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PROCEDURE AND EVIDENCE—1957 TENNESSEE SURVEY

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PLEADING

Generally: Pleadings are construed liberally in favor of the pleader, and this is particularly true when the attack is made after judgment. Thus, where the bill in a divorce action is challenged after final decree on the ground that it fails to allege the jurisdictional requisite, abandonment for more than one year next preceding the filing of the bill, the court will construe it as so alleging an averment of voluntary, continuous abandonment for more than a year preceding the filing. Such a construction prevents the decree from being void on the face of the record. Hence it is not subject to attack for lack of jurisdiction in a later proceeding for the admiinstration of the estate of a woman who married the defendant after the decree became final.[1]

Use of Several Counts: It is entirely proper under prevailing practice to state the same cause of action in several counts, each setting forth a different theory or ground of recovery; but they must not be so framed as to make the declaration prolix and unduly repetitious. If they are so framed, the trial judge may order some of them stricken.[2]

Where a pleading consists of several counts, pleas or replications, the adverse party may interpose a single demurrer designating his ground or grounds of demurrer to each count, plea or replication, thus indicating that the demurrer is to be taken distributively. Or he may interpose a separate demurrer to each count, plea or replication.[3]

Same—Pleading Evidence of Ultimate Fact: In most jurisdictions with a typical code, allegations of evidence from which the ultimate fact may be deduced, whether or not the deduction is expressly averred by the pleader, are insufficent against a demurrer for failure to state a cause of action. The theory is that the pleading must show that plaintiff does have a cause of action and not merely that he may or may not have a cause depending upon the conclusion which may be drawn by the trier of fact. The ruling of the chancellor in *Delzell*

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1. Stephenson v. Stephenson, 298 S.W.2d 36 (Tenn. App. E.S. 1956).
2. Staples v. Hamilton Nat'l Bank, 298 S.W.2d 24 (Tenn. 1956).
3. *Ibid.*

v. Pope[4] was consistent with this theory. The bill set forth facts in detail concerning prior employment and concluded with an allegation of an implied contract of employment for one year. The chief justice of the Supreme Court, speaking for the court, agreed with appellant's counsel that the question was whether or not the bill alleged facts which, if true, would justify a fair and reasonable inference that there was such an implied contract and reversed the decision of the chancellor.

Same—Lack of Jurisdiction: A bill against agents of the state asserting title to property as such agents and seeking a writ of mandamus and an injunction to put complainant in possession of the property is a suit against the state and is subject to demurrer. The court had no jurisdiction to entertain such an action under Tennessee Code Annotated Section 20-1702. Such a demurrer is not waived by filing it contemporaneously with an answer.[5]

Answer—Plea in Abatement: To an action brought in the Circuit Court of Knox County, a plea of another action pending for the same cause in the United States District Court is insufficient. And the general rule that the pendency of another action for the same cause in the court of another jurisdiction is not a ground of abatement is not affected by Federal Rules of Civil Procedure, Rule 13(a), which requires a claim arising out of the transaction which is the subject of plaintiff's claim to be pleaded as a counterclaim. Also inapplicable is the rule that, as between a federal court and a state court having jurisdiction over the same matter, the court first acquiring jurisdiction retains it.[6]

Same—Failure to Deny Incorporation: Where an answer failed to deny under oath the allegation of corporate existence of plaintiff, defendant could not later claim fraud because of plaintiff's failure to disclose that plaintiff's charter had been revoked. Incidentally, the court recognized the difficulty that arises when a judgment is entered in favor of a non-existent plaintiff. To whom must the judgment debtor, or the court officers after execution, pay the amount awarded? A similar problem arises when the judgment is against a non-existent corporate defendant: Against whom will execution issue? Obviously in both cases the record should by proper proceedings be made to conform with the facts as to the identity of the party who has the benefit or the obligation created by the judgment. The remedy is not an action or other proceeding to set aside the judgment as void.[7]

Replication—Right to Interpose: Where plaintiff's motion to strike

4. 294 S.W.2d 690 (Tenn. 1956).
5. Fritts v. Leech, 296 S.W.2d 834 (Tenn. 1956).
6. Hubbs v. Nichols, 298 S.W.2d 801 (Tenn. 1956).
7. Cravens v. Tanner, 291 S.W.2d 582 (Tenn. 1956).

defendant's plea is denied, he must be given opportunity to reply. It is error to dismiss the action as a result or as a part of the order striking the plea.[8]

Same—Departure: At common law and by the majority rule under the codes a departure in a later pleading from the ground or theory of the pleader in his earlier pleading is a defect of substance and subject to demurrer; but if the opponent takes issue upon it, the defect is cured by the verdict. And in some jurisdictions, as in Tennessee, the defect is regarded as one of form. At common law, under the formulary system, a departure from the form of action in the declaration to another form in the replication was fatal and incurable. An analogous situation is found in *Staples v. Hamilton Nat'l Bank.*[9] Plaintiff alleged a breach of defendant's contract to pay money due upon proper presentation by her of a check drawn against her account in defendant bank. Defendant answered that it had paid out the entire amount of her deposit upon checks previously drawn by her. Plaintiff's reply alleged that she was an adjudged lunatic at the time when the deposit was made and the previous checks drawn and paid. On demurrer the court held that the replication was in effect an equitable claim for recission of the entire transaction, and beyond the jurisdiction of the circuit court. Such a departure is a defect of substance, not of form.

PARTIES

Parties—Proper—Generally: A person who makes an unconditional bid at a sale of realty ordered by the chancellor which is accepted becomes a party to the proceeding. If he secretly intends to buy only after inspection and thereafter refuses to perform after inspection, he is guilty of contempt of court.[10]

Same—In Proceeding for Administration of Estate: Decedent was survived by her infant child. The mother of decedent is not the proper party as petitioner for the appointment or removal of the administrator of decedent's estate. The father, who had been divorced from decedent, the child's mother, is a proper person to be appointed.[11]

Same—Intervention: In a suit to compel a motor freight carrier to receive goods for transportation to plaintiff and from plaintiff for transportation to consignee, a labor union is not entitled to intervene to challenge the jurisdiction of the court.[12]

Same—Necessary or Indispensable: A materialman whose contract

8. Wyatt v. Lassiter, 299 S.W.2d 229 (Tenn. App. W.S. 1956).
9. 298 S.W.2d 24 (Tenn. 1956).
10. Matthews v. Eslinger, 292 S.W.2d 543 (Tenn. App. 1955) (en banc).
11. Lakins v. Isley, 292 S.W.2d 389 (Tenn. 1956).
12. National Carloading Corp. v. Arkansas Motor Freight Lines, 298 S.W.2d 720 (Tenn. 1957).

is with an independent contractor for materials used in the construction of a house upon an owner's realty and who brings a bill against the contractor and owner by attaching the realty, but fails for a year thereafter to have process personally served upon the contractor, is not entitled to a judgment pro confesso against the contractor and the owner, and the chancellor may properly grant the owner's motion to dismiss the attachment and leave pending the bill against the contractor. In such a case the contractor is an indispensable party. In the opinion it is said that the contractor is a necessary party but the reason given makes him indispensable—namely, that the action cannot be maintained without establishing both the debt and the lien.[13]

Same—Misjoinder: Although several owners of separate farms, each damaged by defendant's wrongful interference with the flow of a stream, are properly joined in seeking to secure an injunction against the continuance of the interference, they are misjoined in seeking the damages suffered by each of them by the interference. The rule which allows a single owner in such a siutation to secure incidental damages together with the injunction has no application. The chancellor should have sustained defendant's demurrer for misjoinder of parties to the separate claims for damages.[14] It seems too clear for comment that the rule in this case should be changed by statute; it requires needless litigation. Of course, if counsel knows the rule and brings a separate suit for each owner, avoidance of separate trials might be accomplished by consolidation for trial.

Same—As Representative in a Derivative Action—Class Action: A number of stockholders in an incorporated tobacco growers' association have no standing (a) to maintain an action against the corporation and its secretary for waste and mismanagement without first having invoked action by the board of directors, unless it is shown that such invocation would have been futile, or (b) to maintain an action to recover for themselves and others similarly situated their respective shares of a fund which they allege that the corporation was obliged to distribute, but which the majority of the stockholders did not desire to have distributed. The chancellor should decline to entertain such an action as a class action.[15]

REMEDIES

Remedies—Certiorari to Circuit Court—From Judgment of Justice of Peace: Certiorari from a judgment of a justice of the peace to the circuit court in forma pauperis can be granted only after giving to the

13. Jordan v. Deitz, 296 S.W.2d 866 (Tenn. 1956).
14. Griffith v. Hurt 291 S.W.2d 271 (Tenn. 1956).
15. Range v. Tennessee Burley Tobacco Growers Ass'n, 298 S.W.2d 545 (Tenn. App. E.S. 1955).

adverse party notice and opportunity to be heard. A writ granted *ex parte* to the judgment debtor by the justice is properly dismissed by the circuit court.[16]

Same—Same—From Beer Board Decision: After a Beer Board had held a hearing, had heard witnesses and had postponed further consideration, notifying defendant's attorney that the matter would not come up at the next subsequently held meeting, it nevertheless considered the matter at that meeting, in the absence of defendant's attorney and against the advice of the county solicitor, and revoked defendant's license. On certiorari to the circuit court, that court should have ruled that the hearing had not been completed and should have remanded the case for further hearing and final action; it should not have ordered the Board to reinstate the license.[17]

Same—Certiorari to Chancery Court—From Order of Commissioner of Safety: Under the Tennessee Financial Responsibility Act,[18] an order of the Commissioner of Safety revoking a driver's license and automobile registration is subject to review only on certiorari to the Chancery Court of Davidson County. Section 59-713(f) of the Tennessee Code has application only where the revocation is of the driver's license alone.[19]

Same—Mandamus: A writ of mandamus will not issue against officers or agents of the State of Tennessee to require them to put complainant in possession of real estate claimed by him but in possession of the officers or agents in their representative capacity. The writ cannot be used as a substitute for an action of ejectment, for no such proceeding can be entertained against the State.[20]

Same—Quo Warranto: Quo warranto was held to be the proper remedy to challenge the eligibilty of members of the County Board of Education of Lake County, who were members of the county court and one of whom was also clerk and master of the chancery court of the county. Section 49-209 of the Tennessee Code specifically makes such persons ineligible, but chapter 334 of the Private Acts of 1929 purports to make them eligible. The constitutionality of this private act was properly challenged in this proceeding and it was held to be unconstitutional.[21]

Same—Quo Warranto, In Nature of: The proceeding by private individuals in the nature of quo warranto authorized by sections 6-301 to 6-319, of the Tennessee Code is an equitable proceeding. Con-

16. Lewis v. Simmons, 289 S.W.2d 702 (Tenn. 1956).
17. Chanaberry v. Gordy, 292 S.W.2d 18 (Tenn. 1956).
18. TENN. CODE ANN. § 59-1202 (1956).
19. Roney v. Luttrell, 292 S.W.2d 411 (Tenn. 1956).
20. Fritts v. Leech, 296 S.W.2d 834 (Tenn. 1956).
21. Algee v. State *ex rel.* Makin, 290 S.W.2d 869 (Tenn. 1956).

sequently, the circuit judge is authorized in the exercise of his discretion to allow an appeal to an order overruling a demurrer.[22]

Same—Declaratory Judgment—Discretion of Trial Court: It is not an abuse of discretion for the trial judge to refuse to render a declaratory judgment as to whether a liability insurance company is obliged to defend a pending personal injury action brought against its insured even though the insured failed to give the insuror the notice of the accident and injury as required by the policy. The prayer for relief asked also that trial of the pending action be delayed until the declaratory judgment was rendered. The purpose of the Declaratory Judgment Law will not be furthered if a party is delayed in the prosecution of an accrued cause of action until the termination of proceedings for a declaratory judgment.[23] In like manner a chancellor may properly exercise his discretion to dismiss a bill filed by a liability insurance company for a declaratory judgment that its liability is limited to the amount stipulated in its policy, where the issue is whether the insuror acted in good faith in its negotiations for settlement. That issue raises questions aside from the construction of the policy and would require trial of a controversy which in essence is a tort action.[24]

Same—Nonjudicial—Judges of Election: The judges of election have sole authority to determine all objections to the reception of the vote of any individual offering it. Chancery has no power to determine this question by issuing an injunction against the reception of the proffered vote or by ordering the tendered ballots to be impounded prior to their reception.[25]

PRESUMPTIONS

Generally: The current opinions of our courts do little to dispel the the confusion which afflicts the subject of presumptions generally. Courts and legislatures continue to use the term "conclusive presumptions"; but when the latter do so, the court is required to determine whether they mean what they say. For example, section 50-1013, of the Tennessee Code (Workmen's Compensation Act), declares that minor children are conclusively presumed to be dependent upon their father. This was sensibly interpreted as having no application to a situation in which the mother, an employee, was killed in the course of employment and the children actually dependent upon her at the time were claimants, even though after her death the hus-

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22. State *ex rel.* Southerland v. Town of Greenville, 297 S.W.2d 68 (Tenn. 1956).
23. Southern Fire & Cas. Co. v. Cooper, 292 S.W.2d 177 (Tenn. 1956).
24. Tennessee Farmers Mut. Ins. Co. v. Hammond, 290 S.W.2d 860 (Tenn. 1956).
25. Brown v. Thurman, 300 S.W.2d 883 (Tenn. 1957).

band, their father, who had deserted the family, returned.[26]

The great Thayer more than half a century ago pointed out that the so-called presumption of a lost grant based on long-continued user or possession began as a mere justifiable inference, developed into a so-called strong or weighty inference, then into a presumption or required assumption in the absence of contrary evidence, and finally into a so-called irrebuttable presumption or rule of substantive law.[27] In dealing with the character of estate acquired by adverse possession, the court of appeals resorted to this ancient presumption, asserting that it did not include a presumption as to the intent of the fictitious grantor, and repeated the common but unhelpful generalization that one presumption may not be the basis of another.[28] This, like the analogous dogma that one inference cannot be based upon another, is usually only a statement of the desired result rather than the reason for it, for it is perfectly clear that in dealing with circumstantial evidence one inferred fact may be used as a basis for inferring another fact. And there seems to be no reason why one presumed fact cannot be made the basis for inferring or presuming the existence of another fact.

