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Evidence—1963 Tennessee Survey

Lyman R. Patterson[*]

I. Judicial Notice

The doctrine of judicial notice is that an indisputable proposition of fact or a proposition of law of the jurisdiction is not subject to proof. The doctrine thus serves to relieve the litigant of the burden of proving certain facts and law, and is one of immense theoretical implication for the trial lawyer. A fact which is judicially noticed has much greater probative value than a fact which is proved, no matter how strong the proof. Judicial notice thus offers the trial lawyer an extremely effective, but apparently largely unused, device in litigation. None of the cases involving judicial notice during the survey period was concerned with the propriety of judicial notice at the trial level. An appellate court, of course, can take judicial notice of any matter of which a trial court could take judicial notice and the contrary obviously follows.

One explanation for the failure of trial lawyers to take advantage of judicial notice is that the doctrine appears to be used by the appellate courts merely to support their opinions, most often in affirming a decision. But sometimes a fact, if judicially noticed at the trial level, could have swayed the trier of fact in a close case. In other instances, a request for judicial notice would pinpoint the issue in such a way, if granted, to make further argument irrelevant. And in still other instances, a request for judicial notice can serve to inform the court of the real issue involved in a case. Three cases decided during the survey period illustrate these points.

Wood v. Edenfield Electric Co.,[1] a workmen's compensation case, is

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1. 211 Tenn. 295, 364 S.W.2d 908 (1963).

an example of an instance where a request for judicial notice might have swayed the trier of fact in a close case. The plaintiff, a sixty-six year old workman, suffered a hernia and had an operation; doctors testified that the operation was successful and that there was no permanent disability. The plaintiff testified as to his condition, giving a contrary opinion. The trial court made an award of twelve and one-half per cent permanent disability. The appellate court judicially noticed that surgical operations leave scar tissue quite often with an accompanying permanent tenderness and discomfort, which is ordinarily not disabling. The court made it clear that had it been the trier of fact, it would have concluded that there was no permanent disability; but because its duty was only to review the evidence to determine whether there was material evidence to support the verdict, it affirmed.[2]

State v. Hughes[3] is an example of a case in which a request for judicial notice by the defendant would have shown that further argument was irrelevant. The defendant moved to quash an indictment charging him with driving a motor vehicle "in wilful or wanton disregard for the safety of persons or property upon said highway, by driving said vehicle to his left across a yellow stripe in said highway. . . ." The motion was granted and on appeal the supreme court sustained. "This Court judicially knows that it is not always a violation of the law of this State to drive 'to his left across a yellow stripe.'"

A third case illustrates how a plaintiff was harmed by failing to request judicial notice of a fact which would have informed the court of the real issue involved. In *Brannan v. American Telephone and Telegraph Co.*,[4] plaintiff landowners alleged that defendant had "no right to build and use a higher tower or to relay transmissions in another direction" under an earlier condemnation judgment by which their land was taken. One of the bases of the allegations was that the property involved was capable of being used for television relay towers, and if defendant so used its new tower, it would be impossible to use other areas of the tract for television relay towers and "thereby valuable property rights will be lost" by plaintiffs. The lower court had sustained demurrers to the bill, and the pertinent question here involved as posed by the court was: "Has the defendant in any way taken or exploited or trespassed on any property owned by the complainants?"[5] In support of their allegations, the plaintiffs cited

2. The plaintiff was sixty-eight at the time of the trial. Could the trial court have taken judicial notice of the effect of this age on the ability of a man to do physical labor?

3. 371 S.W.2d 445 (Tenn. 1963).

4. 210 Tenn. 697, 362 S.W.2d 236 (1962).

5. The other two questions, answered contrary to complainant's contentions, were: "1. Was the 1953 condemnation judgment valid? 2. If it was valid, what limitations were placed on the defendant's use of the land?" *Id.* at 703, 362 S.W.2d at 238.

recent cases in which the flight of aircraft at low altitudes was held to be a taking of the land because of interference with the enjoyment and use of the land. The court distinguished these cases.

> It is common knowledge that the air above the lands of the United States is constantly traversed by countless numbers of radio signals and impulses. We are confident that the sending of such signals has never been held an actionable trespass or invasion of the rights of a landowner. No harm is done nor interference with the use of the land created, no matter how low the signals may pass or how frequently.[6]

What the court did not recognize, and what the plaintiffs did not make clear, was that the plaintiffs were asking the court to take judicial notice of the fact that recent developments in electronics and the field of communications have made air rights sufficiently valuable to constitute property subject to being the object of the tort of trespass.[7] Ironically, the court judicially noticed the fact which gave substance to the complainant's allegations.

