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Jury Trial in Chancery Court in Tennessee

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JURY TRIAL IN CHANCERY COURT IN TENNESSEE

Tennessee has since 1827[1] maintained, in some degree, a separate court of equity, presided over by a chancellor. Though most states have abolished the procedural distinction between cases in law and suits in equity, Tennessee still retains this dichotomy in its court system. Prior to 1827 law and equity were dispensed in Tennessee by a single court of general jurisdiction, the Superior Court of Law. This practice grew out of the North Carolina Act of 1782[2] and the continuation of that Act by the First Territorial Legislature in 1794,[3] both of which gave equity jurisdiction to the Superior Court of Law. All matters of fact in law or in equity in this court were triable by a jury as if at law.[4] This was the practice when the Tennessee Constitution of 1796[5] was adopted. The Act of 1809[6] abolished the Superior Court and established the Circuit Court in its stead with all its jurisdiction in law and equity. Such unity was short-lived for the Act of 1819[7] provided that all chancery cases should be taken on deposition; the Circuit Court sitting in an equity cause was styled the Court of Chancery. Finally the Act of 1827[8] created two separate chancery courts and appointed a chancellor for each.

Although prior to the Constitution of 1796[9] the statutory right to jury trial in equity was the same as at law, the courts limited the constitutional right of jury trial to those cases in which it existed as a common-law right in the North Carolina territory.[10] Of course,

1. Tenn. Acts 1827, c. 79, § 2, 1 LAWS OF TENNESSEE 175 (Haywood and Cobbs 1831) created separate Courts of Chancery.
2. N.C. Acts 1782, c. 11, § 2, LAWS OF TENNESSEE 153 (Haywood 1815).
3. This Act of 1794, c. 1, § 77, 1 LAWS OF TENNESSEE AND NORTH CAROLINA 484 (Scott 1821), declared the North Carolina Act of 1782, which gave equity jurisdiction to the Superior Courts of Law, to be in full force and effect.
4. "All matters of fact . . . shall be determined by a jury . . . as in trials at law . . . and mode of procedure by such juries shall be the same in every respect as in trials at law. . . ." N.C. Acts 1782, c. 11, § 3, LAWS OF TENNESSEE 156 (Haywood 1815) (re-enacted in Tennessee as shown in note 3 *supra*).
5. TENN. CONST. Art. V, §§ 1, 2 (1796).
6. Tenn. Acts 1809, c. 49, § 4, 1 LAWS OF TENNESSEE AND NORTH CAROLINA 1148 (Scott 1821).
7. Tenn. Acts 1819, c. 31, § 1, 2 LAWS OF TENNESSEE AND NORTH CAROLINA 485 (Scott 1821).
8. See note 1 *supra*.
9. The Statutory right to jury trial on all issues of fact in equity, as at law, was first granted while Tennessee was a part of North Carolina in 1782 (see note 4 *supra*) and re-enacted while Tennessee was still a territory in 1794 (see note 3 *supra*); both grants precede TENN. CONST. Art. XI, § 6 (1796), by which the right to jury trial was preserved inviolate.
10. The earlier cases preserved the right to trial by jury as it existed in "force and use" in North Carolina in the year 1789. *See* Garner v. The State, 13. Tenn. 132, 146 (1833). However, the later decisions limit this inviolate right to cases in which there was at common law a right to jury trial at the formation of the constitution of 1796. *See* Trigally v. The Mayor and Aldermen of Memphis, 46 Tenn. 382, 385 (1869); Exum v. Griffis Newbern Co., 144 Tenn. 239, 247, 230 S.W. 601 (1921); Willard v. State, 174 Tenn. 642, 645, 130 S.W.2d 99 (1938); McGinnis v. The State, 28 Tenn. 23, 28 (1848).

in accord with the English practice the chancellor could at his discretion[11] call a jury or transfer to a law court[12] a disputed, material issue of fact so that a jury could inform "the conscience of the Chancellor,"[13] but this jury verdict was merely advisory.[14] The legislature in 1846, however, placed a duty upon the chancellor "upon the application of either of the parties, to empannel [*sic*] a jury to try . . . any case pending in said courts—the finding of which jury shall be final and conclusive upon the chancellor. . . ."[15] This was one of the first of a line of statutes which create the right to jury trial in chancery court. It should be noted that no qualifying limitations were placed on this right; rather the jury could be demanded by "either" party to try "any" issue of fact in "any" case in chancery court. Though the previous practice was to seek only a special verdict on a specified fact issue[16] the right to both general and special jury verdicts was granted under this statute.[17] Since there were no common-law actions triable in chancery at this time, the legislature clearly intended to extend the right of jury trial to a purely equitable cause.

