

IN THE COURT OF APPEALS OF TENNESSEE

HERBERT E. WYATT and) C/ A NO. 03A01-9502-CV-00066
 BRENDA WYATT, his wife,) KNOX COUNTY CIRCUIT COURT
)
 Plaintiffs-Appellants,)
)
) HONORABLE WHEELER A. ROSENBALM
) JUDGE
)
)
 A-BEST PRODUCTS COMPANY,)
 INC., et al.,)
)
 Defendants-Appellees.) AFFIRMED AND REMANDED

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| <p>FILED</p> <p>November 30, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p> |
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GEORGE A. WEBER III, MIKE G. NASSIOS, JERE FRANKLIN OWNBY III, of THE LAW OFFICES OF PETER G. ANGELOS, Knoxville, and JERRY J. PHILLIPS, of counsel, for Appellants.

LOUIS C. WOLF, HUGH B. BRIGHT, M DENISE MORETZ, J. FORD LITTLE, of WOLF, McCLANE, BRIGHT, ALLEN & CARPENTER, Knoxville, for Appellee OWENS-ILLINOIS, INC.

DONALD F. PAINE, DWIGHT E. TARWATER, THOMAS A. BICKERS, ANDREW R. TILLMAN, Knoxville, for Appellee OWENS-CORNING FIBERGLAS CORPORATION.

CHARLES W BURSON, Attorney General and Reporter of the State of Tennessee, KEVIN STEILING, Assistant Attorney General, for Intervenor, ATTORNEY GENERAL OF THE STATE OF TENNESSEE.

PAUL T. GILLENWATER of GILLENWATER, NICHOL & AMES, Knoxville, and DAVID F. PARTLETT, Vanderbilt University School of Law, Nashville, filed Amicus Curiae brief.

MICHAEL Y. ROWLAND, JANET EDWARDS, of ROWLAND & ROWLAND, P.C., Knoxville, filed Amicus Curiae brief.

DAVID E. WAITE of BROWN & WAITE, Knoxville, filed Amicus Curiae brief.

ROBERT H. HOOD, G. MARK PHILLIPS, JAMES D. GANDY, III, JOSEPH C. WILSON, IV, of the HOOD LAW FIRM, Charleston, S.C., and R. HUNTER CAGLE of KENNERLY, MONTGOMERY & FINLEY, Knoxville, filed brief of Amici A.P. GREEN INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., ASBESTOS CLAIMS MANAGEMENT CORPORATION f/k/a NATIONAL GYPSUM COMPANY, GAF CORPORATION, T&N PLC, and UNITED STATES GYPSUM COMPANY.

O P I N I O N

Susano, J.

The complaint in this case seeks damages for lung disease caused by exposure to asbestos. Herbert E. Wyatt (Wyatt) sued numerous manufacturers and sellers of products to which he was allegedly exposed during his working years. His wife, Brenda Wyatt, sued for loss of consortium. The trial judge granted the defendants summary judgment. He held that the Wyatts' action was time-barred by the ten-year statute of repose found at T.C.A. § 29-28-103(a)¹, a part of the Tennessee Products Liability Act of 1978 (TPLA)². He also concluded that the 1979 amendment³ to the TPLA, codified at T.C.A. § 29-28-103(b)⁴, the so-called asbestos exception, could not be constitutionally construed to revive the Wyatts' already-barred claims. This latter holding was based on the trial court's determination that the defendants had acquired a vested right in repose as a result of the 1978 enactment of the TPLA, and that this vested right could not be retroactively divested by the asbestos exception. The trial court also struck down the asbestos exception as unconstitutional class legislation

¹T.C.A. § 29-28-103(a) provides, in pertinent part, as follows:

Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions it must be brought within six (6) years of the date of injury, *in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption . . .*

(Emphasis added.)

²Chapter 703, Public Acts of 1978, effective July 1, 1978.

³Chapter 162, Public Acts of 1979, effective July 1, 1979.

⁴T.C.A. § 29-28-103(b) provides, in pertinent part, as follows:

The foregoing limitation of actions [T.C.A. § 29-28-103(a)] shall not apply to any action resulting from exposure to asbestos . . .

in violation of Article XI, Section 8 of the Tennessee Constitution. The Wyatt appeal, raising issues that pose the following questions:

1. Did the defendants acquire a right in the bar of the ten-year period of limitations that could not be divested by enactment of the asbestos exception without running afoul of Article I, Section 20, of the Tennessee Constitution?
2. Is the asbestos exception unconstitutional class legislation in violation of Article XI, Section 8, of the Tennessee Constitution?

