Approved March 31, 1987
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on March 30, 1987 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter and Yost.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Janet Stubbs, Home Builders Association of Kansas

House Bill 2376 - Sub. for H 2376 by Committee on Judiciary - Division of property in divorce actions; military retirement pay.

The chairman pointed out the handout from Representative Martha Jenkins, prime sponsor of the bill. In the statement she explained this bill would put Kansas in line with 35 other states which do consider military pensions as divisible property. A copy of her statement is attached (See Attachment I).

The chairman also referred to a letter to Representative James Lowther from John O. Sanderson. In the letter Mr. Sanderson stated I prefer the wording in House Bill 2376 over the wording in the substitute. House Bill 2376 allows the present value of benefits under any pension, retirement or other deferred compensation plan covering either party, whether vested or not vested; whereas the wording under the substitute reads, "present value of any vested or unvested military retirement pay". The wording in House Bill 2376 covers all retirement pay rather than singling out military retirees. A copy of his letter is attached (See Attachment II).

House Bill 2386 - Statute of limitations, 10-year period of repose.

Janet Stubbs, Home Builders Association of Kansas, appeared in support of the bill. She testified the bill was introduced and unanimously passed by the House Judiciary Committee before receiving the approval of the full House on a vote of 110 to 12. A copy of her testimony is attached (See Attachment III).

House Bill 2452 - Venue of personal injury actions against utilities.

Senator Talkington reported he had not been able to come up with any situations where persons who had an accident out of state and come into Kansas court to file their case. The chairman noted if the bill is passed out as drafted it would limit out of state.

Staff handed out copies of the case annotations of the venue where state venue law applies, and a copy of the first part of the case Siruta v. Hesston is attached (See Attachments IV). Staff pointed out page 659 of the handout indicating venue determined.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 30, 1987

House Bill 2452 continued

Following considerable committee discussion, the committee voted on the pending motion to report the bill favorably, and six members voted in favor of the bill and five in opposition. The motion carried.

House Bill 2376 - Sub. for H 2376 by Committee on Judiciary - Division of property in divorce actions; military retirement pay.

Following committee discussion, Senator Talkington moved to report the bill favorably. Senator Gaines seconded the motion, and the motion carried.

House Bill 2386 - Statute of limitations, 10-year period of repose.

Senator Langworthy moved to report the bill favorably. Senator Burke seconded the motion, and the motion carried.

The meeting adjourned.

A copy of the guest list is attached (See Attachment V).

A copy of handout from Steven C. Montgomery concerning House Bill 2452 is attached (See Attachments VI).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-30-87

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Vaughn Taylor	2424 Lafayette	Page
Michael Hill	1130 Richmond	Page
Kevin M Hill	Topeka	
Bill Sneed	Topeka	KFL
Kevin Jones	Olathe	Kans. for Life
Janet Stubbs	Topeka	KBAK
Julie Price	Topeka	KBA
Kevin Robertson	Topeka	KS Consulting Eng.
Tom Taylor	Topeka	KPL Gas Service
Pat Hubbell	Topeka	Kans. Railroad
George Barbee	Topeka	KS Consulting Engrs
Gail Hamilton	Lawrence	KS NOW
Lori Callahan	Topeka	Am. Ins. Assoc.
Dick Litton	Topeka	KCCI
Leroy Jones	Overland Park	B.L.E.
Ron Calbert	Newton	U.T.U.
Roger L. Ring	K.C.	
Don Lindsey Jr	Osawatomie, Ks.	
Sheila R. Geiger	Lawrence, KS	UTU
Sharon K. Sayer Ling	KCKS	
Bob Culbertson	Topeka	KTLA
Robert Loughbom	KCKS	Lawyer
Steve Montgomery	Topeka	Coalition for Consumer Rights
Rick Kready	"	KPL Gas Service
Mike Germann	"	Ks Railroad Ass'n.

attach. F
Senate Judiciary
3-30-87

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
[illegible]	Topeka	MSBA
T. C. Anderson	Topeka	KSCPA
Marjorie Van Buren	Topeka	OJA
Bill Kenney	Topeka	Kansas Engineering Society

attach V
Senate Judiciary
3-30-87

3-30-87

HB 2376

DIVISION OF MILITARY PENSIONS IN DIVORCE ACTION

TESTIMONY BEFORE THE JUDICIARY COMMITTEE
MARCH 30, 1987

REPRESENTATIVE MARTHA JENKINS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Substitute for HB 2376 expands the type of property that can be considered to be marital property to include military retirement pay.

Under current law in Kansas the military pension is not divisible as separate property. Federal legislation enacted in 1983, known as the Uniform Services Former Spouses Protection Act, opened the door for the division of military retirement benefits. The USFSP Act removed the prohibition on military pensions if the state law allowed for such a decision. Since then 35 states have held that military retirement is divisible under state law. Kansas' laws fall under the minority rule as one of eight states that have ruled it is not a divisible asset.

HB 2376 would put Kansas in line with the 35 other states which do consider military pensions as divisible property.

In 1984 the Kansas Court of Appeals upheld the lower court's ruling in Grant vs. Grant, a case used as a precedent in the State of Kansas. The wife of an Air Force man appealed the trial court's division of property, specifically in regard to his military retirement pay. The Appellant Court held that the plaintiff's military retirement pay had no lump sum present value determinable when the divorce was filed. This bill allows military retirement pay to be considered as marital property.