One of the dangers of judicial notice is that the court may judicially notice an inference drawn from a general proposition, as well as the proposition itself, where the determination of the issue in question depends upon the inference. Once the proposition is noticed, there must, of course, be an evidentiary basis on which the inference relevant to the issue in question can be based. This was the problem involved in *Nicks v. Nicks*,[8] although the court's opinion does not refer to judicial notice.

The action was a very involved divorce proceeding, and the opinion is not entirely clear on the facts;[9] but the particular issue here involved was the paternity of a child born to the wife during the divorce proceedings. The court ordered two blood tests, the second one after testimony to the effect that the first one was unreliable, primarily because the child in question was not six months old at the time of the test. The second test was made by a physician in New York, and apparently the court used the results of this test to determine that the husband was not the father of the child. This report, however, was not offered in evidence by either party, was not presented by the person preparing the report, was not offered under oath, or

6. *Id.* at 708-09, 362 S.W.2d at 241.

7. That the court did not recognize this is shown by its language that, "complainants seem to be confused as to the effect of the 1953 condemnation judgment. By that judgment only a small plot of ground was taken. They remain the owner in fee of the remainder of the tract with all the rights and privileges that accompany such ownership. Nothing prevents them from building an observation platform on a mountain or selling land for a television relay tower." 362 S.W.2d at 241.

8. 369 S.W.2d 909 (Tenn. App. M.S. 1962).

9. The opinion, for example, states that the child in question was born on March 13, 1961, and later states that the trial court entered an order on February 23, 1961 concerning the "'minor child just born.'" 369 S.W.2d at 912.

otherwise identified "and was so irregularly handled as to actually be left not a part of the record in this cause or available to the appellant or her solicitors on this appeal whereby even the contents of the report might be determined."[10]

Apparently, the results of the test were not even received and considered until after the trial had been concluded and the cause taken under advisement for decision. Thus, since at this stage of the proceeding the tests could not possibly have been received as proof, the trial court must have used the results of the test to take judicial notice of the fact that the husband was not the father of the child. Although the trial judge did not spell out this finding, the appellate court said the finding was evident, since the husband was held to have "'no legal responsibility'" for the child.

The appellate court reversed as to this holding, but based its decision on Tennessee Code Annotated section 24-716, concerning blood grouping tests to disprove paternity. The provisions of the statute requiring the tests to be made by qualified persons in laboratories in Tennessee were not complied with.[11] The court also seemed to hold that such tests shall not be received "without an opportunity afforded the parties involved to examine the witness who made the tests as to his competency and as to the means employed by him, and all other factors having to do with the reliability of such tests."[12]

In other cases, the courts judicially noticed that many persons who can neither read nor write can sign their names[13] and the statutory and common law of the State of Texas, under Code sections 24-607 and 24-608.[14] But the appellate courts still refuse to take judicial notice of the rules of the circuit courts.[15]

II. Presumptions

Presumptions were involved in only a few cases during the survey period, and no case showed an effort to discuss this confused area in a comprehensive manner. *MacFarland v. Wofford*[16] was a proceeding to review an order of the Commissioner of Revenue for forfeiture of an automobile which contained unstamped whiskey. The statute under which the Commissioner acted, Tennessee Code Annotated sec-

10. 369 S.W.2d at 913.

11. The court also said that the tests were made before the child was six months old. The judge's order for the tests was dated August 17, 1961, but the order provided for the blood samples to be taken on September 20, 1961. If the child were born on March 13, 1961, as stated in the opinion, it would have been six months old.

12. 369 S.W.2d at 914.

