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Procedure and Evidence

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PROCEDURE AND EVIDENCE

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PLEADING

Demurrer: The Tennessee cases reiterate the orthodox proposition that a demurrer admits the facts alleged or averred in the pleading to which it is interposed.[1] It is perhaps unnecessary to note that this proposition is true only when the problem concerns the sufficiency of the allegations or averments in the pleading. In truth, the demurrer is merely a default as to the facts and a tender of issue on the law. If the demurrer is overruled and the action is for unliquidated damages, the plaintiff's averment as to the amount of the damages is not taken as true; he must prove the amount. And if the demurrer to the declaration is overruled and the defendant then answers by a denial, the fact that he has previously demurred is not receivable in evidence against him as an admission. The rule as to the effect of a demurrer is applicable to bills in equity as well as to declarations at law. But the admission "is strictly *confined to the facts.* It does not admit any matters of law suggested in the bill, or inferred from the facts stated. Upon the argument of a demurrer, the bill alone must be looked to *for the facts* of the case, except such facts as the Court may judicially know. The demurrer does not admit 'arguments, deductions, inferences, or conclusions set forth in the bill.'" Thus, it does not admit the conclusion of the pleader that the defendant "fraudulently procured the enactment" of designated private acts or "coerced" certain county judges to make specified payments under them.[2] Although contributory negligence is an affirmative defense[3] and although the Statute of Frauds must be specially pleaded,[4] if either of these defenses affirmatively appears on the face of the declaration or bill, it is demurrable.[5] But if the declaration or bill also contains matter meeting and avoiding the defense, it is sufficient against demurrer.[6]

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1. See, *e.g.*, Wilson v. Miller, 250 S.W.2d 575 (Tenn. 1952).
2. State v. Hobbs, 250 S.W.2d 549, 552 (Tenn. 1952); *cf.* Hayslip v. Bondurant, 250 S.W.2d 63 (Tenn. 1953) (petition for certiorari from decision of board of education).
3. See Kingsul Theatres, Inc. v. Quillen, 29 Tenn. App. 248, 259, 196 S.W.2d 316, 320 (E.S. 1946).
4. Cobble v. Langford, 190 Tenn. 385, 391, 230 S.W.2d 194, 196 (1950); Citty v. Manufacturing Co., 93 Tenn. 276, 24 S.W. 121 (1893).
5. McCampbell v. Central of Georgia Ry., 253 S.W.2d 763 (Tenn. 1952) (contributory negligence); Buice v. Scruggs Equipment Co., 250 S.W.2d 44 (Tenn. 1952) (statute of frauds).
6. Buice v. Scruggs Equipment Co., 250 S.W.2d 44 (Tenn. 1952).

Interpretation: Pleadings in general should be construed liberally, and this is particularly true in workmen's compensation cases. Thus, an allegation by plaintiff that her leg was severely injured to the extent of permanent disability should have been interpreted as including an assertion of injury which aggravated a prior disease, and it was error to exclude evidence tending to show the aggravated disability.[7] But a plea in abatement, even in a criminal case, is to be strictly construed. It is, of course, to be filed promptly. Thus, where the record tended to show that the plea had not been filed until at least three weeks after defendant had knowledge of the alleged irregularities, the Court said: "While the plea states that it was filed at the first opportunity, and within the three week period, it is more or less uncertain as to when, during that time, the irregularity was actually discovered." It then accepted as settled law a statement in *Chairs v. State*[8] which included the following: "The plea must exclude by proper allegations and averment, every legal intendment or conclusion that otherwise might be made against it by the court. It must appear from its averments to have been filed at the earliest possible time. . . . And the rule is general that the greatest strictness prevails in the construction and application of pleas in abatement."[9]

Replication, Effect of Failure to File: In a suit brought by a county judge pursuant to a statute authorizing him to bring suit for recovery of a shortage in public funds, the bill showed that it was brought under the statute and that counsel filing it had been selected by the judge. A plea in abatement alleged lack of both authority and selection. No replication was required.[10] The Court declared that in such case the replication would have been surplusage. It did not indicate whether the allegations in question were essential to the bill or were in the nature of an anticipatory replication. But, in either event, it seems clear that no replication would be required either under orthodox equity practice or under the Code, which dispenses with replications to answers and requires no special plea except to attack jurisdiction.[11] And in an action to recover on a fire insurance policy, plaintiff's failure to file a replication to a plea in abatement was no ground of error where the record showed that the parties proceeded to a hearing as if a replication had been filed.[12]

Set-Off and Counterclaims: Code section 8746[13] provides for unlimited counterclaims in tort and contract "in actions or suits in which a resident of another state and a resident of this state are adversary

7. Ledford v. Miller Bros. Co., 253 S.W.2d 552 (Tenn. 1952).
8. 124 Tenn. 630, 644, 139 S.W. 711, 714 (1911).
9. Gray v. State, 250 S.W.2d 86 (Tenn. 1952).
10. Smith v. State, 250 S.W.2d 55 (Tenn. 1952).
11. TENN. CODE ANN. §§ 10396, 10400 (Williams 1934).
12. Motors Ins. Corp. v. Lipford, 250 S.W.2d 79 (Tenn. 1952).
13. TENN. CODE ANN. § 8746 (Williams 1934).

parties." The Supreme Court interpreted this as not applying to litigation in chancery, even though the circuit court also would have had jurisdiction to decide the particular case. This permitted a nonresident to avoid a counterclaim in a contract action by suing in chancery.[14] This unhappy result has been made impossible in future controversies by Chapter 144 of the Tennessee Public Acts of 1953.[15]

Need for further liberalization of the counterclaim statutes is indicated in *Julian Engineering Co. v. R. J. and C. W. Fletcher, Inc.*[16] Complainant sold defendant a prefabricated smokehouse for $6,000.00 on a conditional sales contract. Defendant paid $2,000.00 in cash but failed to make further payments. Complainant sought repossession of the smokehouse but did not seek any money judgment. Defendant attempted to set off or counterclaim for breach of warranties of fitness and suitability. The Court held that recoupment and set-off are properly allowed only where plaintiff is suing for money. That defendant's claim arose out of the very transaction which is the subject of the suit is immaterial. In this case, it happened that the plaintiff was a foreign corporation. It did not appear whether defendant could have qualified as a resident of Tennessee. If so, would the 1953 amendment have made the counterclaim proper: "In cases in equity such matters shall be set up by way of cross-bill."?