The chancery court was made a constitutional court in 1870[18] and in 1877 its jurisdiction was expanded to include "all civil causes of action now triable in the Circuit Court, except . . . [those] involving

11. See Simmons v. Tillery and Wilson, 1 Tenn. 217, 222-23 (1808); Lowe v. Traynor, 46 Tenn. 633, 637 (1869); State v. Allen, 2 Tenn. Ch. Rep. 42, 46 (1874) (discretion to send fact issue to court of law or to impanel a jury in chancery); Lawson v. Cooper, 263 S.W.2d 763 (Tenn. Ct. App. E.S. 1953). The chancellor may upon his motion and for his advice convene a jury at any time in the trial. GIBSON, SUITS IN CHANCERY § 554a (4th ed., Higgins and Crownover, 1937). But when the impaneling of a jury is properly sought by the parties the matter is no longer discretionary with the chancellor. Allen v. Saulpaw, 74 Tenn. 477 (1880); Cooper & Stockell v. Stockard, 84 Tenn. 140 (1885). *Compare* Miller v. Washington County, 143 Tenn. 488, 500, 226 S.W. 199 (1920) (decided under Tenn. Acts 1919, c. 90), *with* Greenwood v. Maxey, 190 Tenn. 599, 612, 231 S.W.2d 315 (1950) (the latest supreme court decision on this subject).

12. Tenn. Acts 1801, c. 6, § 40, 1 LAWS OF TENNESSEE 182 (Haywood and Cobbs 1831) (granted chancellor power to call jury *instanter*); Orgain v. Ramsey, 22 Tenn. 438 (1842); Timmons v. Garrison, 23 Tenn. 108, 110 (1843).

13. James v. Brooks, 53 Tenn. 150 (1871).

14. Timmons v. Garrison, 23 Tenn. 108, 110 (1843); Orgain v. Ramsey, 22 Tenn. 438 (1842); Lawson v. Cooper, 263 S.W.2d 763, 764 (Tenn. Ct. App. E.S. 1953).

15. Tenn. Acts 1846, c. 122, § 14.

16. See, *e.g.*, Simmons v. Tillery and Wilson, 1 Tenn. 217 (1808) (issues as determined by chancellor); Lancaster's Administrators v. Ward and Bosly, 1 Tenn. 340 (1809); Baker v. King, 14 Tenn. 215 (1834).

17. See, *e.g.*, Allen v. Saulpaw, 74 Tenn. 477 (1880) (error for failure to allow jury verdict on special issues); Nelson v. Claybrooke, 72 Tenn. 687, 688-89 (1880) (special verdict); Mills v. Faris & Co., 59 Tenn. 451, 453-54 (1873) (special verdict); Morris v. Swaney, 54 Tenn. 591, 592-93 (1872) (general verdict); James v. Brooks, 53 Tenn. 150, 152-53 (1871) (general verdict "not guilty"); Lowe v. Traynor, 46 Tenn. 633, 635-36 (1869) (special verdict).

18. TENN. CONST. Art. VI, § 1 (1870).

unliquidated damages. . . ."[19] This extension of chancery jurisdiction was a re-enactment of the Act of 1782[20] and the Constitution of North Carolina[21] to the extent that it gave a court of primary jurisdiction the power to hear cases in law and suits in equity. Therefore, again, there was an unlimited right to a jury trial in any cause, legal or equitable, over which chancery had jurisdiction. Except for temporary variations,[22] this statute remained unchanged until 1932 when the Code Commissioners,[23] with the approval of the Joint Committee on Codification,[24] modified the right to jury trial in chancery in the following manner:

> "Either party to suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, save in cases involving complicated accounting, as to such accounting, and those elsewhere excepted by law or by provision of this Code, and all the issues of fact in any proper case shall be submitted to one jury."[25]

Under the courts' limited interpertation of the constitutional right[26] to jury trial, this statute is the only source of such a right in chancery.[27] What is the proper interpretation of this statute?

Proper Cases for Jury

Either party[28] presenting a material question of fact and making a timely request has a statutory right to a jury trial in a "proper case." All civil suits for liquidated damages are "proper" cases for jury trial in chancery if the material, disputed fact issues for which a jury is sought, involve neither complicated accounting nor are else-