13. Bradford v. Bradford, 364 S.W.2d 509 (Tenn. App. E.S. 1962).

14. Mutual Life Ins. Co. v. Templeton, 50 Tenn. App. 615, 362 S.W.2d 938 (W.S. 1962).

15. Horn v. Commercial Carriers, Inc., 365 S.W.2d 908 (Tenn. App. E.S. 1962).

16. 211 Tenn. 309, 364 S.W.2d 914 (Tenn. 1962).

tion 57-622, provides for the forfeiture of a car containing unstamped whiskey for gift, sale, or distribution, and further makes the presence of such whiskey in a car prima facie evidence that it is for the proscribed purposes. The arresting officers had found a partly filled pint bottle of whiskey in the automobile in question. The court sustained the circuit court in reversing the Commissioner, saying that when evidence was offered that the whiskey was not for distribution, gift, or sale, the presumption disappeared. All the evidence in the record showed that the occupants of the car had it there for the purpose of drinking.

Logically, a presumption is nothing more than an inference from a proved fact. Legally, a presumption is such an inference given effect by the law. When the "presumption disappears," the effect is not to remove the inference, but to remove the force of law behind the inference. The presumption then becomes a mere inference to be considered on a par with inferences arising from other evidence. This, apparently, is what the Commissioner did not understand. He treated the presumption as having substantive force when in fact it was only a procedural device for requiring the defendant to explain the presence of the whiskey in the car. The court emphasized this point when it said that the state has the burden of proving affirmative allegations upon which the right to forfeiture exists.

Before a presumption can be used, of course, the basic fact must be proved. If, in proving the basic fact, the inference which would arise from the basic fact is negated, the presumption never comes into play. This is what happened in *Walters v. Kee*,[17] a tort action involving an automobile owned by defendant company, from whom the co-defendant had obtained possession for test driving and demonstrating to his parents. The plaintiff contended that he was entitled to go to the jury against defendant company under the presumptions in Code sections 59-1038 and 59-414, making registration prima facie evidence of ownership, and creating a presumption that one operating the vehicle was doing so for the owner's benefit. The plaintiff's evidence, however, had shown that the co-defendant was using the automobile for his own purposes, to take himself and his companions to Kentucky Lake for recreation. The appellate court affirmed the directed verdict for the defendant company.

A similar point was involved in *Caldwell v. Adams*,[18] a tort action against defendant truck operator and his employer. The plaintiff sought to rely on a presumption that the operator was acting within the scope of his employment. The evidence, however, showed that the operator in the course of his driving had gone "on a frolic of his

17. 366 S.W.2d 534 (Tenn. App. W.S. 1962).
18. 367 S.W.2d 804 (Tenn. App. M.S. 1962).

own," by stopping at a tavern to drink beer for two hours. The court said: "This uncontradicted evidence, we think, destroyed the arbitrary presumption of the statute . . . . 'A legal presumption . . . is an assumption for convenience, but where proof to the contrary is introduced, the assumption is waived for it is no longer logical to assume a fact which is refuted by positive testimony.' "[19]

The force of a given presumption determines the amount of evidence necessary to overcome it. In the case of a presumption which is purely procedural, little evidence is required to remove the force of law behind a given inference. Where, however, the presumption is a manifestation of public policy, it may attain a status very close to that of a rule of substantive law. In such instances, something in the nature of positive proof is required to overcome the presumption. Such is the case with the presumption of legitimacy, as shown by *Anderson v. Anderson*.[20] The action was an ejectment proceeding concerning property descended from a former slave. The two questions involved were the legitimacy of Sam Anderson and the legitimacy of his children. The chancellor had determined that all of them were illegitimate. The appellate court reversed, using the presumption of legitimacy, "one of the strongest presumptions known to the law" to determine that they were legitimate. There was no direct proof that Sam Anderson was legitimate or illegitimate, and the presumption as to him prevailed rather easily. There was evidence, however, that Sam Anderson had never considered himself to be married to the mother of the three children, that the mother had subsequently married another, and that Sam Anderson himself had considered his progeny to be "outside children." The court said:

> In view of the extremely long time which has elapsed between the birth of these three children and the trial of this cause we hold that the evidence of reputation among the family of Sam Anderson during his later years is insufficient to overcome the presumption of the legitimacy of the three children . . . .

In *Smith v. State*,[21] the court reiterated the rule that the fact of killing with a deadly weapon raises a presumption of malice in the absence of evidence to rebut this presumed fact, but held that the evidence was sufficient to rebut the malice.

III. Circumstantial Evidence

> Circumstantial evidence is evidence which tends to prove the proposition in question, but is not necessarily inconsistent with other propositions. Direct evidence, on the other hand, tends to prove the disputed proposition

19. 367 S.W.2d at 807.
20. 372 S.W.2d 452 (Tenn. App. W.S. 1962).
21. 370 S.W.2d 543 (Tenn. 1963).