Several opinions are consistent with the Thayer doctrine that the procedural effect of a presumption is to put upon the opponent the burden of seeing to it that there is evidence in the case, called the burden of producing evidence, which would justify a finding of the nonexistence of the presumed fact. Thus, in *Hall v. State*[29] the trial judge told the jury that the husband as head of the family was presumed to be "in possession of anything found in the home and premises but this is a presumption of law merely and is effective as proof only so long as there is an entire lack of evidence on that point," and went on to charge that if the jury found beyond reasonable doubt that the wife exercised any dominion or control over the liquors, she would also be guilty. This charge was approved. The common law presumption that the owner of a chattel is in possession of it,[30] and the statutory presumption that an automobile registered in a person's name is being operated and controlled by him[31] were each held to be applicable where the owner or registrant and another were in the automobile at the time it crashed. The evidence in each case did not justify an inference to the contrary and was not inconsistent with the presumed fact. But it must be noted that in the former case the court talked of a presumption or inference.

26. Johnson Coffee Co. v. McDonald, 143 Tenn. 505, 226 S.W. 215 (1921), cited in Royal Indemnity Co. v. Jackson, 300 S.W.2d 893, 895 (Tenn. 1957).
27. THAYER, PRELIMINARY TREATISE ON EVIDENCE 313 (1898).
28. Preston v. Smith, 293 S.W.2d 51, 60 (Tenn. App. M.S. 1955).
29. 292 S.W.2d 716, 719 (Tenn. 1956).
30. Moore v. Watkins, 293 S.W.2d 185 (Tenn. App. E.S. 1956).
31. Ross v. Griggs, 296 S.W.2d 641 (Tenn. App. W.S. 1955).

On the other hand, some opinions treat a presumption as affecting the burden of persuasion. For example, in *Briscoe v. Allison*[32] the court approved a charge to the jury that "when a will is traced into the testator's possession and at his death cannot be found or is found mutilated, cancelled or defaced the presumption in the absence of circumstances tending to show a contrary conclusion, is that the testator destroyed it with the intention to revoke it," and that he who seeks to overcome this presumption must do so "by adequate proof." And the court at times talks in terms of presumption as prima facie proof when consideration of the effect of the presumption is unnecessary, as where the applicable statute expressly provides that the burden is on the opponent to prove the nonexistence of the presumed fact. Thus, where a statute, section 47-159 of the Tennessee Code, put on the holder of a note the burden "to prove that he or some person under whom he claims acquired the title as holder in due course" when "it is shown that the title of any person who has negotiated it is defective," the court talked of the presumption created by proof of such a defective title and held it applicable whether the maker of the note was seeking the affirmative relief of cancellation or was merely defending an action upon the note.[33] A fortiori whether the language used is presumption or prima facie evidence, it has no effect where the record conclusively shows the nonexistence of the presumed fact.[34]

Same—Presumption of Innocence: In a proceeding to punish defendant for criminal contempt of an injunction he is presumed to be innocent until proved guilty beyond reasonable doubt, as he is in all criminal prosecutions; but after conviction he is, on appeal, presumed to be guilty, and he has the burden of overcoming this presumption.[35]

Same—Conflicting Presumptions—Validity of Ceremonial Marriage: The presumption of the validity of a ceremonial marriage prevails over both the presumption of continuance of life of a spouse of a former marriage and over the presumption of the continuance of status. Evidence of the husband, in an action by the wife for divorce, that he had been formerly married and had never secured a divorce from his former wife and that she had always lived in a specified county and that there was no decree of dissolution of his marriage to her in that county did not require the chancellor to find that the earlier marriage was subsisting at the time of the later ceremonial marriage.[36] The record indicates that the chancellor did not credit the testimony of the husband concerning the residence of the former wife. This

32. 290 S.W.2d 864, 867 (Tenn. 1956).
33. Braswell v. Tindall, 294 S.W.2d 685 (Tenn. 1956).
34. Welch v. A.B.C. Coal Co., 293 S.W.2d 44 (Tenn. App. M.S. 1956).
35. Davidson County v. Randall, 300 S.W.2d 618 (Tenn. 1957).
36. Rutledge v. Rutledge, 293 S.W.2d 21 (Tenn. App. W.S. 1953).

decision is in accord with the weight of authority. Some courts hold that in such a situation there is no applicable presumption; a few others, that the presumption of continuance of the former marriage prevails.[37]

BURDEN OF PROOF

Substantive or Procedural: In determining whether the law of the locus delicti or the law of the forum is to govern in the application of the generalization that the former governs substance and the latter procedure, the allocation of the burden of proof, in the sense of burden of persuading the trier of fact, is substantive. Hence in an action brought in Tennessee for wrongful death caused by an accident in Illinois, the law of Illinois as to that burden on the issue of contributory negligence is to be applied.[38]

Same—Allocation Under Sections 147, 155, 159 of the Tennessee Code: The payee of a negotiable note which includes usurious interest acquires only a defective title, and a transferee who acquires the note before maturity has the burden of proving that he acquired title as a holder in due course. This rule is applicable to bearer notes. In *Braswell v. Tindall*[39] the chancellor erroneously held that the inclusion of usurious interest did not make the title defective. The court of appeals held otherwise and on examining the evidence found that the defendant had taken the notes in question in bad faith and with full knowledge, and gave judgment to the plaintiff for the amount of the usurious interest already paid and enjoined the collection of a note not yet paid. The Supreme Court in an opinion upholding the judgment of the court of appeals denied certiorari.

EVIDENCE

Relevance—Prior Custom: Evidence of prior practice in the operation of coupling railroad cars is relevant and admissible as tending to show its feasibility and safety. In an action for injuries caused by a plug blown out by steam pressure in coupling under the current practice it is entirely proper to admit testimony of the earlier practice of cutting off steam while couplings were being made.[40]

Same—Subsequent Repairs: In an action in which the issue was negligence in stretching a rope across a walk or apron of a swimming pool without signs or other means of making its presence clearly observable, the trial judge admitted photographs of the locus made after the guard towers and posts to which the rope was attached had

37. See cases collected in Annots., 34 A.L.R. 464, 483-490 (1925); 77 A.L.R. 729, 738-40 (1932); 14 A.L.R.2d 735-45 (1951).
38. Gordon's Transports v. Bailey, 294 S.W.2d 313 (Tenn. App. W.S. 1956).
39. 294 S.W.2d 685 (Tenn. 1956).
40. Thurmer v. Southern Ry., 293 S.W.2d 600 (Tenn. App. E.S. 1956).

been repainted in alternating stripes of black and white. In other respects the photographs were accurate pictures of conditions at the time of the accident in question. The court of appeals held that the trial judge had not abused his discretion, rejecting as mere speculation defendant's argument that the jury inferred from the pictures that defendant in repainting had been remedying a defective condition.[41]

Same—Other Crimes or Wrongs: Uniform Rules of Evidence, Rule 55 provides in substance that evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove his disposition to commit crime or civil wrong on another specified occasion but is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity. It is believed that this represents the generally accepted law although the usual statement is that such evidence is inadmissible except when offered to prove one or more of a list of specified matters, most of which are mentioned in the concluding phrase of Rule 55. Illustrations are found in recent opinions of the Tennessee Supreme Court. When a defendant was charged with a violation of the liquor law and it was the function of the jury to fix the punishment, evidence that he had committed other similar offenses, though inadmissible as tending to prove his guilt, was properly admitted after he had been found guilty to enable the jury to determine what his punishment should be.[42] Again, in a prosecution for burglary of one supermarket, evidence that the accused was engaged in an attempt to burglarize another supermarket on the same night, tending to show his participation in a scheme or plan or joint venture to which an accomplice testified, was admissible.[43] A striking example is found in *Gibbs v. State.*[44] An otherwise admissible confession of the deliberate killing of a woman was not rendered inadmissible by inclusion therein of a confession that accused first compelled her to kill her baby and then shot her to prevent her disclosure of his murder of her husband, and soon thereafter killed her daughter to prevent the daughter's disclosure of the murder of her mother. The same principle was applied in a proceeding to revoke the suspension of sentence of a parolee for violation of parole. The notice to him listed specific instances of violation and included a general statement of violative conduct. In such a proceeding all that is required is that the parolee "shall have a chance to say his say before the word of his pursuers is received to

41. Management Services v. Hellman, 289 S.W.2d 711 (Tenn. App. E.S. 1955).
42. McBride v. State, 290 S.W.2d 648 (Tenn. 1956). See MORGAN, BASIC PROBLEMS OF EVIDENCE 188 (1954).
43. Jones v. State, 292 S.W.2d 767 (Tenn. 1956).
44. 300 S.W.2d 890 (Tenn. 1957).

his undoing."[45] All that need be made known to him is what in general he has to answer. Hence, the evidence is not limited by the enumeration of specific instances. The proceeding is not a criminal or civil action.[46]

Opinion—Lay Opinion: Among the subjects concerning which a lay witness may give his opinion after testifying to the facts upon which it is based are his own physical ability to work, including even the extent of his disability,[47] and the value of his own services.[48] In like manner he may testify to the identity and condition of another. Thus, he may testify that an accused is the same person whom he saw and heard talking on a previous occasion, that on the former occasion he smelled on that person's breath the odor of intoxicants and observed his manner of speech and conduct and that the person was drunk.[49]

Hearsay—Admissions—Function of Judge and Jury: Kunk v. Howell[50] raises an interesting question concerning the function of the judge when evidence of a declaration is offered as an admission and the identity of the declarant is in dispute—a question rarely, if ever, thoroughly debated.[51] It is clear that a statement, by one other than a party, offered to prove its truth is pure hearsay and that a statement by a party offered against him is admissible as an exception to the hearsay rule. Theoretically, by the orthodox rule, which Tennessee courts usually apply, the identity of the declarant should be determined by the judge. But the court of appeals ruled that it should be determined by the jury where the evidence, either circumstantial or direct, was in dispute and upheld the ruling admitting the declaration in evidence. It seems to be assumed that the judge submitted the question to the jury with pertinent instructions.

Same—Admission by Nonverbal Conduct: In considering the sufficiency of evidence to support the trial judge's refusal to direct a verdict, the court of appeals ruled that defendant's unexplained failure to call its employee, a guard, who witnessed the accident, justified the inference that his evidence would not have contradicted the testimony of other eye witnesses. This is no doubt in accord with the accepted rule. Qualification and conflict arise when such evidence is offered as affirmative proof of the fact not disclosed or purposely suppressed.[52]

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45. Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956).
46. *Ibid.*
47. Hamlin & Allman Iron Works v. Jones, 292 S.W.2d 27 (Tenn. 1956).
48. Murray v. Grissim, 290 S.W.2d 888 (Tenn. App. M.S. 1956).
49. Hopson v. State, 299 S.W.2d 11 (Tenn. 1957).
50. 289 S.W.2d 874 (Tenn. App. E.S. 1956).
51. See MORGAN, BASIC PROBLEMS OF EVIDENCE 244 (1954).
52. Management Services v. Hellman, 289 S.W.2d 711 (Tenn. App. E.S. 1955).

Same—Vicarious Admission: A statement made by defendant's foreman while visiting an injured plaintiff for the purpose of getting a statement from him as to how the accident occurred was held to have been properly excluded.[53] The court of appeals said: "To be admissible against the principal the declarations or admissions of the agent must relate to the act he is performing for the principal at the time the declaration or admission is made."[54] It is suggested that the court might well have explained the inapplicability of this generalization. Surely the foreman was a speaking agent. He was not to act as a mere stenographer; and in order to induce plaintiff to talk he might well have had to give his own version of the circumstances. The rule stated is derived from cases where the agent is performing some authorized act other than narration and makes an explanatory assertion. Of course, it may be that the statement was clearly without the express or implied or incidental authority of the foreman, but this is not necessarily so. In *Kendall Oil Co. v. Payne,*[55] it was perfectly clear that the unidentified employee had no authority to speak as to the custom of defendant with reference to washing the service station floors.