Amendment: Section 8711 of the Code[17] provides: "The court may allow material amendments at any stage of the proceedings upon such terms, and subject to such rules, as it may prescribe." And section 8713[18] forbids dismissal of a civil suit for want of necessary parties and gives the court power to "strike out or insert in the writ and pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court. . . ." In *Goodloe v. Puckett*,[19] plaintiff brought action as administratrix of her husband's estate upon promissory notes payable to him. Before action brought, she had been discharged as administratrix and had become the sole owner of the notes. The action was brought before the statutory period of limitations had expired. After it had expired, plaintiff moved to amend her declaration so as to make herself personally the plaintiff. The trial judge held that the statute of limitations prevented the amendment. In a forceful opinion by Chief Justice Neil, the Supreme Court reversed, saying in part: "He [defendant] was before the court upon the averment in the declaration that he was the maker of the notes; that they were due and

14. Hood Lumber Co. v. Five Points Lumber Co., 249 S.W.2d 896 (Tenn. 1952).
15. See 6 VAND. L. REV. 797 (1953).
16. 253 S.W.2d 743 (Tenn. 1952).
17. TENN. CODE ANN. § 8711 (Williams 1934).
18. TENN. CODE ANN. § 8713 (Williams 1934).
19. 254 S.W.2d 745 (Tenn. 1953).

unpaid. The notes were in the possession of the plaintiff and it was wholly immaterial whether Mrs. Goodloe held them in her capacity as administratrix or as the individual owner. The proposed amendment added no new party and made no change in the cause of action."[20]

Lost Pleading: Where an original declaration has been lost, the court may permit a copy to be filed in its stead.[21]

PARTIES

Action Challenging Right to Public Office: In an action to enjoin a person who has been duly elected to a county office from taking that office because he is ineligible to hold it, the proper party plaintiff is the State on the relation of the Attorney General. Neither the present incumbent of the office nor the taxpayers of the county may maintain such action.[22]

Surviving Tort Action: In an action for damages caused by the wrongful act of a person who dies before action brought, the proper party defendant is the personal representative of the decedent. Consequently, no action will lie until such personal representative exists. An action brought against the wrongdoer's widow and children is subject to a plea in abatement. Incidentally, in Tennessee the circuit court has no power in a law case to appoint an administrator ad litem.[23]

Joinder: Where suit is brought on an officer's bond to recover shortages, as authorized by statute, it is proper to join the sureties on the bond for the officer's second successive term with those on his bond for the first term. This procedure enables the court to do equity between all the sureties.[24]

REMEDIES

Intervention: Where plaintiff filed his bill in March for the recovery of possession of property and in November following assigned his interest to a third person, the trial judge properly allowed the assignee to intervene. The defendant's rights were in no way affected by the intervention. The original plaintiff, if successful, would secure possession for the use and benefit of the intervenor.[25]

Interpleader: As a result of a contract between the Atomic Energy Commission and the Anderson County Board of Education, the United States paid some $2,000,000.00 to the Board of Education, which turned it over to the Trustee of Anderson County. A dispute between the

20. *Id.* at 746.
21. Chumbley v. Coffee County, 253 S.W.2d 32 (Tenn. App. M.S. 1952).
22. Bickford v. Swafford, 253 S.W.2d 557 (Tenn. 1952).
23. Brooks v. Garner, 254 S.W.2d 736 (Tenn. 1953).
24. Smith v. State, 250 S.W.2d 55 (Tenn. 1952).
25. Julian Engineering Co. v. R. J. and C. W. Fletcher, Inc., 253 S.W.2d 743 (Tenn. 1952).

County and the Board of Education as to the disposition of $117,000.00 out of the fund caused the Trustee to keep this amount in a special fund. To determine what disposition should be made of it, the Trustee interpleaded the County and the Board of Education. The chancellor held that, since the funds were all turned over to the Board for defraying the expenses of the Oak Ridge school system, the County had no claim to any part of the fund or to any commission for handling it. Neither party raised an issue as to the propriety of interpleader in this situation.[26]

Habeas Corpus: Where a trial court has committed a defendant to jail for contempt in failure to obey its order to pay alimony and defendant claims the order is unjustified because his failure was due to inability to pay, defendant's remedy is not habeas corpus. His remedy is by appeal to the Court of Appeals and then by petition for certiorari to the Supreme Court. He cannot use the writ of habeas corpus as a substitute for an appeal in due course.[27]

Declaratory Judgment or Decree: In a previous proceeding for the construction of a will, the parties reached an agreement which was embodied in a consent decree that vested all of the testator's lands in Mrs. *B* and ordered the personalty divided between Mrs. *B* and Mrs. *P*. In a condemnation proceeding in the United States district court, all funds representing the award for taking portions of the real estate were claimed by Mrs. *B*, while Mrs. *P* claimed one-half of them. The United States court ruled provisionally that they should be paid as the state court decree provided. Mrs. *B* brought action for a declaratory judgment construing the original consent decree. The Court held that the decree was ambiguous and that the controversy presented a proper case under the Declaratory Judgment Act and upheld the construction decreed by the chancellor.[28] The case presents the interesting problem whether in these circumstances the writing should have been construed by the United States court, whose duty it was to make the award in the condemnation case. As to this, the report merely said that Mrs. *P* "had filed a petition in the United States District Court claiming an interest in these funds and that the matter had been called to the attention of the United States District Judge and it was agreeable to him to have the controversy disposed of in the Chancery Court and an order entered in the Federal Court in accord with the decree of the Chancellor in this case." Is this in effect another consent order or decree in the United States court, or is it a practicable device for the application of the *Erie v. Tompkins* doctrine?

Code section 8836[29] provides for an action for a declaratory judgment

26. Larue v. Anderson County, 253 S.W.2d 736 (Tenn. 1952).
27. State v. Upchurch, 254 S.W.2d 748 (Tenn. 1953).
28. Barnes v. Pierce, 253 S.W.2d 33 (Tenn. App. M.S. 1952).
29. TENN. CODE ANN. § 8836 (Williams 1934).

as to the validity of a statute or ordinance by any person whose rights are affected by it. In *Johnson City v. Caplan*,[30] Caplan was convicted and fined in city court for violation of an ordinance. He appealed to the circuit court, and, while the case was there pending, he filed in the chancery court a petition to have the ordinance declared unconstitutional. The chancellor overruled the demurrer of Johnson City and held for the plaintiff. The Supreme Court reversed and ordered the suit dismissed. In so doing, it acted in accord with the great weight of authority. Any other result would pervert the purposes of the Declaratory Judgment Act. However liberally it should be interpreted, it ought not to be construed to sanction interference with the progress of a pending civil or criminal action in which the issue is identical with that sought to be resolved by the declaratory proceeding.

Presumptions

The customary loose use of the term "presumption," is found in the Tennessee opinions. For example, there is said to be a presumption that every citizen knows the law, but a county clerk and master could not be presumed to know that a legislative act was unconstitutional when the Supreme Court would presume it to be constitutional.[31] Obviously, what the Court is saying is that ignorance of the law is ordinarily no excuse for a violation of law but that this rule has no application to a situation where a subordinate official obeys a statute which might later be held unconstitutional. In an action to recover overtime pay, the Court declared that the defendant company would be entitled to a "prima facie presumption" that it had not violated the Wage Stabilization Act in so far as the violation subjected it to criminal penalties, yet as to civil penalties, "there is no presumption of innocence, but in the absence of evidence showing a reason for violation, it is a fair practical assumption that the law was not violated."[32] It is a bit difficult to see the difference between a prima facie presumption and a fair practical assumption. And one wonders why a party is not entitled to a presumption of innocence of a violation of a statute for which a civil penalty is imposed. Is the distinction due to the fact that the alleged wrongdoing was done by the defendant's superintendent for which defendant was only vicariously responsible?