> and is inconsistent with any other proposition. In a civil case where circumstantial evidence is used, it is sufficent for "the party having the burden of proof to make out the more probable hypothesis, and the evidence need not arise to that degree of certainty that will exclude every other reasonable hypothesis or conclusion. However, where there are two or more equally probable hypothesis [sic] appearing, and either could equally have caused the injury or damage, the Jury cannot speculate or guess or surmise that any certain one was the cause and cannot find for the plaintiff on such basis.

This language in the charge to the jury was approved as stating the correct law in *Kee v. Hill*,[22] a companion case to *Walters v. Kee*, discussed previously.

A special form of circumstantial evidence is the doctrine of res ipsa loquitur, also involved in the *Hill* case. Where the conditions for res ipsa loquitur are present, the fact of the injury, in the absence of explanation by defendant, permits the jury to infer the defendant's negligence " 'in preference to other permissible or reasonable inferences from the facts and circumstances.' "[23]

The key problem in the use of circumstantial evidence is that of relevance. Since direct evidence is consistent with the disputed proposition and no other, there is ordinarily no problem of relevance where direct evidence is involved, as there is with circumstantial evidence. The relevancy of the circumstantial evidence can best be determined by examining the premise upon which the offer of the evidence is based. This problem occurred in *Ivey v. State*,[24] in which the supreme court reversed for the admission of irrelevant circumstantial evidence. The court did not analyze the case in terms of the premise underlying the offer of the circumstantial evidence, but the case can best be understood by so doing.

The defendant was convicted of the murder of a seventeen year old girl. His defense was that he accidentally killed her with his car, panicked and hid the body, which was not found until he revealed its location. Because the case was reversed for a new trial, the court discussed only the evidence which was the basis for reversal. This evidence was that defendant, a married man with children, had improper associations with other women, and that his wife had threatened to leave him if he continued these associations. The purpose of the evidence was to prove motive. The premise upon which the evidence was based was that a man who has improper associations with women and whose wife threatens to leave him because of such associations will probably kill a woman *with whom he has been*

22. 366 S.W.2d 520 (Tenn. App. W.S. 1962).
23. 366 S.W.2d at 525.
24. 210 Tenn. 422, 360 S.W.2d 1 (Tenn. 1962).

associating to prevent his wife from learning of his relationship with her. The premise is a tenuous one at best, but the flaw in the state's evidence was that there was no evidence that defendant had any relationship with the victim at all. A factual basis for the premise underlying the circumstantial evidence must, of course, be shown to exist by the evidence. Here, however, the state was attempting to have the jury infer a fact of the evidential proposition supported by the premise. This proposition in turn was to be used to support an inference that defendant murdered the deceased. The failure of the state to show any relationship between the defendant and the victim made the evidence irrelevant and prejudicial.

A. *Evidence of Other Crimes*

Certain types of circumstantial evidence occur so frequently that the rules regarding their admission have become stereotyped. Such is the case with evidence of other crimes. The rule is generally stated that evidence of other crimes is not admissible to prove that defendant committed a particular crime, subject to a group of exceptions. This statement of the rule is misleading in that the rule is that evidence of other crimes generally is not admissible *to show disposition to commit crimes* as proof of the commission of a particular crime. However, evidence of other crimes is admissible when used to prove a material issue on trial, such as motive, intent, the absence of mistake or accident, a common scheme or plan for the commission of two or more crimes so related to each other that the proof of one tends to establish the other, or identity of the defendant. These rules do constitute exceptions to a general statement that evidence of other crimes is inadmissible, but they do not constitute exceptions to the rule prohibiting evidence of other crimes to prove disposition to commit a crime. Thus, there are in fact two rules, not a rule and exceptions.

This problem was dealt with in *Carroll v. State*,[25] a particularly unsavory case in which defendant was convicted of rape. The evidence showed that defendant: (1) broke and entered an apartment in the night time; (2) assaulted and disabled the victim's husband; (3) forced victim to engage in sexual perversion with him; (4) raped the victim; (5) left the apartment and broke into another; (6) forced the woman occupant of that apartment at the point of a knife to engage in sexual perversion; (7) assaulted the woman with intent to force her to have intercourse with him. The defendant alleged error in the admission of evidence of items (5), (6), and (7) above, relative to incidents in the second apartment "as evidence of

25. 370 S.W.2d 523 (Tenn. 1963).

other and independent crimes which did not elucidate or tend to prove defendant's guilt of the charges upon trial. . . ."