Same—Confession—Improper Inducement: A confession is not so improperly induced as to be inadmissible merely because an officer told the accused while she was being questioned that it would be better for her to tell the truth, where it appears that the physical surroundings were "not conducive to the begetting of fear."[56] The court points out that an inducement to tell the truth cannot produce a false confession. It concedes that a number of courts have a rule of thumb to the contrary. There is no suggestion that the circumstances may not indicate that these innocuous words may be used as an improper inducement to tell what the questioner desires to have the accused admit to be the truth. There may be physical or other circumstances indicating coercion or other vitiating inducement.

Same—Same—Functions of Judge and Jury: When there is a dispute in the evidence as to whether the confession was improperly induced, the question of admissibility is to be decided by the judge; with that the jury has nothing to do. If the judge admits the confession, the jury is to determine its weight, and evidence of all the circumstance in which it was secured is admissible for consideration by the jury. Hence, in *Nelson v. State*[57] the judge erred in ruling that none of the evidence submitted to the court on the preliminary issue as to hope or fear or promise or threat was admissible. After this ruling he

53. Thurmer v. Southern Ry., 293 S.W.2d 600 (Tenn. App. E.S. 1956).
54. *Id.* at 604.
55. 293 S.W.2d 40 (Tenn. App. E.S. 1955).
56. Barksdale v. State, 292 S.W.2d 193, 195 (Tenn. 1956).
57. 292 S.W.2d 727 (Tenn. 1956).

stated to counsel: "But as I say you are entitled to go on and ask questions about the manner in which it is obtained or how it was obtained, but whenever that question requires an answer that goes to the point of force or threats or promises or hope of reward or immunity or anything like that, it is a matter not competent for the jury to hear and I will sustain the objection."[58] Because counsel did not offer any evidence "along this line" and did not preserve the evidence that he intended to offer before the jury, the court held that it was impossible to determine that the error was prejudicial. With due respect, it is suggested that it would have been futile, if not misconduct, for counsel to have offered any of the forbidden testimony and that the ruling of the judge seems to have assumed that he believed counsel had indicated an intention to present such evidence.

Same—Spontaneous Statement: In two opinions the Court of Appeals, for the Eastern and Western Sections respectively, dealt with the admissibility of statements made contemporaneously with the event, which they described or explained, or made spontaneously, using the confusing phrase *res gestae.* The eastern section was dealing with the typical personal injury case where the injured person states the cause of his injury while still at the scene and while still suffering so that there is no reason to suspect fabrication. There were three statements, one made spontaneously and the others in answer to inquiries. As to the latter, the court said in effect that it was for the trial judge to determine whether there was likelihood of fabrication; as to the former it had no doubt.[59] The result is in accord with myriads of decisions in other jurisdictions. In the case in the western section the ruling is in strict accord with the Thayer doctrine which regards substantial contemporaneity as the test. Of course, when a person describes what he is then observing, there is an element of spontaneity; there is usually also an opportunity for his auditor to check the accuracy of the statement. The Thayer theory applies wherever the event or condition is relevant, whether or not it is the matter or part of the matter in issue or only circumstantial evidence of the matter. In the instant case[60] a physician was examining an X-ray film of the back of a patient made about nine months after an operation by defendant. As reported by the witness, the physician said: "He certainly did take a big chunk out of your spine." The assignment of error of the trial judge's ruling excluding evidence of this statement was that the doctor's "spontaneous exclamation" was "a part of the *res gestae* of his examination." The court, citing several cases involving exciting events and statements made within a few

58. *Id.* at 730.
59. Management Services v. Hellman, 289 S.W.2d 711 (Tenn. App. E.S. 1955).
60. Hall v. De Saussure, 297 S.W.2d 81 (Tenn. App. W.S. 1956).

minutes thereafter, held that the evidence should have been admitted as part of the *res gestae.* Now, it must be clear that the statement was no part of his examination of the patient; but it was a statement of the appearance of the X-ray picture expressed in terms, not of what it actually contained, but what had been done to the subject of the picture. If offered for the truth of the statement—that is, to show what the defendant had done—it is the clearest kind of hearsay and not within any imaginable exception. If offered to show that the X-ray film pictured the spine with "a big chunk" missing and if the necessary foundation was laid to make the film admissible, the ruling is an excellent example of application of the Thayer theory; but the cited cases are not in point, and there is nothing in the opinion to indicate the issue upon which it was offered. Consequently it is impossible to evaluate the decision as a precedent.

Same—Fresh Complaint in Sex Offenses: In a prosecution for sodomy committed upon a seven-year-old boy with his consent, the trial court admitted evidence of a detailed statement of the boy made to his father, upon inquiry by the father as to the source of the money with which the boy had bought cakes and candy. The Supreme Court affirmed in an unsatisfactory opinion which says only that it is well settled that in such a case evidence of a detailed statement made within a reasonable time after the event is admissible.[61] It gives no reason. It cites an Arizona case in which the statement was clearly spontaneous.[62] *Curtis v. State,*[63] the latest Tennessee case cited, contains a dictum indicating that such a statement is admissible for its truth in corroboration of the prosecuting witness, while two earlier Tennessee cases appear to hold such evidence receivable only as rehabilitating and not for their truth. The opinion reflects the uncertainty exhibited in judicial decisions generally.

Same—Declaration of Intent: A like use of the unintelligible term, *res gestae,* is found in *Nichols v. State,*[64] where the court in a prosecution for murder held admissible evidence of a declaration of intent by the decedent to do a relevant act, namely, to sell his property for cash. It was said that the declaration was a part of the *res gestate* of a trip by decedent and of his transaction with reference to his property. There were several declarations, some of which did not accompany any relevant event. There is now a well recognized exception to the hearsay rule which admits declarations of a presently existing state of mind, including intent, made without circumstances of suspicion, and the use of this Latin phrase, which has been condemned by com-

61. Johnson v. State, 296 S.W.2d 832 (Tenn. 1956).
62. Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (1908).
63. 167 Tenn. 430, 70 S.W.2d 364 (1934).
64. 289 S.W.2d 849 (Tenn. 1956).

mentators and the most distinguished judges, serves no purpose other than to obscure the discussion. The Court cited *Mutual Life Insurance Co. v. Hillmon*[65] and *Ford v. State*,[66] both of which admit evidence of declarations of intent as tending to prove later conduct in execution of the intent although the execution involved inferences as to conduct of another. These are most liberal decisions, and their effect ought not to be clouded by foggy phrases, which may be misleading as to the value of the cases as precedents.

Same—Parol Evidence Rule: In remanding a case for retrial the court of appeals, speaking with reference to an issue which would probably be correctly raised in the trial court, said that testimony as to whether a covenant not to sue a named tortfeasor was by contemporaneous oral agreement in fact a release from liability could not be received as tending to prove that it was a release as between the plaintiff and the covenantee tortfeasor, but that it was receivable against the plaintiff in favor of other persons whom plaintiff was suing as joint tortfeasors of the covenantee.[67] It quoted "The rule that parol contemporaneous evidence is not admissible to alter or vary the terms of a valid written instrument has reference only to the parties to the instrument."[68]

WITNESSES

Required Witnesses—Will Contest: In a will contest all attesting witnesses must be called or be shown to the judge to be unavailable. If an available attester is not called, no issue as to the testator's competency can be properly tried.[69]

Examination—Time and Form of Objections—To Depositions: Exceptions to a deposition must assign reasons to support them. If such reasons are omitted, the trial court is warranted in overruling the exceptions.[70]

Same—Same—To Testimony—General and Specific: When an objection, amounting only to a general objection, is interposed and is overruled, the ruling will not be examined on appeal; if the objector specifies a particular ground and that ground does not exist, he may not, on appeal, rely upon any other ground. Thus, where his objection to a hypothetical question was that "no human being on earth could

65. 145 U.S. 285 (1892).
66. 184 Tenn. 443, 201 S.W.2d 539 (1945).
67. Wyatt v. Lassiter, 299 S.W.2d 229 (Tenn. App. W.S. 1956). For a brief statement and reference to leading treatises, see MORGAN, BASIC PROBLEMS OF EVIDENCE 354 (1954).
68. Wyatt v. Lassiter, *supra* note 64 at 237; Nashville Interurban Ry. v. Gregory, 137 Tenn. 422, 437, 193 S.W. 1053, 1056 (1917).
69. Swindoll v. Jones, 292 S.W.2d 531 (Tenn. App. E.S. 1954).
70. Agar Packing and Provision Co. v. Weldon, 300 S.W.2d 51 (Tenn. App. W.S. 1956).

answer that question with all those answers" and "it's going into the realm of what a jury should decide in this case," he could not on appeal urge that the question did not contain a correct statement of all the facts.[71]

Same—Objection Too Broad: Where five cases growing out of the same accident were consolidated for trial, three of which were by or against the administrator of the objecting party, his objection that evidence of statements of his decedent was inadmissible under the so-called Dead Man's Statute was properly overruled since the statute had no application to two of the actions and he did not limit his objection to the three cases to which it was applicable.[72]

Competency—Dead Man Statute: In an action against the administrator of decedent for wrongful injury, plaintiff is competent to testify that she was riding in an automobile which was being driven by the administrator's intestate at a speed of ninety miles per hour and that it overturned, killing the driver and injuring plaintiff. These are facts open to the observation of all persons, and the word "transaction" in the Dead Man Statute,[73] while applicable to torts as well as contracts, is not to be construed as applicable to such "independent" facts. It does, however, cover the fact of the relationship between plaintiff and intestate as, for example, whether plaintiff was intestate's guest or a passenger for hire, or an unwilling passenger. The statute should be strictly construed and should not be given wide application.[74]

Same—Juror Regarding Verdict: The trial judge properly refuses to hear a juror on being polled as to his reasons for his agreeing to the verdict and later properly refuses to hear his testimony or consider his affidavits as to those reasons.[75]

Privilege—Against Self-Incrimination: In a disbarment proceeding the defending attorney is entitled to the benefit of his privilege against self-incrimination, but an order which directs him either to produce specified letters or other matter or to claim the privilege as a reason for not doing so does not violate the privilege.[76]

Impeachment—Effect: The fact that a witness left the property of the accused owing him several hundred dollars did not affect his competency to testify to an admission of guilt by the accused; it affected only his credibility.[77] The same is true where the impeaching

71. McKamey v. Andrews, 289 S.W.2d 704 (Tenn. App. E.S. 1955).
72. *Ibid.*
73. TENN. CODE ANN. § 24-105 (1956).
74. Christofiel v. Johnson, 290 S.W.2d 215 (Tenn. App. E.S. 1956).
75. Dixon Stave & Heading Co. v. Archer, 291 S.W.2d 603 (Tenn. App. E.S. 1956).
76. Memphis & Shelby County Bar Ass'n v. Vick, 290 S.W.2d 871 (Tenn. App. W.S. 1955).
77. Nichols v. State, 289 S.W.2d 849 (Tenn. 1956).

fact is a statement contrary to his testimony, made some two years after the event and before the trial or hearing.[78]

Rehabilitation—Prior Consistent Statements: Where the defendant has attempted on cross-examination to show that the testimony of the witness was the result of persuasion by his mother and the prosecutor, evidence that the witness had on the day of the event in question told substantially the same story as that given in his testimony is admissible. It tends to show that the testimony was not induced by the alleged persuasion.[79] This is a well recognized qualification of the rule that a prior consistent statement is not in ordinary circumstances admissible to rehabilitate a witness who has been impeached by evidence of prior inconsistent statements.