19. Tenn. Acts 1877, c. 97, §§ 1, 2.
20. See note 2 *supra.*
21. N.C. Const., §§ 13, 21, 29 (1776) provided the constitutional authority for the Act of 1782 which created one court of law and equity. Gibson, Suits in Chancery § 10, (4th ed., Higgins and Crownover, 1937).
22. The right to have a jury impaneled in chancery court was repealed by Tenn. Acts 1919, c. 90, §§ 1, 2. This right was reinstated, however, by Tenn. Acts 1921, c. 10, § 1.
23. The restrictions on the right to jury trial in chancery were written into the Tenn. Code Ann. § 10574 (Williams 1934) by the Code Commissioners in their draft of the Code submitted to the Joint Committee on Codification of the Sixty-seventh General Assembly. Note the *Preface* to the Tennessee Code of 1932.
24. This committee, composed of the members of the judiciary committees of the Senate and the House, met with the Commissioners, and revised the original dummy draft. A study of this "dummy" draft, kept in the State Archives, shows that the procedure for the revision of the Commissioner's draft was by red pencil deletion and insertion of the Joint Committee's changes. This study also reveals that Code Section 10574 was enacted as the Commissioners proposed it in their original draft.
25. Tenn. Code Ann. § 10574 (Williams 1934).
26. See note 10 *supra.*
27. See Third Nat. Bank v. American Equitable Ins., 27 Tenn. App. 249, 257, 178 S.W.2d 915, 919 (1943).
28. All parties complainant or all parties defendant must join in the request for a jury trial. *See* Burns v. Nashville, 142 Tenn. 451, 576-77, 221 S.W. 828 (1919).

where excepted by law or provisions of the Code. Hence there is a statutory right to jury trial in the vast majority of chancery suits.

There are certain criteria by which the complainant can determine whether he has a "proper case" for a jury trial.[29] If the cause could have been brought in the circuit court and a jury trial had, then there is also a right to a jury in chancery, unless the case is excepted by law or Code provision. If the cause is brought in chancery under its inherent equity jurisdiction, and the pleadings disclose that there are material, disputed issues of fact, a jury should be impaneled upon request unless those issues involve complicated accounting, or are excepted by law.

If the case involves an issue triable by jury at common-law and prays only legal relief the respondent should have a constitutional right to jury trial, even under the supreme court's limited interpretation.[30] The complainant had a choice of bringing his civil cause of action for liquidated damages either in circuit court where the right of jury trial is constitutional and absolute or in chancery where that right is only statutory and limited. Hence the complainant has not been denied the right to jury trial but has waived that right. This cannot be said as to the respondent for he could answer only in the court in which he was sued.

The Tennessee Legislature impliedly recognized this problem in the Act of 1919[31] and preserved this constitutional right of the respondent to a jury trial in the common-law action while repealing those sections of the Code of 1858[32] which gave an unqualified right to jury trial in chancery. The Act stated that the complainant who sued under the provisions of the Act of 1877, which gave chancery jurisdiction over common-law actions for liquidated damages, shall "have waived the right to demand a trial by jury by not having elected to sue at law. . . ."[33] But where the defendant in such a case demands a jury in his first pleading "the Chancellor, by an order . . . shall transfer the cause to the Circuit Court . . . where it shall be tried before the court and a jury."[34] This was repealed by the Act of 1921,[35] and those sections of the Code of 1858 which were in effect before the Act of 1919 were re-enacted. With this exception, the Code of 1858 and its subsequent re-codifications up until 1932 provided for the unqualified right of jury trial on material issues of

29. There are some cases in which a jury is considered especially appropriate. See GIBSON, SUITS IN CHANCERY § 458f (4th ed., Higgins and Crownover, 1937).
30. See note 10 *supra*.
31. Tenn. Acts 1919, c. 90, §§ 1-3.
32. TENN. CODE §§ 4465-4470 (Meigs and Cooper 1858).
33. Tenn. Acts 1919, c. 90, § 2.
34. Tenn. Acts 1919, c. 90, §§ 2-3.
35. Tenn. Acts 1921, c. 10, § 1.

fact upon the timely request of either party. Such legislation preserved inviolate not only the constitutional right of jury trial[36] but also the statutory right as it existed at the adoption of the constitution of 1796.[37] The Code of 1932 placed some restrictions on the right of jury trial in chancery but surely did not intend by implication to deprive the respondent of his constitutional right to trial by jury as it existed at common law. Though there are no decisions in point, it seems logical to conclude that Code Section 10574 recognizes the constitutional right of the respondent to a jury trial on any materially disputed question of fact arising out of a case in which such a right existed at common law.

The Right to Jury Trial

The right to jury trial involves two distinct ideas; the right determined at the outset of the case to have a jury impaneled, and subsequently upon the presentation of the required quantum of evidence the right to a jury verdict.[38] Upon the resolution that the case is "proper" for a jury trial the statute intelligibly governs the method of procedure and the effect of jury trial.