The court held the evidence admissible on several different grounds. (1) They were part of the same transaction. " 'Evidence of another and distinct crime is admissible if it was committed as a part of the same transaction and forms part of the *res gestae*.' " (2) The evidence tended to establish motive, criminal intent, and the absence of mistake or accident. (3) The third basis, as opposed to the two others, was a true exception to the rule that evidence of other crimes is not admissible to show disposition to commit a crime. The court approved the modern tendency in cases involving sex crimes and abnormal sex practices, " 'to admit evidence of disposition and, as proof of disposition, evidence of other offenses of the same kind.' "

Kennedy v. Crumley,[26] involved the problem of the use of prior convictions in a civil case. The action was against the operator and owners of an automobile for injuries received in an automobile accident on September 11, 1960. The plaintiff introduced evidence that the operator of the car had been convicted of reckless driving on October 22, 1955, driving while intoxicated on March 19, 1957, and of public drunkenness on December 22, 1956. The purpose of the evidence was to show negligence by the owners in entrusting their automobile to an incompetent driver, or to one whom they should have known was incompetent.

The court said that evidence of specific acts of carelessness, recklessness, or intoxication may be shown on the issue of the incompetency of the driver of an automobile, and that it is competent to show the entruster knew of specific acts. But the admission of the evidence in this case was erroneous as there was no showing that the owners had knowledge of these convictions, or other facts which would put them on notice. The court also said the convictions were too remote to be of any evidential value upon the issue of the knowledge of the defendants of the incompetency of the operator.

B. *Character*

Character evidence is another type of circumstantial evidence around which there has developed a body of stereotyped rules. In *Taylor v. State*,[27] the defendant alleged error on the part of the trial court in allowing the prosecutor to cross-examine his character witness by asking him if he knew "that Taylor had been arrested for gambling and had fought with the arresting officers when he was taken into custody for this offense." The appellate court said that it was entirely

26. 367 S.W.2d 797 (Tenn. App. M.S. 1962).
27. 369 S.W.2d 385 (Tenn. 1963).

proper to question the character witness "about certain charges or rumors of misconduct that he had heard, facts known to him, etc., for the purpose of testing the value of the witness' evidence in chief."

Such examination is generally held proper, except that most jurisdictions permit the questions to be phrased only in the form, "Have you heard," rather than "Do you know," since it is the witness' knowledge of defendant's reputation, not his knowledge of defendant's conduct that is being tested. The distinction may be a technical one and of little importance if instruction is given limiting the jury to the use of the evidence for the purpose of impeachment. But the court in the *Taylor* case further held that the defendant is not entitled to such limiting instruction.

IV. Opinion Testimony

Normally, lay opinion evidence, as opposed to fact evidence, is inadmissible. But the distinction between fact and opinion is one of degree, not kind, and courts do admit lay opinion evidence in many instances. One example of this is a layman's opinion as to physical condition. In *American Surety Co. v. Kizer*,[28] a workmen's compensation case, the court said: "It has long been recognized that a lay witness may testify as to his own physical condition or that of another person provided such witness first states the detailed facts and then gives his conclusions."[29]

The opinion of an expert, of course, is generally admissible, since the reason for the expert's testimony is to give an opinion to aid the jury. However, even the expert must show a basis for his opinion, not hearsay, which explains the necessity for hypothetical questions. In *Fidelity and Casualty Co. v. Treadwell*,[30] the problem of hearsay basis for the expert's opinion was involved. A doctor testified in a workmen's compensation case that it was his opinion that the plaintiff's disability was one-hundred per cent. But to support his conclusion he had examinations made by others, whose conclusions were given to him, and which, he said, supported his own conclusion. The trial court overruled an objection that the opinion of the doctor was based on hearsay information not in the record. The appellate court said that the general rule that testimony of medical experts based on hearsay is inadmissible is subject to "many fluctuations depending entirely on how the case was tried and conducted." The court affirmed on the basis that the finding of the trial judge and the conclusion of

28. 369 S.W.2d 736 (Tenn. 1963).
29. 369 S.W.2d at 740. See also Wood v. Edenfield Elec. Co., 364 S.W.2d 908 (Tenn. 1963).
30. 367 S.W.2d 470 (Tenn. 1963).

the doctor were not based on the hearsay; the doctor had already formed his conclusion and used the hearsay information merely to sustain that conclusion.