In *Norbert Trading Co. v. Underwood*,[33] the Supreme Court made clear the effect of two presumptions: (1) that the president of a corporation has authority to endorse and transfer commercial paper payable to the corporation and (2) that, under the Negotiable Instruments Act, there has been a valid and intentional delivery of the instrument

30. 253 S.W.2d 725 (Tenn. 1952).
31. State v. Hobbs, 250 S.W.2d 549 (Tenn. 1952).
32. Todd v. Roane-Anderson Co., 251 S.W.2d 132, 135 (Tenn. App. E.S. 1952).
33. 253 S.W.2d 722 (Tenn. 1952).

to the holder of the instrument. The effect of the latter presumption was to make inapplicable a long line of Tennessee decisions holding that on a plea of non-assignavit the plaintiff had the burden of proving title to the instrument sued on. Evidence to the contrary is required to dissipate each presumption. Evidence is likewise required to remove the presumption that a child under fourteen years of age is incapable of negligence. When material evidence of his capacity is introduced, the question is for the jury.[34]

There are many statements in Tennessee cases indicating that a presumption loses all efficacy in an action as soon as evidence is received which would justify a jury in finding the nonexistence of the presumed fact. But this rule, advocated by both Thayer and Wigmore, is honored quite as much in breach as in observance. The presumption against suicide is a striking example. In *Provident Life & Acc. Ins. Co. v. Prieto*,[35] the Court exhaustively reviewed all the authorities and in effect concluded that the presumption did not disappear upon the introduction of evidence tending to show suicide but, where "the proof is equally balanced, or is conflicting, this presumption comes to the aid of the plaintiff in making out his or her case."[36] In *Bryan v. Aetna Life Ins. Co.*,[37] the Court said that it was unwilling to overrule its previous cases and quoted from the *Prieto* case with approval. And the Court of Appeals has followed the *Prieto* case in *Maddux v. National Life & Acc. Ins. Co.*[38]

BURDEN OF PROOF

Only two cases during the pertinent period involved the allocation of the burden of proof. The one is entirely orthodox. A party relying upon a former judgment as an estoppel or res judicata has the burden of proving it, and, where the record in the former pleading does not make it appear that the matter in question was adjudicated, evidence *aliunde* must be produced.[39] The other may be somewhat more questionable. Where defendant was indicted for unlawfully possessing unstamped whiskey, he had the burden of producing evidence and the burden of persuading the jury that whiskey possessed by him was stamped. Since he produced no such evidence, his conviction was affirmed.[40] The Court cited only a case in which defendant insisted that the prosecution must prove lack of a license to do an otherwise prohibited act.[41] The reasoning of the cited case was that it is entirely

34. Hadley v. Morris, 249 S.W.2d 295 (Tenn. App. W.S. 1951).
35. 169 Tenn. 124, 83 S.W.2d 251 (1935).
36. *Id.* at 168, 83 S.W.2d at 268.
37. 174 Tenn. 602, 130 S.W.2d 85 (1939).
38. 254 S.W.2d 433 (Tenn. App. M.S. 1953).
39. Carter County v. Street, 252 S.W.2d 803 (Tenn. App. E.S. 1952).
40. Everhart v. State, 250 S.W.2d 368 (Tenn. 1952).
41. Knowling v. State, 176 Tenn. 56, 138 S.W.2d 416 (1940).

proper to put upon the defendant in a criminal case the burden of proving the existence of a fact peculiarly within his knowledge, even where the nonexistence of that fact is an essential element of the offense charged. This reasoning has frequently been advanced in the license cases. But there are obvious limitations to its general applicability.[42]

EVIDENCE

The decisions dealing with evidence are, for the most part, orthodox in statement and in application. In situations where the admissibility of an item of relevant evidence depends upon the determination of a question of fact, the determination is made by the judge. Thus, in a prosecution for homicide, it was for him to decide whether a statement made by the victim was made while he was rational and while he had the requisite realization of speedily impending death.[43]

Illegally Obtained Evidence: The doctrine of the United States Supreme Court governing the admissibility of evidence obtained through search and seizure in violation of the Constitution is accepted in Tennessee. Its application cannot be avoided by subterfuge. Where an officer stopped an automobile on the pretext of examining defendant driver's license, saw intoxicating liquor in the car and held the defendant until a proper warrant was secured, the arrest and search were illegal, and evidence found as a result was inadmissible.[44] On the other hand, if officers have sufficient information concerning the commission of a felony to justify the arrest of defendant in his home, a search of his room after the arrest is not in violation of the Constitution, and a pistol found therein is receivable in evidence against him.[45] A person who accepts the privilege of taking wild life under a statute which requires him to submit to inspection to ascertain whether the statutory requirements are being observed cannot complain of a search which reveals game illegally procured, and evidence of the results of the search is admissible.[46] Even though intoxicants procured through illegal search have been erroneously admitted against the defendant in a prosecution for their illegal possession, if he thereafter takes the stand and admits possession, the error is cured.[47]

Other Crimes: A few states have accepted the American Law Institute's analysis that evidence of other crimes is inadmissible only where its relevance is by way of inference from the criminal act to disposi-

42. See Morrison v. California, 291 U.S. 82, 54 Sup. Ct. 281, 78 L. Ed. 664 (1934).
43. Helton v. State, 255 S.W.2d 694 (Tenn. 1953).
44. Murphy v. State, 254 S.W.2d 979 (Tenn. 1953).
45. Williamson v. State, 250 S.W.2d 556 (Tenn. 1952).
46. Monroe v. State, 253 S.W.2d 734 (Tenn. 1952).
47. Burks v. State, 254 S.W.2d 970 (Tenn. 1953).

tion to commit such acts and thence to the commission of the act charged. Tennessee adheres to the usual statement that such evidence is inadmissible, subject to a group of exceptions. These include situations where evidence of the other crimes shows motive or otherwise tends to prove the crime charged. Thus, where the charge was an attempt to bribe an officer not to perform his duty, evidence that the defendant was engaged in a "numbers racket" was admissible to show his motive and the objective to be accomplished by the bribe.[48] And where the other criminal acts constitute a part of the transaction in which the crime charged was committed, the excluding generalization has no application. For example, in an action to enjoin a liquor nuisance, evidence of specific illegal acts connecting defendant with the possession and sale of whiskey was properly received.[49] And where the act charged was the shooting of *A*, evidence of the shooting of *B* and *C* at the same time and place was admissible.[50]

The reason for excluding such evidence is not its lack of relevance but the fact that its slight logical value in the usual situation is outweighed by the undue prejudice which its reception is likely to cause.[51] In like manner the favorable financial situation of a defendant who is sued for damages in tort has very little if any relevance and is rejected. But where his wrong subjects him to punitive damages, evidence of his wealth is relevant and receivable, for obviously the imposition of a small financial penalty upon a man of wealth constitutes but slight punishment.[52]

Parol Evidence Rule: The Thayerian view that the parol evidence rule is a rule of substantive law is accepted. Consequently, evidence which violates the rule, though received without objection, cannot be the basis of a finding. The rule does not apply where the parol evidence would establish a claim of waiver or estoppel. But it does forbid the use of such evidence to explain the meaning of an unambiguous writing. There is a conflict of authority upon the question whether a negotiable instrument is thus unambiguous in the following situation. The first signature consists of the name of a corporation; underneath this, the word "by" is followed by the name of an individual without further designation or description; beneath the name of that individual, but with not quite the same margin, is the name of a second individual without designation or description. The Tennessee Court, adopting the minority view, held the instrument unambiguous and reversed the trial judge's finding, based on parol evidence, that the second individ-

48. Lee v. State, 254 S.W.2d 747 (Tenn. 1953).
49. Poston v. State, 256 S.W.2d 63 (Tenn. App. E.S. 1952).
50. Gray v. State, 250 S.W.2d 86 (Tenn. 1952).
51. For a penetrating analysis of the problem, see Trautman, *Logical or Legal Relevancy — A Conflict in Theory*, 5 VAND. L. REV. 385, 403 (1952).
52. Suzore v. Rutherford, 251 S.W.2d 129 (Tenn. App. W.S. 1952).