JUDICIAL NOTICE

Laws of Tennessee and of Sister States: A court of a state is bound to take judicial notice of the common law and public statutes of the state, but the orthodox rule treats the decisional and statutory law of a sister state as a fact to be proved by evidence as other facts are proved. In Tennessee the Uniform Judicial Notice of Foreign Law Act has been adopted,[80] requiring its courts to take judicial notice of the laws of sister states, but not of foreign countries, where the adverse party has been given notice of his opponent's intention to rely thereon in the pleadings or otherwise. A written notice of the statute and judicial decisions of the sister state to be relied on is sufficient.[81]

Laws of Nature and Arithmetical Computations: The court judicially knows that an automobile traveling at the rate of thirty miles an hour will travel four and four-tenths feet in one-tenth of a second and that in a collision between a vehicle weighing 52,000 pounds and one weighing 4,000 pounds, the former will keep in motion and push the latter some distance. When an expert so testifies, the court may take judicial notice of the truth of his testimony. The foregoing is in effect the ruling of the court of appeals in *Gordon's Transports v. Bailey.*[82]

Propositions of Generalized Knowledge and the Existence of Specific Facts: Propositions and facts that are so commonly known or notorious as not to be the subject of intelligent dispute in the community are judicially noticed. Thus the court judicially knows that the City of Memphis is located in Shelby County. As a result it follows that an

78. Volz v. Southerland, 292 S.W.2d 385 (Tenn. 1956).
79. Farmer v. State, 296 S.W.2d 879 (Tenn. 1956).
80. TENN. CODE ANN. § 24-607 (1956).
81. Gordon's Transports v. Bailey, 294 S.W.2d 313 (Tenn. App. W.S. 1956).
82. *Ibid.*

allegation that an offense was committed in the City of Memphis is the equivalent of an allegation that it occurred in Shelby County, and evidence from which it may be inferred that it occurred in that county is sufficient.[83] Furthermore, a variance as to the place within the county would not be material. In *Kingsport Utilities v. Brown*[84] the court ruled that it had been common knowledge "for the past 15 years at least, that massive machinery and cranes with tall booms are more commonly used in construction work than other methods in excavating, road building, bridge building, construction of office buildings, hospitals, etc." Consequently public utilities using overhead wires carrying heavy current must take this fact into consideration in providing insulation for such wires. At times the proposition judicially noticed is inaccurately phrased. Thus, it is doubtless true that a court judicially knows that money received by a woman for the support of children of her first and second marriages while she is living with her third husband is likely to be used together with her current earnings for the general support of the family, but the court was certainly speaking loosely when it said that it judicially knew that the woman in question would so use it.[85]

Facts Capable of Immediate Demonstration: The court of appeals takes judicial notice of its own former opinion and decision at a prior stage of the same litigation.[86] It seems self-evident that a court's own records, particularly those pertaining to all stages of the pending case and cases arising out of the same transaction or occurrence, should be subject to judicial notice. Wigmore thinks that even this imposes too great a burden on the judges of a modern court, but it is suggested that the matter is not open to reasonable dispute and that the sources are not too difficult to produce with the aid of counsel. Of course, the judge can insist that counsel make the necessary search; but when the materials are produced or found by the judge, the process of using them should be that applicable to judicial notice and not that applicable to the introduction of evidence.[87]

JURISDICTION AND VENUE

Jurisdiction Over Person—Effect of Appearance: A garnishee who appears and discloses that he is indebted to the defendant in a named sum and makes no objection concerning the service of the garnishee summons waives all defects therein, if any, and subjects himself to

83. Hopson v. State, 299 S.W.2d 11, 14 (Tenn. 1957).
84. 299 S.W.2d 656, 659 (Tenn. 1955).
85. See Pruett v. Pruett, 291 S.W.2d 278, 285 (Tenn. App. W.S. 1956).
86. Memphis & Shelby County Bar Ass'n v. Vick, 290 S.W.2d 871, 875 (Tenn. App. W.S. 1955).
87. See MORGAN, BASIC PROBLEMS OF EVIDENCE 10 (1954).

the jurisdiction of the court.[88] This is, of course, in complete accord with the multitude of decisions dealing with the effect of responding to the merits as a general appearance.

Illustrations are found in *Wyatt v. Lassiter*[89] where a cross-defendant appeared and participated in the trial without objection, and *Clements v. Morgan*[90] where petitioner for adoption was given no notice of intervention but was given full opportunity to be heard while present at the hearing.

Jurisdiction Over Subject Matter—Generally: Where an insurance policy provides for the appointment of an umpire to be selected by a judge of a court of record at the request of either insured or insuror, the judge who makes the appointment is not acting as a court and his order need recite no jurisdictional facts.[91]

Same—Local Action: A court in Tennessee has no jurisdiction over an action for injury to real property located in Georgia when the cause of the injury also occurred in Georgia, and it is immaterial whether the count alleges trespass *quare clausum* or negligence or nuisance.[92] This is the accepted common law rule in the overwhelming majority of American jurisdictions.

Same—Judgment of United States Court: A state court of Tennessee has no jurisdiction to enjoin the enforcement of a judgment of a United States District Court rendered in compliance with a decision of the Supreme Court of the United States.[93] This would have seemed too clear to be the subject of serious litigation had it not been actually seriously disputed.

Same—Continuance of Jurisdiction: As between a court of Tennessee and a United States court with concurrent jurisdiction, the court first acquiring jurisdiction retains it to the exclusion of the other court.[94] And in Tennessee the court which in the exercise of its jurisdiction grants a divorce retains the power to enter or modify the decree providing for the custody or support of a child of the marriage.[95]

Same—Chancery Court: Martin v. Martin[96] presented an interesting problem of jurisdiction over a judgment previously rendered in a circuit court. While the parties were husband and wife residing in Pennsylvania, a court of that state entered a decree requiring him

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88. Stonecipher v. Knoxville Sav. & Loan Ass'n, 298 S.W.2d 785 (Tenn. App. E.S. 1956).
89. 299 S.W.2d 229 (Tenn. App. W.S. 1956).
90. 296 S.W.2d 874 (Tenn. 1956).
91. Agricultural Ins. Co. v. Holter, 299 S.W.2d 15 (Tenn. 1957).
92. McCormick v. Brown, 297 S.W.2d 91 (Tenn. 1956).
93. Roy v. Brittain, 297 S.W.2d 72 (Tenn. 1956).
94. *Ibid.*
95. Roble v. Roble, 295 S.W.2d 817 (Tenn. App. M.S. 1956).
96. 292 S.W.2d 9 (Tenn. 1956).

to make payments for her maintenance. Thereafter in 1951 he came to Tennesssee and secured a divorce in the circuit court sitting in Johnson City. The wife did not discover the existence of the divorce decree until the husband was in the military service "beyond the jurisdiction of the United States." She brought suit in chancery at Johnson City to set aside the divorce as fraudulently obtained and made service by publication. After a decree in her favor, the husband appeared specially, contending that the court did not and could not secure jurisdiction by service by publication. The Supreme Court held that the judgment of divorce was a *res* within the State and that the chancellor had jurisdiction of the *res* so that service by publication was sufficient.

But a court of chancery has no power to enjoin election commissioners from delivering ballots to various precincts or to impound ballots in their hands intended to be cast in a forthcoming election as votes of absentee voters. It cannot conduct an election contest under the guise of an injunction proceeding.[97]

Same—Same—Administration of Estate Involving Interest of Incompetent: On suggestion of insolvency of the estate in the county court, the cause was transferred to chancery. The chancellor, after appointment of a guardian of an incompetent, who was brought in by service by publication, ordered a partition of real estate by private sale. After a decree that the clerk and master deliver a deed to the purchasers at the sale, a so-called next friend filed a petition in intervention challenging the jurisdiction of the court. The petition was dismissed. The court of appeals held (1) that chancery obtained jurisdiction when the suggestion of insolvency was filed and thereafter retained it and (2) that chancery had jurisdiction over the property and the incompetent's interest therein and had inherent power to make such disposition of that interest as it deemed best for her protection. Errors in the proceeding, if any, did not affect the court's jurisdiction.[98]

Same—Circuit Court: The circuit court may hear and determine an equitable cause when its jurisdiction to do so is not challenged by demurrer. The circuit judge acts as a chancellor. He has authority to transfer the case to chancery but is under no duty to do so.[99] On an appeal from the county court, the circuit court has no power to grant letters of administration; its powers are revisory only.[100]

Same—County Court: The county court has exclusive jurisdiction to determine whether a person purporting to act as chairman of the

97. Brown v. Thurman, 300 S.W.2d 883 (Tenn. 1957).
98. Goins v. Yowell, 293 S.W.2d 251 (Tenn. App. E.S. 1956).
99. Brigham v. Southern Trust Co., 300 S.W.2d 880 (Tenn. 1957).
100. Lakins v. Isley, 292 S.W.2d 389 (Tenn. 1956).

beer committee is a member of that committee. A person who has been ordered to show cause why his beer permit should not be revoked cannot raise that question before the committee.[101]

Same—Supreme Court on Certiorari: Until a petition for certiorari has been granted, the Supreme Court has no power to determine the applicable law or to render an advisory opinion in the litigation. Therefore, anything stated in a memorandum opinion denying the petition which might or would be applicable in a new trial is of no effect.[102]

Same—Venue in Criminal Prosecution: Section 9 of article 1 of the Constitution of Tennessee confers on an accused the right to demand a speedy trial by an impartial jury of the county in which the crime shall have been committed. This has been uniformly construed as preventing the legislature from conferring judicial jurisdiction to try an offense committed outside the county, no matter how close to the boundary. Therefore, under a statute prohibiting the transportation of liquor in a dry county, the court of a wet county has no power to try a defendant, against his objection, upon a charge of having transported liquor through a dry county into the wet county even though the transportation is intended to terminate in another dry county.[103] In one part of the opinion the Court says: "This is a venue question. . . . The question here is, in what county should he be tried."[104] It concludes, however: "[A]s we view it no crime as laid in the indictment was committed in Hamilton County [a wet county] and therefore this county had no jurisdiction to try the plaintiff in error."[105] The case presents a very unusual situation; the accused had committed no crime in Hamilton County. If the court in Hamilton County had no jurisdiction of the subject matter, the defendant could not confer it by consent; yet the constitutional provision in terms confers a right and the court assumes that the venue could have been changed on application or consent of the accused in the same way that personal rights, including venue generally, may be waived. The situation suggests the problem raised in actions for damages for injury to realty located in another state. If accused had not raised the question of venue, and the indictment had disclosed the place of the offense, would a judgment of conviction have been void on its face?

TRIAL

Right of Accused to Counsel: In a habeas corpus proceeding the court conceded that where counsel is appointed for two indigent

101. Jones v. Sullivan County Beer Board, 292 S.W.2d 185 (Tenn. 1956).
102. Kendall Oil Co. v. Payne, 293 S.W.2d 43 (Tenn. 1956).
103. Chadwick v. State, 296 S.W.2d 857 (Tenn. 1956).
104. *Id.* at 859.
105. *Id.* at 861.

defendants, each is entitled to separate counsel if their interests are conflicting. In the instant case[106] the record failed to show any claim of conflict of interest, and there was evidence that the relator did have separate counsel. Consequently, his right to counsel was not infringed.

Right to Jury Trial—Accused in Criminal Prosecution: Section 14 of article 6 of the Constitution of Tennessee provides that "no fine shall be laid on any citizen of this State that shall exceed fifty dollars unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars." The jury in the instant case found defendant guilty of assault and battery with intent to commit voluntary manslaughter, and assessed as punishment imprisonment and a fine exceeding fifty dollars. The court construed the indictment as charging only assault and battery, ruled that the verdict was effective as a finding of guilt of that offense, and ordered the case remanded with directions that the trial judge empanel a jury to assess the punishment only for the offense of assault and battery. It held specifically that neither the constitutional right to trial by jury set forth in article 1, section 9, nor article 14, section 6, quoted above, requires that the finding of guilt and the assessment of the fine should be by the same jury.[107] The opinion, it is submitted, reflects a sound policy of preserving carefully all substantial rights of an accused and disregarding irregularities in the proceedings which do not materially affect those rights.

Same—Same—Law and Fact: Section 19 of article 1 of the Tennessee Constitution has proved difficult of application. It provides that "in all indictments for libel, the jury shall have a right to determine the law and the facts under the direction of the court, as in other criminal cases." In *Dykes v. State*[108] the court held flatly and without qualification that it is error, which cannot be harmless and is therefore reversible, to charge the jury that they "are the sole judges of the evidence and the weight to be given to the swearing of each and every witness in the case, but the law you will take as given you by the Court." *Ford v. State*[109] overruled prior Tennessee cases and declared it error to charge that the court is the judge of the law. It explained that the jury should be instructed: "The jury are the judges of the facts, and the law as it applies to the facts. In making up their verdict they are to consider the law in connection with the facts, but the court is the proper source from which they are to get the law. In other words, they are the judges of the law as well as the

106. State *ex rel.* Melton v. Bomar, 300 S.W.2d 875 (Tenn. 1957).
107. Huffman v. State, 292 S.W.2d 738 (Tenn. 1956).
108. 296 S.W.2d 861 (Tenn. 1956).
109. 101 Tenn. 454, 47 S.W. 703 (1898).

facts, under the direction of the court."[110] Does the second half of the first sentence of this quotation mean anything more than that the jury is to determine the application of the law to the facts, or does it mean that they are to determine the applicability of the law which comes from the court as the proper source of the law? In some states, as in Maryland, counsel may argue to the jury that the statement of the law by the court is erroneous and ask them to accept counsel's version. Certainly the *Ford* opinion would not tolerate this, and the opinion in the instant case accepts an anonymous commentator's conclusion that the primary object was not to invest the jury with the power of the court but rather to prevent the court from invading the province of the jury. Now, it is too clear for argument that at common law, though the jury has always had the power to disregard the instruction of the court notwithstanding that in doing so they violate their oaths to render a true verdict according to the evidence and the law as given them by the court, this does not mean that such a violation is judicially approved. Still, if the *Ford* opinion is to be taken as including in the jury's proper function the determination of the applicability of the law, what does the second half of the second sentence mean? Can it mean anything except that they are to get the law from the court—where else can they get it?—and if the court is the source of the law which they are to apply, is it not strictly accurate to tell them that they are to take the law from the court? The opinion in *Ford* in a part not quoted in the instant case does say that the jurors should take the law as far as given them by the judge and not set up their own assumed knowledge, but it adds that they should not be limited to it if there is other law not contradictory. Where, it may be asked, can they get the other law, and if such other law exists, is it not the duty of defendant's counsel to call it to the attention of the judge, so that he, as the source of the law, may give it to the jury? In short, was the instruction in the instant case erroneous in the absence of any showing or contention that there was applicable law other than that given in the charge? The decision in this *Dykes* case should be widely publicized in order that trial judges may not inadvertently violate its mandate and prosecutors may be on guard.