The expert's opinion, in order to support a finding, must not be mere conjecture, speculation, or surmise. This was the objectionable feature of the expert's opinion in another workmen's compensation case. To a question of whether the injury would affect plaintiff's eyesight, the expert replied, "very possibly, if he gets to the point where he can't close those eyes, but I couldn't tell you that, and nobody else can."[31]

V. HEARSAY

Surprisingly, the problem of hearsay was involved in only a few cases during the survey period, but four cases deserve particular comment. These cases involved the problem of admissions, confessions, and prior testimony.

A. *Admissions*

There is a sharp distinction between admissions and declarations against interest, which are often confused, as in *Wooten v. Curry*.[32] An admission is a statement made by a party (or someone who had the authority to make the statement for the party); the admitter need not have personal knowledge of the fact asserted in the admission, and he need not be unavailable as a witness. The admission may have been highly self-serving when made, and it is receivable only against the admitter (or one who stands in the same position as if he had personally made the admission). A declaration against interest may be made by one who is an entire stranger to the parties to the action, but it must be made by one who had personal knowledge and who is unavailable as a witness. The declaration against interest must have been disserving when made, and it is admissible whenever relevant.[33]

The *Wooten* case was a malpractice action against a physician who had performed a hysterectomy on plaintiff, subsequent to which the plaintiff's female organs were malformed. The testimony in question was to the effect that the defendant said, " 'he was sorry it happened and could have probably avoided it if he had checked on her as he should.' " The court's opinion refers to this testimony as "an admission or declaration against interest," without indicating which it was.

The question involved was not admissibility, but whether this evidence was sufficient to require a submission of the case to the

31. Maryland Cas. Co. v. Young, 362 S.W.2d 241, at 243 (Tenn. 1962).

32. 362 S.W.2d 820 (Tenn. App. E.S. 1962). Two cases, one an action by the wife, the other by the husband.

33. MORGAN, BASIC PROBLEMS OF EVIDENCE 297-98 (1962).

jury, and the failure to distinguish between the two types of hearsay resulted in a confusing opinion. The defendant contended "that declarations against interest and admissions made by a physician are not competent evidence of negligence in an action for malpractice." But the court said the admissibility of such statement is to be governed "by the same rules as if the statement had been made by the declarant as a witness. It is necessary, of course, that it be contrary to the interest of the declarant and, if in the form of an opinion, about a subject upon which the declarant would be competent to speak as an expert witness."[34] Subsequently, the court cited, "Cases holding expressions by a physician more or less similar to that here involved competent as an *admission* and sufficient to carry the case to the jury. . . ."[35]

It seems that when a statement which would be a declaration against interest is made by a party to the action, it constitutes an admission. However, the requirements for an admission are considerably more lenient than those for a declaration against interest. And the *Wooten* case seems to say that for an admission to be sufficient evidence to make a jury question, the admission must satisfy certain requirements necessary for a declaration against interest.

B. *Confessions*

A confession in a criminal case is analogous to an admission in a civil case, although the requirements for the two vary considerably. In *Grove v. State*,[36] the court was faced with a confession problem of first impression in Tennessee. The defendants, convicted of armed robbery, sought to introduce a number of confessions of other crimes unrelated to the charge "for the purpose of showing that the confessions made in this case were coerced or forced through beating or otherwise." The defendants argued that they could prove that they did not commit the crimes to which they confessed. It was not made clear when the other confessions had been made, but the court refused to allow the evidence.

The court, quoting from a Maryland case, concluded that evidence that a confession of another crime was false would not prove the falsity of the confession of the crime charged in the indictment, and would be wholly irrelevant to the issue.

> 'In order to determine the truth or falsity of the confessions of the other crimes, the court would be called upon to receive evidence concerning offenses not charged in the indictment in this case. The practical effect

34. 362 S.W.2d at 823.

35. 362 S.W.2d at 824. (Emphasis added.)