Attch. I.
Senate Judiciary
3-30-87

TO: Senate Judiciary Committee, For your consideration 3-30-87
Re: SUB HB 2376 Rep. Jim Lowther

ATHERTON, SANDERSON & VANDER VELDE
ATTORNEYS AT LAW
304 BANK IV BUILDING
BOX 624
EMPORIA, KANSAS 66801

JOHN G. ATHERTON
JOHN O. SANDERSON
JAY W. VANDER VELDE

TELEPHONE
316-342-1277

March 16, 1987

The Honorable James E. Lowther
State Representative
16th District, Room 155-E
State Capitol Building
Topeka, KS 66612

Re: Substitute for HB 2376

Dear Jim:

Thank you for sending me a copy of the substitute for House Bill No. 2376; of the two bills, I prefer the wording in HB 2376 over the wording in the substitute. HB 2376 allows the "present value of benefits under any pension, retirement or other deferred compensation plan covering either party, whether vested or not vested;" whereas the wording under the substitute reads, "present value of any vested or unvested military retirement pay,". The wording of HB 2376, covers all retirement pay rather than singling out military retirees. I haven't done any research on this, but it seems to me that on its face, singling out military retirees' pay conflicts with the equal protection clause of the 14th Amendment to the U.S. Constitution and Section 1 of the Kansas Bill of Rights. Also, it could be argued in court that by singling out military retirement pay, the legislature intended to exclude all other retirement pay. That seems to single out military retirees whereas I think all retirement pay from all professions should be available and subject to the court's jurisdiction in making a fair and equitable division of property.

Again, thank you for thinking of me and providing me with an opportunity to comment.

Yours sincerely,

John O. Sanderson

John O. Sanderson

JOS:jc
cc: Ron Smith

Attach. II
Senate Judiciary
3-30-87

3-30-87

HOME BUILDERS ASSOCIATION
OF KANSAS, INC.

Executive Director
JANET J. STUBBS

TESTIMONY BEFORE
SENATE JUDICIARY COMMITTEE
MARCH 30, 1987
BY
JANET J. STUBBS, EXECUTIVE DIRECTOR
HOME BUILDERS ASSOCIATION OF KANSAS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS JANET STUBBS, EXECUTIVE DIRECTOR OF THE HOME BUILDERS ASSOCIATION OF KANSAS.

I AM APPEARING TODAY IN SUPPORT OF HB 2386 WHICH WAS INTRODUCED AND UNANIMOUSLY PASSED BY THE HOUSE JUDICIARY COMMITTEE BEFORE RECEIVING THE APPROVAL OF THE FULL HOUSE ON A VOTE OF 110-12.

HB 2386 AMENDS SUBSECTION (b) OF K.S.A. 60-513 WHICH WAS ENACTED IN 1963. UNTIL 1974, IT WAS BELIEVED THAT NO ACTION BASED ON NEGLIGENCE COULD BE FILED MORE THAN 10 YEARS AFTER THE ACT COMPLAINED OF IN THE LAWSUIT. THE FEBRUARY 15, 1963, MINUTES OF THE HOUSE JUDICIARY COMMITTEE SUPPORT THIS INTERPRETATION AS THE LEGISLATIVE INTENT AT THE TIME OF ENACTMENT.

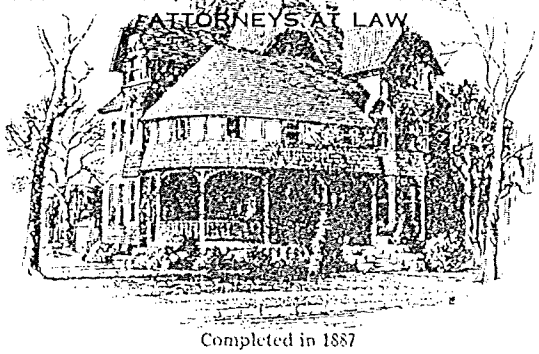
HOWEVER, IN 1974, THE SUPREME COURT OF KANSAS REVERSED AN OPINION FROM THE NEOSHO DISTRICT COURT IN RUTHRAUFF, ADMINISTRATRIX V. KENSINGER, 214 KAN. 185, 519 P.2D 661. ATTACHED IS A COPY OF THE TESTIMONY PRESENTED TO THE HOUSE COMMITTEE BY DAVE CROCKETT, A WICHITA ATTORNEY WITH THE FIRM OF CROCKETT, KELLEY & GILHOUSEN. I WILL READ EXCERPTS OF MR. CROCKETT'S TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE IN ORDER TO ILLUSTRATE OUR POSITION.

Attach. III

803 Merchants National Bank Building • 8th and Jackson Street • Topeka, Kansas 66612 • (913) 233-9853

Senate Judiciary
3-30-87

CROCKETT, KEELEY & GILHOUSEN
ATTORNEYS AT LAW



A PARTNERSHIP INCLUDING
A PROFESSIONAL ASSOCIATION:
DAVID G. CROCKETT, P.A.
EDWARD L. KEELEY
JAMES R. GILHOUSEN

DAVID A. GRIPP
OF COUNSEL

THE AMIDON HOUSE
1005 N. MARKET
WICHITA, KANSAS 67214
(316) 263-9662

Testimony of David G. Crockett
before the House Judiciary Committee
in Support of House Bill 2386
February 17, 1987

Mr. Chairman and Members of the Committee, my name is Dave Crockett. I am an attorney in Wichita, Kansas with the lawfirm of Crockett, Keeley & Gilhousen. I am appearing today on behalf of the Wichita Area Builders Association in support of H.B. 2386.

As you know, H.B. 2386 amends K.S.A. 60-513, the statute which establishes a limitation period of two years for certain types of lawsuits, including suits based on negligence. Specifically, H.B. 2386 addresses K.S.A. 60-513(b) which currently provides as follows:

> "(b) Except as provided in subsection (c) of this section, the cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action."

The current statutory section was enacted in 1963. It would appear from a straight-forward reading of the section that no action based on negligence could be filed more than ten (10) years after the act complained of in the lawsuit. The February 15, 1963 minutes of the House Judiciary Committee support such an interpretation as the legislative intent.

Nevertheless, the Supreme Court of the State of Kansas construed this section quite differently in Ruthrauff, Administratrix v. Kensinger, 214 Kan. 185, 519 P.2d 661 (1974). In order to fully appreciate the impact of the

Attach III

Ruthrauff decision, it is necessary to review the facts confronting the Court in that case. The lawsuit arose from a gas explosion and fire. The plaintiff sought damages from the defendant construction company and others, claiming that the construction company had negligently constructed the property thereby allowing the explosion to occur. The important dates are as follows:

1. May, 1959; all work completed by defendant
2. May, 1960; defendant sold property to Hall
3. December, 1969; Hall sold property to Smith
4. September 17, 1970; explosion
5. September 15, 1972; suit filed

The trial court concluded that the plaintiff's claim was barred by the same language which now appears as K.S.A. 60-513(b), because the suit was filed more than thirteen years after the alleged negligent act.

