Vanderbilt Law Review

Volume 18
Issue 3 *Issue 3 - June 1965*

Article 18

6-1965

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I. Presumptions

The difficulty in dealing with presumptions arises in part from the fact that the term embraces a host of different meanings, varying with the purposes underlying the presumption in a given situation. Unfortunately, the courts seldom articulate the meaning which they are attributing to the term and consequently do little to clear up the confusion. Three cases in which the term was used during the survey period illustrate the point.

Kernodle v. Peerless Life Insurance Co.[1] presented the recurring question of the effect of the presumption against suicide. The deceased had taken out an insurance policy providing for benefits for accidental death resulting from injuries received "while the insured is riding as a fare-paying passenger within the enclosed part of a railway passenger car." The policy was taken out twenty-six days prior to the death, caused by a fall from the enclosed loading platform of a moving passenger train, the doors of which "required considerable strength" to open. The court reviewed the evidence, which contained "no positive proof" of death by accident or by a deliberate act. In applying the presumption against suicide, the court, relying on prior cases, said that,

> where a death by external and violent means is shown, and there is no proof as to how it is caused, or the attendant circumstances leave the question doubtful, or the proof concerning them is conflicting or not inconsistent with accident, the law presumes accidental death, and the burden of proof, in its

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1. 213 Tenn. 631, 378 S.W.2d 744 (1964).

> secondary sense, is cast on the defendant . . . to prove by a fair preponderance of the evidence that death was caused by suicide.[2]

Further, the court held that in such circumstances, the presumption against suicide "comes to the aid of complainant in making out a case of accidental death."

In *Arnett v. Fuston*,[3] a negligence action, plaintiff argued that a verdict of not guilty against one of the two co-defendants was not supported by any evidence, and that a presumption should apply against him "for his election to stand on his motion for directed verdict and his failure to offer any evidence," because the facts of the accident were peculiarly within his knowledge and "his silence gives rise to the presumption that his testimony, if given, would be contrary to his contention in his plea of not guilty."[4]

In rejecting this contention, the court made three points: (1) Negligence is never presumed from the mere happening of an accident, but must be proved; (2) where two different conclusions might reasonably be drawn from undisputed facts, the questions of negligence and ordinary care are for the jury; and (3) the rule of adverse presumption relied on by plaintiff is not to be taken as substantive proof and never relieves the party with the burden of proof from making out a prima facie case.

The plaintiff in the *Arnett* case was apparently arguing on appeal that the presumption of which he spoke should have been taken into account by the appellate court in determining the sufficiency of the evidence to support the verdict. In *Shelby Mutual Insurance Co. v. Wilson*,[5] an action on a fire insurance policy for loss of household furniture, the appellate court apparently did just that. The principle question in the case was whether the defendant company had notice of a move from the premises described in the policy to another city, and thence to a house outside the other city's limits. The court affirmed a judgment for plaintiff, and in so doing, said that if the agent, or the company through the agent, knew the facts, and the company with its agent in the courtroom offered no proof, and did not put the agent on the stand, "the presumption would be that if he had testified his evidence would have supported that of the plaintiffs."[6]

In *Southern Coal & Coke Co. v. Beech Grove Mining Co.*,[7] the court said:

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2. *Id.* at 638, 378 S.W.2d at 747.
3. 378 S.W.2d 425 (Tenn. App. M.S. 1964).
4. *Id.* at 428.
5. 383 S.W.2d 791 (Tenn. App. E.S. 1964).
6. *Id.* at 799.
7. 381 S.W.2d 299 (Tenn. App. E.S. 1963).

> It is a well-settled rule of law in this state that 'where it is apparent that a party has the power to produce evidence of a more explicit, direct, and satisfactory character than that which he does introduce and relies on, it may be presumed that if the more satisfactory evidence had been given it would have been detrimental to him and would have laid open deficiencies in and objections to, his case, which the more obscure and uncertain evidence did not disclose.'[8]

II. Circumstantial Evidence

Monts v. State[9] resulted in a conviction of three defendants for murder, and two of the defendants appealed. One of the principal errors alleged was the failure of the trial court to charge on circumstantial evidence. The rule in Tennessee is that when the only evidence connecting a defendant with the commission of a crime is circumstantial, the trial court must instruct the jury on circumstantial evidence, regardless of whether the defendant requests the charge. However, when the evidence is both circumstantial and direct, the failure of the trial court to give a charge on circumstantial evidence is not reversible error, unless the defendant requests the charge.

