa. Super. 515, 157 Atl. 44 (1931).

owned the car but was compensated by his employer for its use on company business. A later Pennsylvania decision followed the *Green* case, *supra,* under a similar fact situation where the employee was provided with the car by his employer.[3]

The New York Court of Appeals announced the New York doctrine in *Harby* v. *Marwell Bros.*[4] The decedent had been killed while going with his sample case from his home to take a train to visit his customers. In affirming an award the court held that a traveling man begins his work when he leaves his home or the place where he lives or passes the night to visit directly a customer. A Nebraska decision[5] followed the same line of reasoning in allowing compensation where the decedent was killed while crossing the street from his home office toward a taxi stand for the purpose of hiring a taxi to take him to the railroad station where he was to catch a train for a business trip.

A number of states, however, Massachusetts being particularly notable among them, have refused compensation for injuries incurred from "street risks" while the traveling employee is upon a public thoroughfare. The principle, as announced in *Donahue's Case,*[6] is to the effect that an injury to an employee, suffered while on a public thoroughfare, does not arise out of the employment, even though the employee is called upon to use the street in the performance of his work; that the risks of such injuries are common to everyone traveling the highway, whether employed or unemployed, and are not peculiar to the employment. This rule was followed by the Massachusetts court in a number of cases,[7] until the state legislature amended the workmen's compensation provisions of the state in 1927 to include compensation for injuries sustained through ordinary street risks.[8] It is interesting to note that before this legislative action the same court followed the street risk doctrine and denied compensation in *Braley's Case,*[9] after having failed to apply it just one year earlier in *Moran's Case,*[10] where the injury resulted from the employee's attempting to board a street car. The court announced that the cases were distinguishable, but failed clearly to distinguish them. Had we to depend on the authority

[3] Beck v. Ashton, 124 Pa. Super. 307, 188 Atl. 368 (1936).

[4] 203 App. Div. 525, 196 N. Y. Supp. 729 (1922); *cf.* Kowalek v. New York Consol. R. Co., 229 N. Y. 489, 128 N. E. 888 (1920).

[5] Kirkpatrick v. Chocolate Sales Corp., 127 Neb. 604, 256 N. W. 89 (1934).

[6] 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215, (1917) (Salesman was injured in fall on icy street.).

[7] Blakely's Case, 252 Mass. 212, 147 N. E. 576 (1925) (fell on icy street); Whitley's Case, 252 Mass. 212, 147 N. E. 576 (1925) (slipped on icy surface); Braley's Case, 237 Mass. 105, 129 N. E. 420 (1921) (turned and broke ankle while leaving street car); Hewitt's Case, 221 Mass. 1,113 N. E. 572, L. R. A. 1917B, 249 (1917) (traveling in car which overturned).

[8] MASS. ANN. LAWS (Michie, 1942) c. 152 §26.

[9] 237 Mass. 105, 129 N. E. 420 (1921), cited *supra* note 7.

[10] 234 Mass. 566, 125 N. E. 591 (1920); *accord,* Cook's Case, 243 Mass. 572, 137 N. E. 733 (1923).

of these cases alone, we would be faced by the paradoxical situation of traveling employees being protected by the Workmen's Compensation Act while boarding street railway cars, but assuming the risks attendant to debarking therefrom, regardless of the fact that both actions were undertaken pursuant to the employment. Fortunately, the legislative amendment has precluded any such anomaly.

The Indiana,[11] Illinois,[12] and Wisconsin[13] courts have allowed compensation for injuries to traveling employees through street accidents, but the neighboring jurisdiction of Michigan, in *Hopkins* v. *Michigan Sugar Co.*,[14] chose to apply the earlier Massachusetts view in regard to street risks.[15]

Unlike the "street risk" cases just dicussed, where the employee is unquestionably on the streets in the performance of his duties, there is a class of cases which, like the principal case, raises the question whether the employee, when injured, was fulfilling the duties of his employment or doing anything incidental thereto, so that the injury can be said to have arisen "out of and in the course of the employment."[16] In determining the status of the employee at the time of the injury, many extrinsic factors must be taken into consideration, such as the location of the accident,[17] the time of its occurrence, the condition of the employee at the time of the accident, whether he was acting in a manner which the employer might reasonably contemplate, and

[11] Capital Paper Co. v. Conner, 81 Ind. App. 545, 547, 144 N. E. 474, 475, (1924) (Salesman struck by street car while crossing street. "The mere fact that the hazard is one to which every person on the street is exposed is not sufficient to defeat compensation."); *In re* Harraden, 66 Ind. App. 298, 301, 118 N. E. 142, 144 (1917) (slipped on icy sidewalk. "While the conditions produced by the weather may in a sense affect all alike in the particular vicinity, yet the fact remains that a person so employed is much more exposed to such hazards than the public generally because of the duties enjoined upon him by his employment and the place or places to which he must necessarily go in the discharge of such duties.").