Right to have Jury Impaneled:

If one of the parties fails to make a timely demand he waives the right to have a jury impaneled as he would at law. Since the statutes[39] which regulate when and how a demand for jury in law shall be made do not apply to chancery,[40] any demand is timely which is made before the cause is heard by the chancellor.[41] However, each chancellor has the inherent power to make reasonable rules of procedure for demanding a jury.[42] The prevention of surprise and the affording

36. Tenn. Const. Art. XI, § 6 (1776).
37. See notes 3 and 4 *supra.*
38. Confusing the two aspects of jury trial has resulted in conflicting decisions. In Hunt v. Hunt, 169 Tenn. 1, 80 S.W.2d 666 (1935), the pleadings had established the right to a jury which was impaneled and the issue was whether evidence was introduced sufficient to create the right to a jury verdice. But Doughty v. Grills, 260 S.W.2d 379, 386-87 (Tenn. Ct. App. E.S. 1952) interprets the *Hunt* decision as holding that in an inherently equitable cause there is no right to a jury trial (either to impanel a jury or to a jury verdict).
39. Tenn. Code Ann. §§ 8734-39 (Williams 1934).
40. *See* Worthington v. Nashville, C. & St. L. Ry., 114 Tenn. 177, 182, 86 S.W. 307 (1904); Cheatham v. Pearce & Ryan, 89 Tenn. 668, 689-91, 15 S.W. 1080 (1891); Stepp v. Stepp, 11 Tenn. App. 578, 581 (W.S. 1930).
41 *See* Cheatham v. Pearce & Ryan, 89 Tenn. 668, 688, 15 S.W. 1080 (1891) (collects cases); Stepp v. Stepp, 11 Tenn. App. 578, 581 (1930) (collects cases).
42. *See* Cheatham v. Pearce & Ryan, 89 Tenn. 668, 691, 15 S.W. 1080 (1891) (collects cases); Stepp v. Stepp, 11 Tenn. App. 578, 583 (1930). A rule requiring the demand for jury on or before the second day of the term was held to be reasonable. Stadler & Co. v. Hertz & Co., 81 Tenn. 315 (1884). But a rule requiring that the motion be made in open court was held to be unreasonable where the respondent sought a jury in his answer. World Gramite Co. v. Morris Bros., 142 Tenn. 665, 222 S.W. 527 (1919).

of an opportunity to demand a jury are the measure of the reasonableness of these procedural rules.[43] Where the demand is made in the pleadings, the cause will be tried at the first term after issue is joined.[44] But if the demand is made after the cause is ready for hearing, the trial will be before a jury summoned *instanter*,[45] and the chancellor may set the date.[46]

The statute requires that chancery follow the procedure of the law courts.[47] This has introduced many significant changes in chancery practice: the use of oral testimony,[48] the summons of witnesses and the enforcement of their attendance,[49] the necessity of a motion for new trial as a prerequisite of appeal,[50] and the appellate review of only questions of law rather than traditional simple appeal which is a *de novo* trial.[51] But in certain other respects chancery courts have found the traditional equity procedure preferable.[52]

Right to Jury Verdict:

When the pleadings present an issue of fact in a "proper case" the parties have a right to have a jury impaneled but neither party has a right to a jury verdict unless evidence sufficient to satisfy the required quantum has been introduced. Hence the party who seeks a jury in chancery must submit at his peril enough evidence to keep the chancellor from withholding the issues from the jury.[53] It has been

43. Harris v. Bogle, 115 Tenn. 701, 710, 92 S.W. 849 (1905).
44. TENN. CODE ANN. § 10576 (Williams 1934).
45. TENN. CODE ANN. § 10575 (Williams 1934).
46. GIBSON, SUITS IN CHANCERY § 548 (4th ed., Higgins and Crownover, 1937).
47. TENN. CODE ANN. § 10579 (Williams 1934).
48. See Greenwood v. Maxey, 190 Tenn. 599, 603, 231 S.W.2d 315, 317, (1950); Ray v. Crain, 18 Tenn. App. 603, 609, 80 S.W.2d 113, 117 (M.S. 1934) (oral testimony of twenty-six witnesses); Bejack, *The Chancery Court*, 20 TENN. L. REV. 245, 251 (1948).
49. TENN. CODE ANN. § 10580 (Williams 1934).
50. Davis v. Mitchell, 27 Tenn. App. 182, 204, 178 S.W.2d 889, 898 (W.S. 1943); GIBSON, SUITS IN CHANCERY § 551c (4th ed., Higgins and Crownover, 1937).
51. TENN. CODE ANN. § 9037 (Williams 1934) (excepts jury verdict in chancery from the right to *de novo* appeal); see Collier v. City of Memphis, 160 Tenn. 500, 26 S.W.2d 152 (1929); GIBSON, SUITS IN CHANCERY § 551g (4th ed., Higgins and Crownover, 1937).
52. The reading of the pleadings is a matter within the discretion of the chancellor. GIBSON, SUITS IN CHANCERY § 551a (4th ed., Higgins and Crownover, 1937). Where a special quantum of evidence is required it is the duty of the chancellor, rather than of the jury, to determine whether the evidence meets this rquirement. Hunt v. Hunt, 169 Tenn. 1, 11, 80 S.W.2d 666, 669 (1935). The chancellor has a much broader latitude in withdrawing issues from the jury than the circuit judge in directing a verdict. Hunt v. Hunt, *supra*, at 10. There are no directed verdicts in chancery. Mutual Life Ins. Co. of New York v. Burton, 167 Tenn. 606, 613, 72 S.W.2d 778, 780 (1934) (collects cases). Directing a verdict has the effect of withdrawing the issue so that the verdict is nugatory. Standard Life Ins. Co. of the South v. Strong, 19 Tenn. App. 404, 409, 89 S.W.2d 367, 371 (M.S. 1935). But see Anderson v. Stribling, 15 Tenn. App. 267, 276-77 (M.S. 1932); see note 51 *infra*.
53. See Greenwood v. Maxey, 190 Tenn. 599, 606, 607, 231 S.W.2d 315 (1950); Burton v. Farmers', Etc. Ass'n, 104 Tenn. 414, 417, 58 S.W. 230, 231