Same—In Disbarment Proceedings: A disbarment proceeding is sui generis and not a civil action or a criminal prosecution. The defendant has no right to trial by jury on demand therefor, even if the misconduct charged constitutes a crime.[111]

Challenges to Jurors—For Cause: At common law, challenges to

110. 47 S.W. at 705.
111. Memphis & Shelby County Bar Ass'n v. Vick, 290 S.W.2d 871 (Tenn. App. W.S. 1955).

jurors for cause had to do with ineligibility of the prospective juror because of incapacity or lack of qualification to sit on any jury, principal challenge which included relationship to a party within a prohibited degree, and challenge to the favor. In modern terminology the principal challenge is said to be for implied bias, to the favor for actual bias. Where the practice, as in Tennessee, permits prospective jurors to be questioned on *voir dire*, failure to inquire as to the existence of grounds for challenge is ordinarily held to be a waiver of the right to challenge for an undiscovered disqualification. Thus, in *Farmer v. State*,[112] a prosecution for homicide, the fact that a juror was a brother-in-law of the sheriff was not available to defendant, where no challenge was interposed, as a ground for invalidating the verdict of guilty, even though the relationship was not known to the defendant or his counsel. If it was a valid ground for challenge, the objection came too late. When a pertinent question is put on *voir dire* and the juror honestly gives an incorrect answer, the question seems to be whether thus depriving the party of an opportunity to challenge for cause or peremptorily is prejudicial. Thus where counsel asked if any juror had been a defendant in a lawsuit and no juror responded, so that counsel treated the silence as a negative answer, the fact was that one juror was a member of a partnership that had been sued for a cause arising out of partnership activities, but he interpreted the question as not applying to such a situation. The trial judge deemed this no ground for a new trial on a simple issue where the jury had returned a verdict after five minutes deliberation. The court of appeals reversed, but the Supreme Court held the trial court's error to be harmless.[113]

Same—Effect of Erroneous Ruling on Challenge for Cause: Two defendants were on trial for malicious destruction of an employer's property during a strike called by a union of which defendants were members. The trial judge erroneously ruled that any person who was a member of any union whatever was ineligible to sit as a juror and thereby disqualified fourteen members of the panel. The Supreme Court analyzed this ruling as merely the equivalent of sustaining fourteen peremptories by the prosecution which had eleven peremptories unused, thus erroneously giving the prosecution three unauthorized peremptories. It then applied a commonly accepted principle that a defendant is not entitled to trial by any particular juror or group of jurors, but only to a trial by twelve qualified jurors, and that a judge's error in mistakenly excluding a qualified juror is nonprejudicial.[114] With due respect, it is submitted that this analysis

112. 296 S.W.2d 879 (Tenn. 1956).
113. Thomas v. Hodges, 299 S.W.2d 1 (Tenn. 1957).
114. Nelson v. State, 292 S.W.2d 727 (Tenn. 1956).

is incorrect. What the judge did was not merely to grant an unauthorized peremptory challenge or mistakenly to exclude a juror for actual bias, but to disqualify as jurors members of a large segment of the community to which the defendants belonged. This is contrary to the basic theory of our system that the jury should represent a cross section of the community, in this instance, of the county in which the offense was committed. The same reasoning would have been applicable had the excess number been sufficient to form a complete jury of members otherwise qualified.

Same—Number of Peremptories and Order of Exercise: In a civil action each side, not each individual party, is entitled to only two peremptory challenges, and the trial judge may require that the second peremptory be exercised before the vacancy caused by the exercise of the first has been filled. Such a ruling, if error, is harmless error.[115]

Order of Proof and the Like: The order of proof in a legal action, civil or criminal, is governed by the discretion of the judge; and it is no abuse of his discretion to permit the prosecution to recall a witness in rebuttal and to allow him to testify to a highly relevant matter which should have been covered in the prosecution's main case but of which the prosecution then had no knowledge.[116] Likewise, the order of proceeding in chancery is in the discretion of the chancellor. He may order a factual accounting before determining the applicable law; and he may set aside a report made on an order of reference where it is clear that special training, apparently not possessed by the master first appointed, was required for a complete accounting of the complex business in suit.[117]

Motions During Trial—Nonsuit, Dismissal, Directed Verdict—At Law: At common law a case might be disposed of without trial by nonsuit, discontinuance or retraxit. In Tennessee practice retraxit does not exist. And the effect of a disposition of a case with or without trial depends upon the reasons for which the disposition was made. But a judge trying a case at law has no power to enter a judgment of dismissal with prejudice, which will make the judgment entered thereon operate as a conclusive disposition of the cause of action on the merits.[118] The Court of Appeals of the Western Section has fully reconsidered the test for the direction of a verdict both in a wills contest and in an ordinary action, and has formulated it as follows:

> From the whole of the relevant, material and substantial evidence introduced by the party against whom the motion is made together with

115. Kunk v. Howell, 289 S.W.2d 874 (Tenn. App. E.S. 1956).
116. Nichols v. State, 289 S.W.2d 849 (Tenn. 1956).
117. Kelso v. Kelso, 292 S.W.2d 483 (Tenn. App. E.S. 1955).
118. Long v. Kirby-Smith, 292 S.W.2d 216 (Tenn. App. M.S. 1956).

> all other evidence in the case supporting the position of such party and all legitimate inferences of fact favorable to him which may be legally drawn from such evidence, disregarding all other countervailing evidence, can the party against whom the motion is made succeed under the proper charge of the Court?[119]

But it is to be remembered that where the testimony of a witness is contrary to the physical facts established by the evidence and by mathematical calculations and other judicially noticed matter, that testimony must be disregarded; the credibility of the witness in this respect is not a jury question.[120]

Same—Dismissal in Chancery: In a suit to set aside the foreclosure of a deed of trust, the chancellor may in his discretion stop proceedings and order the bill dismissed where he is convinced that the testimony of the plaintiff and her supporting witnesses upon the crucial issue is "wholly incredible." He is the sole judge of the credibility of the witnesses, and in such a situation it would be futile to continue the trial or hearing.[121]

Charge to Jury—Request to Charge—When Necessary: Where the general charge given in a civil case covered the general subject matter involved but omitted all reference to a special defense pleaded, namely that the fire in question started on premises leased by defendant to plaintiff, there was no error in absence of a request by defendant, particularly since defendant offered no evidence in support of this defense.[122] Even in a criminal case where the judge charged fully upon reasonable doubt, his omission to apply the rule as charged to defendant's theory of defense "was nothing more than meagreness in the charge" and was not error in the absence of a request by defendant to supply the omission.[123] But where there are several parties defendant in a civil action and a special request by one of them covers a matter common to himself and the others, no request by the others is necessary. The purpose of requiring a request is to bring the matter requested to the attention of the judge. Yet if a portion of the charge is inaccurate as to a single defendant only, he must request correction or clarification.[124]

Same—Effect of Denial: The Tennessee Court of Appeals is constantly called upon to remind counsel that failure or refusal to charge as specially requested is not erroneous when the matter requested is fairly covered in the general charge.[125] The same is true where the

119. Jones v. Sands, 292 S.W.2d 492, 498 (Tenn. App. W.S. 1953); Callahan v. Town of Middleton, 292 S.W.2d 501, 510 (Tenn. App. W.S. 1954).
120. Gordon's Transports v. Bailey, 294 S.W.2d 313 (Tenn. App. W.S. 1956).
121. Allen v. Goldstein, 291 S.W.2d 596 (Tenn. App. W.S. 1956).
122. Illinois Central R.R. v. Exum, 296 S.W.2d 372 (Tenn. App. W.S. 1955).
123. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956).
124. Womac v. Casteel, 292 S.W.2d 782 (Tenn. 1956).
125. McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956); Funk v. Weldon, 292 S.W.2d 207 (Tenn. App. W.S. 1953).

requested charge is not applicable to the evidence received or is incomplete or otherwise inaccurate.[126]

Same—Form in Felony Cases: In a prosecution for felony the trial judge's charge is required to be in writing and "no part of it shall be delivered orally." But the Supreme Court has held that the harmless error statute is applicable if it affirmatively appears that the failure to comply with the requirement is harmless. In *Black v. State*[127] the jury, being in doubt as to whether accused was guilty of second degree murder or of voluntary manslaughter, returned and asked for further instructions defining "malice" as an ingredient of second degree murder. The doubting jurors, "just a short while" after receiving an oral charge in compliance with the request, agreed to the verdict of murder in the second degree. Consequently, it affirmatively appeared that the oral instruction did influence the verdict to the prejudice of defendant, and the conviction was reversed and a new trial granted.

Same—When Erroneous Charge Harmless: The trial judge erroneously charged that the law presumes statements made by the accused against himself are true, while those made in his own behalf may be considered as true or false as the jurors see fit. The error was held to be harmless, in the absence of a contrary showing, because there was in the evidence no statement of the accused against himself.[128] The wonder grows that any Tennessee trial judge should assume the existence of such a presumption, particularly in a criminal case.

Same—Defining the Issues: When the trial judge correctly charged that the proved condition of a public street of a city did not constitute a nuisance per se, his charge to the jury permitting recovery against the city either on the theory of nuisance in fact or a dangerous condition caused by the negligence of the city was proper. The court may properly submit issues raised by each of several counts based on different theories or specifications alleged therein for the same wrong where they are not inconsistent in fact. Thus it may properly submit to the jury plaintiff's claims (1) that the injury in question was caused by defendant's violation of the statute regulating the driving of a motor vehicle on the public highways, and (2) that it was caused by his conduct constituting common law negligence.[129]

Same—Recalling the Jury for Additional Instructions: The court may, on its own motion or on suggestion of a party, recall the jury and make such corrections of the charge previously given as he deems necessary, even to the extent of instructing them to disregard entirely the original charge and substituting a new charge therefor.[130]

126. Hammonds v. Mansfield, 296 S.W.2d 652 (Tenn. App. W.S. 1955).
127. 296 S.W.2d 833 (Tenn. 1956).
128. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956).
129. Ross v. Griggs, 296 S.W.2d 641 (Tenn. App. W.S. 1955).
130. McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956).

Verdict—Court's Refusal to Accept Improper Verdict: The jury returned a verdict that accused was guilty of three offenses; namely, receiving, transporting and possessing intoxicating liquors. The evidence showed that all three occurred in a single transaction. The trial judge refused to receive the verdict and over accused's objection sent the jury back with instructions to confine their verdict to one of the three. The jury then returned a verdict of guilty of transporting. It was held that the action of the trial judge was correct.[131] This ruling is no doubt in accord with common law practice. The judge may for good cause require a jury to reconsider its verdict in the light of further instructions.

Same—General Verdict—Special Interrogatories: It is recognized procedure in Tennessee to have the jury return a general verdict together with answers to special interrogatories. If these answers do not warrant a judgment, then judgment is to be entered on the general verdict. A special finding accompanying a general verdict as an answer to interrogatories may be properly set aside by the judge if it is vague and not responsive to the questions submitted.[132]

Motions After Trial—Motion in Arrest of Judgment—Waiver: A motion in arrest of judgment, other than for a defect in the verdict, goes to the foundation of the plaintiff's claim and assumes that the trial was regular and that the verdict is warranted by the evidence. Hence such a motion is inconsistent with a motion for a new trial, and filing the former motion after or contemporaneously with a motion for a new trial is a waiver of the motion in arrest.[133]

NEW TRIAL

Misconduct of Counsel: Counsel for the State was guilty of serious misconduct in charging a "frame-up" between defendant's counsel and a witness, but the trial judge did not err in refusing to grant a mistrial, for he immediately excluded the jury, reprimanded counsel and, after questioning a number of jurors, concluded that no juryman had heard the objectionable statement.[134]

Misconduct of Juror: Though a juror should base his verdict upon a consideration of the evidence and the instructions of the court, still the court will not consider any testimony by him that he agreed to the verdict because he was ill and wanted to go home or that he did not really agree but left the decision to God and the other eleven jurors. Testimony of the mental operations by which he arrived at the verdict and the considerations which induced him to agree is

131. McBride v. State, 290 S.W.2d 648 (Tenn. 1956).
132. Lenoir Car Works v. Littleton, 293 S.W.2d 585 (Tenn. App. E.S. 1956).
133. Wakefield v. Baxter, 297 S.W.2d 97 (Tenn. App. M.S. 1956).
134. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956).

inadmissible in impeachment of the verdict. But the repetition by a juryman in the jury room of a conversation overheard by him between two expert witnesses unfavorable to appellant's claim is misconduct for which a new trial must be granted upon an affirmative showing that the misconduct influenced the verdict; in the absence of such a showing, the trial judge's refusal to grant a new trial is not reversible error.[135] The court heard testimony of the jurors to the effect that none of them was influenced by this misconduct. In considering the testimony and relying upon the harmless error statute, the court relied upon the opinion of the late Judge Anderson in *Meegal v. Memphis St. Ry.*[136] He in turn had relied on the decision in *Thomason v. Trentham*[137] in which the Supreme Court applied the statute to misconduct of jurors in the jury room in discussing matter which might well have been prejudicial and in which the jurors had testified that they were not influenced by the objectionable matter. That decision made the earlier precedents to the contrary no longer applicable. A fortiori, the trial judge was held to be justified in denying a motion for a new trial based on the affidavit of one juror that another of the jurors whom he could not identify by name or otherwise said that he would try to lean over backwards in the case because of his prejudice against Jews.[138] The record showed that each juror on *voir dire* swore that he had no prejudice against Jews. Defendant was a Jew.