[12] J. E. Porter Co. v. Industrial Commission, 301 Ill. 76, 133 N. E. 652 (1922) (struck by automobile while boarding street car).

[13] Schroeder & Daly Co. v. Industrial Commission of Wisconsin, 169 Wis. 567, 569, 173 N. W. 328, 329 (1919) (Salesman slipped and injured leg. "The fact that others may be exposed to like risks does not change the character of the risk to which applicant was exposed.).

[14] 184 Mich. 87, 90, 150 N. W. 325, 327 (1915) (Salesman fell on ice while hurrying to meet street car. "One of the most common risks to which the general public is exposed is that of slipping and falling upon ice. This risk is encountered by people generally, irrespective of employment."). *But cf.* Redner v. H. C. Faber & Son Co., 233 N. Y. 379, 119 N. E. 842 (1918) (Employee fell while crossing street between two establishments owned by defendant.).

[15] For a more complete discussion of street risks see HOROVITZ, WORKMEN'S COMPENSATION (1944) 95-99; NOTES (1931) 80 A. L. R. 126; (1918) 15 N. C. C. A. 294.

[16] Brown, *Arising out of the Employment* (1931-32) 7 WIS. L. REV. 15 and 67; (1933) 8 WIS. L. REV. 134 and 217.

[17] Clegg v. Motor Finance Corp., 20 N. J. Misc. 437, 28 A. (2d) 533 (Work. Comp. Bd. 1942) (Compensation allowed where auto repossessor, failing to locate defaulting purchaser of car, drove thirty miles beyond to visit wife, and was injured while returning and before he had reached home of purchaser.).

whether the acts were done principally in furtherance of his employer's business or for his own benefit.[18]

Cases are numerous where compensation has been allowed for injuries and death suffered by employees with exceptionally wide discretionary powers in the performance of acts far beyond what might usually be thought of as the ordinary scope of employment of a traveling employee. Thus, in *Southwestern Portland Cement Co.* v. *Simpson,*[19] where the decedent was killed in the early hours of the morning while driving to a night club, compensation was found proper in view of the fact that the decedent's duties included fraternizing with prospective customers whenever and wherever possible, and it was established that his intention in going to the night club was for that purpose. Where a sales supervisor attended a banquet and party at the request of his employer, leaving at 3:30 A.M. in a car furnished him by the employer, but, instead of going home, parked in front of the employer's establishment and fell asleep, the New Jersey Commission allowed an award for his death by drowning, caused when the car rolled away into a canal nearby.[20]

An unusually liberal award was made by the Pennsylvania court in *Baumann* v. *Howard J. Ehmke Co.*[21] The decedent there, whose territory embraced the entire United States, sold fruit pickers' bags and followed the fruit crops. He had completed his sales for the Washington apple season and was staying for a few weeks on the farm of a friend, awaiting the ripening of the California orange crop, which fact was known to his employer. While watching his friend split a tree, decedent was struck by a flying chip from a wedge, and died as a result of blood poisoning contracted therefrom. The court stated that from the time the salesman departed from the employer's office in Philadelphia until he reported there on the completion of his trip he was actually engaged in the employer's business unless he did something to break the employment. This unbounded latitude is not typical of many jurisdictions, although the New York court allowed a recovery for the death from malaria of a traveling salesman who, while on a sales trip in South Africa, was bitten by a mosquito.[22] The court held

[18] Solar-Sturges Mfg. Co. v. Industrial Commission, 315 Ill. 352, 146 N. E. 572 (1925) (Struck while crossing street from cigar store to establishment of prospective customer to whom he intended giving cigars just purchased. Award allowed); *accord,* Parrish v. Armour & Co. 200 N. C. 654, 158 S. E. 188 (1931) (on way to buy cigars for customer when injured).

[19] 135 F. (2d) 584 (C. C. A. 10th, 1943).

[20] Rafferty v. Dairymen's League Co-op Assn., 16 N. J. Misc. 363, 200 Atl. 439 (Work. Comp. Bd. 1938).

[21] 126 Pa. Super. 108, 190 Atl. 343 (1937).