In the *Monts* case, the evidence was both circumstantial and direct, the direct evidence being a confession. In such a case, the court reasoned that it is entirely possible that the jury, in determining the credibility of the evidence, might reject the direct evidence and rely entirely on the circumstantial evidence. "But without the law of circumstantial evidence before them, how can they be expected to properly evaluate this evidence?"[10] The court then conceded that under this rationale, logically the charge on circumstantial evidence should be given whenever circumstantial evidence is present. However, the court felt that the mandatory provisions of section 40-2517 of the Tennessee Code prevented a change in the established rule. That statute provides that if attorneys desire further instructions, they must request them. Although the provisions of the statute are mandatory, they are not mandatory "where the omitted charge concerns fundamental defenses." The subject matter of a circumstantial evidence charge is not fundamental where the state's case consists of both circumstantial and direct evidence.

One is tempted to use Wigmore's phrase, "a wondrous cobweb of pedantry," in describing the court's opinion on this point, particularly since the technicality of the approach led the court to reverse the conviction of the defendant who had requested a charge on circumstantial evidence, but to affirm as to the defendant who did not so

8. *Id.* at 302.
9. 379 S.W.2d 34 (Tenn. 1964).
10. *Id.* at 41.

request. Since both defendants must have been convicted on the same evidence, having been tried together, and since both defendants were sentenced to death, the occasion seems to have been particularly inappropriate for such technical reasoning as the court displayed. It should be pointed out, however, that on the second petition to rehear, the court was convinced that the defendant in question did make the request, and reversed the conviction on that ground.

One type of circumstantial evidence the Tennessee courts exclude is the result of a lie detector test. In *Grant v. State*,[11] defendant, charged with subornation of perjury, sought to introduce evidence in regard to a polygraph test he had taken. The court said its exclusion was not error. "The results of a polygraph test are inadmissible in evidence and this would include the circumstances surrounding the taking or not taking of such test by a defendant."[12]

A. *Opinion Evidence*

Opinion evidence is a form of circumstantial evidence, which is generally excluded under the opinion rule. The opinion rule is, in fact, two rules, one relating to the opinions of laymen, the other to the opinions of experts. Two cases during the survey period dealt with expert opinions.

Murray v. State,[13] was a prosecution for incest. Part of the evidence was the fact of the birth of a deformed child to defendant's sixteen-year-old daughter. The evidence objected to was testimony by a physician in attendance when the short-lived child was born, that "an incestuous union would be one of the causes of deformity borne by a sixteen year old mother."

Although the doctor testified further that he had eliminated all other known causes for the deformity and that it was his opinion that an incestuous union was the cause of the deformity, the court's opinion was concerned with his testimony as quoted above. The court said "it is always permissible to permit a qualified expert to state a conclusion or give an opinion on a subject on which the trial court and the jury need the help of expert opinion."[14]

To the defendant's contention that the evidence was highly speculative, the court said such testimony is always more or less speculative, but it is not inadmissible for that reason. The opinion was relevant "because it was circumstantial evidence which tended to show that the prosecutrix had entered into an incestuous relationship."[15]

11. 213 Tenn. 440, 374 S.W.2d 391 (1964).
12. *Id.* at 443, 374 S.W.2d at 392.
13. 377 S.W.2d 918 (Tenn. 1964).
14. *Id.* at 919.
15. *Id.* at 920.

In a workmen's compensation case, *Magnavox Co. v. Shepherd*,[16] claimant was awarded increased compensation due to increase of incapacity from the original injury. In determining on appeal that there was no evidence to support the award, the court said the claimant and her husband were not competent to testify that the increase in incapacity "'was due solely to her injury.'" The question was one for a doctor. The testimony of the physician in the case was to the effect that his opinion was that the change was not due to the original injury, and that of the present complaint. The court said if the doctor, as a competent medical authority, so testifies, "then the testimony of lay witnesses to the contrary would be of no probative value. At best, such evidence would be considered merely speculative and the testimony of the doctor would have to be accepted over that of the lay witnesses under these circumstances. Any other holding would deny the probative force of men learned in a profession and give way to the testimony of those totally unfamiliar with the human body and the many complexities therein."[17]

B. *Corroborating Testimony*

Corroborating testimony is another category of evidence which is usually circumstantial. In two cases during the survey period, *State v. Fowler*[18] and *Boulton v. State*,[19] the primary question involved was the sufficiency of evidence to corroborate an accomplice's testimony. In the *Fowler* case, two defendants were convicted of larceny, largely upon the testimony of two witnesses who had confessed and pleaded guilty to the same charge. On appeal, the defendants alleged that the state failed to corroborate the accomplice's testimony.