The Supreme Court, however, after seven pages of reasoning, reversed the trial court and held that:

1. The period of limitation does not begin to run until the date on which substantial injuries result; and
2. The ten-year provision refers only to injuries which are not reasonably ascertainable until some time after the initial act.

In other words, the Supreme Court limited the application of the ten-year provision to injuries which are not immediately ascertainable, e.g. injuries such as inhalation of toxic material causing noticeable damages a substantial period of time later. The Court construed the ten-year provision to mean that such injuries must be ascertained within ten years of the date of the act causing the injuries, otherwise the claim will be barred by the statute of limitations.

But what about sudden and immediately ascertainable injury, such as the injuries caused by the gas explosion in the Ruthrauff case? The Supreme Court concluded that the ten-year period has no application to claims for such

injuries, and consequently such claims are not barred if a suit is filed within two years of the date of the injury. Therefore the plaintiff in Ruthrauff was permitted to proceed, even though the plaintiff was seeking damages for an act which had occurred more than thirteen years before the lawsuit was filed. The Ruthrauff decision is still the law of this state.

Should the Ruthrauff decision remain the law of Kansas? Leaving aside the technical principles of statutory construction, and leaving aside whether the Supreme Court was correct in its interpretation of this section, should the law allow a suit for damages arising from an act or omission more than a decade old? I suggest to you that the answer to these questions is "no".

This issue is far from being merely academic. Two years ago I was hired by a client who had constructed a small medical office building for two doctors. My client completed his construction in October, 1972. In February, 1984, more than thirteen years later, an elderly lady slipped and fell when leaving one of the medical offices in the building. In March, 1985, more than fourteen years after my client drove the last nail in that building, he was sued by the lady on a theory of negligent design and construction. Because the plaintiff filed her suit within two years of the date of her injury, my client was completely unprotected by any statute of limitations. We were successful in our defense of the client on other grounds, but only after a substantial expenditure of time and money.

An even more dramatic example, albeit thank-goodness a hypothetical one, is my firm's own office building. Our firm is located in a Victorian mansion which has been adapted for office use. The building was completed in 1887 by the Garver family, and we're planning a 100th birthday party this spring. Suppose someone slips on the limestone front steps, or tumbles down the curving front staircase. There would be no legal barrier to such a person filing suit against poor old Mr. Garver himself, claiming that he was negligent in the design or construction of the steps or the stairway. Of course, Mr. Garver and his worldly assets are now long gone, but this would not be true if an entity such as a corporation had built our house a century ago. If that corporation were still in business, it would be every bit as exposed to liability claims in 1987 as it was in 1887.

Attach III

My comments to this point have concerned builders and contractors. As I noted at the outset of my remarks, I am here on behalf of the Wichita Area Builders Association. I related the story about my client and the medical building he constructed, and I followed it with the anecdote about our office building. Even the Ruthrauff case involved a professional contractor.

But it would be a mistake to conclude that H.B. 2386 would help only contractors. Individual home sellers have found themselves increasingly the targets of negligence suits, and the time periods for those suits are just as unrestrained as they are for suits against contractors.

This state of the law is wrong. In addition to being wrong, it is dangerous. There must be some point in time at which liability exposure terminates. Otherwise, our society is like a person rolling a snowball uphill. The farther he goes, the bigger the snowball gets, and the bigger its gets the harder it is to roll, until finally it stops altogether.

There is nothing radical whatsoever about limiting the period of time in which a person is exposed to liability. Periods of limitation existed in Roman law, and England adopted the Limitation Act over 350 years ago. Developments in the Law: Statutes of Limitations, 63 Harv.L.Rev. 1177 (1950).

House Bill 2386 is an important step in restoring balance and fairness to our Kansas legal system. It establishes a ten year period during which suit may be filed. During that decade, the homes, shops, offices, and plants constructed by members of the Wichita Area Builders Association will be in daily use. If negligence really occurred in the design or construction of those facilities, it would surely become apparent during that ten-year period. Likewise, an individual who sells his home would be exposed to possible liability for negligence in repairs and maintenance for the same ten-year period. Ten years, after all, is a long time---twice the period of limitation even for written contracts.

It would be both fair and wise to adopt H.B. 2386, and we urge the Committee's favorable consideration.

Respectfully, submitted,

David G. Crockett

Attach. III

IN FINDING IN FAVOR OF THE DEFENDANT, KENSINGER & WHITE, THE NEOSHO DISTRICT COURT BASED ITS DECISION ON THE 10 YEAR PROVISION CONTAINED IN THE LAST CLAUSE OF THE FINAL PARAGRAPH OF K.S.A. 60-513 AND SAID:

> "THE PARAGRAPH EXPLICITLY PROVIDES IN ITS INCEPTION THAT IT APPLIES TO THE ENTIRE SECTION AND ITS SIGNIFICANCE FOR OUR PURPOSE LIES IN REFERRING THE TEN YEAR BAR NOT TO THE CAUSE OF ACTION, BUT TO THE ACT GIVING RISE TO THE CAUSE OF ACTION. TO THIS COURT THE MEANING IS NOT DEBATABLE. NO CAUSE OF ACTION CAN ARISE IF MORE THAN TEN YEARS HAVE ELAPSED SINCE THE ALLEGED WRONGFUL ACT."

HOWEVER, IN THE RUTHRAUFF OPINION, THE SUPREME COURT SPEAKS AT LENGTH TO THE RULES OF STATUTORY CONSTRUCTION AND, PARTICULARLY, THE FACT THAT THE "SUBSTANTIAL INJURY CLAUSE" IS SEPARATED FROM THE "CLAUSE RELATING TO INJURIES NOT IMMEDIATELY ASCERTAINABLE" BY A CONJUNCTION (OR) AND THAT THE CONJUNCTION IS BOTH PRECEDED AND FOLLOWED BY A COMMA.