Newly Discovered Evidence—Required Showing: The rule is well settled that the party seeking a new trial on the ground of newly discovered evidence must show that he used due diligence to discover it and have it available at the trial; and where the evidence which he presents is such as to justify a finding of lack of such diligence, a denial of a new trial will not be disturbed on appeal.[139] And the same is true where it does not appear that the newly discovered evidence would be likely to affect the result. Where there was conflicting evidence at the trial and the moving party was aware of the presence of the witness at the scene and did not inform his counsel, a new trial was properly denied.[140]

Same—Impeaching Testimony: The ruling of the trial judge denying a new trial will be approved where (1) the facts tend to show lack of diligence, (2) the evidence is of prior inconsistent statements of a witness who, the defendant asserts, was thoroughly discredited at the trial so that the new evidence is cumulative and (3) the new evi-

135. McKamey v. Andrews, 289 S.W.2d 704, 709, 710 (Tenn. App. E.S. 1955).
136. 34 Tenn. App. 403, 238 S.W.2d 519 (W.S. 1950).
137. 178 Tenn. 37, 154 S.W.2d 792 (1941).
138. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956).
139. Illinois Central R.R. v. Exum, 296 S.W.2d 372 (Tenn. App. W.S. 1955).
140. Spence v. Carne, 292 S.W.2d 438 (Tenn. App. W.S. 1954).

dence is not likely to effect a result more favorable to the moving party.[141]

Same—Form and Validity of Ruling On: It is the duty of a trial judge to set aside a verdict if he is not satisfied with it, and his ruling ordering the new trial without stating the reasons therefor is not subject to review.[142] In denying a new trial, the judge need not state whether or not he applied the thirteenth juror rule. In the absence of any statement with reference to that rule, it will be assumed that he approved the verdict.[143]

Same—Thirteenth Juror Rule—Limitation: The thirteenth juror rule requires that if the trial judge is dissatisfied with the verdict, so that had he been a juror he would not have agreed with the other jurors in returning it, he must set the verdict aside and grant a new trial. It does not empower him to reduce a verdict of guilty of murder in the first degree to a verdict of guilty of a lesser included offense; and if his ruling purports to do so, it will be reversed on appeal and a new trial will be ordered.[144]

JUDGMENTS

Effect of Judgment as Res Adjudicata or Collateral Estoppel—Judgment Other Than on Merits: A judgment of dismissal of an action at law "with full prejudice" is not a judgment on the merits, for no such judgment is recognized in Tennessee practice. It is the equivalent of a judgment of nonsuit and the cause of action is not merged in the judgment. Such is the effect of the decision in *Wyatt v. Lassiter.*[145] By analogy, in a criminal case where a defendant was charged with stealing brass rollers and the indictment was quashed at the trial because the evidence showed a stealing of bronze rollers, the decision did not bar a subsequent prosecution for stealing the bronze rollers.[146]

Same—Effect Upon Finding or Decision on Merits: Bills and motions by defendant in a divorce action to have a decree for separate maintenance and support of plaintiff changed to a decree for absolute divorce were denied and no appeal from the orders and decrees of denial was taken. These decrees operated as a complete bar to a later bill by defendant to have the decree for separate maintenance replaced by a decree for absolute divorce, and there is no public policy that requires plaintiff to seek or accept an absolute divorce.[147]

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141. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956). See also Bradshaw v. Holt, 292 S.W.2d 30 (Tenn. 1956).
142. Wakefield v. Baxter, 297 S.W.2d 97 (Tenn. App. M.S. 1956).
143. Gordon's Transports v. Bailey, 294 S.W.2d 313 (Tenn. App. W.S. 1956).
144. State v. Odom, 292 S.W.2d 23 (Tenn. 1956).
145. 299 S.W.2d 229 (Tenn. App. W.S. 1956).
146. Wilson v. State, 292 S.W.2d 188 (Tenn. 1956).
147. Perrin v. Perrin, 299 S.W.2d 19 (Tenn. 1957).

Same—Collateral Estoppel in Tax Cases: In an action by the State against a defendant who was performing a contract with the United States government a finding that, for the purpose of determining its liability to pay sales taxes, it was an independent contractor and not an agent of the United States, does not operate to prevent the contractor from asserting that it was to be treated as an agent of the United States in a later action in which the issue was its liability to pay privilege taxes. The court declared that in tax cases the doctrine of collateral estoppel cannot be applied "unless the identical taxes are involved in the second or later suit."[148]

Direct or Collateral Attack: A judgment of a court of general jurisdiction which appears on the face of the record to be void is subject to collateral attack. Hence a consent decree entered on a stipulation that is void as against public policy is a nullity and may be stricken on motion.[149] But a judgment of such a court which does not appear on its face to be void is subject only to a direct attack. And this rule is applicable to a judgment of conviction in the Criminal Court of Davidson County, so that in a habeas corpus proceeding the convicted defendant cannot raise the question of lack of jurisdiction of the subject matter on the ground that accused was under eighteen years of age and the offense for that reason was within the exclusive jurisdiction of the juvenile court.[150]

APPEAL AND ERROR

Generally: The Tennessee courts are alert to protect the rights of a defeated litigant to have his case reviewed where he has been prevented from complying with the technical requirements without fault of any kind on his part. In *Uselton v. Price*,[151] Judge Shriver, speaking for the court, approved and applied an early opinion by Mr. Justice Carruthers specifying the conditions under which certiorari may properly be used as a substitute for an appeal. The petitioner for the writ must show that his appeal was prevented or defeated:

1. By the oppressive or erroneous act of the court or justice.
2. By the wilful or negligent act of the clerk.
3. By the contrivance or procurement of the adverse party.
4. By inevitable accident.
5. By the blameless misfortune of the petitioner.[152]

148. Roane-Anderson Co. v. Evans, 292 S.W.2d 398, 402 (Tenn. 1956).
149. Lane v. Sumner County, 298 S.W.2d 708 (Tenn. 1957).
150. Bomar v. State *ex rel.* Stewart, 300 S.W.2d 885 (Tenn. 1957); discussed in Earle, *Criminal Law and Procedure—1957 Tennessee Survey*, 10 VAND. L. REV. 1073, 1078-79 (1957).
151. 292 S.W.2d 788 (Tenn. App. M.S. 1956).
152. *Id.* at 793.

The issue of such a writ by the circuit court to a justice of the peace was proper in a case in which failure of an appeal bond to reach the justice on time was due to an unusual delay in the mails.

On the other hand, the courts regularly resort to the doctrine of harmless error where the record does not indicate to their satisfaction that errors committed by the trial court resulted in prejudice to the appellant. In some instances the record may affirmatively show lack of prejudice, as where objectionable evidence is received upon a matter as to which there was no substantial dispute[153] or where the trial judge's refusal to grant an appeal was followed by a writ of error in hearing which all pertinent objections were heard and decision was rendered on the merits.[154] But in other situations much may be said in support of the contention that the court brushes aside errors that in the opinion of the bar are regarded as affecting such substantial rights as trial by jury in criminal prosecutions. Thus in *Nelson v. State*[155] the court held to be harmless error first a ruling which counsel may well have reasonably interpreted as preventing his introducing to the jury upon the issue of the worth of an admitted confession testimony tending to show that it was obtained by force, threats or other wrongful inducement, and secondly another erroneous ruling disqualifying all members of any labor union, where the panel contained fourteeen such jurors. The court found the evidence of guilt strong and felt that the statute requiring disregard of harmless error required affirmance. It analyzed the ruling as to ineligibility as resulting only in allowing the state three unauthorized challenges and not to be in violation of defendant's constitutional right to an impartial jury. At present the court regards the harmless error statute as inapplicable to any ruling which invades a constitutional right of a defendant.[156]

Who May Appeal—Error Not Prejudicial to Appellant: In an action for a mandatory injunction to compel interstate carriers to interline freight in which a union and some of its members engaged in a labor dispute with plaintiff were made defendants, the union pleaded that the court had no jurisdiction of the cause and prayed that it be dismissed. The court ordered the union dismissed but entered a decree against the carriers. The carriers did not appeal; the union in its appeal did not assign any error in the order dismissing it. The plaintiff's motion that the appeal be dismissed was granted on the ground that the union, none of whose members was employed by plaintiff, had no standing to appeal.[157] Parties plaintiff in an action

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153. Illinois Central R.R. v. Exum, 296 S.W.2d 372 (Tenn. App. W.S. 1955).
154. Agricultural Ins. Co. v. Holter, 299 S.W.2d 15 (Tenn. 1957).
155. 292 S.W.2d 727 (Tenn. 1956).
156. Dykes v. State, 296 S.W.2d 861 (Tenn. 1956).
157. Covington Truck Co. v. Teamsters Union, AFL, 298 S.W.2d 561 (Tenn. 1956).

who were not parties to a cross-bill by one defendant against a third party defendant cannot complain of a decree in favor of that defendant against the cross-complainant.[158] In like manner, where a bank interpleaded a claimant, a daughter of the depositor to whom a certificate of deposit was "payable on her (depositor's) death," and all the other next of kin of the depositor and the chancellor decreed that the payment be made to the daughter "subject to the just debts" of the depositor, the court on appeal held that the certificate constituted a contract between the bank and the depositor for the benefit of the daughter, and that the decree in no way aggrieved the other next of kin. The daughter might have appealed from the portion of the decree making the award subject to the debts, but the other next of kin were in no way harmed and had no standing to appeal.[159]

Same—State in Criminal Case: The state is entitled to certiorari to review the judgment of conviction of defendant of murder in the second degree entered pursuant to order of the trial court on motion of defendant for a new trial after the jury had returned a verdict of guilty of murder of the first degree. A judge has no power to modify the jury's verdict, though he may set it aside and grant a new trial.[160]

Same—From Decision of County Court as Administrative Tribunal: A person who was not a party before the county court in a proceeding to establish as a utility district an area in which he was a resident is not a party aggrieved by the decision so as to be entitled to appeal to the circuit court. In such a proceeding the county court functions as an administrative rather than a judicial tribunal.[161]

What is Appealable—Finality of Decision: Where a demurrer was sustained to a bill of complaint interposed by fewer than all defendants and the bill dismissed as to them, but the action remains pending as to the other defendants, no appeal lies by plaintiff; and an appeal taken by him will be dismissed.[162] In a similar situation a discretionary appeal from an order overruling a demurrer as to certain specifications of negligence will be dismissed, leaving the case for trial on other issues. In an action at law there is no provision for a discretionary appeal.[163] But in an equitable proceeding the trial court may authorize a discretionary appeal, and the proceeding in the nature of quo warranto authorized by sections 6-301 to 6-319 of the Tennessee Code is an equitable proceeding.[164]

158. Lowe v. Wright, 292 S.W.2d 413 (Tenn. App. M.S. 1956).
159. Peoples Bank v. Baxter, 298 S.W.2d 732 (Tenn. App. W.S. 1956).
160. State v. Odom, 292 S.W.2d 23 (Tenn. 1956).
161. Griffitts v. Rockford Utility District, 298 S.W.2d 33 (Tenn. App. E.S. 1956).
162. Murphey v. Brewer, 296 S.W.2d 884 (Tenn. 1956).
163. City of Memphis v. Birkner, 292 S.W.2d 195 (Tenn. 1956).
164. State *ex rel.* Southerland v. Town of Greenville, 297 S.W.2d 68 (Tenn. 1956).