frequently held that the chancellor retains a much broader latitude in withdrawing issues from the jury than does a circuit judge in directing a verdict.[54] How does this fit into the statutory requirement that the jury trial should be the same as at law? Is the required quantum of evidence necessary to establish a jury issue different in these chancery proceedings? Of course this requirement is applicable only to the common-law actions over which these two courts have concurrent jurisdiction. Where the suit arises under the inherent equity jurisdiction of chancery the courts have held that the chancellor, under the statute, could properly require the same quantum of evidence as was required traditionally in equity[55] before an issue is presented to a jury for its verdict.[56] When evidence sufficient, if believed, to satisfy this special quantum is presented, a jury issue is established even though the evidence is thoroughly contradicted.[57]

The parties may, separately or by agreement,[58] present the fact issues upon which they want a jury verdict. The preparation of those issues is under the supervision of the chancellor, who has the power and the duty to mold the submitted issues so as to present only the determinative issues of fact.[59] The method and time for presenting such issues is subject to the reasonable discretion of the chancellor.[60]

The form of the issues and the scope of the jury's verdict is a more complex problem. Traditionally a jury in equity was called only by the chancellor for his information and aid; the questions submitted did not purport to encompass the case but rather covered particular issues of fact concerning which the chancellor had serious doubt.[61] Usually such questions were to be answered categorically; the chan-

(1900); Ragsdale and Mabry v. Gossett, 70 Tenn. 729, 740 (1879). The chancellor has a duty to withdraw the issues from the jury if they are immaterial. See De Rossett Hat Co. v. London Lancashire Fire Ins. Co., 134 Tenn. 199, 207, 183 S.W. 720, 722 (1915) (collects cases).

54. *See* Pass v. State, 181 Tenn. 613, 618, 184 S.W.2d 1, 2-3 (1943); Hunt v. Hunt, 169 Tenn. 1, 10, 80 S.W.2d 666, 669 (1935) (in cases of an equitable nature). However, withdrawing an issue because there is no material evidence to support it is a question of law reviewable upon appeal. See Lincoln County Bank v. Maddox, 21 Tenn. App. 648, 660, 114 S.W.2d 821, 828 (M.S. 1937); Ray v. Crain, 18 Tenn. App. 603, 609, 80 S.W.2d 113, 117 (M.S. 1934) (common-law action); Anderson v. Stribling, 15 Tenn. App. 267, 277 (M.S. 1932).

55. See Greenwood v. Maxey, 190 Tenn. 599, 612, 231 S.W.2d 315, 320 (1950).

56. See Hunt v. Hunt, 169 Tenn. 1, 80 S.W.2d 666 (1935).

57. See Greenwood v. Maxey, *supra* note 55, at 612-13.

58. This has always been the chancery practice. See Lancaster's Administrators v. Ward and Bosly, 1 Tenn. 340, 342 (1809). See also GIBSON, SUITS IN CHANCERY § 549c (4th ed., Higgins and Crownover, 1937).

59. See De Rossett Hat Co. v. London Lancashire Fire Ins. Co., 134 Tenn. 199, 207, 183 S.W. 720 (1915); Burton v. Farmers', Etc. Ass'n, 104 Tenn. 414, 417, 58 S.W. 230, 231 (1900).

60. *See* First Nat. Bank of Coeburn v. Hartsell, 14 Tenn. App. 578, 580 (E.S. 1932); Newburger v. Newburger, 10 Tenn. App. 555, 561 (W.S. 1930); Madison Land & Loan Co. v. Hammond, 2 Tenn. App. 423, 429-31 (W.S. 1926) (collects cases).