The state introduced evidence that on the night of the crime, larceny of a safe from a store, both defendants were seen talking with both witnesses; that the station wagon of one of the defendants was seen near the scene of the burglary on the night in question; that four unidentified men went behind the telephone company and drove away in a truck which the defendants were charged with stealing; and that the ashes of burned paper were found on the farm of one of the defendants where the accomplice's witnesses said the group had burned the papers from the safe, after dividing the money. The state also showed that when defendants were confronted by the implicating statements of the accomplices, "they hung their heads and made no audible responses." The court, without so stating, strongly implied that this admission by silence was corroborating evidence.

16. 379 S.W.2d 791 (Tenn. 1964).
17. *Id.* at 793.
18. 213 Tenn. 239, 373 S.W.2d 460 (1963).
19. 377 S.W.2d 936 (Tenn. 1964).

The rule applied was that the testimony of an accomplice requires corroboration, and "there should be some fact testified to entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the defendant is implicated in it, and the corroboration must consist of some fact that affects the identity of the party accused."[20] The court concluded that even though "slight circumstances may be sufficient to furnish the necessary corroboration of an accomplice," the circumstances in the present cases, in addition to the proven facts, were more than slight.

In the *Boulton* case, applying the same rule as in the *Fowler* case, the court found that the testimony of the accomplice was not corroborated. The defendant was indicted "with a crime against nature by engaging in fellatio with a 14-year-old-boy," and found " 'guilty of an attempt to commit a felony.' " The only direct evidence was the story of the boy, who was an accomplice. The evidence relied on to corroborate that of the accomplice was the testimony of the boy's married sister. Her testimony was that the defendant had been the boy's grade school teacher, had taken the boy, with others, on swimming parties, that once or twice he took the boy and the boy's brother to a Christmas parade in Nashville, and that once he had expressed to the boy's mother affection for the boy.

The court said, "evidence which merely casts a suspicion on the accused or only shows he had an opportunity to commit the crime, is legally insufficient to corroborate the testimony of the accomplice."[21]

The state also invoked the rule of admission by silence, on the basis of testimony by the sister that when confronted with the charges, the defendant burst into tears and asked the boy, " 'Why did you do this to me?' " The witness testified that defendant did not deny the charge, but on cross-examination, she said she did not remember hearing the defendant ask, " 'Why don't you tell the truth?' "

The court said that the conduct of the accused could not be construed as silence or acquiescence in the truth of the charge. "It is recognized in all our cases that this rule of admission by silence 'should be applied with circumspection.' "

III. BEST EVIDENCE

In *Gamble v. State*,[22] three defendants, members of the Memphis Police Department at the time of the crime alleged in the indictment, were convicted of grand larceny. Part of the state's evidence consisted

20. 213 Tenn. 239, 245, 373 S.W.2d 460, 463 (1963).
21. 377 S.W.2d at 939.
22. 383 S.W.2d 48 (Tenn. 1964).

of police radio logs, in which entries were made at the time of the broadcasts, which broadcasts were also recorded on tape. The defendants contended that the tape recordings were best evidence. The court, in rejecting this contention, said the radio logs were original records made in the regular course of the business of the police department at the time of the event and were admissible under the provisions of code sections 24-712 through 24-715. The court also pointed out that at no time did defendants obtain a subpoena duces tecum and seek to introduce the tapes in evidence at the trial.

IV. Admissions

Holley v. Taylor[23] presented an interesting factual situation concerning admissions. The action, by plaintiff-sister against defendant-sister, driver, and other parties who did not appeal, was for injuries resulting from an automobile accident. Plaintiff had given a deposition and also testified at the trial. The defendant alleged error by the trial court in refusing her a directed verdict, on the grounds that plaintiff's testimony on cross-examination negatived each and every allegation of negligence. The defendant also introduced certain evidence from the discovery deposition of plaintiff as admissions, which was even more inconsistent with the allegations of negligence than was the testimony at the trial.