THE 1963 HOUSE JUDICIARY COMMITTEE MINUTES REFLECT THAT A CONCERN WAS EXPRESSED BY A CONFEREE REGARDING THE STATUTE CONSTRUCTION FOR FEAR OF MISINTERPRETATION DUE TO "A SOMEWHAT AMBIGUOUS EXTENSION OF THE STATUTE OF LIMITATIONS. HE STATED THAT IT READS 10 YEARS, BUT COULD BE INTERPRETED TO READ 10 YEARS PLUS 2 YEARS."

THE AMENDMENT PROPOSED IN HB 2386 IS THE LANGUAGE PROPOSED BY THE SUPREME COURT IN RUTHRAUFF TO, IN THEIR OPINION, CLEARLY EXPRESS INTENT OF THE 1963 LEGISLATURE.

THEREFORE, MEMBERS OF THE COMMITTEE, WE ASK THAT YOU RECOMMEND HB 2386 FAVORABLE FOR PASSAGE. I WILL ATTEMPT TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

Attach. III

precedent to the maintenance of an action against a railroad by an employee for injuries, and the acceptance and retention by employee of check given by railroad and failure of employee to return or offer to return the money received did not bar the action. Johnson v. Elgin, J. & E. Ry. Co., 1949, 87 N.E.2d 567, 338 Ill.App. 316.

160. Recovery of payments

Defendant had burden of proving that its employees were loaned servants to railroad and thereby not in its service at time of injury to railroad employee, or that railroad's employee had been guilty of negligence contributing to his accident or that railroad had been guilty of negligence regarding the accident in action by railroad against defendant, which furnished two employees to railroad for bridge repair work, to recover amount which railroad had paid to its employee allegedly injured by negligence of one of defendant's employees. Chicago, R.I. & P.R. Co. v. Powers Foundation Drilling Co., D.C.Okl.1968, 294 F.Supp. 921.

Shipper, who constructed overhang of loading shed in violation of minimum clearance in spur track agreements under which shipper agreed to indemnify railroad for any injury to employees resulting from any act or omission of shipper and to bear liability equally for any joint or concurring negligence of both parties, was guilty of active negligence and railroad was only passively negligent and railroad was entitled to recover amount of settlement made with brakeman who was struck by overhang during course of his employment. Louisiana & A. Ry. Co. v. Anthony, D.C.Arke.1961, 199 F.Supp. 286, affirmed 316 F.2d 858, certiorari denied 84 S.Ct. 74, 375 U.S. 830, 11 L.Ed.2d 61.

In action by railroad against an industry to recover on an indemnity agreement, under which the industry agreed to indemnify railroad for liability for injuries to persons due to maintenance of structures or obstructions encroaching upon standard clearances upon sidetracks serving the industry for amount paid by railroad to an industry employee who was injured during a switching operation when pinned between a railroad car and a locomotive underframe placed across the sidetrack by the industry's employees, where there was no false representation or concealment of material facts by railroad with respect to such placement, and no intent by railroad that the industry should act on any misrepresentation or concealment, none of the essential elements of equitable estoppel existed and railroad was not estopped to enforce the indemnity agreement. New York Cent. R. Co. v. General Motors Corp., D.C.Ohio 1960, 182 F.Supp. 273.

Where railroad was held liable under this chapter to its employee who fell from "sill step" of tank car company's car while inspecting it on leased "siding" and car company's failure to properly maintain car was found to be cause of the slip, the car company was contractually required to indemnify railroad for entire amount of judgment against it and was not limited to 50 percent contribution where indemnity clause covered "any act or omission" while contribution clause required only 50 percent payment for joint or concurring negligence. Bean v. Norfolk and W. Ry. Co., 1980, 405 N.E.2d 418, 39 Ill.Dec. 665, 84 Ill.App.3d 395.

Where railroad had settled with its injured employee and sought indemnity from lessor of equipment that caused injury, burden was on railroad to establish liability of lessor under state law. Katcher v. Heidenwirth, 1962, 118 N.W.2d 52, 254 Iowa 454.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

Historical Note

Codification. The first paragraph of this section is from Act Apr. 22, 1908.

The second paragraph of this section is from Act Apr. 5, 1910.

1948 Amendment. Act June 25, 1948, omitted ... in last sentence, ... of ...

3-30-87

INJURIES TO EMPLOYEES

Amendment. Act Aug. 11, 1939, ... limitation in first sentence, from two ... years.

Change of Name. "District court" was substituted for "circuit court" to conform to Act ... 3, 1911, which transferred the powers ... and d... courts.

Effe... tion 3... amend... effecti...

Cross Referenc...

...es in state courts not removable to federal courts, s...
... Judicial Procedure.
...ue of district court—
... Generally, see section 1391 et seq. of Title 28.
... Change of venue, see section 1404 of Title 28.

Federal Practice and P...

Choice of venue, see Wright, Miller & Cooper: Jurisdict...
Concurrent jurisdiction conferred on state and federa... Jurisdiction 2d §§ 3526, 3527.
Order of separate trial on issue of venue, see Wright &...
Removal from state courts, see Wright, Miller & C...
Venue in district courts, see Wright, Miller & Cooper: ...

Federal Jury Practice and ...

Discussion of this chapter, see § 94.01 et seq.

West's Federal Fo...

Complaint for negligence under this chapter, see §§ 16...
Motion for summary judgment by defendant, limitation...
Removal of cases, see § 1124 Comment.
Statute of limitations, see §§ 2112 to 2115.
Venue of action, see § 1048 Comment.

West's Federal Practic...

Checklist in preparing case, see § 1430.
Jurisdiction and venue, see § 1417.
Limitation of actions, see § 1429.
Scope of this chapter, see § 1401.

Library Referen...

Employer's Liability ⇐176.
C.J.S. Master and Servant § 487.