61. Lancaster's Administrators v. Ward and Bosly, 1 Tenn. 430, 433 (1809).

cellor then decided the suit.[62] The Code clearly authorizes a general verdict in requiring that the trial is to "be conducted like other jury trials at law."[63] If the "proper case" is to be tried as at law, the usual practice would be for the chancellor sitting as a judge to present the case for the jury's general verdict. By statute[64] it is within the judge's discretion to form special issues for submission to the jury and this is the recommended practice.[65] However, where several determinative issues of fact are submitted for special verdict, the jury must return a finding on all or none of the issues and "may not find on one or more and disagree on another and the verdict be valid."[66]

As a general rule the verdict of the jury, regardless of its scope (general or special[67]) has the same binding effect upon the chancellor and the appellate court[68] as it has at law. The Code[69] expressly provides that where one of the parties requests a jury in a "proper case" the verdict is binding.[70] "As at law," the chancellor is under a duty to grant a new trial if the verdict is against the weight of the evidence; on appeal the appellate court may grant a new trial. Neither however, may disregard the verdict as was formerly possible in chancery.

62. State *ex rel.* Mynatt v. King, 137 Tenn. 17, 26-27, 191 S.W. 352 (1916); Cooper & Stockell v. Stockard, 84 Tenn. 140, 143-44 (1885); Third Nat. Bank v. American Equitable Ins. Co. of New York, 27 Tenn. App. 249, 257, 178 S.W.2d 915, 919 (M.S. 1943).

63. TENN. CODE ANN. § 10579 (Williams 1934). See Bejack, *The Chancery Court,* 20 TENN. L. REV. 245, 251 (1948). But as to the court's interpretation of the right to general verdict in chancery see: State *ex rel.* Mynatt v. King, 137 Tenn. 17, 26-27, 191 S.W. 352 (1916) (no general verdict of guilty or not guilty); Cooper & Stockell v. Stockard, 84 Tenn. 140, 144 (1885) (no general verdict allowed). While allowing a special verdict the court in Minton v. Wilkerson, 133 Tenn. 484, 186-87, 182 S.W. 238, 239 (1915), required finding on *all* of the special issues. *But see* Morris v. Swaney, 54 Tenn. 591, 592-93 (1872) (general verdict); James v. Brooks, 53 Tenn. 150, 152-53 (1870) (general verdict of "not guilty"). Note that there is a distinction drawn between a general verdict and a special verdict which is determinative of the entire case. *See* Wright v. Jackson Const. Co., 138 Tenn. 145, 149-50, 196 S.W. 488 (1917). Is there any real basis for such a distinction?

64. TENN. CODE ANN. § 10346 (Williams 1934). Although this section involves circuit court practice, the jury trials in chancery under § 10579 of the Code are to follow the practice of law courts.

65. See GIBSON, SUITS IN CHANCERY § 550 (4th ed., Higgins and Crownover, 1937); Bejach, *The Chancery Court,* 20 TENN. L. REV. 245, 251 (1948).

66. Minton v. Wilkerson, 133 Tenn. 484, 486-87, 182 S.W. 238 (1915); Buchanan v. Gower, 7 Civ. App. 306, 309-10 (Tenn. 1916).

67. TENN. CODE ANN. § 10346 (Williams 1934) (provides that special verdicts "shall have the force of other verdicts at law").

68. Beatty v. Schenck, 127 Tenn. 63, 152 S.W. 1933 (1912) (where chancellor by agreement of the parties sits as the jury, his findings are given the effect of a binding verdict); McElya v. Hill, 105 Tenn. 319, 332, 59 S.W. 1025, 1028 (1900); Scruggs v. Heiskell, 95 Tenn. 455, 457, 32 S.W. 386 (1895) (collects cases); Hammond v. Herbert Hood Co., 31 Tenn. App. 683, 691, 221 S.W.2d 98, 101 (W.S. 1948) (law case); Davis v. Mitchell, 27 Tenn. App. 182, 196, 178 S.W.2d 889, 895 (W.S. 1943) (equity suit); National Life & Acc. Ins. Co. v. American Trust Co., 17 Tenn. App. 516, 528, 68 S.W.2d 971, 978 (M.S. 1933); Johnson v. Graves, 15 Tenn. App. 466, 475 (W.S. 1932).

69. TENN. CODE ANN. § 10579 (Williams 1934).

70. James v. Brooks, 53 Tenn. 150, 154 (1870). See note 68 *supra.* In each one of the cases there cited the parties had sought the jury.

The exception to this general rule exists where the chancellor, independently of the parties, seeks the jury; the verdict is then only advisory and not binding on the appellate court.[71] Even in this latter situation the appellate court will not completely disregard the jury verdict.[72]

THE SCOPE OF THE STATUTORY EXCEPTIONS

From 1846 up until 1932, with the exception of a three-year period,[73] the right to jury trial was made available to either party to a suit in chancery without further limitation. The Tennessee Code of 1932 limited the previous statutory right to jury trial in chancery by the following language:

> "Save in cases involving complicated accounting, as to such accounting, and those elsewhere excepted by law or by provision of this Code. . . ."[74]

How have the courts determined the scope of each of these exceptions? To what can we look to determine the legislative purpose in the enactment of these limitations on the right to jury trial in chancery?