The court quoted at length from the plaintiff's testimony at the trial and concluded that it was "not completely inconsistent with all of the allegations of negligence in her declaration." Admitting that the testimony from the deposition was "more inconsistent with the allegations" of negligence, the court said, "It was within the province of the jury to decide which, if either, version of plaintiff's testimony it would believe," and affirmed the judgment.

Gay & Taylor, Inc. v. American Casualty Co.[24] was an action by an insurance company against an independent adjusting firm for breach of contract. The defendant had failed to forward to plaintiff's attorneys a claim file, and default judgments were rendered against plaintiff's insured. The plaintiff had to prove that its insured had a meritorious defense to the suits in which default judgments were rendered, and the only evidence in the record describing the accident involved was a statement by the insured's driver. Although the court did not so term it, the statement constituted an admission, and largely on the basis of this evidence, the court concluded that there was no meritorious defense to the suits in question. However, the court did award plaintiff nominal damages for breach of contract.

23. 381 S.W.2d 510 (Tenn. App. W.S. 1964).
24. 381 S.W.2d 304 (Tenn. App. E.S. 1964).

V. IMPEACHMENT

It is the accepted rule in Tennessee that prior inconsistent statements admitted for the purpose of impeachment are not to be considered as substantive evidence of the truth of the matter contained in the statement. Such statements are to be considered only for the purpose of testing the witness's credibility. *McFarlin v. State*,[25] presented an interesting trial situation in which two witnesses for the state surprised the prosecutor by giving testimony contradictory to their prior written statements. The witnesses admitted having made the statements, but denied that they were correct. Later, the witnesses were recalled and testified that, contrary to their previous testimony, the matters stated in their extra-judicial statements were true.

The defendant alleged on appeal that the only evidence in the record showing him to be guilty of the charges, contributing to the delinquency of the two minor female witnesses, was the statements made prior to the trial. The court, rejecting the contention that the prior inconsistent statements could not be considered as substantive evidence, said that the main argument against the admission of extra-judicial declarations is that they are hearsay, subject to hearsay dangers.

> However, when the impeached witness, after denying the truth of such a prior statement, is recalled and corrects his testimony so as to affirm the truth of it, his statement then is not hearsay because it is now made under oath, in the presence of defendant, and before the court, and subject to cross-examination to test his credibility; and it is then to be considered by the jury as part of the total testimony of the witness.[26]

Both the reasoning and the result of the case are sound, since the witness, in effect, gave their extra-judicial statements under oath. Had the witnesses not recanted and affirmed the correctness of their extra-judicial statements, the orthodox rule would have limited the use of the statements for purposes of impeachment and precluded their use as substantive evidence. On this point, the United States Court of Appeals for the Second Circuit has recently qualified the orthodox rule in a case which may have far reaching consequences and which, for that reason, deserves a brief discussion here. The case was *United States v. DeSisto*[27] in which a witness on direct examination identified the defendant as the man who had hi-jacked his truck. On cross-examination, the witness recanted and expressed doubt as

25. 381 S.W.2d 922 (Tenn. 1964).
26. *Id.* at 924.
27. 329 F.2d 929 (2d Cir. 1964).

to the identification. On re-direct, the witness admitted having several times identified the defendant, at FBI headquarters, before a grand jury, and at the first trial of the defendant. However, he continued to express doubt at the second trial. The defendant's counsel sought an instruction during the Government's presentation that the prior identifications conld be considered only as bearing on the witness' present credibility and not as substantive evidence. The trial judge gave a general instruction several days later that an inconsistent statement by a witness " 'made prior to trial, not made under oath, is not to be considered as affirmative proof on the issue but only brought before you as impeaching testimony.' " The appellate court assumed arguendo that the charge did not correct the claimed error.

The court said that the prior identification could be used as substantive evidence in what appears to be the first instance of such a holding. To what extent the holding will in the future be limited to the facts of the case or to what extent it may presage a more reasoned application of rules such as the one in question are matters to be determined. The case, however, is well worth the attention of Tennessee lawyers and judges.

In *Payne v. State*,[28] the state called a rebuttal witness to impeach one of defendant's witnesses. The impeaching witness stated he would not believe the defendant's witness under oath. On cross-examination, the impeaching witness refused to answer a question as to the source of his knowledge, and the trial court rejected defendant's request that the witness be required to answer.