36. 365 S.W.2d 871 (Tenn. 1963).

would be that the State, in order to prove one case, would be required to establish the appellant's guilt in four cases.'[37]

In *Dykes v. State*,[38] defendant agreed to plead guilty upon continuance of his case to the next term. The case was tried upon a plea of not guilty, and defendant alleged error in allowing testimony as to this agreement. The court sustained him and reversed. The Tennessee rule is that a withdrawn plea of guilty cannot be shown in evidence as a judicial confession, and the same reasoning applies to an agreement to plead guilty. The state was held to have waived the agreement by proceeding to trial on the pleas of not guilty.

C. *Prior Testimony*

Tennessee Bar Association v. Freemon[39] was an action to disbar defendant on two grounds, one of which was that defendant entrapped the wife of a client into committing adultery for the purposes of divorce. The court in the divorce action sustained the charge of entrapment and dismissed the bill for divorce for that and other reasons. The decree, however, contained no finding that defendant knowingly participated in the scheme of entrapment. In the disbarment proceeding, the chancellor used testimony in the divorce case as substantive evidence against the defendant.

The appellate court held this to be error on the ground that, even though there is authority that disbarment proceedings are sui generis, "the better rule is that the same rules of evidence which apply in other judicial proceedings control the admissibility of evidence in disbarment proceedings." Thus, the general rule "that testimony given in a former proceeding is not sufficient to give it the status of proof in another action" was applied.

VI. ILLEGAL SEARCH AND SEIZURE

Even before the Supreme Court in *Mapp v. Ohio*[40] held that evidence obtained by illegal search and seizure is inadmissible in a state court, the rule in Tennessee was to exclude such evidence. Thus, it would seem that the *Mapp* decision had little significance for Tennessee attorneys. However, *Hill v. State*[41] indicates that the rule in Tennessee is merely a rule of evidence. If this is so, the Tennessee Supreme Court should re-examine the procedure it requires of a defendant to enforce the right to have illegally obtained evidence excluded. The rule is no longer a privilege, the exercise of which

37. 365 S.W.2d at 876.
38. 372 S.W.2d 184 (Tenn. 1963).
39. 362 S.W.2d 828 (Tenn. App. M.S. 1961).
40. 367 U.S. 643 (1961).
41. 367 S.W.2d 460 (Tenn. 1963).

depends upon compliance with strict technical procedures, but a constitutional right protected by the fourth amendment through the fourteenth amendment.

The *Hill* case involved a violation of the liquor laws, and the defendant raised the issue of illegal search and seizure three times. He objected to the receipt of certain evidence after direct examination of the state's one witness, and after cross examination of the same witness, he moved to exclude the evidence. After re-direct and re-cross examination, the state rested, and the defendant moved for a dismissal of the charge on the ground of illegal search. Upon denial of this motion, the defendant took the stand to testify as to the search and nothing else. He was asked whether the prosecuting witness had testified differently at the preliminary hearing. The court ruled that if defendant went into that line of questions and answers, he would be outside the scope of the search, and could be examined as to any part of the case. The defendant left the stand, and this ruling was the principal ground relied upon for reversal.

No error was alleged against the ruling that the evidence was competent, and the appellate court dealt only with the proper procedure to be used in determining the admissibility of illegally obtained evidence. Relying on prior cases, the court said the procedure to be followed in determining the admissibility of evidence where the issue of illegal search is raised "is the same as that followed when objection is raised as to the admissibility of a confession or a dying declaration."[42] This issue is for the trial judge to determine, and "when an objection is made to the offered evidence, the approved practice is for the Court to hear full testimony of all the relevant facts and circumstances in the absence of the jury and then rule upon the admissibility of the testimony offered."[43]

The opinion is unsatisfactory because the issue as raised at the trial was much narrower than the one dealt with by the court in its opinion. The issue as raised was whether the question put by defendant's counsel was within the scope of the search, and not whether defendant could testify only on the issue of the search. The trial court was apparently willing to let the defendant testify on the issue of the search alone, but did not consider the question propounded as being within the scope of the search. The appellate court, however, did not deem it necessary to deal with this narrow issue, because defendant had failed to follow the proper procedure and in effect lost his right to complain. Said the court: "In order to put the trial court in error for not permitting the defendant to testify as to the circumstances of the search only, he must offer himself

