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Procedure and Evidence -- 1954 Tennessee Survey

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PROCEDURE AND EVIDENCE—1954 TENNESSEE SURVEY

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PLEADING

Generally: The strict rules of pleading are not applicable in a will contest,[1] which is a proceeding *sui generis* and regulated by statute.

Demurrer. A demurrer to a cross-bill in chancery on the ground that it "states no cause of action upon which relief can be granted" is a nullity, and should be stricken on motion. It is also subject to a motion to have it state the grounds more specifically.[2] For the purpose of determining the sufficiency of a pleading attacked by demurrer, allegations of well pleaded facts are taken as true, but this does not apply to conclusions of the pleader, and particularly to conclusions of law. Thus an allegation of facts as to the use and age of a gas heater is conceded to be true but not an allegation that the heater was inherently dangerous.[3] And in an action to recover on a sick and accident policy, notwithstanding a release given by plaintiff in exchange for a specified sum of money, his allegation that defendant owed him in unpaid benefits on the policy more than the specified sum was a mere conclusion which assumed the policy still in force and was not the equivalent of an allegation of payment or tender of the amount received.[4] *A fortiori* an allegation that a city ordinance is unconstitutional, a bare conclusion of law, is totally ineffective against a demurrer.[5] Likewise where specific facts pleaded show no joint liability of plaintiff and defendant, the pleader's conclusion therefrom that they became jointly liable and that plaintiff has a right to contribution from defendant is worthless.[6]

Plea in Abatement: Where the chancellor upon hearing a plea in abatement of another action pending for the same cause, found that the cause was substantially the same, and granted plaintiff permission to file the bill in the later suit as an amended or supplemental complaint, plaintiff had no ground for reversal because he had been given

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1. Wrinkle v. Williams, 260 S.W.2d 304 (Tenn. App. E.S. 1953).
2. Greenville Cabinet Co. v. Hauff, 263 S.W.2d 526 (Tenn. 1953).
3. Evens v. Young, 264 S.W.2d 577 (Tenn. 1954).
4. Gibbons v. Mutual Ben. Health & Accident Ass'n, 195 Tenn. 339, 259 S.W.2d 563 (1953).
5. Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953).
6. Vaughn v. Gill, 264 S.W.2d 805 (Tenn. 1954).

full opportunity to secure a result that would in no way prejudice him.[7]

General Issue: The Code of 1858 provided that if defendant pleaded the general issue, he must give notice of all his real defenses whether by way of denial or avoidance.[8] At present he may plead the general issue or a general denial, which is the equivalent of the general issue.[9] This means that the defenses upon which defendant may rely under such a plea depend upon the common law form of action which would have been used to redress the wrong alleged in the declaration; but it is not safe to rely entirely upon the common law precedents in case, assumpsit, replevin, detinue, or ejectment, for the Tennessee decisions, and in some instances statutes, modify the orthodox common law rules.[10] It seems permissible for the defendant to plead both the general issue and defenses in confession and avoidance, but it is doubtful to what extent this procedure limits his right under the general issue.[11] The Code provides that in replevin he may plead not guilty or may plead specially. It does not permit both. Hence, if he pleads specially, his accompanying plea of not guilty is ineffective.[12] And where upon motion made by plaintiff, defendant is required to specify his defenses, he cannot rely at all upon the general issue, but must include in his specified defenses those in denial as well as those in avoidance.[13] And the same seems to be true where he pleads the general issue with notice of the special defenses upon which he intends to rely, although there is no existing statute authorizing or requiring such a practice.[14]

The text writers agree that the court is not required to order the defendant to plead specially the defenses on which he intends to rely. The language of the statute "may order" is obviously not mandatory. Yet the Court of Appeals, Middle Section, has indicated a doubt in avoiding a decision upon the point by holding that when the trial judge required the defendant to disclose only a single defense, leaving him free to rely upon any other defense at the trial, the error, if any, was harmless when defendant rested without offering any evidence.[15]

7. Waterhouse v. Perry, 195 Tenn. 458, 260 S.W.2d 176 (1953).

8. See West v. Taylor, 42 Tenn. 96 (1865).

9. TENN. CODE ANN. § 8765 (Williams 1934).

10. See 5 VAND. L. REV. 256 (1952) commenting on Sing v. Headrick, 34 Tenn. App. 187, 236 S.W.2d 95 (E.S. 1950).

11. See McKay v. Louisville & Northern R.R., 133 Tenn. 590, 182 S.W. 824 (1915); Creekmore v. Woodward, 192 Tenn. 280, 241 S.W.2d 397 (1951).

12. Lillard v. Yellow Mfg. Acceptance Corp., 263 S.W.2d 520 (Tenn. 1953), interpreting TENN. CODE ANN. § 9297 (Williams 1934).

13. Creekmore v. Woodard, 192 Tenn. 280, 241 S.W.2d 397 (1951).

14. Watts v. Town of Dickson, 260 S.W.2d 206 (Tenn. App. M.S. 1953).

15. State *ex rel.* George v. Fleming, 264 S.W.2d 589 (Tenn. App. M.S. 1953). See CARUTHERS, HISTORY OF A LAWSUIT § 226; (7th ed., Gilreath, 1951); HIGGINS & CROWNOVER, TENNESSEE PROCEDURE IN LAW CASES § 566 (1937).