The supreme court, admitting that "there is no decision in this State exactly in point," reversed for failure to permit the cross-examination. The court said that the general principle is that every witness may be discredited by showing the inadequacy of the sources of his knowledge by cross-examination. "If an impeaching witness to another's bad reputation is speaking from a well-founded knowledge of such reputation, he ought to be able to specify some of the rumored misconduct or some of the individual opinions that have gone to form that reputation."[29]

In *State v. Fowler*,[30] the defendant alleged error because the prosecutor asked him on cross-examination about his gambling activities, unrelated to the crime of larceny, with which he was charged. The court simply stated that while proof of other independent crimes is inadmissible, when the defendant takes the stand as a witness, he is subject to cross-examination as any other witness. "[F]or the

28. 379 S.W.2d 759 (Tenn. 1964).
29. *Id.* at 762.
30. *Supra* note 18.

purpose of affecting his credibility, he may be asked as to specific acts which involve moral turpitude or any other conduct which tends to show his lack of veracity or untrustworthiness."[31]

VI. ILLEGAL SEARCH AND SEIZURE

Several cases during the survey period raised the problem of illegal search and seizure. In *Shafer v. State*,[32] the four defendants were found guilty of carrying burglarious instruments, and one was found guilty of carrying a pistol with intent to go armed. Each of the defendants raised the question of unreasonable search and seizure at the outset of the trial. The jury was excused while the trial judge heard proof and arguments as to the legality of the search. He concluded that the search and seizure made at the time of the arrest of defendants Shafer and Sterger was lawful, and that the search and seizure made of defendants Newman and Carson was not incident to a lawful arrest.

The evidence as to the search and seizure made in connection with Shafer and Sterger was in direct conflict, the police officers giving one version, the defendants another. The court, quoting from various cases, said that what is a reasonable search cannot be determined by a fixed formula, but that each case must be based on its own facts. The crucial question in this case was whether the defendants had waived their rights and consented to the search. The appellate court relied on the fact that the trial judge and the jury found the story of the arresting officers to be true. Thus, the credibility of the witnesses had been determined.

The defendants further alleged error in the failure of the trial court to charge that if the jury found that the arresting officers entered the quarters, a motel room, under the color of office, the entry was granted in submission to authority rather than as an understanding and waiver of a constitutional right. The court said that no witness had testified that Shafer granted permission to enter the room in submission to authority pursuant to a demand made by the officers.

The defendants also alleged that the issue of the legality of the search was to be made by the court, not the jury, relying on the fact that the trial judge had permitted the jury to consider the evidence on the search in order to make their own determination. The court said that the rule as to legality of search is the same as that applied to confessions, and that Tennessee follows the orthodox rule, *i.e.*, the judge rules on the voluntariness for purposes of admissibility,

31. *Id.* at 253, 373 S.W.2d at 466.
32. 381 S.W.2d 254 (Tenn. 1964).

and the jury considers voluntariness as affecting weight or credibility of the confession. The fact that the trial judge went further and applied the "Massachusetts or Humane Rule," allowing the jury to make its own independent determination was not error. "The defendants could not possibly be harmed by having the jury in addition to the Trial Judge pass upon the legality of the search in this case."[33]

After arrest and search and seizure made in connection with defendants Shafer and Sterger, police officers set up a watch in the motel room. When defendant Newman knocked on the door, the officers arrested him, and then arrested defendant Cason, who had remained seated in his automobile in which the two men had arrived. The two defendants and the automobile were searched. The trial judge ruled that this search was not incident to a legal arrest, and the evidence obtained thereby was incompetent. The appellate court affirmed.

In *Warden v. State*,[34] defendant was convicted of unlawful possession of intoxicating liquor. He had been searched and arrested by officers when he appeared at a house which the officers were searching under a search warrant. The officers testified that after seeing a liquor bottle on defendant's person, they searched him and found two pints of whiskey and one pint of vodka, and then arrested him. The court held that a public offense was being committed in the presence and sight of the officers. They were thus authorized to arrest, and as an incident to the arrest, were authorized to search him. The fact that the search preceded the arrest made no difference, as the search and arrest were at the same time and as such part of the same transaction.