In *Hickle v. Irick*[165] the effect of the death of the trial judge after orally announcing his order overruling plaintiff's motion for a new trial and before the order was entered upon the minutes was the key to the decision. The entry was made as of the date of the oral announcement by the clerk at the succeeding term of court by copying a form of order approved by the attorneys of both parties immediately after the hearing. Thereafter plaintiff moved for a new trial before a judge who had been recently appointed and who ruled that the original order had become effective as of the date of its rendition. On appeal it was held that (1) the oral decision was without legal effect, (2) the clerk's action was beyond his power and the entry upon the minutes was without legal significance, (3) the judgment first became appealable after the entry of the later order denying plaintiff's motion and (4) that order was erroneous. The case was remanded with instructions that it be restored "to the docket for trial as upon continuance."[166] This was a logical result and afforded the plaintiff an adequate legal remedy, so that there was no occasion for him to resort to equity for relief.

To What Court: From a decree finding defendant guilty of and imposing punishment for contempt in violating an injunction against acts contrary to a zoning ordinance[167] or an injunction against mass picketing[168] an appeal lies directly to the Supreme Court for the proceedings are criminal in nature. It follows that on appeal on the ground of insufficiency of the evidence, the judgment will be affirmed unless the court is convinced that the evidence preponderates against the finding of guilt. The same rule applies where the appeal is to the court of appeals.[169]

A suit by private individuals in the nature of quo warranto,[170] to prevent annexation of territory to a municipality is an equitable proceeding, and a discretionary appeal to the Supreme Court is therefore proper.[171]

Effect of Appeal upon Jurisdiction: In the *Hickle* case the well settled rule is assumed that the filing of a motion for a new trial or a rehearing within the prescribed time suspends all proceedings upon the judgment until the motion is disposed of. But the case does not touch the question of the effect of a perfected appeal upon the power of the trial court to entertain a motion for a new trial or rehearing

165. 300 S.W.2d 54 (Tenn. App. E.S. 1956).
166. *Id.* at 59.
167. Davidson County v. Randall, 300 S.W.2d 618 (Tenn. 1957).
168. Gunn v. Southern Bell Tel. & Tel. Co., 296 S.W.2d 843 (Tenn. 1956).
169. Aladdin Industries v. Associated Transport, 298 S.W.2d 770, 785 (Tenn. App. M.S. 1956).
170. TENN. CODE ANN. §§ 6-301 to 6-319 (1956, Supp. 1957).
171. State *ex rel.* Southerland v. Town of Greenville, 297 S.W.2d 68 (Tenn. 1956).

made thereafter and before the end of the period in which such a motion may normally be made. That question was answered in *Johnson v. Johnson*.[172] After an appeal from a decree of the chancellor in favor of defendants, complainants filed a petition to rehear which the chancellor entertained. Over objection of defendants he ordered a rehearing. Defendants petitioned the court of appeals for a writ of certiorari. After thorough consideration of the authorities, the court held that upon the perfection of an appeal the case is transferred to the appellate court but with the reservation of the power in the trial court to recall the appeal at any time within the statutory period in which a party may move for a new trial or rehearing. The trial court does not lose jurisdiction within that period.

Prerequisites: The courts have been uniformly strict in requiring compliance with the statutory requisites as to leave to appeal, time for filing a bill of exceptions, the necessity for such a bill and its authentication, the necessity for a previous motion for a new trial and the like, as previous *annual surveys* have noted. Recent examples are found in *Duboise v. State*,[173] in which it has held that an order extending the time for filing the bill of exceptions made after the expiration of the prescribed thirty-day period was a nullity, and in *Parrish v. Yeiser*,[174] in which the same rule was recognized but in which it was also held that when the order for extension was made within the prescribed period failure to enter it upon the minutes for five days was a mere irregularity which did not vitiate the order.

Recent statutes must be consulted, for some of them have made former rulings inapplicable. For example, section 27-303 of the Tennessee Code provides that cases tried in a court of record without a jury are reviewable upon a simple appeal "and no motion for a new trial shall be necessary." But its application is still subject to interpretation. In *Adams v. Patterson*[175] the Supreme Court held that it did not change the former rule in workmen's compensation cases. In such cases the appeal is still an appeal in the nature of a writ of error in a civil case; the later enacted statute embodied in section 27-303 of the Tennessee Code has no application. Where a motion for a new trial is granted in a case tried by jury and exception is taken thereto and preserved in a wayside bill of exceptions and a verdict and judgment are entered on the second trial, the plaintiff need not move for a new trial as a condition of having the ruling reviewed. If at the second trial the plaintiff again recovers and defendant, on his motion for a new trial, is granted judgment on the ground that the

172. 292 S.W.2d 472 (Tenn. App. W.S. 1956).
173. 290 S.W.2d 646 (Tenn. 1956).
174. 298 S.W.2d 556 (Tenn. App. W.S. 1956).
175. 301 S.W.2d 362 (Tenn. 1957).

judge should have directed a verdict for him, the plaintiff as a prerequisite to appeal must move for a new trial. In the decision the court follows precedents old and new, which it considers mistaken; it regrets doing so, for its opinion clearly indicates disapproval of the action of the trial judge.[176]

Scope of Review—Writ of Error, Appeal in the Nature of: The court of appeals has no power to review the evidence and determine a mere preponderance of the evidence or the credibilty of the testimony on which a verdict is based.[177] Nor does it have power to reverse a judgment because it believes the damages awarded are inadequate or excessive in the absence of a showing that the excess or inadequacy is due to fraud or is so great as to evince passion, prejudice or unaccountable caprice.[178] Where the trial judge requires a remittitur as a condition of refusing a new trial and the court of appeals affirms, in practice the Supreme Court treats the concurrent finding as well nigh conclusive; but where plaintiff accepts the remittitur under protest and the court of appeals affirms, the ruling may, under section 27-119 of the Tennessee Code, be reviewed by the Supreme Court for the sole purpose of determining whether or not the verdict should have been reduced. The court may either affirm the judgment for the reduced amount or render judgment for the full amount of the verdict; it has no power to order a further reduction.[179] Furthermore, the findings of the trial judge on the motion for a new trial have the same effect on review as does a verdict of a jury.[180] But where there is no conflict in the evidence as to any material fact, the question presented is one of law; and there is no necessity of determining the extent of the court's authority to consider the issue de novo on the evidence.[181]

Same—Same—From County Court to Circuit Court: The appeal from the county court to the circuit court in a proceeding to establish a utility district is in the nature of a writ of error. Consequently, when a bill of exceptions would be necessary in an appeal from the circuit court to the court of appeals, it is equally necessary in such an appeal from the county court to the circuit court.[182]

Same—Appeal from Chancery Court: On a broad appeal from a decree in chancery the case is reviewable de novo on the law and the

176. Howell v. Wallace E. Johnson, Inc., 298 S.W.2d 753 (Tenn. App. W.S. 1956).
177. McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956).
178. *Ibid.;* Hammonds v. Mansfield, 296 S.W.2d 652 (Tenn. App. W.S. 1955).
179. Lambert Brothers v. Larkins, 296 S.W.2d 353 (Tenn. 1956).
180. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956).
181. Robinson v. Kemmons Wilson Realty Co., 293 S.W.2d 574 (Tenn. App. W.S. 1956).
182. Griffitts v. Rockford Utility District, 298 S.W.2d 33 (Tenn. App. E.S. 1956).

facts.[183] Thus, where the chancellor found that the two cross-defendants in a suit to set aside the foreclosure of a deed of trust had conspired to deprive the complainant of her equity in her home and prevent her from refinancing it, the court of appeals reviewed the evidence and found (1) no conspiracy and (2) a breach of trust by each defendant; it therefore entered a decree, modifying the chancellor's decree, based on the theory that one of the defendants was primarily liable and the other secondarily liable for a sum found to be the value of the equity.[184] And on appeal of a wife from a decree dismissing her cross-complaint for separate maintenance after the court had dismissed the husband's bill for divorce because of his lack of residence for the required period, the court reviewed all the evidence, including that offered on the husband's bill, in considering whether her conduct had been such as to deprive her of the right to support. It held that the preponderance of the evidence showed the wife guilty of cruel and inhuman treatment which would have entitled the husband to a divorce had it not been for his failure to meet the residence requirement.[185] But where a matter has been properly referred to a master and he has made findings of fact in which the chancellor concurs, the finding is not subject to review by the court of appeals.[186]

It is also true that where the chancellor and court of appeals agree as to the facts, their finding is conclusive upon certiorari to the Supreme Court as was true, for example, with the finding that a deed by husband and wife to a stranger and his reconveyance to them were intended to create a tenancy by the entirety.[187] But where relevant evidence of the damages caused plaintiff by breach of contract has been erroneously excluded, the fact that the master, the chancellor and the court of appeals all agreed does not preclude the Supreme Court upon the issue, for this rule has no application to findings "upon a non-determinative point" or to a finding which has no evidence to support it.[188] Where the chancellor and the court of appeals are in sharp disagreement in their findings of fact, the Supreme Court on certiorari examines the evidence de novo. In so doing it begins with a "presumption" in favor of the chancellor's finding which is overcome only when the preponderance is against his finding.[189]

Same—Bill of Review: In the case of a bill of review for errors on

183. Real Estate Management v. Giles, 293 S.W.2d 596 (Tenn. App. E.S. 1956); Stonecipher v. Knoxville Sav. & Loan Ass'n, 298 S.W.2d 785 (Tenn. App. E.S. 1956) (an appeal from judgment of circuit court affirming judgment of general session).

184. Jones v. Thomas, 296 S.W.2d 646 (Tenn. App. W.S. 1955).

185. Elrod v. Elrod, 296 S.W.2d 849 (Tenn. App. W.S. 1956).

186. Kelso v. Kelso, 292 S.W.2d 483 (Tenn. App. E.S. 1955); TENN. CODE ANN. § 27-113 (1956).

187. Moore v. Cole, 289 S.W.2d 695 (Tenn. 1956).

188. Jennings v. Lamb, 296 S.W.2d 828 (Tenn. 1956).

189. Barnett v. Thirkifeld, 300 S.W.2d 905 (Tenn. 1957).

the face of the record the court examines only the pleadings and the decree for the errors alleged in the bill and cannot examine the evidence to determine whether the statement of facts in the decree was erroneous.[190]

Record on Appeal—Requisites—Technical Record: The statute which requires that the minutes be signed by the judge each day is directory rather than mandatory, and the failure of the judge to sign for the day on which the order convicting defendant was entered does not invalidate the judgment of conviction.[191]

Same—Same—Bill of Exceptions: The bill of exceptions must be authenticated by the signature of the judge; but where the record as originally transmitted to the court of appeals mistakenly included not the original but an unsigned copy, the record may be corrected. Where necessary the court may in such a situation grant a rehearing, though petition therefor is filed late, if the original opinion was based on the failure of the record to include an authenticated bill.[192]

Same—Exceptions—Evidence: Before the enactment of chapter 236, Public Acts of 1955,[193] error in rulings on evidence could not be considered unless the record showed that exceptions had been taken at the trial.[194] But it is now sufficient that the objection was timely and specific "and, when appropriate, where such error was called to the attention of the trial court by inclusion as a ground of the motion for a new trial."[195] But where the defendant did not object to certain evidence, preserved no exception to it and did not make its reception a ground of his motion for a new trial, the error, if any, may not be considered on appeal.[196] And an alleged error denying requests for special instructions is not available to appellant if the requested instructions are not included in the bill of exceptions, for they are not part of the technical record.[197] Likewise, no consideration can be given to an assignment of error that there was no evidence to sustain the judgment where the evidence was not preserved in the bill of exceptions.[198]

Same—Assignment of Error: An assignment of error, based on the contention that the judgment and decree are contrary to the law and the evidence, will be disregarded unless it specifies the particulars indicating the alleged inconsistency.[199] And the court will not consider

190. Orrick v. Orrick, 296 S.W.2d 825 (Tenn. 1956).
191. Duboise v. State, 290 S.W.2d 646 (Tenn. 1956).
192. McAmis v. Carlisle, 300 S.W.2d 59 (Tenn. App. E.S. 1956).
193. TENN. CODE ANN. § 27-311 (Supp. 1957).
194. McKamey v. Andrews, 289 S.W.2d 704 (Tenn. App. E.S. 1955).
195. TENN. CODE ANN. § 27-311 (Supp. 1957).
196. Rosenthal v. State, 292 S.W.2d 1 (Tenn. 1956).
197. Gordon's Transports v. Bailey, 294 S.W.2d 313 (Tenn. App. W.S. 1956).
198. Rutledge v. Rutledge, 293 S.W.2d 21 (Tenn. App. W.S. 1953).
199. *Ibid.*

a contention that a so-called special verdict (a narrative answering special questions) is inconsistent with the general verdict where the trial judge had ordered the special verdict set aside and the appellant did not assign the ruling as error.[200]

Dismissal of Appeal—Case Moot: Where the trial judge sustained defendant's demurrer in a quo warranto proceeding and defendant thereafter resigned from the office the usurpation of which was alleged by relators, the issue of usurpation became moot; and the Supreme Court refused to retain jurisdiction merely to determine the issue of taxation of costs.[201] The court relied upon *State ex rel. Wilson v. Bush*,[202] in which the court carefully and fully examined the authorities and distinguished those holding otherwise as depending upon statutes giving the prevailing party an absolute right to costs, whereas in Tennessee taxation of costs is within the discretion of the trial judge under the statute which is now embodied in section 20-1621 of the Tennessee Code.