ual had signed, not as maker, but as an officer of the corporation.[53] Likewise evidence of an oral agreement that an instrument creating an easement of way over a strip of land was intended to give the grantee the right to exclusive possession of the strip was held inadmissible. The instrument contained no provision as to possession.[54]

The reasoning in the decision of the Supreme Court in *Brewing Corp. of America v. Pioneer Distributing Co.*[55] is completely out of harmony with the generally accepted concepts as to the scope of the rule. Two individuals executed a contract of guaranty which contained a provision that it should continue in force until revoked by notice sent by registered mail. In an action on the guaranty, one surety offered to prove a parol release. The Court said: "To permit the defendant Wilcox to prove that by a subsequent oral agreement, he was released from the written contract of guaranty, while such contract was left in force against his co-guarantor, Maddux, would clearly be to permit the introduction of oral evidence to 'alter, modify and contradict' the express terms of a written contract, and so a violation of the parol evidence rule."[56] The only case cited to support this statement is not in point.[57] Perhaps the subsequent oral agreement was unenforceable for lack of consideration or because within the Statute of Frauds, but certainly the parol evidence rule has never been thought to be effective to prevent the modification of a written contract by subsequent oral contract.[58]

Former Judgments: In an action to enjoin a liquor nuisance, defendant offered to prove that he had been tried and acquitted of the offense of making the sale of liquor which formed a basis for a finding against him. The rejection of the evidence by the trial judge was approved by the Court of Appeals.[59] This ruling is in accord with the overwhelming weight of authority. But in the same case the judge received over the defendant's objection "a certified copy of Mr. Johnson's [defendant's] record in the Police Court of Knoxville showing he was fined many times for violation of municipal ordinances against

53. Lazarov v. Klyce, 255 S.W.2d 11 (Tenn. 1953). See the comment on this case in the Interpretation section of the Contracts article and in the Parol Evidence section of the Bills and Notes article.
54. Frumin v. May, 251 S.W.2d 314 (Tenn. App. E.S. 1952).
55. 253 S.W.2d 761 (Tenn. 1952).
56. *Id.* at 762.
57. Klein v. Kern, 94 Tenn. 34, 28 S.W. 295 (1894).
58. The Court did not discuss the application of the statute to the agreement in question. It may have involved difficult problems. See 2 WILLISTON, CONTRACTS §§ 591-594 (Rev. ed. 1936). The same authority has this to say about an analogous misconception: "A failure to observe the reason why neither sealed instruments nor contracts within the Statute of Frauds can be varied by oral executory agreements has sometimes led to broad statements that written contracts can be altered only by another written contract, or by an executed oral agreement and the California Civil Code so provides, and the provision has been copied in the statutes of a number of states." 6 WILLISTON, CONTRACTS § 1828 (Rev. ed. 1938).
59. Johnson v. State, 257 S.W.2d 20 (Tenn. App. E.S. 1950).

storing, transporting and possessing intoxicants." In affirming, the Court cited only the statute making admissible evidence of defendant's reputation. It is, of course, well settled that evidence of prior instances of reprehensible conduct is inadmissible as tending to prove the disposition or character of a witness or party but that conviction of an offense consisting of that conduct is admissible. Hence, if the statute had provided for the admissibility of evidence of defendant's character, the decision might have been an application of a settled rule. But, certainly, a record of a single conviction would hardly be admissible evidence of reputation, although it might well have some logical relevance. Is the case to be explained on the theory that a police record of many convictions is a vehicle of community reputation? Such theory would probably accord with common experience in a small community, and there was a time when the verdict of the jury on a matter of public interest was regarded as involving reputation. But any modern case reflecting such a notion is based on the long obsolete system whereby jurors decided the issues submitted to them on their own knowledge and not on the evidence introduced at the trial.[60] Or should the reference to reputation be ignored and the convictions used as conclusive evidence of the earlier offenses, proving defendant a common or habitual liquor seller?[61]

Judicial Notice: The current cases dealing with this subject are of the simplest sort. Chiefly, they are those in which the matter noticed is so notorious as not to be the subject of reasonable dispute — so-called matter of common knowledge: (1) that "moonshine liquor" is illegally made whiskey, and that whiskey contains more than 5% alcohol;[62] (2) that children play and run about on unfenced lawns abutting on a highway so that motorists using the highway must be on guard;[63] (3) that it is a universal custom for the maker of a promissory note to sign the note at the right near the bottom of the face of the note;[64] and (4) that there is an over-all cost of maintaining trunk sewer lines so that all users must contribute to pay it.[65] The Supreme Court has judically noticed that the town named in the warrant of a justice of the peace was located in the county in which the suit was brought.[66] This may have been on the theory that the fact was notorious to men in the position of members of the Court or that it was a matter capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.

60. See 5 WIGMORE, EVIDENCE § 1593 (3d ed. 1940).
61. See 1 WIGMORE, EVIDENCE § 203 (3d ed. 1940).
62. Everhart v. State, 250 S.W.2d 368 (Tenn. 1952).
63. Hadley v. Morris, 249 S.W.2d 295 (Tenn. App. W.S. 1951).
64. Lazarov v. Klyce, 255 S.W.2d 11 (Tenn. 1953).
65. Cline v. Red Bank Utility Dist., 250 S.W.2d 362 (Tenn. 1952).
66. Motors Ins. Corp. v. Lipford, 250 S.W.2d 79 (Tenn. 1952).

Weight and Credibility: Tennessee has apparently accepted the minority view that the uncontradicted testimony of an unimpeached witness must be accepted. In an action in which it was essential for plaintiff to establish that she was rightly in the defendant's truck assisting in unloading it, uncontradicted testimony of several unimpeached witnesses that the driver was prohibited from permitting others to enter the truck was held to be conclusive. Nothing was said as to whether any one of them was interested or uninterested.[67] But, where the proof of a fact depends solely on the testimony of a single witness and it is self-contradictory, a finding of fact by the jury cannot stand. This is particularly true where a fair interpretation of the testimony tends to negative the fact.[68]

If the matter in question is one with respect to which a layman could have no knowledge, expert testimony may be conclusive, but in other situations a conflict between experts and laymen in their testimony as to objective facts, such as the observable conduct of a person claiming to be totally disabled, raises an issue to be decided by the trier of fact.[69]

Federal Decisions: In *Niagara Fire Ins. Co. v. Bryan & Hewgley, Inc.*,[70] the federal court of appeals held admissible an exhibit showing the amount of merchandise in the warehouse in question five or six months before the loss insured against. The court pointed out that, while it was inadmissible as evidence of the truth of the matters stated in it, yet, since it had been prepared at the request of the defendant company from original records, it was receivable as tending to show that the insured had kept books or records such as the policy required.

West v. Cincinnati, N.O. & T.P. Ry.[71] involved the application of the Tennessee statute of limitations to an action in the federal court. The complaint had been filed within the statutory period and the summons issued, but service upon one defendant had been held up, apparently at the request of the plaintiff. Judge Taylor interpreted the Tennessee statute and decisions as holding that the issuance of the summons commenced the action and normally tolled the statute, that there was no authority for delaying service of summons at the request of a party and that if service were thus delayed the issuance of the summons would not constitute the commencement of the action so as to stop the running of the statutory period.