In *Fox v. State*,[35] two defendants, Fox and Thomerson, were convicted of burglary for taking coins from public telephones. Both defendants were lawfully arrested without a warrant, as the officer had reasonable cause to believe the defendants had committed or were about to commit a felony. Subsequent to the arrest, officers told Fox they had a search warrant for his car and searched it, obtaining evidence used in the case. On appeal, the defendants questioned the validity of the search of the automobile, the state attempting to sustain the search as incident to a lawful arrest.

The court held the search to be illegal, because it "was not conducted at the time of the arrest but at a later hour and in another place." The court also rejected the state's contention that Fox had

33. *Id.* at 261.
34. 379 S.W.2d 788 (Tenn. 1964).
35. 383 S.W.2d 25 (Tenn. 1964).

given his consent to have the car searched. The circumstances of the case, showing that Fox had been at all times after the arrest under the control of the police, and that the officers told him they had a warrant suggested "an act of necessity rather than volition."

Even though the evidence seized was inadmissible against Fox, it was admissible against Thomerson. The automobile, at the time of seizure and search, was owned by and in possession of Fox, and the protection extended by the Constitution against illegal search and seizure did not inure to the benefit of Thomerson.

In *Larkins v. State*,[36] the court reversed the conviction of three defendants for burglary and grand larceny because of illegal search and seizure. A search warrant was issued on December 8, 1962, but the supporting affidavit recited that the information on which the warrant was issued was received on December 11, 1962. After the search, all three defendants and the wife of one of them were arrested and placed in jail. On December 12, 1962, while the defendants were still in jail, another search warrant for the same premises was issued.

The court held that the search on December 8, 1962, violated the constitutional rights of the defendants, and any evidence obtained thereby should have been excluded. The court further found that the arrest and detention of defendants on December 8th was unlawful and that the subsequent issuance of a valid search warrant did not have the effect of legalizing the arrest and did not justify the introduction of evidence discovered as the result of the second search. The search of December 12th was a continuation of the search of December 8th and the evidence obtained thereby was inadmissible.

Two of the defendants signed confessions, but the third denied his participation, and without the confessions, there was no competent evidence to convict him of the crime. The court did not discuss these confessions further, but did discuss two statements by the wife of one of the three defendants. The wife repudiated the statements in court, and the reason she gave for making them was to be with her baby. The court found that the statements were not given freely and voluntarily and were inadmissible.

The court concluded by saying that, "strong evidence of guilt will not justify our affirming these convictions where the record reveals that the constitutional rights of the Defendants were violated in obtaining evidence."[37]

In *State v. Sircy*,[38] the state appealed from a judgment of the trial court sustaining a motion of defendant charged with possession of

36. 213 Tenn. 520, 376 S.W.2d 459 (1964).
37. *Id.* at 531, 376 S.W.2d at 464.
38. 383 S.W.2d 37 (Tenn. 1964).

burglarious instruments to suppress evidence. The evidence, lock picks, was obtained by a search of defendant's automobile, which was parked in the driveway of a house for which officers had obtained a search warrant. The warrant was to search for narcotics at the premises of named individuals, "including any out-house, or vehicle found upon or in said premises." The defendant was not named in the warrant and was not in any way connected with the narcotics or stolen merchandise. The court found that defendant was a "'stranger to the process,'" and that the search of his automobile was illegal. The motion to suppress the evidence was affirmed.

VII. Sufficiency of Evidence for Grand Jury To Indict

In *Burton v. State*,[39] a prosecution for burglary and larceny, the defendants alleged error in the refusal of the trial court to allow cross-examination of the only witness to appear before the grand jury to show that substantial portions of his testimony were hearsay. The court discussed the problem at length, but avoided ruling directly on the question of whether an indictment can properly be based on hearsay. The opinion cited the United States Supreme Court case of *Costello v. United States*,[40] for the proposition that the Constitution does not prescribe the kind of evidence upon which grand juries must act, and cited as the majority rule the proposition that the court will not inquire into the legality or the sufficiency of the evidence on which an indictment is based. Even so, the court said that the witness in question "testified when the case was heard on its merits and demonstrated that he, of his own knowledge, knew ample facts to establish the offenses. The assignment of error relating to the character of evidence heard by the Grand Jury are overruled." Thus, the court appears to have left open in Tennessee the question of whether hearsay alone is sufficient on which to base an indictment.