[22] Lepow v. Lepow Knitting Mills, 288 N. Y. 377, 43 N. E. (2d) 450 (1942); *see* Marks' Dependents v. Gray, 251 N. Y. 90, 93, 167 N. E. 181, 182 (1929) (". . . the decisive test must be whether it is the employment or something else which sent the traveler forth upon the journey or brought exposure to its

that the decedent was sent to South Africa upon a mission arranged by his employer solely to promote its business interests, and that the risks incidental to his itinerary through regions infested by a death-bearing insect were special in character, related to his employment, and were not his own.

The nature of their employment requires many traveling employees to seek food and lodging in localities to which their duties take them. A nice question, and one that finds varied answers in numerous jurisdictions, is whether injuries incurred while in restaurants or hotels, rooming houses and the like are compensable as arising out of and in the course of the employment. Where the employee, stopping at a hotel or rooming house, has suffered injury or death as the result of fire breaking out in the building, the courts have generally allowed compensation.[23] In a California case, *Forman* v. *Industrial Accident Commission*,[24] however, where the claimant, a real estate salesman, had been sent to a town for the purpose of securing customers when and where he could, and had been instructed to stay there indefinitely, the court refused compensation for burns suffered when the hotel in which he was living caught fire, contending that at the time of the fire the employee was not performing services growing out of and incidental to the employment and acting within the course of his employment as such. The Minnesota court in *Stansberry* v. *Monitor Stove Co.*[25] distinguished that case from the *Forman* case in that in the latter the representative was quartered at the hotel for an indefinite time, and was not a mere overnight guest.

Where death results from suffocation or asphyxiation caused by the escape of noxious fumes from heating or lighting equipment in hotel rooms or tourist cabins, the courts are usually in agreement. The Texas court[26] affirmed an award where the decedent, a traveling collector, engaged a tourist cabin on a November night, and was later found dead of monoxide poisoning, the windows and doors of the cabin being closed and the gas heater turned on. In an identical fact situation,

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perils."); Katz v. Kadans & Co., 232 N. Y. 420, 421, 134 N. E. 330, 331 (1922) ("If the work itself involves exposure to the perils of the street, *strange, unanticipated, and infrequent though they may be,* the employee passes along the street when on his master's occasions under the protection of the statute.") *(Italics ours).*

[23] Standard Oil Company (Kentucky) v. Witt, 283 Ky. 327, 336, 141 S. W. (2d) 271, 275 (1940) ("It was certainly and necessarily in the contemplation of the parties that there would be periods of rest and sleep as essential incidents of the employment. . . ."); Souza's Case, —— Mass. ——, 55 N. E. (2d) 611 (1944); Thiede v. G. D. Searle & Co., 275 Mich. 108, 270 N. W. 234 (1936); Stansberry v. Monitor Stove Co., 150 Minn. 1, 183 N. W. 977 (1921); Texas Employers' Insurance Assn. v. Harbuck, 73 S. W. (2d) 113 (Tex. Civ. App. 1934).

[24] 31 Cal. App. 441, 160 Pac. 857 (1916).

[25] 150 Minn. 1, 183 N. W. 977 (1921), cited, *supra,* note 23.

[26] Texas Employers' Insurance Assn. v. Cobb, 118 S. W. (2d) 375 (Tex. Civ. App. 1938).

where the accident happened in the month of January, the California court[27] allowed compensation, saying that commercial travelers may be regarded as acting in the course of their employment so long as they are traveling in their employer's business, including the whole period of time between their starting from and returning to their place of business or home. The Indiana court[28] allowed compensation where a truck driver was asphyxiated by gas from a tourist cabin heater. The court made no mention of the unreasonableness of the decedent's actions, although it appears that he had secured all the windows and doors, the temperature being two degrees below zero.

The courts have allowed recoveries where a traveling employee fell from a hotel porch,[29] and where a traveling salesman fell downstairs in a home in which he had been invited to spend the night and in which he had undertaken to perform some of the duties of his employment.[30] But no recovery was had where the employee fractured his leg in a tourist cabin shower,[31] was scalded in a hotel bath room when he slipped and grabbed the shower lever as he fell,[32] bled to death from a cut suffered in a fall on the stair of a rooming house at four o'clock Sunday morning,[33] or fell from the stage of a Y.W.C.A. auditorium while being shown to her room in the dark.[34]

A majority of the courts hold that eating is a mere necessity to human life and not an incident of the employment. Under this theory no award was made where a traveling salesman stopped at a public restaurant, and during the course of the meal a chicken bone became lodged in his throat, necessitating medical treatment,[35] an insurance collector and solicitor, entering a restaurant to eat, fell down a flight of stairs while looking for a washroom,[36] or contracted typhoid fever from food served by a carrier in a town to which he had been sent to sell goods.[37] Where compensation has been allowed, the court has

[27] California Casualty Indemnity Exchange v. Industrial Accident Commission, 5 Cal. (2d) 185, 53 P. (2d) 758 (1936).