67. Brooks v. Southeastern Motor Truck Lines, Inc., 255 S.W.2d 128 (Tenn. App. W.S. 1952).
68. Lawrence v. Lawrence, 250 S.W.2d 781 (Tenn. App. M.S. 1951).
69. Henderson v. New York Life Ins. Co., 250 S.W.2d 11 (Tenn. 1952)
70. 195 F.2d 154 (6th Cir. 1952).
71. 108 F. Supp. 276 (E.D. Tenn. 1952).

WITNESSES

Preferred Witness: In proving execution of a document which is required to be attested, the attesting witnesses must first be called or their unavailability shown. This rule is applicable to proof of execution of wills in Tennessee, but it does not confine the proponent's evidence to the testimony of the attesters. Once the attesters have been called or their absence properly accounted for, testimony of due execution from other witnesses is receivable, and it may justify a finding even where the testimony of an attester is uncertain or adverse.[72]

Examination: When defendant in a criminal case takes the stand, he is subject to cross-examination like any other witness. Thus, where defendant, charged with the murder of a woman with whom he had had illicit relations, introduced evidence tending to show himself a faithful father and husband, the trial judge properly allowed extensive cross-examination about his domestic affairs and about his arrest for nonsupport of his wife and children.[73] The defendant may be asked whether he has not been previously convicted of offenses involving moral turpitude for the purposes of affecting his credibility as a witness. That the evidence incidentally shows the commission of other crimes does not prevent its reception.[74]

Privileged Communications: Husband and wife are competent to testify against each other in both civil and criminal cases, but neither may testify as to any matter that occurred between them by virtue of or in consequence of the marital relationship.[75] The prohibition is designed to protect marital confidences. Hence, it has no application to testimony of a wife that the defendant, her husband, jumped on her in the home, beat her, chased her out of the house and followed her, threatening to shoot her.[76]

Effect of Failure to Call: No inference can be drawn against a party for failure to call a witness not under his control and equally available to his opponent. Thus, in an action on an insurance policy providing benefits for total and permanent disability, failure of plaintiff to call doctors from Vanderbilt Hospital who had treated him warranted no unfavorable inference.[77]

TRIAL

Jurisdiction over Person: In *McDaniel v. Textile Workers Union of America*,[78] the Court of Appeals held no longer applicable Tennessee

72. Miller v. Thrasher, 251 S.W.2d 446 (Tenn. App. E.S. 1952).
73. Helton v. State, 255 S.W.2d 694 (Tenn. 1953).
74. Gray v. State, 250 S.W.2d 86 (Tenn. 1952); Everhart v. State, 250 S.W.2d 368 (Tenn. 1952).
75. TENN. CODE ANN. §§ 9777, 9778 (Williams 1934).
76. Dowdy v. State, 250 S.W.2d 78 (Tenn. 1952).
77. Henderson v. New York Life Ins. Co., 250 S.W.2d 11 (Tenn. 1952).
78. 254 S.W.2d 1 (Tenn. App. E.S. 1952).

decisions based on *Flexner v. Farson.*[79] Hence, service on the Secretary of State in an action against a nonresident unincorporated association doing business in Tennessee, as authorized by 1950 Code Supplement section 8679.1,[80] was effective to support a judgment enforceable against the property of the association. In an action for divorce, where jurisdiction to decree divorce was secured by constructive service, the court has no power to make a decree for the support of the children by the defendant.[81] These cases reflect currently accepted doctrines.[82]

Venue: A petition for change of venue by plaintiff must be made promptly after discovering the cause for which it is sought. Otherwise, a denial of the petition is not an abuse of the trial judge's discretion.[83]

Right to Trial by Jury: The right to trial by jury in equity in Tennessee is created by statute. It is not embodied in the Constitution. Consequently, when a statute governing ouster of public officers provided that the procedure should be that of courts of chancery, the defendant had no right to a jury trial. An act of 1933, amending the statute, granted that right; the 1933 act was repealed by an act of 1937, which in turn was repealed by an act of 1939. In *Edwards v. State,*[84] defendant's demand for a jury was denied, and findings were made against him. The Supreme Court held that the evidence was such that, had there been a jury, the court must have directed a verdict against Edwards. An erroneous denial of jury trial would, therefore, have been without prejudice, and it was unnecessary to decide whether the repealing act of 1939 revived the provision for jury trial in the act of 1933.

Challenge to the Array: The method of selection of citizens for duty as jurors is sometimes provided by private act. The generally accepted doctrine in this country is that a substantial variance from the method prescribed by statute makes the array subject to challenge. The statutory objective is the prevention of possibility of manipulation by the officials charged with the duty of furnishing the panel. It is ordinarily true that the statutory details are held to be merely directory, but a disregard of the general plan is not tolerated. The Jury Commission Law of Hamilton County provided that the commissioners should obtain a list of qualified voters from the magistrates and, from such lists and other reliable sources of information, should select the names of the veniremen. Commissioners acting under this statute received only four or five lists from the eleven magistrates and se-

79. 248 U.S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250 (1919).
80. TENN. CODE SUPP. § 8679.1 (1950).
81. Watkins v. Watkins, 254 S.W.2d 735 (Tenn. 1953); cf. May v. Anderson, 73 Sup. Ct. 840 (U.S. 1953).
82. See 6 VAND. L. REV. 783 (1953).
83. Tennessee Gas Transmission Co. v. Oakley, 249 S.W.2d 880 (Tenn. 1952).
84. 250 S.W.2d 19 (Tenn. 1952).

lected 1200 names by using voting registration lists and by inquiring "among their acquaintances, civic organizations and the like." The Court held that the provisions of the statute were directory only and that, in the absence of any suggestion of improper influence, the array so selected was not subject to challenge.[85]

Examination on Voir Dire: Where the action is one in which a party may be carrying liability insurance, it is proper to ask jurors concerning ownership of stock in a company writing such insurance. It is said that the questions must be put in good faith, but how that good faith or lack of it is to be made apparent is not explained.[86]

Objections during Trial: Where the fact of liability insurance is improperly disclosed to the jury during trial, the party prejudiced thereby should immediately move for a mistrial. Even then, the trial judge has some discretion in ruling on the motion. Certainly, the complaining party cannot wait until moving for a new trial to make known his objection and to demand appropriate action by the trial judge.[87]

Rulings on Evidence: When an objection to offered evidence is sustained, the proponent must by appropriate action, such as an offer of proof, make known the content of the offered evidence. If the record on appeal does not contain the rejected evidence, the reviewing court has no means of knowing whether the error prejudically affected the result.[88] When the objection is erroneously overruled in a jury case, the error may ordinarily be cured by an instruction in the charge directing the jury to disregard the objectionable testimony.[89] And where the trial is by a chancellor, the error will be harmless if he states that he did not consider the testimony received under objection.[90] The generally accepted doctrine that the chancellor is not influenced by incompetent evidence is interestingly illustrated in a case where an action for breach of contract was begun before a jury which was later discharged by agreement of the parties. While the jury was present, objections made to the reception were overruled. These objections were held not subject to review on appeal.[91]

Misconduct of Counsel: In a prosecution of a Negro defendant for the murder of a Negro, the prosecutor, in examining a white character