The three Code Commissioners,[75] who were authorized by the Tennessee General Assembly of 1929[76] to draw up a new code, suggested these exceptions in their draft submitted to the Joint Committee on Codification of the House and Senate in 1931. This Joint Committee, while making some insignificant changes in portions of *Title 10, Article X*—Issues of Fact and Trial by Jury in Chancery—retained these modifications[77] to the right to jury trial in chancery, and the bill for adoption of the entire Code was passed without amendment by the General Assembly of 1931.[78] Since the dummy draft of the Code drawn up by the Commissioners with the red pencil work of the Joint Committee written in its margin is our only source of official legislative history we must look to the well-known common-law sense of the statutory language,[79] in light of the original statute, as the primary guide to the legislative purpose of these limitations.

The clause "save in cases involving complicated accounting, as to

71. Lowe v. Traynor, 46 Tenn. 633 (1869). *See* Moris v. Swaney, 54 Tenn. 591, 594 (1872) (distinguishes *Traynor* and *Brooks* cases).
72. Lowe v. Traynor, 46 Tenn. 633, 638 (1869) (collects cases; sustain unless unsupported by proof).
73. See note 22 *supra.*
74. TENN. CODE ANN. § 10574 (Williams 1934).
75. The three commissioners who were appointed by the supreme court were: Samuel C. Williams, Chairman; Robert T. Shannon and George Harsh.
76. Tenn. Acts 1929, c. 48.
77. The modification of the TENN. CODE § 4465 (1858) suggested by the Commissioners and enacted by the legislature in TENN. CODE ANN. § 10574 (Williams 1934) was the insertion of "save in cases involving complicated accounting, as to such accounting and those elsewhere excepted by law or by provision of this Code," and consequently changed "all issues of fact in any case" to "any proper case."
78. Tenn. Acts 1931, c. 88.
79. Apple v. Apple, 38 Tenn. 348, 351-52 (1858).

such accounting," indicates that no jury should be impaneled when an accounting becomes so complicated that the ordinary juror could not unravel the jumbled facts and figures of the involved claims and counterclaims.[80] Such an account would have come within the inherent equity jurisdiction of chancery.[81] If the fact issues involved in a particular case cannot be separated from the complicated accounting, the chancellor must deny a jury trial.[82] This common-law-sense interpretation of the statute is verified by the historical development of the equity action for complicated accounting, in which the very basis of jurisdiction was the inadequacy of the law action with its jury trial.

While excepting from the right to jury trial complicated accounting, a limited portion of chancery's inherent equity jurisdiction, the legislature failed to except all other types of inherent equity jurisdiction. If the legislature had intended that all inherently equitable causes in chancery should be excepted from the right to jury trial it could have expressly so stated and set up complicated accounting as as example thereof. But the legislature evidenced an intention to except only those cases which involved "complicated accounting" and those only "as to such accounting." It would appear incongruous to read into this limited exception an intent to except all inherently equitable causes from this statutory right to jury trial.

The next exception which applies to all those cases "elsewhere excepted by law or by provision of this Code"[83] is more troublesome to interpret by the common-law-sense method. Does the meaning of "elsewhere excepted by law" include all of the common-law and statutory exceptions to the right of jury trial not found in the Code? Or is it limited to the statutory exceptions other than those found in the Code? To hold that "elsewhere excepted by law" means elsewhere excepted by the "common law"[84] is to exclude all cases of inherent equity jurisdiction from the right to jury trial. This the

80. In Greene County Union Bank v. Miller, 18 Tenn. App. 239, 244-45, 75 S.W.2d 49, 52 (1934), the court stated that the basis for inherent equity jurisdiction was "the inadequacy of the legal remedy, as where there is an embarrassment in the making of proof, the necessity for a discovery, or the production of books and papers, or where it would be difficult, if not impossible, for a jury to unravel the numerous transactions involved, and justice could not be done except by employing the methods of investigation peculiar to courts of equity." When the chancellor finds that the case falls within this inherent equity jurisdiction then it would seem to be within the complicated accounting exception to jury trial.

81. Taylor v. Tompkins, 49 Tenn. 89 (1870).

82. In Greene County Union Bank v. Miller, 18 Tenn. App. 239, 252, 75 S.W.2d 49, 56 (1934), the court split 2-1 on the right to jury trial on the accounting issues. Judge Faw dissented contending that there were issues of fact separable from the complicated accounting upon which the party had a right to jury trial. This case pointedly illustrates the tenuousness of the right to jury trial in a case of accounting.

83. TENN. CODE ANN. § 10574 (Williams 1934).

84. Doughty v. Grills, 260 S.W.2d 379, 386-87 (Tenn. Ct. App. E.S. 1952).

legislature implicitly refused to do in the first of these exception clauses.