I

Wyatt worked as a carpenter from 1951 to 1984. He claims employment-related exposure to products containing asbestos that were manufactured and/or sold by the defendants. Although it is not clear when he was last exposed to asbestos, it is undisputed that none of the defendants sold or distributed any asbestos-containing products relevant to this action within ten years of July 1, 1978, the effective date of the original enactment of the TPLA.

In 1984, Wyatt opted for early retirement due to health problems, including unexplained shortness of breath. In May, 1989, he was diagnosed with asbestosis. He and his wife filed this action on May 2, 1990, within one year of the date he

discovered that he was suffering from an asbestos-related lung disease.

II

The resolution of this case depends upon the proper interpretation of T. C. A. § 29-28-103(a). That statute provides, in pertinent part, as follows:

Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions it must be brought within six (6) years of the date of injury, *in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption.* . . .

(Emphasis added). A threshold question in this case is whether the italicized part of the statute is properly characterized as a statute of limitations, or as one of repose. Wyatt argues that it should be classified as a conventional statute of limitations, pointing out that it was a part of a section entitled "Statute of Limitations" when the TPLA was originally enacted by the legislature⁵; and that the 1979 asbestos exception⁶ to the TPLA refers to "limitation of actions" but not "repose." We think, however, that the analysis should revolve around the substance of

⁵See footnote 2, this opinion.

⁶See footnote 3, this opinion.

the statutory language, and its logical and intended effect, rather than how it was entitled or labeled.

Courts in Tennessee have consistently pointed out the distinction between a statute of limitations and a statute of repose. The former has been described as affecting only a party's remedy for a cause of action, while the running of a statute of repose has been said to "nullif[y] both the remedy and the right." *Bruce v. Hamilton*, 894 S.W2d 274, 276 (Tenn. App. 1993); *Via v. General Elec. Co.*, 799 F.Supp. 837, 839 (W.D. Tenn. 1992). Generally speaking, the critical distinction in classifying a statute as one of repose or one of limitations is the event or occurrence designated as the "triggering event," i.e., the event that starts the "clock" running on the time allowed for the filing of suit. In a traditional statute of limitations, the triggering event is typically the accrual of the action, i.e., when all the elements of the action, including injury or damages, have coalesced, resulting in a legally cognizable claim. A statute of repose, on the other hand, typically describes the triggering event as something other than accrual, prompting courts to note that such statutes are "entirely unrelated to the accrual of any action. . ." *Watts v. Putnam Co.*, 525 S.W2d 488, 491 (Tenn. 1975), *Cronin v. Howe*, 906 S.W2d 910, 913 (Tenn. 1995).

Because a statute of repose sets the triggering event as something other than accrual, it can have the effect of

barring a plaintiff's claim before it accrues, most typically before the plaintiff becomes aware of his or her injury. See *Cronin*, 906 S.W2d at 913; *Bruce*, 894 S.W2d at 276 ("A statute of repose is a substantive provision because it expressly qualifies the right which the statute creates by barring a right of action even before the injury has occurred if the injury occurs subsequent to the prescribed time period.") This possibility has prompted courts to hold that statutes of repose affect the substantive right of a party to bring suit, as well as the remedy. *Id.*

The ten-year period set forth in T.C.A. § 29-28-103(a) is properly characterized as a statute of repose. Its triggering event is the "date on which the product was first purchased for use or consumption." It starts the "clock" running from that occurrence, and the time is up after ten years. When the TPLA was originally enacted in 1978, the legislature did not provide an exception or allowance for latent injuries or the like; its use of the words "in any event" underscores the unconditional nature of the ten-year limitation. Further, several courts that have addressed this issue, or issues closely related to it, have interpreted the ten-year period to be a statute of repose. *Via*, 799 F.Supp. at 839; *Jones v. Five Star Engineering, Inc.*, 717 S.W2d 882, 883 (Tenn. 1986); *Myers v. Hayes Int'l. Corp.*, 701 F.Supp. 618, 624-25 (M.D. Tenn. 1988); *Wayne v. TVA*, 730 F.2d 392, 400-01 (5th Cir. 1984). Accordingly, we hold that the ten-

year period established by T. C. A. § 29-28-103(a) is a statute of repose.