85. Helton v. State, 255 S.W.2d 694 (Tenn. 1953).
86. City Water Co. v. Butler, 251 S.W.2d 433 (Tenn. App. E.S. 1951).
87. Logwood v. Nelson, 250 S.W.2d 582 (Tenn. App. E.S. 1952).
88. Turner v. Tennessee Products & Chemical Corp., 251 S.W.2d 441 (Tenn. App. M.S. 1952).
89. Central Truckaway System, Inc. v. Waltner, 253 S.W.2d 985 (Tenn. App. E.S. 1952).
90. American Nat. Bank & Trust Co. v. Mander, 253 S.W.2d 994 (Tenn. App. E.S. 1952).
91. Tennessee Handle Co. v. Builders Supply Co., 255 S.W.2d 412 (Tenn. App. M.S. 1952).

witness testifying for defendant, threatened to indict him for perjury and, in arguing to the jury, referred to the disgrace it brought upon a county to have white men testify as character witnesses for a Negro. The Supreme Court held that the attempted coercion of a witness and the appeal to race prejudice required a reversal of the judgment of conviction. The Court left no doubt of its strong disapproval of such conduct.[92]

Motion for Nonsuit or Dismissal: If a motion for a peremptory instruction at the close of the plaintiff's evidence is erroneously denied, the error is waived when defendant thereafter proceeds to introduce evidence.[93] This is the well-accepted doctrine in practically all jurisdictions. The Tennessee cases abound with statements of the established rule that, in passing upon a motion for a peremptory instruction or for a nonsuit or directed verdict, at whatever stage made, the trial judge must consider the evidence in favor of the opponent in the light most favorable to him. When there is credible evidence which, if believed, would justify a verdict in his favor, the motion should be denied.[94]

Requests to Charge and Charges: It is well settled that, in considering alleged errors in the judge's instructions to the jury, the charge is to be considered as a whole and the instruction complained of will be reversible error only where it is likely to mislead the jury on a material matter.[95] Each portion of the charge is to be construed as part of the whole and not in isolation.[96] The text writers agree that the charge should cover all the chief matters in issue. It has been held that, if an issue not made by the pleadings is tried without objection, it is properly submitted to the jury.[97] This rule prevails in most code states.

Refusal to give a requested instruction is not error, if the instruction is not accurately phrased[98] or if the requested proposition is substantially covered in the general charge.[99] When the charge as given is attacked as insufficiently detailed or as subject to misinterpretation or

92. Manning v. State, 257 S.W.2d 6 (Tenn. 1953).
93. (Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139 (Tenn. App. W.S. 1952).
94. Henderson v. New York Life Ins. Co., 250 S.W.2d 11 (Tenn. 1952); Central Truckaway System, Inc. v. Waltner, 253 S.W.2d 985 (Tenn. App. E.S. 1952); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951). In this connection, attention should be given to TENN. CODE ANN. § 10622 (Williams 1934) with reference to *de novo* trials in the Court of Appeals where the trial below was without a jury.
95. All v. John Gerber Co., 252 S.W.2d 138 (Tenn. App. W.S. 1952); Miller v. Thrasher, 251 S.W.2d 446 (Tenn. App. E.S. 1952).
96. Southern Fire & Cas. Co. v. Norris, 250 S.W.2d 785 (Tenn. App. E.S. 1952).
97. France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).
98. All v. John Gerber Co., 252 S.W.2d 138 (Tenn. App. W.S. 1952).
99. Miller v. Thrasher, 251 S.W.2d 446 (Tenn. App. E.S. 1952); Act-O-Lane Gas Service Co. v. Hall, 248 S.W.2d 398 (Tenn. App. E.S. 1951); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).

as confusing, it is incumbent upon counsel to request additional or clarifying instructions; and this is particularly true where the judge inquires whether counsel has further requests or objections.[100]

Deliberation of Jury: It is misconduct of the jury to discuss or consider the amount of attorney's fees which a party will have to pay or the probability that the defendant is protected by liability insurance, but such misconduct does not necessarily require that the verdict be set aside.[101]

Verdict: The provisions of Code section 8824[102] have incidental salutary consequences. If a single count in a declaration is good and is supported by evidence, a general verdict for the plaintiff will stand and an erroneous refusal to direct a verdict on counts not supported by evidence will be harmless. The effect of the statute is to interpret a general verdict for the plaintiff as a finding in his favor on every count.[103]

Judgment: When judgment is entered, it is to be construed like any other document so as to give full effect, if possible, to every word and make its several parts consistent, effective and reasonable.[104]

MOTION FOR A NEW TRIAL

Time for Making: Section 8980 of the 1950 supplemental Code[105] provides that a motion for a new trial shall be made only within 30 days from the decree, verdict or judgment in question, subject to rules of court prescribing the time, but the rules may not allow less than ten days. The termination of the term of court does not shorten the time. If the motion is not made within the time prescribed, the court has no jurisdiction to entertain it, although, if filed in time, it may be argued and considered later.[106]

Grounds: The few cases reaching the appellate courts during the period under consideration exhibit no unusual features. And the treatment by the reviewing courts is orthodox,[107] except for the de-

100. See Jones v. State, 253 S.W.2d 740 (Tenn. 1952); Poston v. State, 256 S.W.2d 63 (Tenn. App. E.S. 1952); All v. John Gerber Co., 252 S.W.2d 138 (Tenn. App. W.S. 1952).
101. France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).
102. TENN. CODE ANN. § 8824 (Williams 1934).
103. Central Truckaway System, Inc. v. Waltner, 253 S.W.2d 985 (Tenn. App. E.S. 1952).
104. Branch v. Branch, 249 S.W.2d 581 (Tenn. App. E.S. 1952).
105. TENN. CODE SUPP. § 8980 (1950)
106. Suzore v. Rutherford, 251 S.W.2d 129 (Tenn. App. W.S. 1952).
107. France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951) (misconduct of jury in discussing liability insurance or amount of attorney's fees); Johnson v. McCord, 251 S.W.2d 144 (Tenn. App. W.S. 1952) (same, as to unauthorized view by two jurors); Logwood v. Nelson, 250 S.W.2d 582 (Tenn. App. E.S. 1952) (incidental disclosure of liability insurance); Searcy v. Simmons, 250 S.W.2d 109 (Tenn. App. M.S. 1951) (surprise at testimony of adverse witness fully cross-examined). In all cases, motion was denied.

cisions dealing with the functions and duty of the trial judge where the ground of motion is the insufficiency of the evidence to sustain the verdict. In these, the courts have applied the rule which is well settled in Tennessee but which has not been found elsewhere in a reasonably thorough search of authorities.