Notes of Decisi...

For Detailed Alphabetical Note Index, se...

I. GENERALLY

Cons...
Excl...
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3-30-87 Senate Judiciary attch. IV

...ble and time for ...ed by New Jersey ... 48:12-151. Cole ... Limited, D.C.N.Y.

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plied. Brooks v. Southern Pac. Co., 1970, 466 P.2d 736, 105 Ariz. 442.

In action by widow for alleged wrongful death, where evidence disclosed that intestate and railroad were engaged in interstate commerce at time of intestate's death, whether widow's amendment to her complaint to include allegations appropriate to an action under this chapter introduced a new cause of action barred by this section, would be governed by this section. Graham v. Atlantic Coast Line R. Co., 1954, 82 S.E.2d 346, 240 N.C. 338.

This chapter and the federal decisions construing said chapter determine the time for bringing an action, and Code 1940, Tit. 7, § 42 to effect that in an action seeking relief on grounds of fraud the cause of action must not be considered as having accrued until after the discovery of the fraud by the aggrieved party, after which he must have one year in which to bring the suit, has no application. Central of Georgia Ry. Co. v. Ramsey, 1962, 151 So.2d 725, 275 Ala. 7.

Fact that railroad employer's settlement with injured employee, made within three years after employee's cause of action arose, was not made until after employee's cause of action against railroad owner of defective car had been barred by two-year statute of limitations, Vernon's Ann.Civ.St. art. 5526 did not preclude employer from recovering indemnity from owner. Missouri Pac. R. Co. v. Southern Pac. Co., Tex.Civ.App.1968, 430 S.W.2d 900.

Where switchman brought action against railroad for injuries and alleged that carrier was engaged in interstate and foreign commerce, but did not allege that injuries occurred while switchman was employed in such commerce, and railroad raised defense of limitations, employee failed to bring action under this section, and action would be determined by construction given by state courts to state statutes of limitation. Hallaway v. Thompson, 1950, 226 S.W.2d 816, 148 Tenn. 471.

9. —— Venue

The allowance or denial of federal privilege regarding venue in action under this section is a matter of "federal law" and not a matter of "state law" under the doctrine of Erie R. Co. v. Tompkins, Baltimore & O.R. Co. v. Kepner, Ohio 1941, 62 S.Ct. 6, 314 U.S. 44, 86 L.Ed. 28.

Provision of this section that action may be brought in federal court in district of defendant's residence or in which cause of action arose, or in which defendant shall be doing business at time of commencing action relates purely to venue and does not preclude application of any procedural requirement of the forum which plaintiff selects for trial. Grant v. Pennsylvania R. Co., D.C.N.Y.1948, 8 F.R.D. 40.

This section, providing place of trial for actions in federal court, does not apply to actions in New York state courts, which were governed by New York Civil Practice Act [now McKinney's N.Y. CPLR]. Barton v. Delaware, L. & W.R. Co., 1926, 218 N.Y.S. 171, 218 App. Div. 748.

This section is inapplicable to actions under this chapter brought in state courts, and thus Michigan transportation lines venue statute, M.C.L.A. § 600.1635, governs venue in action brought under this chapter in Michigan state court. Rodriguez v. Grand Trunk Western R. Co., 1982, 328 N.W.2d 89, 120 Mich.App. 599.

Tennessee law controls disposition of venue in suits brought in Tennessee state courts pursuant to this chapter. Garland v. Seaboard Coastline R. Co., Tenn.1983, 658 S.W.2d 528.

Texas venue statute, rather than venue provisions of this section would control in claimant's suit, under this chapter, seeking to recover damages for personal injuries sustained while employed as a brakeman where suit was brought in state as opposed to federal court. Hopmann v. Southern Pacific Transp. Co., Tex.Civ.App.1979, 581 S.W.2d 532, certiorari denied 100 S.Ct. 146, 444 U.S. 870, 62 L.Ed.2d 94.

Where a suit under this chapter is brought in a state court, venue, as distinguished from jurisdiction, is established by state enactment and is subject to state law. Missouri Pac. R. Co. v. Little, Tex.Civ.App.1959, 319 S.W.2d 785, certiorari denied 80 S.Ct. 69, 361 U.S. 823, 4 L.Ed.2d 67, rehearing denied 80 S.Ct. 194, 361 U.S. 898, 4 L.Ed.2d 153.

This section does not fix the venue where action thereunder is brought in a state court, but the state law on venue governs. James v. Nashville, C. & St. L. Ry., 1949, 221 S.W.2d 449, 310 Ky. 616.

Under Ark.Acts 1939, Act No. 314, requiring actions for personal injury to be brought in county where accident occurred or in county where person injured resided, an action under this chapter for injury to a railroad employee was required to be brought in county where employee resided and injury occurred, in view that this section fixes jurisdiction but leaves venue to the state to determine by its applicable statute. Ledbetter v. Sanford, 1947, 205 S.W.2d 464, 212 Ark. 277.

10. —— Jurisdiction

In action brought under this chapter, federal law and not state law was controlling in determining question of district court's jurisdiction, where defendant railroad was a nonresident corporation but maintained offices in forum state. Fraley v. Chesapeake & O. Ry. Co., C.A.Pa.1968, 397 F.2d 1, on remand 294 F.Supp. 1193.

Whether state court has jurisdiction of action brought under this chapter is to be determined by state or local law, and not by federal laws. Law v. Atlantic Coast Line R. Co., 1951, 79 A.2d 252, 367 Pa. 170.

Even though this section provides that suits may be filed in either federal or state courts, rights created by this chapter are governed by decisions of federal courts. State ex rel. Burlington Northern Inc. v. District Court of Eighth Judicial Dist. In and For Cascade County, 1976, 548 P.2d 1390, 169 Mont. 480.

All questions of substantive liability under this chapter must be determined according to provisions of said chapter and authoritative federal decisions construing its provisions, but where state court assumes jurisdiction under said chapter, state regulations and rulings as to procedure control, except where said chapter otherwise provides. Midland Val. R. Co. v. Manios, Okl.1956, 307 P.2d 545.