[28] Lasear Inc. v. Anderson, 99 Ind. App. 428, 192 N. E. 762 (1934). *But cf.* Kass v. Hirschberg, Schutz & Co., 191 App. Div. 300, 181 N. Y. Supp. 35 (1920).

[29] Employers' Liability Insurance Co. v. Warren, 172 Tenn. 403, 112 S. W. (2d) 837 (1938).

[30] Cowles v. U. S. Rubber Products, 254 App. Div. 123, 4 N. Y. S. (2d) 811 (1942).

[31] Gibbs Steel Co. v. Industrial Commission, 234 Wis. 375, 10 N. W. (2d) 130 (1943).

[32] Davidson v. Pansy Waist Co., 240 N. Y. 584, 148 N. E. 715 (1925) (used the hotel room to display line of merchandise).

[33] Wilson v. L. M. Berry & Co., 149 Pa. Super. 492, 27 A. (2d) 721 (1942); *cf.* Turner v. Cathedral Publishing Co., 268 N. Y. 656, 198 N. E. 542 (1935).

[34] Jakeway v. John V. Bauer Co., 218 App. Div. 302, 218 N. Y. Supp. 193 (1926).

[35] Barron v. W. W. Norton & Co., 264 App. Div. 802, 34 N. Y. S. (2d) 740 (1942).

[36] Goldman v. John Hancock Mutual Life Ins. Co., 276 N. Y. 582, 12 N. E. (2d) 587 (1937).

[37] Johnson v. Smith, 263 N. Y. 10, 188 N. E. 140 (1933).

justified its action on the grounds that the employee, after entering the restaurant, did some act or acts in furtherance of the employment.[38]

The Texas court in *Wynn* v. *Southern Surety Co.*,[39] under a parallel fact situation to the principal case, denied recovery and announced a somewhat blanket rule on injuries of this type. "A traveling salesman, while eating his meals, or sleeping at hotels, or attending church or theatres, or going on private picnics or errands for his own pleasure or profit, is not, within the contemplation of the Workmen's Compensation Act, engaged in his employer's business, and an injury received by him while performing said acts or engaged in said recreation is not, within the purview of said law, an injury received 'in the course of the employment.' "[40]

There seems to be little likelihood of any extension of the protection afforded employees of this type within the jurisdiction of the Georgia court, for it is said in the principal case,[41] "To hold that there was a causal connection between the employment and the injury in this case, which is necessary to sustain the award, would be the equivalent of holding that a traveling salesman while away from home or headquarters, is in continuous employment, and that any accident which he may suffer arises out of and in the course of his employment. We do not understand that to be the rule in Georgia." It is submitted that the application of such a rule would be unwise in any jurisdiction.

The reader will note that all cases cited have involved persons who were clearly employees, and that no attempt has been made to digest cases deciding the question of whether the particular claimant's status was actually that of employee, or whether his particular characteristics marked him as an independent contractor. This discussion was omitted for the sake of brevity, but it would be error to make no mention whatsoever of the situation as it does exist.

The true traveling salesman is somewhat of a hybrid among employees. The unique status which he occupies is a result of the fact that the very movements which bring him closer and closer to the unprotected realm of independent contractor, that is, the extension and enlargement of his freedom of action and area of activity, operate at the same time to give him ever-extending protection until such time as he oversteps the vague bounds of employment into the category of inde-

[38] Employers' Liability Assurance Corp. v. Pruitt, 63 Ga. App. 149, 10 S. E. (2d) 275 (1940) (entered cafe to inquire as to whereabouts of prospective customer and fell from stool after eating a meal therein); Everard v. Woman's Home Companion Reading Club, 234 Mo. App. 760, 122 S. W. (2d) 51 (1938) (stepped on splinter while leaving lunchroom after eating meal with superior, discussing afternoon's work, and writing out order solicited earlier in the day).

[39] 26 S. W. (2d) 691 (Tex. Civ. App. 1930) (salesman struck by car while returning to hotel from restaurant).

[40] *Id.* at page 693.