"The rule in this state is firmly established that the trial court shall exercise the function of a thirteenth juror upon hearing of a motion for a new trial. . . ."[108] Consequently, when the trial judge in passing upon such motion said, "In these cases where the evidence is in sharp conflict the Court does not feel that he has a right to interfere with the verdict of the jury, and overrules the motions," the Court of Appeals reversed and remanded the case for a new trial.[109] Where the trial judge makes no statement concerning his conception of his duty to weigh the evidence or phrases his comment so that the appellate court considers it less than an affirmative disclaimer of having exercised his judgment as a thirteenth juror, his order denying a new trial will be affirmed.[110] The Tennessee doctrine is clearly set forth in *State* ex rel. *Richardson v. Kenner,*[111] in which the Court again quotes with approval a manuscript decision in *Durant v. State,* decided in 1925. There, the Court reversed the trial judge, who said that he was glad that he did not have to decide upon the guilt of the defendant or the credibility of the witnesses. The Supreme Court declared that this was exactly what he had to do and that he must grant a new trial unless he found defendant guilty beyond a reasonable doubt. The United States Court of Appeals for the Sixth Circuit has recently held that the thirteenth-juror rule is not to be applied in a United States district court sitting in Tennessee.[112] The appellant was insisting that the verdict was so excessive as to indicate passion and prejudice and to require a new trial as to damages and apparently argued that the Tennessee rule should be applied in considering either the granting of a new trial or the ordering of a remittitur. It seems to be well settled in Tennessee that the thirteenth-juror rule does not apply where the disapproval of the judge is limited to the excessiveness of the verdict. "[W]here the trial judge has simply expressed his disapproval of the verdict as being excessive, yet has refused to set it aside, this [Supreme] Court will not, alone upon the ground of such disapproval or dissatisfaction with the amount of the verdict, grant a new trial."[113] It would be unprofitable to speculate whether the doctrine of *Erie*

108. McLaughlin v. Broyles, 255 S.W.2d 1020, 1023 (Tenn. App. E.S. 1952).
109. *Ibid.*
110. Central Truckaway System, Inc. v. Waltner, 253 S.W.2d 985 (Tenn. App. E.S. 1952).
111. 172 Tenn. 34, 109 S.W.2d 95 (1937).
112. Werthan Bag Corp. v. Agnew, 202 F.2d 119 (6th Cir. 1953).
113. Tennessee Coal & R.R. v. Roddy, 85 Tenn. 400, 409, 5 S.W. 286, 290 (1887); *accord,* Third Nat. Bank v. American Equitable Ins. Co., 27 Tenn. App. 249, 178 S.W.2d 915 (M.S. 1943).

Railroad v. Thompkins would be held applicable to the division of functions between judge and jury where the thirteenth-juror rule is involved.

It is interesting to note the control which the judge maintains over the action of the jury in view of the accepted doctrine that he must not comment upon the weight of the evidence or the credibility of the witnesses in his charge and especially in view of the rule that the jury in criminal cases determines both the law and the facts.

APPEAL AND ERROR

What is Appealable? In a criminal case, an appeal lies only from a final judgment. Consequently, rulings striking out defenses of another action pending and former judgment and former jeopardy are not appealable.[114] They are, of course, reviewable on an appeal from the final judgment and are, therefore, not reviewable by certiorari.[115]

In equity, under section 9038 of the Code,[116] the chancellor may, in his discretion, allow an appeal from decrees which do not finally dispose of the controversy before him. Thus, he may grant an appeal from a finding of liability although he has ordered a reference to fix the amount.[117] And a habeas corpus proceeding for the determination of the right to the custody of a child is regarded as a proceeding in equity in so far as the chancellor's power to allow a discretionary appeal is involved.[118] On appeal, the chancellor's discretionary taxation of costs is reviewable only on the ground that it is arbitrary or capricious.[119]

A judgment in favor of a party which grants less than he demanded is appealable by him, but the errors reviewable are only those errors which affect the amount or extent of recovery.[120]

To Which Court? Although appeal from the circuit or chancery court lies to the Supreme Court in cases involving the right to hold a public office, an appeal in a suit brought against a mayor of a town to recover from him money unlawfully paid to him as mayor, to dismiss him from office and to adjudge him ineligible to hold that office for ten years lies only to the Court of Appeals. The Court gave no explanation as to why the suit did not involve the right to hold a public office. It seemed to place reliance almost wholly upon former cases in which the appeal was uniformly to the Court of Appeals and in which no question of that Court's jurisdiction was raised.[121]

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114. Allen v. State, 250 S.W.2d 539 (Tenn. 1952).
115. Helton v. State, 250 S.W.2d 540 (Tenn. 1952).
116. TENN. CODE ANN. § 9038 (Williams 1934).
117. Brewing Corp. of America v. Pioneer Distributing Co., 253 S.W.2d 761 (Tenn. 1952).
118. State *ex rel.* Bolden v. Woodring, 254 S.W.2d 737 (Tenn. 1953).
119. Young v. Jones, 255 S.W.2d 703 (Tenn. App. E.S. 1952).
120. All v. John Gerber Co., 252 S.W.2d 138 (Tenn. App. W.S. 1952).
121. Crass v. Walls, 253 S.W.2d 755 (Tenn. 1952).

In a recent case,[122] the Court of Appeals was able, because of the peculiar situation, to avoid determining which of two appeals from a county court is to be given priority. An appeal from an order fixing an attorney's fees for services rendered to an estate was taken to the chancery court by one party. Thereafter, an appeal to the circuit court was taken by the other party. The clerk of the county court sent the record to the chancery court; the other party's petition for certiorari to compel the clerk to send the record to the circuit court was denied on the ground that the appeal first in time was to be preferred. By reason of illness of the chancellor, the circuit judge had been appointed special chancellor, and so he would hear the appeal in whichever court it was pending. The Court of Appeals held that, for this reason, it was immaterial whether he acted as chancellor or as circuit judge.

Formal Requisites: Although an appeal in the nature of a writ of error is a matter of right, a prayer for the allowance of an appeal and the allowance are required, and if the technical record does not show the prayer and allowance, the appeal will be dismissed. The failure of the minutes to record this useless formality is not necessarily fatal to a review by the appellate court, for the aggrieved party may proceed by writ of error after his appeal has been dismissed. And, as was most sensibly done in *State v. Hobbs*,[123] the appellate court may, in its discretion, treat the abortive appeal as if it were a writ of error, where the record satisfies the conditions prescribed for such a writ.

The statutory provision as to the time for praying an appeal and for filing the bond or pauper's oath is mandatory. The appellate court has no power to permit a bond to be filed after the expiration of the prescribed time, though it may allow the correction or amendment of a defective bond timely filed.[124] Similarly, the time for petitioning the Supreme Court for certiorari is mandatory, and neither a justice of the Court nor the Court itself has power to entertain a petition after the prescribed period has elapsed.[125]

As to the amount of the bond on appeal, Code section 9043[126] provides that it must cover "the whole debt, damages, and costs" in certain actions, including those on "written obligations for the delivery of specific articles." In *Julian Engineering Co. v. R. J. and C. W. Fletcher, Inc.*,[127] the plaintiff sought the recovery of a chattel, sold to defendant on a conditional sale contract, for default in payment of part of the unpaid purchase price represented by a promissory note. The Court

122. McClure v. Wade, 253 S.W.2d 554 (Tenn. 1952).
123. 250 S.W.2d 549 (Tenn. 1952).
124. England v. Young, 155 Tenn. 506, 296 S.W. 14 (1927).
125. Parham v. Beasley, 251 S.W.2d 251 (Tenn. 1952); Smith v. Memphis, 249 S.W.2d 893 (Tenn. 1952).
126. TENN. CODE ANN. § 9043 (Williams 1934).
127. 253 S.W.2d 743 (Tenn. 1952).

interpreted the statute as applicable only where the judgment or decree was for the payment of a sum of money. Hence, a motion of plaintiff to dismiss the appeal by defendant from a decree awarding repossession to plaintiff was denied, though defendant's bond covered only costs.