Jurisdiction of state courts of causes of action arising under this chapter is to be determined by law of state where action is brought provided such law is not discriminatory. Shaw v. Texas & Pac. Ry. Co., La.App.1965, 170 So.2d 874, application denied 172 So.2d 703, 247 La. 621.

11. Power of Congress

This section is purely remedial and is couched in plain language, and Congress was clearly acting within its constitutional power when it passed the amendment, and while U.S.C.A. Const. Art. 3, § 2, declares that the judicial power shall extend to all cases arising under that instrument and the laws of the United States, as also, among others, to cases "between citizens of different states," yet it was long ago settled that, as to courts inferior to the Supreme Court, their jurisdiction in every case must depend upon some Act of Congress. Teel v. Chesapeake, etc., Ry. Co., Ky.1913, 204 F. 918, 123 C.C.A. 240, 47 L.R.A.,N.S., 21. See, also, Winders v. Illinois Cent. R. Co., 1929, 223 N.W. 291, 177 Minn. 1.

12. Exclusive nature of section

This chapter furnishes exclusive remedy for all cases coming within it, to exclusion of any state statute, so that the two-year [now three-year] limitation applies to action for injury to employee in interstate commerce. Shannon v. Boston & M.R.R., 1914, 92 A. 167, 77 N.H. 349.

II. LIMITATION OF ACTION

Subdivision Index

Attach. IV

No. 53,597

DON SIRUTA, *Appellee*, v. HESSTON CORPORATION, *Appellant*.

(659 P.2d 799)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Venue—Action against Corporation.* Under K.S.A. 60-604(3), whether a corporation is transacting business in a particular county for venue purposes is essentially a question of fact. Venue must be determined on a case-by-case basis and consideration should be given to such relevant factors as (1) the nature and scope of the corporation's business operations, (2) the extent of the activities conducted on its behalf within the county, (3) the continuity of those activities, and (4) its contacts within the district.
2. SAME—*Venue—Action against Corporation—Consideration of Activities of Local Dealer.* Where venue is based solely upon the activities of the corporation's local dealer or distributor, the important consideration is the amount of control exercised by the corporation over the dealer or distributor.
3. EVIDENCE—*"Physical Facts Rule"—Application.* The so-called "physical facts rule" should be applied only where the evidence on which a party relies is clearly contrary to some immutable law of physics or is hopelessly in conflict with one or more established and uncontroverted physical facts.
4. SAME—*Expert Opinion Testimony—Admissibility.* Expert opinion testimony is admissible although it embraces the ultimate issues to be decided by the trier of the fact if it will be of special help to the jury on technical subjects as to which the jury is not familiar and will assist the jury in arriving at a reasonable factual conclusion from the evidence.
5. SAME—*Remedial Conduct—Admissibility When Not Offered to Prove Negligence or Culpable Conduct.* Where evidence of remedial or precautionary measures is not offered to prove negligence or culpable conduct, it is admissible when offered for other relevant purposes such as the feasibility of a design change in a products liability case.

Appeal from Ellis district court; STEVEN P. FLOOD, judge. Opinion filed February 4, 1983. Affirmed.

Keith Martin, of Payne & Jones, Chartered, of Olathe, argued the cause, and *Larry E. Sanford*, of Hesston, and *William E. Westerbeke*, of Lawrence, were with him on the briefs for the appellant.

Thomas C. Boone, of Hays, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

PRAGER, J.: This is a products liability case in which the plaintiff, Don Siruta, lost his left arm in a Hesston hay baler. Plaintiff's theory of recovery was strict liability in tort. The primary issue in the case was whether the baler, manufactured by defendant Hesston Corporation, was dangerously defective. The jury applied principles of comparative fault and found that Siruta was 34% at fault and that defendant Hesston was 66% at fault. The jury found the plaintiff's damages to be in the total amount of $800,000. The district court entered judgment on the jury verdict in favor of the plaintiff and against the defendant in the amount of $528,000. The defendant appealed.

On the appeal, defendant raises fourteen points. Before turning to those points relating to claimed trial errors, we should first consider defendant's challenge to the venue of the action in Ellis County. Defendant maintains that Ellis was not a county of proper venue and, hence, the judgment should be set aside. The facts relating to the venue issue were undisputed and are as follows: Defendant Hesston is a Kansas corporation with its principal administrative, engineering, and manufacturing offices in Harvey County. Defendant also maintains a business office in Johnson County. Plaintiff Siruta is a resident of Logan County. The accident occurred in Logan County and the baler involved in the accident had been purchased by the plaintiff's employer from a farm implement dealer in Logan County. Defendant Hesston does not maintain any branch office in Logan County. The defendant's contacts with Ellis County are based on a sales and service agreement executed in 1969 between Rupp's Inc., a farm implement dealer in Ellis County, and Hesston Corporation. The provisions of this agreement and the nature of Hesston's activities in Ellis County will be discussed later.

We should first look at the Kansas statute which controls the venue of actions against defendant corporations. K.S.A. 60-604 provides:

"60-604. **Actions against corporations.** An action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county,

"(1) in which its registered office is located, or

"(2) in which the cause of action arose, or

"(3) in which the defendant is transacting business at the time of the filing of the petition, or

"(4) in which there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 at the time of the filing of the action."

The plaintiff brought this action in Ellis County on the basis of paragraph (3)—that the defendant was "transacting business at the time of the filing of the petition." Simply stated, the defendant maintains that the defendant was not transacting business in

Ellis County at the time of the filing of the petition within the meaning of the statutory language. The issue presented is one that has not been determined by the Kansas appellate courts. In interpreting the questioned statutory language, it would be helpful to consider the previous Kansas statute on venue and pertinent decisions of Kansas and federal courts.