42. 367 S.W.2d at 462.
43. *Ibid.*

as a witness on this issue before calling for and obtaining from the court a ruling on the very issues and before the State closes its proof."[44] Thus, the court seems to be saying that the trial court, under such circumstances, can do what it pleases, either allow the defendant to testify on the issue of the search only or not, without being in error. But would it have been error to refuse any evidence by defendant on the issues of the search after the state rested its case? The court implies again that the trial court could not be in error. "Since it is the duty of the Judge and not the jury to make the decision as to the legality of the search, it is incumbent upon both parties to offer all of their proof on this question before calling for a ruling from the Court."[45]

It is not, of course, at all unusual for appellate opinions to be criticized and called unsatisfactory. But in this the courts are not always wholly to blame, for they must take the case as it is presented to them. Thus, a large share of the responsibility for unsatisfactory opinions must be shared by the bar. The *Hill* case itself seems to be in this category. Nevertheless, it would seem that the Tennessee Supreme Court should at the earliest opportunity review the proper procedure to be followed in illegal search and seizure cases in the light of the *Mapp* case.

VII. FEDERAL COURT CASES

The federal court cases involving evidence in this survey are unique in that they were all decided by the same judge and all dealt with the violation of internal revenue liquor laws. They should all be required reading for revenue agents in eastern Tennessee.

In *United States v. Ramsey*,[46] the question was whether, when the defense of entrapment is urged, the prosecution shall be required to offer as a witness a paid informer on whose entrapping activities the conviction rested. The court concluded first "that federal trial courts have the duty to require fair and lawful conduct from federal agents in furnishing evidence of crime." Expressing grave concern about the fairness of the agents' activities, the court then decided that the defendant had a right to be faced with the paid informer.

Three cases were on motion to suppress as evidence moonshine whiskey obtained as a result of illegal search and seizure. The court granted all three motions.[47] The cases, of course, turn on their particular facts, which do not warrant discussion here, but all of them

44. 367 S.W.2d at 463.

45. *Ibid.*

46. 220 F. Supp. 86 (E.D. Tenn. 1963).

47. United States v. Souther, 211 F. Supp. 848 (E.D. Tenn. 1962).

involved arrest and seizure on private property without warrants, or what the court determined was reasonable justification.

In *United States v. Plemmons*,[48] the search was made under a warrant, issued upon the affidavit of an officer that he had observed odor of mash in the vicinity and that a fellow officer had reported the operation of a distillery on the premises. The defendant contended the affidavit was insufficient to authorize a search. The court disagreed, saying that hearsay alone does not render an affidavit insufficient. The Commissioner was not obliged to require the informants or their affidavits to be produced so long as there was a substantial basis for crediting the hearsay. The agent's knowledge that mash was somewhere in the immediate area was reasonably corroborative of the facts reported to him.

VIII. Legislation

There were several statutes on evidence passed by the legislature during 1963, the most significant of which dealt with confessions and "admissions against interest" in criminal cases.[49] This statute provides that a criminal defendant is entitled upon demand to a copy of any confession or "admission against interest" made to a law enforcement officer or agency of the state, together with a list of the names and addresses of all persons present when the statement was made. If the statement was not reduced to writing, a list of the names and addresses of all persons present when the statement was made shall be furnished. Failure to comply with the statute means that the confession or admission against interest shall not be admitted as evidence.

Three acts dealing with the trial of civil actions were apparently enacted to clarify and make uniform certain procedures in Tennessee courts which have heretofore varied somewhat with individual judges. One provides that counsel shall be permitted to use demonstrative evidence in his argument to the jury "for the purpose of illustrating his contentions with respect to the issues which are to be decided by the jury."[50] Another provides that counsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury.[51] The third provides that "counsel shall be permitted to read his entire declaration . . . to the jury at the beginning of the lawsuit, and may refer to same in argument or summation to the jury."[52]

48. 223 F. Supp. 853 (E.D. Tenn. 1963).
49. Tenn. Code Ann. § 40-2441 (Supp. 1963).
50. Tenn. Code Ann. § 20-1326 (Supp. 1963).
51. Tenn. Code Ann. § 20-1327 (Supp. 1963).
52. Tenn. Code Ann. § 20-1328 (Supp. 1963).

Code section 59-930, enacted during 1963, requires safety belts in the front seats of all cars sold in Tennessee beginning with the 1964 models. The statute, however, eliminates a potentially litigious point by providing that in no event shall "failure to wear seat belts be considered as contributory negligence, nor shall failure to wear said seat belts be considered in mitigation of damages on the trial of any civil action."