III

The next issue we must address is the effect of the TPLA's *enactment* upon Wyatt's cause of action. Wyatt and supporting *amici* strenuously and ably argue that since Wyatt's cause of action did not accrue until after the asbestos exception⁷ became effective in 1979, that exception should apply to, and save, his action. They rely upon Tennessee caselaw to the effect that "there is no vested right in a statute of limitation unless and until the cause or action has accrued and expired." *Watts*, 525 S.W2d at 492. If the ten-year period was a conventional statute of limitations, we would agree, since a statute of limitations generally does not start to run until accrual, which, under the discovery rule (*see Teeters v. Currey*, 518 S.W2d 512 (Tenn. 1974); *McCroskey v. Bryant Air Cond. Co.*, 524 S.W2d 487 (Tenn. 1975)), does not occur until the plaintiff discovers or should have discovered his or her injury.

Since the ten-year period set forth in T. C. A. § 29-28-103(a) is a statute of repose, we do not believe it is logical to focus on the date of accrual, since, as noted above, the statute runs from the triggering event without regard to accrual. In the present case, the plain language of T. C. A. § 29-28-103(a)

⁷See footnote 4, this opinion.

requires an interpretation that the ten-year period starts to run from and after the date of the product's original sale for use or consumption. Since it is undisputed that all of the products complained of in this case were sold more than ten years prior to the passage of the 1978 enactment of the TPLA, that act, specifically T. C. A. § 29-28-103(a), barred the Wyatts' causes of action, both the right and the remedy, on July 1, 1978, the date the TPLA became effective. The plain language of the TPLA so dictates, and since it is clear and unambiguous we should look no further for its construction. *Hamblen Co. Ed. Ass'n. v. Hamblen Co. Bd. of Ed.*, 892 S.W2d 428, 431-32 (Tenn. App. 1994), *Carson Creek Vacation Resorts, Inc. v. State*, 865 S.W2d 1, 2 (Tenn. 1993), *Turner v. Harris*, 281 S.W2d 661, 665 (Tenn. 1955).

The defendants argue that the effect of the extinguishment of Wyatt's cause of action on July 1, 1978, was to create in them a vested right to rest in repose. Therefore, they argue, the asbestos exception of 1979 cannot retroactively save Wyatt's claim without running afoul of Article I, Section 20 of the Tennessee Constitution. We agree.

Article I, Section 20 of the Tennessee Constitution states

[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made.

The Tennessee Supreme Court, regarding "retrospective" laws, has stated that they

are generally defined, from a legal standpoint, as those which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed.

Morris v. Gross, 572 S.W2d 902, 907 (Tenn. 1978).

It has long been the law in Tennessee that

when a cause of action is barred by a statute of limitation, in force at the time the right to sue arose, and until the time of limitation expired, that the right to rely upon the statute as a defense is a vested right that can not be disturbed by subsequent legislation.

Gardner v. Stephens, 48 Tenn. 280, 286 (Tenn. 1870); *see also Henderson v. Ford*, 488 S.W2d 720, 722 (Tenn. 1972); *Collier v. Memphis Light, Gas & Water Div.*, 657 S.W2d 771, 775 (Tenn. App. 1983); *Morford v. Yong Kyun Cho*, 732 S.W2d 617, 620 (Tenn. App. 1987); *Buckner v. GAF Corp.*, 495 F.Supp. 351, 353 (E. D. Tenn. 1979). Thus, it is clear that in Tennessee a defendant has a vested right in a statute of limitations defense if the cause of action has accrued and the time allotted has expired. By analogy, a defendant has a vested right in a statute of repose if the triggering event has occurred and the time expired. As we

have noted, on July 1, 1978, the statute of repose operated to cut off Wyatt's right to pursue his cause of action. To allow the General Assembly to revive it retroactively through the 1979 asbestos exception would be imposing a new duty on defendants "in respect of transactions . . . already passed," in violation of the Tennessee Constitution.

Consequently, we hold that the 1979 asbestos exception cannot be applied retroactively to revive Wyatt's already-barred cause of action. This result is not pleasant, for it means that Wyatt's claim was barred by the TPLA before he could be rationally expected to have been aware that he suffered an injury.⁸ However, it is clear that the legislature has the constitutional power to enact statutes of repose which, by definition, have the possible effect of barring a claim before it accrues. See *Jones*, 717 S.W2d at 883 (upholding constitutionality of TPLA statute of repose); *Harrison v. Schrader*, 569 S.W2d 822 (Tenn. 1978); *Harmon v. Angus R. Jessup Assoc., Inc.*, 619 S.W2d 522 (Tenn. 1981). Further, it is what the clear and unambiguous language of the statute demands. In its 1978 enactment, the legislature could have placed exceptions on the repose statute for products sold prior to a certain date