Prior to the adoption of the Kansas Code of Civil Procedure effective January 1, 1964, the venue of actions against domestic corporations was governed by G.S. 1949, 60-504 which provided as follows:

"60-504. **Action against domestic corporation.** *An action*, other than one of those mentioned in the first three sections of this article, *against a corporation* created by the laws of this state or of the territory of Kansas, *may be brought in the county in which it is situated, or has its principal office or place of business, or in which any of the principal officers thereof may reside, or may be summoned;* but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose, or where the plaintiff resides. But the provisions of this article shall not apply in the case of any corporation created by a law of this state or the territory of Kansas whose charter prescribes the place where alone a suit against such corporation may be brought." (Emphasis supplied.)

It should be noted that under G.S. 1949, 60-504 a domestic corporation had to be sued in the county in which it had its principal office or place of business or in which any of its principal officers may reside or may be summoned. There was no provision for suing a domestic corporation in any county in Kansas where it was transacting business.

G.S. 1949, 60-2518 provided for the serving of summons against a corporation in the following language:

"A summons against a corporation may be served upon the president, resident agent, mayor, chairman of the board of directors, or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof, or by the delivery of a copy at the registered office of the corporation, or to the registered agent of the corporation."

The issue has arisen and been determined whether under the two statutes cited above a domestic corporation could be sued in a county other than where its principal office was located. In *Leod v. Trusler Grain Co.*, 127 Kan. 119, 272 Pac. 119 (1928), defendant corporation's principal place of business was Lyon

County, but it had a branch office in Shawnee County. The action was filed in Shawnee County and service was made on the local manager in Shawnee County. The defendant challenged the venue in Shawnee County. The court, in *McLeod*, construed the statutes together and concluded that where a domestic corporation maintains an office in several counties in the state and where it transacts business in several counties where it has a local office, an action could be brought in any such county and it was not necessary for the suit to be brought in the county where its principal office was located. A similar result was reached in *Sluss v. Brown-Crummer Inv. Co.*, 137 Kan. 847, 22 P.2d 965 (1933).

In 1948, the Congress of the United States enacted what is now 28 U.S.C. § 1391 (1976) which provides in section (c):

"A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or *is doing business*, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (Emphasis supplied.)

In a number of cases a controversy has arisen as to the meaning of the words "is doing business" and the sufficiency of the evidence to support venue under § 1391(c).

The federal courts have consistently held that, whether a corporation "is doing business" in a particular district for venue purposes is essentially a question of fact. See for example *Frazier, III v. Alabama Motor Club, Inc.*, 349 F.2d 456, 459 (5th Cir. 1965). In *Frazier*, the opinion discusses the factors to be considered and applied in determining whether a corporation "is doing business" in a district and concludes:

"There is no exact formula under which the question can be decided. To reach the proper answer, consideration must be given to such relevant factors as the general character of the corporation, the nature and scope of its business operations, the extent of the authorized corporate activities conducted on its behalf within the forum district, the continuity of those activities, and its contacts within the district."

The cases generally agree that more than a single or casual transaction is required before the corporation will be considered as "doing business" in the district. 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3811 (1976).

Similar language is used in the venue sections of the Clayton Act, 15 U.S.C. § 22, which provides, in substance, that an action

under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district "wherein it may be found, or transacts business." There is a comprehensive annotation on the interpretation of this language in 3 A.L.R. Fed. 120. In interpreting the various federal cases on the subject, the author of the annotation concludes that the test of whether a corporation transacts sufficient business within a district to establish venue therein is generally stated as being a practical, everyday question without artificial technicalities. The only requirement is that the business must be "substantial," and even this is based, to a large extent, upon what an ordinary businessman would think if given the facts and asked if he thought the company in question was engaged in transacting business. The requirement is usually made that the activities must be continuous, as opposed to isolated, or sporadic occurrences. In those cases where venue is based upon the activities of a local distributor of the corporation's products, a significant factor is the nature of the control exercised over the latter by the former. See for example *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation*, 46 F.2d 623 (1st Cir. 1931).

In the early sixties, the Kansas Judicial Council undertook a revision of the Kansas Code of Civil Procedure. A new code was developed based, in part, on the federal procedures. The Judicial Council and the Kansas legislature undoubtedly relied in part on the federal venue statutes discussed above in formulating K.S.A. 60-604. The only Kansas case interpreting the language "transacting business" in K.S.A. 60-604 is *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (1978). In *Sterling*, defendant Marathon Oil Company's only connection with Rice County was as owner of working interests in two oil leases operated by Phillips Petroleum Company. Marathon owned a 37.5% working interest in the two Rice County oil leases. The operating agreement between Marathon and Phillips gave Marathon certain rights in the operation and development of the leases. The consent of Marathon was required under certain conditions for the drilling, reworking, plugging back of deepening of wells, and for expenditures by Phillips in excess of $10,000. The Supreme Court agreed with the trial court that Marathon was doing busi-
s in Rice County and that, under K.S.A. 60-604, Rice County
venue of the case.

We have concluded that the federal decisions have adopted a logical approach in determining federal venue, and that the courts of Kansas should take a similar position in determining whether a corporation is transacting business in a particular county for venue purposes within the meaning of K.S.A. 60-604. Whether a corporation is transacting business in a particular county at the time of the filing of the petition is essentially a question of fact. There is no exact formula under which the question can be decided. Venue must be determined on a case-by-case basis and consideration should be given to such relevant factors as (1) the nature and scope of the corporation's business operations, (2) the extent of the activities conducted on its behalf within the county, (3) the continuity of those activities, and (4) its contacts within the district. Where venue is based solely upon the activities of the corporation's local dealer or distributor, the important consideration is the amount of control exercised by the corporation over the dealer or distributor.