[41] Hartford Accident & Indemnity Co. v. Thornton, —— Ga. App. ——, 31 S. E. (2d) 115, 117 (1944).

pendent contract. The view of the Georgia court was that, while the traveling employee can be classified as an employee, he must be treated as such. Thus, as it was stated in the *Thornton* case, "The scope and range of a traveling man's territorial activity necessarily broadens the field of his employment, but in no other way is a traveling employee distinguished under the act from ordinary employees who do not have to travel in the performance of their work."[42]

In the final analysis the problem may be solved in either of two ways. The court may set a definite boundary line in each instance over which no traveling employee may step still clothed in the protective covering of the act, or the court must resolve that, as a matter of policy, all traveling employees, and perhaps employees of any nature, will be compensated for any and all accidental injuries arising in the course of activities in any way connected or associated with the employment, throwing the resultant burden on the employer who passes the increased operating expense on to the consumer of his product or services in the form of increased charges. What future courts will choose to do can only be surmised. It is clear that the present trend of the Georgia court is toward the former policy.

CHARLES F. COIRA, JR.

Corporations—Withholding Charter Because No North Carolina Incorporator

Press reports of January 15 stated that the Secretary of State had refused "to issue the charter," i.e., to file the certificate of incorporation of an oil company and certify a copy because no incorporator was a resident of this state.[1] The obstacle was met by adding a North Carolina subscriber, presumably by issuing him one share of stock. The news story correctly stated that the North Carolina corporation law does not require any incorporator to be a resident[2] but does require one director to be and provides that all directors must be bona fide stockholders.[3] As the business of the corporation must be managed by its directors,[3a] this means that sooner or later there must be a North Carolina stockholder if the law is complied with. Nevertheless a corporation might be organized sometime in advance of entering upon active business[4] and there is nothing in the law to prevent it existing for that period without North Carolina stockholders. After the corporation is once organized, however, it might merely ignore the legislative direc-

[42] *Ibid.*

[1] Durham Sun (Jan. 15, 1945), P. ——, col. ——, *re:* Tidewater Petroleum and Gas Co.

[2] N. C. GEN. STAT. (1943) §55-2.

[3] *Id.* at §55-48. *Quaere,* what is meant by "bona fide."

[3a] *Ibid.*

[4] See Hammond v. Williams, 215 N. C. 657, 659, 3 S. E. (2d) 437, 439 (1939).

tion; and the only relief then would seem to be by quo warranto,[5*] a special proceeding seldom resorted to and the chances are that the corporation could go ahead for sometime without compliance.[6*] The Secretary of State by his action heads off the possibility of that evasion[7*] but there seems no warrant for this administrative policing of incorporation, and it is believed mandamus would lie to compel the issuance of a charter.[8*] Here, however, as in so many other cases, compliance was easier than standing up for probably inconsequential rights and the administrative action gets no test.

[5*] That is, a civil action having the essentials of quo warranto. N. C. GEN. STAT. (1943) §55-126. The special proceeding itself is abolished. *Id.* at §1-514.

[6*] Though if securities were sold the "blue sky" law, N. C. GEN. STAT. (1943) Ch. 78, would call for registration with the Secretary and a disclosure of the names and addresses of directors. *Id.* at §78-9(a).

[7*] Of course, if the resident incorporator is a mere nominee of the others, there is no assurance that he will be elected director; and the Secretary's effort to enforce the policy of the law would then be ineffective, perhaps an added reason for holding his action unwarranted.

[8*] "When a statement of incorporation which conforms to the provisions of the general Corporation act is presented to the Secretary of State, he must file it and must issue a certificate of incorporation to the incorporators; but if the statement of incorporation presented to him is not in conformity with the act he must refuse to file it. His duties in this regard are ministerial. The inquiry, then, is whether the statement presented by the relators set forth the information required by the act." People ex rel Hardin v. Emmerson, 315 Ill. 241, 243, 146 N. E. 129 (1925). Certificate issuing officials often have attempted to carry out the policy of a law by refusing to act when they considered it unwise for some reason. Unless discretion was vested in them as to the specific matter objected to they have usually been overruled. Elmer v. Com'r of Ins., 304 Mass. 194, 23 N. E. (2d) 95 (1939) (Commissioner doubts fitness of incorporators); Manley v. McLendon, 158 Ga. 659, 124 S. E. 138 (1924) (Secretary thinks name suggests State ownership); State ex rel Security Sav. & Loan Ass'n v. Brodigan, 44 Nev. 212, 192 Pac. 263 (1920) (Secretary objects to amended certificate on ground of ultra vires). Contrast the situation as to discretion where banking privileges are sought and there is special legislation. Pue v. Hood, 222 N. C. 310, 22 S. E. (2d) 896 (1942). And see State ex rel Lucey v. Terry, 196 Atl. 163 (Del. Super. 1937); Isle Royale Land Corp. v. Sec'y of State, 76 Mich. 162, 43 N. W. 14 (1889) (per Campbell, J., foreign corporation).