⁸This unpleasant result is perhaps what the federal Sixth Circuit was focusing upon when, in the case of *Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459, 462 (6th Cir. 1982) it predicted that "[t]he Tennessee Supreme Court will no longer use the vested rights doctrine to prevent the Tennessee legislature from ameliorating the harshness of a rule that bars a plaintiff's claim before he discovers it." See also *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985). Obviously, to the extent that these cases differ from our present analysis, we express our disagreement with their holdings and predictions.

or for latent injury cases or the like, but did not do so. It is not the prerogative of the courts to read into the statute an exception where none exists. The words of the late Justice Joe Henry of the Supreme Court, regarding another statute of repose, are particularly relevant here:

We do not necessarily agree philosophically with the results we reach. We can only construe the statute as it is, not as we think it ought to be.

Watts, 525 S.W2d at 494.

Wyatt argues that a construction such as the one we have applied in this case would create a conflict with T.C.A. § 28-3-104(b), which states,

For the purpose of this section, in products liability cases:

- (1) The cause of action for injury to the person shall accrue on the date of the personal injury, not the date of the negligence or the sale of a product;
- (2) No person shall be deprived of the right to maintain a cause of action until one (1) year from the date of the injury; and
- (3) Under no circumstances shall the cause of action be barred before the person sustains an injury.

A cursory comparison of the language quoted above with that of T.C.A. § 29-28-103(a) ("*notwithstanding any exceptions to these*

provisions [which would include § 28-3-104(b)] . . . *in any event*, the action must be brought within ten (10) years. . . ." (emphasis added) provides the answer to that contention--there is no conflict between the two statutes.

IV

Because this case may be subject to further appellate review, we now turn to the second issue in this case: the constitutionality, under Article XI, Section 8 of the Tennessee Constitution, of the asbestos exception itself. That constitutional section provides:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

The defendants argue, and the trial court agreed, that the asbestos exception, which states simply that "the foregoing

limitation of actions [T. C. A. § 29-28-103(a)] shall not apply to any action resulting from exposure to asbestos," unfairly singles out asbestos producers and sellers by exempting asbestos claims from the statute of repose, while applying the statute to manufacturers of products similar to asbestos.

On this point, the trial court stated the following, which rather succinctly summarizes the defendants' position:

It does not appear in the legislative history and record furnished to the Court that the legislature gave any consideration to any other product that produced injury only after prolonged exposure or for which there was a period of latency before the onset of symptoms and injury and discovery of whatever disease process may have been caused by exposure to or use of such products. More particularly, nothing has been furnished to the Court . . . that suggests any reason for treating asbestosis or other disease conditions resulting from exposure to asbestos from other diseases that occur only after prolonged exposure to products or which manifest an onset of symptoms and injury after a period of latency. . . Frankly, no satisfactory explanation has been given to the Court why the legislature chose to exempt asbestos from the strictures of the Tennessee Products Liability Act, did not include manufacturers and producers and sellers of other products which were thought to have a propensity to cause injury only after prolonged exposure or from which injury became manifested only after a period of latency.

The trial court struck down the asbestos exception as improper class legislation.

Tennessee courts have long recognized the similarity between Article XI, Section 8, and the equal protection clause of the federal Constitution, and have therefore applied an equal protection analysis to constitutional challenges brought pursuant to Article XI, Section 8. *Mtlow v. State*, 145 S.W 177, 180 (Tenn. 1912); *Estrin v. Mss*, 430 S.W2d 345, 348 (Tenn. 1968); *King-Bradwall Partnership v. Johnson Controls, Inc.*, 865 S.W2d 18, 21 (Tenn. App. 1993) ("the Supreme Court of Tennessee 'has adopted a virtually identical equal protection standard or analysis under Article XI, Section 8 of the Tennessee Constitution.'") The defendants do not argue, nor could they, that infringement of a fundamental right is involved here, or that the legislature has created a classification involving a "suspect" or "protected" class, such as race or national origin. Therefore, the standard to be applied is the familiar "rational basis" standard. *King-Bradwall*, 865 S.W2d at 21; *City of Memphis v. International Broth. of Elec. Wkrs. U.*, 545 S.W2d 98, 102 (Tenn. 1976); *State v. Tester*, 879 S.W2d 823, 828 (Tenn. 1994).