Turning to the factual circumstances in the case now before us, we have concluded that defendant Hesston was transacting business in Ellis County at the time of the filing of the petition so as to authorize venue in Ellis County under K.S.A. 60-604(3). Defendant, as a manufacturer of hay balers, does not have retail outlets. It markets its products wholesale and retail through so-called independent dealers, such as the Rupp Company in Ellis County. The sales and service agreement between Hesston and its independent dealers, including that with the Rupp Company in this case, give to Hesston substantial control over the dealer's operation. Under the agreement with Rupp Company in this case, Hesston provides financing through the Fiat Corporation which, at the time of the accident and at the time the petition was filed, owned the controlling interest in Hesston. Hesston provides cash discounts, dealer bonuses, and incentive payments to Rupp's salesmen. Hesston provides interest waiver periods to customers in Ellis County, plus a "buyer bonus bonanza payment" directly from Hesston to the dealer's customer. There is Hesston-owned machinery located on the Rupp lot, financed to Rupp under arrangements with Fiat. A service representative of Hesston visits Rupp twice monthly to investigate complaints and provide service for new and used Hesston

3-30-87

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MEMORANDUM

TO: Senate Judiciary Committee

FROM: Steven C. Montgomery, Coalition for Consumer Rights

DATE: March 30, 1987

RE: Supplemental Information on HB 2452

This Memo is written in response to the Committee's request for further information regarding this pending bill. The information we have uncovered demonstrates that there is no "crisis" requiring the immediate passage of a bill which would radically change our state's venue statutes and create an advantage for one sector of special interests.

1. **The number of FELA cases filed in Wyandotte County District is minimal.**

Research conducted over the weekend in the office of the District Court Clerk of Wyandotte County indicates that of 464 civil jury and approximately 11,000 civil cases pending in Wyandotte County District Court, only 18 are FELA cases. (See attached affidavit.) A precipitous and radical change in Kansas venue statutes is not justified based upon this small number of cases.

2. **Congress intentionally allows broad FELA jurisdiction.**

The federal statute conferring jurisdiction in FELA cases is intentionally broad and vests concurrent jurisdiction in state and federal courts. All other states with which we are familiar allow FELA actions to be heard in their state court systems based on the "transacting business"

Attach. II
Senate Judiciary
3-30-87

rationale. The Wyandotte County District Court is not the "Mecca for FELA actions."

For example, the recent Missouri Supreme Court case of Besse vs. Missouri Pacific Railroad Company, 721 SW2d 740 (1986), involved a plaintiff from Wichita, Kansas, injured in Kansas who filed a FELA action in Missouri Circuit Court in St. Louis. The Court found that the railroad was not inconvenienced by the filing of the suit in the county where its general headquarters was located. Virtually all states face the possibility that FELA cases will be filed in their state court system based upon federal and state laws conferring venue based upon the "transacting business" rationale. The Missouri Supreme Court in Besse at p. 741 cited Miles v. Illinois Cent. R. Co., 315 U.S. 698 (1942), for the rule that "[t]he states are not at liberty to reject the jurisdiction conferred by Congress."

3. **Kansas courts seriously consider transfers and dismissals of cases against railroads for forum non conveniens.**

The Kansas Supreme Court case of Gonzales vs. Atchison, T. & S.F. Ry., 189 Kan. 689 (1962), is the premier Kansas case dismissing a lawsuit against a railroad based upon forum non conveniens. Neither the railroads nor the plaintiffs have a rubber stamped victory in disputes concerning forum non conveniens as discussed by the Hon. Leo J. Moroney, Administrative Judge of the Wyandotte County District Court, in the attached letter to Senator Frey. It is in the interests of justice that the appropriateness of the forum of cases be decided on a case by case basis, rather than the proposed blanket restrictions of H.B. 2452.

Attach. VI

AFFIDAVIT

STATE OF KANSAS)
) ss
County of Wyandotte)

DEBBIE J. MASSEY, of lawful age, being first duly sworn according to law, states:

1. That she is a deputy clerk in the office of the Wyandotte County Clerk of the District Court.

2. According to the records as of March 26, 1987, there are 464 civil jury cases pending. Of this number 18 are FELA cases. This represents approximately 4% of the total. Five different railroads are defendants. The various plaintiffs are represented by six different lawyers or law firms. A Wyandotte County or Johnson County lawyer is either sole or co- counsel in each case.

3. Research discloses in one of the pending cases the plaintiff, who was injured in La Plata, Missouri, resided in Niota, Illinois. That file further shows a motion to dismiss because of forum non conveniens was considered by the court and overruled. The file fails to reveal any application for appellate review.

4. FURTHER AFFIANT SAITH NAUGHT.

Debbie J. Massey
AFFIANT / Debbie J. Massey

Subscribed and sworn to before me this 24th day of March, 1987.

Felita M. Hamilton
NOTARY PUBLIC

My appointment expires: 6-20-89.

NOTARY PUBLIC STATE OF KANSAS
FELITA M. HAMILTON
My Appt. Exp. 6-20-89

Attach. VI

DISTRICT COURT OF KANSAS

CHAMBERS OF
LEO J. MORONEY
ADMINISTRATIVE JUDGE

COURTHOUSE
KANSAS CITY, KANSAS 66101
913-573-2923

WYANDOTTE COUNTY

March 28, 1987

Honorable Robert G. Frey
Chairman, Judiciary Committee
of the Kansas Senate
State House
Topeka, Kansas

Dear Senator Frey:

House Bill No. 2452 now under consideration by the Judiciary Committee has been brought to my attention. I understand information has been provided to the Committee by certain lobbyists concerning FELA cases filed in Wyandotte County.

According to a reliable source those lobbying for the bill have suggested our Wyandotte County District Court Judges routinely refuse to transfer or dismiss a case if venue is challenged by the defendant.

K.S.A. 60-609 permits the transfer of a case to another county. The common law doctrine of forum non conveniens permits the court to dismiss a case without prejudice.

Whenever a defendant seeks relief under this statute or doctrine, our Judges consider the motion in each case on its merits. Some such motions are briefed and argued extensively by both sides. On one occasion in 1984 a railroad sought to mandamus one of our judges who had overruled its motion to dismiss or transfer. This case was brought by the widow who resided in Newton, Kansas. The accidental death occurred in Elkhart, Kansas. The Kansas Supreme Court considered and denied the petition for writ of mandamus.

I hope this information might be helpful to you and your committee.

Yours very truly,

Leo J. Moroney

Leo J. Moroney
Administrative Judge

attach II