Record on Appeal: Tennessee preserves the distinction between the technical record and the record of proceedings which must be embodied in a bill of exceptions. Thus, if the technical record contains a plea in abatement and a ruling by the trial judge on its sufficiency as a matter of law, the ruling may be reviewed without a bill of exceptions, but if the whole record indicates expressly or by implication that the ruling was one of fact based on evidence, a bill of exceptions is essential.[128] And the bill of exceptions must have been filed within the time fixed by the trial judge within the limit set by the statute; otherwise it cannot be considered part of the record.[129] Where there is an apparent conflict between the court's minutes, which are part of the technical record, and the bill of exceptions, a careful analysis is essential. In *Gray v. State*,[130] the minutes recited a plea in abatement to the indictment alleging an illegal selection of grand jurors but contained no entry showing any disposition of the motion. The bill of exceptions, the Supreme Court held, could not be examined to supply the ruling as a basis for an assignment of error. On the other hand, in *Helton v. State*,[131] the minute entry revealed an exception taken by defendant to a ruling of the trial judge in discharging a juror for allegedly insufficient reason. The Supreme Court, citing only *Percer v. State*,[132] said that "under such circumstances the bill of exceptions controls."[133] In the *Percer* case, the minutes recited the presence of defendant at the reception of the verdict, but the bill of exceptions set forth a motion for a new trial upon the hearing of which the evidence disclosed facts which did not satisfy the requisites of presence. The *Gray* case is easily explained for the reason that there can be no action on or relief from a judgment until it is rendered and its form on the minute entry is conclusive. Furthermore, the minute entry is not conclusive where the bill of exceptions shows that it has been positively disapproved,[134] as in the *Percer* case. Can it be properly said that an omission in a bill of exceptions is a positive disapproval of a minute entry, or does the failure to repeat the exception in the bill

128. Motors Ins. Corp. v. Lipford, 250 S.W.2d 79 (Tenn. 1952).
129. Hamilton v. Wolfe, 250 S.W.2d 910 (Tenn. 1952).
130. 250 S.W.2d 86 (Tenn. 1952). Incidentally, it should be noted that the minutes are not, except in cases of ambiguity, to be explained by extraneous evidence. Gregory v. Trousdale County, 254 S.W.2d 753 (Tenn. 1953).
131. 255 S.W.2d 694 (Tenn. 1953). See the comment on this case in the Former Jeopardy section of the Criminal Law and Procedure article.
132. 118 Tenn. 765, 103 S.W. 780 (1907).
133. 255 S.W.2d at 697.
134. Waller v. Skelton, 186 Tenn. 433, 211 S.W.2d 445 (1948).

prevent an assignment of error on the ruling, or is the explanation that the ruling was not treated as strictly a matter of law but as one based on evidence of the juror's qualification?[135]

If the judgment appealed from is based on a jury verdict, the record must show that the errors assigned were specified in the required motion for a new trial as well as in the bill of exceptions.[136] And if the error assigned is insufficiency of evidence, the bill must contain all the evidence.[137] In an appeal in a divorce action, the finding of the chancellor is entitled to great weight when he has seen and heard the witnesses, particularly where the determination depends largely upon the comparative credibility of the parties.[138] If there has been more than one trial and the errors relied on occurred in an earlier trial, they must be contained in a wayside bill of exceptions. In such a situation, the exceptions in the wayside bill will be considered first on the appeal.[139]

The errors revealed in a bill of exceptions, to be reversible, must affirmately appear to have prejudically affected the substantial rights of the appellant. Thus, an exception based upon the improper exclusion of evidence must show the content of rejected evidence.[140] Misconduct of two jurors in taking an unauthorized view is not of itself sufficiently prejudicial to require a new trial,[141] nor is a probability of improper discussion by the jury of the amount of attorneys fees a party will probably have to pay.[142] In like manner, the remarks of the trial judge in ruling upon objections to evidence will not be ground for reversal where they are not shown to have had a prejudicial effect.[143] Indeed, the courts insist that they will not reverse unless they are satisfied from the whole record that the alleged errors caused substantial harm.[144] It is needless to add that it is extremely difficult for counsel to predict whether the court in a given situation will consider the error or combination of errors sufficiently harmful to warrant reversal.

135. The opinion in the *Helton* case does not make it clear whether the whole record showed that the ruling on the belated challenge to the juror was based on the evidence. The Court seems to assume that as a matter of law appellant's contention that the challenge came too late was sound.

136. Carter County v. Street, 252 S.W.2d 803 (Tenn. App. E.S. 1952).

137. State v. Terry, 253 S.W.2d 753 (Tenn. 1952).

138. Troutt v. Troutt, 250 S.W.2d 372 (Tenn. App. W.S. 1952).

139. See Act-O-Lane Gas Service Co. v. Hall, 248 S.W.2d 398 (Tenn. App. E.S. 1951).

140. Turner v. Tennessee Products & Chemical Corp., 251 S.W.2d 441 (Tenn. App. M.S. 1952).

141. Johnson v. McCord, 251 S.W.2d 144 (Tenn. App. W.S. 1952).

142. France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).

143. Searcy v. Simmons, 250 S.W.2d 109 (Tenn. App. M.S. 1951).

144. Carter County v. Street, 252 S.W.2d 803 (Tenn. App. E.S. 1952). See also Dowdy v. State, 250 S.W.2d 78 (Tenn. 1952). As to the trial court's judgment when a remittitur is questioned, see All v. John Gerber Co., 252 S.W.2d 138, 143 (Tenn. App. W.S. 1952): " 'There is an added weight to the judgment of the trial court when, as here, the circuit judge, by way of remittitur, reduced the amount of the damage fixed by the jury.' "

It goes without saying that a judgment on a verdict approved by the trial judge and supported by material evidence will not be disturbed on appeal[145] and that an assignment of error not argued in the appellant's brief will be deemed abandoned.[146]

MISCELLANEOUS

Power and Function of Grand Jury: In *Hayslip v. State*,[147] the Supreme Court thoroughly considered the inquisitorial powers of the grand jury in Tennessee and its authority to state in its report the reasons for failing to find true bills in a matter under investigation. The members of the Court agreed that it was entirely proper for the grand jury to report that it found the accusations investigated to be entirely baseless, that no witness testified to any fact that would warrant an indictment and that an independent investigation revealed no evidence of the alleged wrongdoing. But there was sharp disagreement as to the propriety of including in the report statements reflecting upon the conduct of the complaining witness.

Mrs. Hayslip had made public accusations of the existence of grossly immoral practices in certain public schools. The school authorities properly requested that the grand jury investigate them. The jury reported that the accusations were without foundation in fact and that the evidence tended to show affirmatively that the alleged practices did not exist. The report stated that the jury had heard Mrs. Hayslip in full and contained the following: "It is our opinion that her continued employment in the City Schools would be unadvisable and a disservice to the community. . . . We cannot escape the conclusion that the Treadwell School has been viciously maligned by the unfounded charges of Mrs. Maurine D. Hayslip."

Mrs. Hayslip moved to have these statements expunged. The trial judge denied the motion. The majority of the Supreme Court affirmed. They agreed with the Chief Justice that the grand jury "will not be permitted to single out persons in civil or official positions to impugn their motives, or by word, imputation or innuendo hold them to scorn or criticism."[148] But they held that one who has been the moving party in bringing about the investigation cannot object to matter which sharply criticizes him for making the charges. The Chief Justice in a vigorous dissent pointed out that this doctrine exposes every citizen who testifies before a grand jury to the danger that he may be publicly condemned without opportunity to defend himself.

145. Rogers v. McDaniel, 253 S.W.2d 36 (Tenn. App. M.S. 1952).
146. Todd v. Roane-Anderson Co., 251 S.W.2d 132 (Tenn. App. E.S. 1952).
147. 249 S.W.2d 882 (Tenn. 1952).
148. *Id.* at 884.