The basic analytical principles of our equal protection analysis were set forth over eight decades ago in the landmark case of *Mtlow v. State*, 145 S.W 177, 180 (Tenn. 1912), and they have remained unchanged since then:

"(1) The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore it is purely arbitrary. (2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. (3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. (4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." The same rules must apply in disposing of a question arising under Article 1, § 8 of our Constitution of 1870. . .

Id., quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911). The touchstone in determining whether the legislature has drawn a proper classification is its reasonableness; and as the above guidelines demonstrate, the

legislature is given fairly broad leeway, for when a court determines that a classification is unreasonable, it is substituting its judgment for that of the legislature, and this it should not do unless the classification is clearly arbitrary and has no rational basis.

Applying these principles to the instant case, we cannot say that the General Assembly's decision to classify asbestos-related claims differently from other latent-injury claims is so patently arbitrary as lacking any rational basis. It is perhaps true that the legislature's purpose might have been better or more effectively served by a general exemption for all latent injury claims; however, the Tennessee Supreme Court has noted,

" . . . the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. "

Swain v. State, 527 S.W2d 119, 121 (Tenn. 1975), quoting *Williams v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The Supreme Court's oft-quoted statement that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all" is also

apposite here. *Railway Express Agency v. People of New York*, 336 U.S. 106, 110, 69 S.Ct. 463, 466 (1948).

The asbestos exception has already withstood several very similar equal protection challenges. Courts in each case have upheld the exception, finding a rational basis for the classification. *Spence v. Miles Laboratories, Inc.*, 810 F.Supp. 952, 961 (E.D.Tenn. 1992) (upholding exception in face of equal protection challenge that argued AIDS patients and asbestos victims are similarly situated); *Wayne v. TVA*, 730 F.2d 392, 404 (5th Cir. 1984) (upholding TPLA asbestos exception in face of equal protection challenge arguing exposure to latent-injury-causing phosphate slag similar to asbestos exposure); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1139 (6th Cir. 1986) ("we think the statute's exemption of asbestos-related injuries has a rational basis if only because such injuries often take considerably longer than ten years to manifest themselves.") The court in *Pottratz v. Davis*, 588 F.Supp. 949 (D.Mt. 1984), presented with an equal protection challenge to a similar asbestos exception in an Oregon statute, responded with a very apposite, if somewhat chilling, statement:

The reasonableness of statutes of limitations as specially applied to asbestosis claims has been repeatedly recognized. [citations omitted] The legislature is entitled to much deference in this matter, and the statute should be presumed to be constitutional. It will simply be noted that among the many factors which place asbestos-related injuries in a class by themselves, it is known that

asbestos-related diseases are not dependent upon repeated inhalations or exposures, but upon the presence of the fiber in the lungs from potentially one, initial exposure. [citation omitted] There is usually a long period of latency of up to 30 years before onset of the diseases. . . Over 3000 different products in daily use at one time contained asbestos, including tooth brushes, ironing board covers, brake linings, roofing shingles, fireproofing and insulating material. [citation omitted] With these few factors in mind, it can hardly be said that there is no rational justification for the Oregon legislature's decision to treat asbestos claimants differently from that of other claimants. . .

Id. at 955-56. We agree with and adopt the *Pottratz* court's reasoning on this issue. We hold that the legislature's remedial action in excepting asbestos-related claims from the TPLA's general statute of repose scheme does not offend Article XI, Section 8 of the Tennessee Constitution.

Our research has uncovered only one case in conflict with this conclusion. The Georgia Supreme Court, faced with the question presently before us in the case of *Celotex Corp. v. St. Joseph Hosp.*, 376 S.E.2d 880, 882 (Ga. 1989), held a similar Georgia asbestos exception violative of equal protection. However, the sum total of that court's reasoning and discussion on the matter is as follows:

This act singles out for special treatment property claims against manufacturers and suppliers of asbestos and differentiates them from *all* other claims that might be based upon other hazardous or toxic substances. Because we do not find this separate classification to be reasonable, the statute does not meet constitutional standards.

Id. (emphasis in original) No citation to authority was given in support of this statement. We are not so quick to substitute our judgment for the legislature's on this matter as perhaps was the *Celotex* court.

Because we hold that the appellants' claims are barred by the ten-year statute of repose in the Tennessee Products Liability Act of 1978, we affirm the judgment of the trial court. This case is remanded for the collection of costs assessed below. Costs on this appeal are taxed and assessed against the appellants.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P. J.

Herschel P. Franks, J.