Decisions of Federal Courts

The following decisions of the United States Court of Appeals, Sixth Circuit, and of the United States District Courts in Tennessee are of interest to Tennessee lawyers.

Court of Appeals

Remedies—Habeas Corpus—Right to be Heard: Where an appellate court has determined that a petition for habeas corpus contains such grave charges that petitioner is entitled to be heard, he is entitled to be present in person at the hearing, and denial of his request to be present is reversible error.[203]

Jurisdiction—Subject Matter: Jurisdiction over subject matter may be raised at any time while the cause is properly before the court at any stage. Therefore, the defendant United States can raise the question for the first time before the court of appeals. A court has no jurisdiction in a civil action against the United States except in cases where the United States has consented to be sued. It has not so consented to actions for torts committed by its servant while not acting within the scope of his employment.[204]

A three-judge court has no jurisdiction of a proceeding to restrain the refusal of a board of education to admit Negro students. The question has been so firmly answered by the United States Supreme

200. Lenoir Car Works v. Littleton, 293 S.W.2d 585, 588 (Tenn. App. E.S. 1956).
201. State v. Stine, 292 S.W.2d 771 (Tenn. 1956).
202. 141 Tenn. 229, 208 S.W. 607 (1918).
203. Kay v. United States, 233 F.2d 442 (6th Cir. 1956).
204. United States v. Taylor, 236 F.2d 649 (6th Cir. 1956).

Court that such a proceeding no longer involves a substantial federal constitutional question.[205]

Judicial Notice—Records in Same Cause: Upon the issue of whether the action has been brought within the period prescribed by the applicable state statute of limitations, the trial judge hearing the case without a jury may properly notice judicially the pleadings, requests for admissions and answers thereto in the pending action which show that plaintiff took a voluntary nonsuit for the same cause in a state court and instituted this action seasonably. The court of appeals suggests, however, a doubt as to the propriety of taking notice of these matters in a trial by jury.[206]

Evidence—Relevance—Hearsay: Hearsay evidence received without objection may properly be considered by the jury and will not be disregarded by the court in determining the weight to be given to the testimony on the issue of whether a verdict should have been directed for defendant.[207]

Opinion—Expert and Lay: The trial judge properly refused to receive testimony of a police captain that the effect of a sudden stop of a vehicle would cause the occupants to be thrown forward. The captain was not an expert in this subject, and it would seem pretty clear that any layman could form an equally reliable opinion and apply it to the facts where the defendant's claim was the plaintiff's car stopped so suddenly that he could not avoid striking it from the rear.[208]

Same—Expert Opinion on Ultimate Issue: The opinion of a qualified physician who was a medical examiner for several insurance companies that assured was insurable at the time of his examination was held admissible.[209]

Evidence—Parol Evidence Rule—Interpretation: Where a mutual life insurance policy, which is not subject to a contrary statutory provision, stipulates that "this policy . . . embodies all agreements existing between himself and the company or any of its agents relating to this insurance," evidence of nonfraudulent statements of fact in the application for the insurance cannot be considered, so that such statements, even though false, are immaterial upon the issue of the validity of the policy.[210]

Witnesses—Examinations—Use of Charts and Diagrams: The trial judge may properly permit a witness to use charts and diagrams in explanation of his testimony concerning the matters which they illus-

205. Booker v. Tennessee Board of Education, 240 F.2d 689 (6th Cir. 1957).
206. McLellan Stores Co. v. Weaver, 238 F.2d 232 (6th Cir. 1956).
207. Byars v. United States, 238 F.2d 82 (6th Cir. 1956).
208. Floyd v. Fedun, 237 F.2d 647 (6th Cir. 1956).
209. Liberty Nat'l Life Ins. Co. v. Hamilton, 237 F.2d 235 (6th Cir. 1956).
210. Harris v. State Farm Mut. Automobile Ins. Co., 232 F.2d 532 (6th Cir. 1956).

trate or explain.[211]

Same—Right of Accused to Examine Exhibit Before Trial: It is reversible error to deny an accused's handwriting experts an opportunity to examine before trial an original writing made by accused at the request of the F.B.I. and studied and used by the prosecution's experts, where the only basic evidence against accused is said writing.[212]

Appeal and Error—Scope of Review—Ruling on Motion for New Trial—Inadequate Damages: Where the verdict for plaintiff in a malicious prosecution action was adequately supported by the evidence on the issue of liability but the jury awarded as compensatory damages but a small fraction of the compensatory damages proved by undisputed evidence and only nominal punitive damages, the court of appeals ruled that the trial judge had erred in refusing a new trial on the issue of damages only and remanded the cause for a new trial on that issue. There was a vigorous, well-argued dissent on the ground that the verdict indicated a compromise on the issue of liability.[213]

District Courts

Jurisdiction—Personal—Subject Matter—Foreign Corporation Nonresident Motorist: A foreign corporation does not become subject to jurisdiction of Tennessee courts by once sending a motor truck into the state carrying goods consigned to a resident, for such a single transaction does not constitute doing business within the state; and a cause of action arising out of personal injuries caused by a defect in the corporation's motor vehicle, which injury occurred while plaintiff was unloading the vehicle, is not one created from use of Tennessee's highways. Consequently, service of process upon the Secretary of State in an action for such an injury conferred no jurisdiction over the corporation.[214]

Motions Before Trial—Motion for Summary Judgment—Controverting Allegations in Pleadings: The trial judge recognized that some cases hold that statements of fact set forth in the pleadings cannot be controverted by affidavits and documentary evidence so as to warrant granting summary judgment but declared that they are contrary to the great weight of authority. When the opponent of the motion does file counter-affidavits, the question for the court is whether there exists a genuine issue as to any material fact. After examination of all materials submitted the judge found that there was no such issue and granted the motion.[215]

211. Smith v. United States, 239 F.2d 168 (6th Cir. 1956).
212. Bass v. United States, 239 F.2d 711 (6th Cir. 1957).
213. Devine v. Patteson, 242 F.2d 828 (6th Cir. 1957).
214. Acuff v. Service Welding & Machine Co., 141 F. Supp. 294 (E.D. Tenn. 1956).
215. Thomas v. Chamberlain, 143 F. Supp. 671 (E.D. Tenn. 1955), *aff'd*, 236 F.2d 417 (6th Cir. 1956).

Burden of Proof and Presumptions—Cause of Illness in Workmen's Compensation: The trial judge found sufficient evidence to warrant as a reasonable inference the conclusion that plaintiff's disease was the result of poisoning causally connected with exposures thereto in his employment and that this satisfied his burden of persuasion. He declared that where experts disagree upon this question of causation "the presumptions as to cause should be resolved in the employee's favor." The opinion as a whole makes it difficult to determine the procedural effect of a presumption in its relation to the burden of persuading the trier to make the desired finding.[216]

Jurisdiction—Subject Matter—Comity: A state court of Tennessee has jurisdiction to try and sentence a person indicted for a crime committed in Tennessee although at the time of trial he was on probation under sentence of a United States District Court. The exercise of such jurisdiction raises a question of comity, not of power as between the United States court and the state court.[217]

Parties—Bringing in Additional—Third Party Defendant: Section 20-120 of the Tennessee Code was interpreted by the trial judge as authorizing defendant to bring in as a third party defendant a person who was liable to plaintiff for the wrong for which plaintiff was suing, but held that since the party sought to be brought in by defendant was of the same citizenship as plaintiff, the motion to bring him in must be denied and the third party complaint stricken.[218] The decision is no longer of importance because section 20-120 was repealed by chapter 33 of the Tennessee Public Acts of 1957.

Judicial Notice—Matter of Common Knowledge: That the climbing of stairs is regarded by the medical profession as among the activities most harmful and dangerous to a person afflicted with arteriosclerosis and angina is judicially noticeable.[219]

Opinion—Expert Opinion—Weight: When medical expert witnesses disagree as to the existence of a causal relation between an injury and exposure to a risk arising out of and in the course of the injured person's work, the trial judge is free to make his own determination consistent with reason.[220]

LEGISLATION

The following enactments of the 1957 Session of the Tennessee General Assembly dealing with procedural subjects are of special significance to the practising lawyer. Chapter references are to Tennessee Public Acts 1957.

216. Lyons v. Holston Defense Corp., 142 F. Supp. 848 (E.D. Tenn. 1956).
217. Eaves v. Edwards, 143 F. Supp. 229 (M.D. Tenn. 1955).
218. Day v. North American Rayon Corp., 140 F. Supp. 490 (E.D. Tenn. 1956).
219. Gunning v. Mead Corp., 143 F. Supp. 35 (E.D. Tenn. 1956).
220. *Ibid.*

Jurisdiction—Subject Matter: Chapter 195, amending section 23-1201 of the Tennessee Code, provides that the circuit court has jurisdiction concurrent with the chancery court to remove the disability of minority only to enable the minor to receive proceeds in settlement.

Same—Service of Process: Chapter 8[221] authorizes service upon the Deputy Insurance Commissioner in specified actions against an insurance company. Chapter 61 amends section 20-224 of the Tennessee Code, the nonresident motorist statute, by defining "non-resident" so as to include any person who has been absent from the state for at least thirty days next preceding the day process is lodged with the Secretary of State, even though that person is a resident of the state and owner of a vehicle registered or licensed in this state.

Chapter 100[222] authorizes service by publication in actions to annul a marriage; and chapter 38[223] provides that certified mail may be used instead of registered mail in giving notice required by law.

Pleading: Chapter 74[224] requires that the bill in a divorce action set forth detailed vital statistics concerning the spouse and minor children, which the clerk is to certify to the Division of Vital Statistics, and chapter 46[225] authorizes deletion of scurrilous matter from divorce bills. Chapter 153[226] makes a long-overdue amendment of Chancery Court practice and pleading by providing that a sworn answer in Chancery, even when required by a bill of discovery or when oath to the answer is not waived, shall have no more weight or effect than the deposition of the defendant filing such an answer.

Parties: Section 20-120 of the Tennessee Code, a very badly drawn provision authorizing a third party defendant if primarily liable, to be brought in, is repealed by chapter 33.

Evidence: Chapter 68 amends section 24-509 of the Tennessee Code by broadening its scope and continuing to require a denial under oath. "An account on which action is brought, coming from another state or another county of this state *or from the county where the suit is brought*" (with requisite affidavit or certificate) "is conclusive against defendant unless denied under oath." [italics added.]

Chapter 154[227] enacts the Uniform Business Records Act. This is welcome legislation, although our courts have shown an increasingly liberal attitude in dealing with business records as evidence.

Chapter 30[228] deals with blood group tests in actions where paternity

221. TENN. CODE ANN. § 56-303 (Supp. 1957).
222. *Id.* § 36-834 (Supp. 1957).
223. *Id.* § 1-311 (Supp. 1957).
224. *Id.* §§ 36-805, 53-450 (Supp. 1957).
225. *Id.* § 36-805 (Supp. 1957).
226. *Id.* § 21-628 (Supp. 1957).
227. *Id.* §§ 24-712 to -715 (Supp. 1957).
228. *Id.* § 24-716 (Supp. 1957).

is in issue. On motion of the putative father the court may order him and the mother and child to submit to such blood grouping tests as may be necessary to determine whether he can be excluded as the father. The judge designates the qualified expert to make the test. The evidence is admissible where the results of the tests indicate exclusion. This limit is imposed, presumably, because of the acceptance of the biologic law which makes it impossible for the blood of a child to be entirely free of certain characteristics of the blood group of his father. The relevance of the presence of some characteristics is generally thought to be too slight to be worth consideration, except in unusual situations.

Chapter 36[229] provides for the admissibility in evidence of microphotographic records made by banks, but does not include microphotographs of wills.

Presumptions: Chapter 37[230] is phrased in terms of conclusive presumptions. If a bank establishes the fact that it mailed a statement of account to a depositor at his last known address and no response or objection is made within six years thereafter, it is conclusively presumed that the statement was correct.

Chapter 123 amends section 59-1037 of the Tennessee Code, which is framed in the ambiguous phrasing of prima facie evidence. The original section made proof of ownership of a motor vehicle prima facie evidence that it was being used with the owner's knowledge and consent. The amendment makes ownership prima facie evidence that the vehicle was being operated by the owner or by his employee for his benefit and in the course and scope of employment.

Appeal and Error: Chapter 177 amends section 27-322 of the Tennessee Code by enlarging the period of time in which the clerk may transmit the transcript. It provides that if a bill of exceptions is to be part of the transcript or is to accompany it, the forty-day period shall not commence until the bill is filed or the time for filing it has expired, whichever occurs first.

229. *Id.* § 45-433 (Supp. 1957).
230. *Id.* § 45-432 (Supp. 1957).