Furthermore, to hold that the phrase "elsewhere excepted by law" includes all the common-law exceptions to the right of jury trial is virtually to write this statute off the books. The need and purpose of this section, since it appeared in the Act of 1846, was: first, to grant the right to jury trial in purely equitable causes; then, with the enlargement of the chancery jurisdiction in 1877 to include common-law actions for liquidated damages to guarantee the right to jury trial in these law actions. This proposed interpretation would limit the right to jury trial in chancery to its status prior to the statute's enactment. This interpretation would also amount to the re-enactment by implication of the Act of 1919[85] which had abolished the right to jury trial in chancery. Such an interpretation would be paradoxical since this Act was repealed in 1921,[86] and the unlimited right to jury trial, which had previously existed for sixty-seven years, was re-established and remained the law until the Code of 1932. If because of the inherent nature of a particular proceeding no right to jury trial had ever existed at common law, in equity or by express statutory provision, clearly, no right to jury trial would exist under the present statute.[87] But where the statutory right to jury trial has been granted, the supreme court even in an inherently equitable cause has not limited that right to its common-law status.

In *Hunt v. Hunt*,[88] the supreme court interpreting this clause as it applied to an inherently equitable case (establishment of a parol trust in land) held that though there was a right to a jury trial on the pleadings the proponent must meet equity's required quantum of "clear and convincing evidence" in order to establish the statutory right to a jury verdict.

In *Greenwood v. Maxey*[89] the supreme court interpreting the *Hunt* case held that the evidence necessary to establish an inherently equitable cause was governed by the same rules as other questions of fact in other jury cases, except where equity requires a special quantum of evidence to establish the existence of a parol trust in land. This quantum must be met before the party has sustained his right to a jury verdict.

The court of appeals in *Doughty v. Grills* [90] gave the *Hunt* case a different twist, interpreting the decision as meaning that cases of

85. Tenn. Acts 1919, c. 90; see note 22 *supra*.
86. Tenn. Acts 1921, c. 10, § 1.
87. Pass v. State, 181 Tenn. 613, 184 S.W.2d 1 (1944) (jury trial denied on the basis of the inherent power of the court to summarily punish for contempt).
88. 169 Tenn. 1, 80 S.W.2d 666 (1935).
89. 190 Tenn. 599, 611, 231 S.W.2d 315, 320 (1950).
90. 260 S.W.2d 379, 386-87 (Tenn. Ct. App. E.S. 1952).

purely equitable cognizance are within the statutory exception to jury trial of "elsewhere excepted by law." "The common-law rule of no right in either party to trial by jury of a purely equitable cause in chancery, which was changed by the Act of 1846, is by this decision again made the law in Tennessee."[91] The supreme court denied certiorari of this suit, although the court in the *Hunt* case did not hold that there was no right to jury trial in a purely equitable cause but rather that a certain quantum of evidence was necessary to establish the right to a jury verdict.[92] The reason for denial of certiorari is difficult to determine,[93] but it should be noted that by such denial the supreme court accepts only the results of the court of appeals decision and not the language of that court.[94]

If the courts follow the language of the *Doughty* decision and begin interpreting the right to jury trial in chancery according to whether the action was triable by jury at common law, then we have come indirectly to the same result as have the code states.[95] The Tennessee Code in Sections 10574-80 by neither the historical nor the common-law-sense interpretation manifests the intention that such should be the case. Rather Code Section 10574 extends the right to jury trial in chancery to all causes (common-law cases and equity suits) which are not excepted, either from time immemorial as being within the inherent power of the court[96] or by legislative act.[97]

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91. See 7 VAND. L. REV. 299 (1954).
92. See notes 88 and 89 *supra*.
93. There was admittedly a great deal of public resentment of the type of "runners" that the St. Louis lawyer (defendant) was maintaining in Tennessee. But the legal grounds for denying certiorari might have been: either that there was not enough evidence to go to the jury; or that the defendants were, as shown by their testimony, aiding the illegal practice of law by the union. *See* Doughty v. Grills, 260 S.W.2d 379, 391 (Tenn. Ct. App. E.S. 1952).
94. CARUTHERS, HISTORY OF A LAWSUIT § 452 (7th ed., Gilreath, 1951).
95. The "code states" while abolishing the distinction between actions at law and suits in equity and retaining but one form of action have continued to determine the right to jury trial on the basis of whether that right existed in the particular cause at the common law. The reason for this is that the right to jury trial as it existed at the common law is preserved inviolate by the Federal Constitution and most state constitutions. See CLARK, CASES ON MODERN PLEADING c. IV, § 2, c. IX, §§ 1, 2.
96. See note 87 *supra*.
97. TENN. CODE ANN. § 10574 (Williams 1934).