VIII. Competency of Juror

In *Treece v. Hamilton*,[41] a tort action, the defendants alleged they were denied a fair trial because of the incompetency of one juror. On *voir dire* examination, the jurors were asked if any of their families had ever been involved in a serious automobile accident. After the trial, it was learned that the husband of one of the jurors was killed in an automobile accident, although she had not mentioned this fact. On examination at a motion for a new trial, the juror explained that

39. 377 S.W.2d 900 (Tenn. 1964).
40. 350 U.S. 359 (1956).
41. 378 S.W.2d 194 (Tenn. App. E.S. 1963).

she understood the question as meaning whether such a fact would cause one to be prejudiced, "but his death would in no way make me lean to one side or the other."

The court discussed the rules pertaining to objections to jurors *propter defectum* and *propter affectum*. The former objections go to the man himself and "are based on general disqualifications such as age, residence, relationship, feeble mindedness and the like." All such objections are waived unless made before the jurors are sworn, regardless of knowledge of the ground for objection. The latter objections go to bias or partiality, and when the constitutional right to trial before an impartial jury is invaded, "the challenge must be heeded even though not made until after verdict."

The court concluded that the juror in question was not prejudiced and that defendants were not denied a fair and impartial trial by reason of her presence on the jury.

IX. FEDERAL COURT CASES

United States v. Northern[42] presented an unusual example of circumstantial evidence. The defendant, convicted of wilfully attempting to evade a portion of income taxes due for 1956, maintained coin-operated machines in various places of business. The Government contended that he did not report in his income tax return collections from machines at a number of locations. The allegations were that in 1956, defendant made an agreement with a location owner, Estes, under which defendant's employee, Green, falsified collection tickets to show only one-half of the actual moneys collected from the machines. The defendant and Estes then divided the undisclosed half and neither reported the money in their tax returns. In 1956, Estes discontinued the use of defendant's machines and Green left defendant's employ. The evidence objected to was that in 1957, subsequent to the indictment years, defendant's machines were re-established in Estes' place of business; defendant personally made the collections from these machines, writing on the collection tickets only one half of the moneys collected and dividing the other half with Estes, all without any discussion of the subject by defendant with Estes.

The evidence was admitted solely to show defendant's knowledge of the prior practice in the indictment years. The court said the evidence tended to prove knowledge and authorization by defendant of the concealments which took place in the tax years in question, and, "We think this testimony was admissible."

42. 329 F.2d 794 (6th Cir. 1964).

In *Dixon v. Serodino*,[43] the action was to recover for the death of plaintiff's seaman husband under the Jones Act. The plaintiff widow testified "to receiving support from her husband, whom she described as a steady worker and good provider." In October, 1960, prior to the fatal accident in June, 1951, the plaintiff had filed a petition for divorce. Her complaint charged that her husband would not support her, that he stayed in an intoxicated condition, and that she had to work to support herself. The admission of the allegations of the divorce complaint was not error. The court said only that the allegations of the divorce complaint strongly contradicted plaintiff's testimony on the issue of support without further analyzing the evidence.

Powers v. J. B. Michael & Co.[44] was an action for injuries sustained in an automobile accident against a highway contractor who was widening highway 64 under a contract with the state. The collision occurred on a portion of the highway not included in the contract, and the question was whether defendant was under any duty to do anything about the danger to motorists because of the narrowing of the highway. Plaintiff introduced evidence of prior accidents at approaches to other bridges on highway 64 for the purpose of showing that defendant had notice of danger at the point in question. The appellate court held the evidence admissible. "[T]he applicable Tennessee decisions do not require exact proof of identity of conditions in order to render the evidence of prior accidents admissible on the question of notice."[45]

The plaintiff also introduced evidence that defendant subsequent to the accident placed on the premises some danger signs and smudge pots. The trial court cautioned the jury that the evidence was not admissible as proof of original negligence by defendant, but was "admissible only as it tended to prove that this part of the highway was under the control of the defendant." The appellate court said, "It is true that the possible prejudicial effect of such evidence remains in the case, but certainly it is a matter of discretion for the trial judge to admit this evidence for this limited purpose, and again we perceive no abuse of discretion."[46]

43. 331 F.2d 668 (6th Cir. 1964).
44. 329 F.2d 674 (6th Cir. 1964).
45. *Id.* at 677.
46. *Ibid.*