Counterclaim: Where the facts stated in a counterclaim constitute a claim which could be used defensively as a recoupment but which is pleaded as a basis for affirmative relief, it cannot be interposed in an action by a county, where the acts were done by representatives of the county performing governmental functions.[16] A party cannot prevent the filing of a proper counterclaim or crossclaim in a tort action by failing to file his declaration; and there is no requirement of a counter-summons to be issued in such a case.[16a]

Replication: In a will contest where the contestant pleaded a general denial or the general issue, the proponent had no opportunity to reply, and consequently could rely upon the conclusive effect of a decision of an issue of fact by an earlier decree or judgment in a former proceeding between the same parties, although he had not pleaded it.[17]

Amendment: Amendments before and during trial are freely allowed, and the trial court's action will be reviewed only for abuse of discretion. Thus in a personal injury action the trial judge committed no error in allowing (1) an amendment which alleged in effect that the defendants were joint-tortfeasors, and thus made demurrable a plea in abatement by some of them, and (2) an amendment substituting a newly appointed administrator as a party defendant in lieu of an administratrix who had resigned, and (3) one amendment before trial raising the amount sued for to $100,000 and another during trial raising it to $115,000.[18] And in an election contest an amendment may properly be allowed in the circuit court to which the proceeding has been appealed.[19] By application of the same liberal principle, an amendment to plaintiff's affidavit in a replevin action is permitted.[20]

An amendment speaks from the date of the original pleading. Although a new cause of action cannot be introduced by amendment after the period of the statute of limitations has elapsed, yet an amendment which merely changes the theory of liability but relies upon the same facts is not objectionable. Thus where the original theory posited liability on the doctrine of *respondeat superior,* an amendment, made after the statutory period had expired alleging the same facts as personal negligence of the master, was properly allowed. But inexcusable delay in seeking the right to amend or plead over will justify denial of a motion asking such relief. For example, after the Supreme Court has remanded a cause to the trial court with directions to proceed in accord with an opinion which in effect overruled defendant's de-

16. Scates v. Board of Com'rs. of Union City, 265 S.W.2d 563 (Tenn. 1954).
16a. Harbison v. Welch, 195 Tenn. 191, 258 S.W.2d 755 (1953).
17. Wrinkle v. Williams, 260 S.W.2d 304 (Tenn. App. M.S. 1953); see RESTATEMENT, JUDGMENTS c.3, tit. E, § 68 (1942).
18. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
19. Blackwood v. Hollingsworth, 195 Tenn. 427, 260 S.W.2d 164 (1953).
20. Lillard v. Yellow Mfg. Acceptance Corp., 263 S.W.2d 520 (Tenn. 1953).

murrer, and the defendant took no action for more than ten weeks after the remand was filed in the trial court, the chancellor did not abuse his discretion in refusing to grant defendant additional time in which to make his defense, particularly where defendant made no showing as to his expected defense or his reason for asking further delay.[21] And it is no abuse of discretion to refuse to allow an amendment to interpose an additional defense when motion therefor is made after filing a motion for a new trial.[21a]

Equity Pleading—Theory of Pleading: Where the answer in equity denies the case set forth in the bill, and sets up a different case, if the plaintiff fails to recover on the case in the bill, he may recover on the case relied upon in the answer, and if the defendant's testimony modifies the case in the answer to plaintiff's advantage, the chancellor may properly enter a decree for the plaintiff on the facts thus proved. Therefore, where defendant's answer set up a relationship between plaintiff and defendant which involved no confidence, but the latter's testimony showed it to be a confidential relationship, the chancellor's decree was properly based upon the violation by defendant of this confidential relationship.[22]

Answer in Equity: A verified answer in equity responsive to the bill still has its orthodox value—it can be overcome only by testimony of two witnesses or by one witness and evidence of corroborating circumstances.[23] Perhaps this rule, which should have no application where witnesses in equity are on the same footing as witnesses at law and testimony *viva voce* is required wherever practicable, may have some excuse for its continued existence in a system where "the testimony of witnesses shall, unless otherwise provided, be taken in writing without compelling their personal attendance."[24] It may not be altogether impertinent to inquire how long the profession in Tennessee will be satisfied with this ancient procedure after its members have had experience under the Federal Rules of Civil Procedure, which require that testimony shall normally be taken orally in open court[25] and which specifically abolish the orthodox rule as to the effect of an answer under oath in equity.[26]

Arrest of Judgment or Non Obstante Veredicto: A motion in arrest of judgment will not reach defects in allegations which affect the form rather than the substance of allegations. Consequently, in a prosecution for violating a traffic ordinance of the City of Memphis,

21. Henry v. White, 195 Tenn. 383, 259 S.W.2d 862 (1953).
21a. Buice v. Scruggs Equipment Co., 267 S.W.2d 119 (Tenn. App. E.S. 1953).
22. Bell v. Garley, 260 S.W.2d 300 (Tenn. App. W.S. 1951).
23. Mason v. Winstead, 265 S.W.2d 561 (Tenn. 1954).
24. TENN. CODE ANN. § 10562 (Williams 1934).
25. FED. R. CIV. P. 43.
26. FED. R. CIV. P. 11.

which is not a criminal prosecution, and in which technical nicety of pleading is not required, a warrant which charged defendant with "the offense of Vio. Sec. 1683 Exceeding the Speed Limit within the City of Memphis" was sufficient against attack upon a motion in arrest.[27]

A motion for judgment *non obstante veredicto* "is a test of the pleadings" and raises no question as to the sufficiency of the evidence to sustain the verdict.[27a]

Parties: Speaking generally, neither the state nor one of its governmental divisions can be made a party defendant without its consent. Each is immune from liability for acts done by its agents or servants in exercising a governmental function. Nor does either give consent or waive immunity by becoming a plaintiff in an action for injury to its property while being used in the exercise of such a function. Hence a defendant sued for negligently injuring property in such circumstances may rely upon any defense based upon the wrongful conduct of plaintiff's servants but cannot make such conduct the basis of a counterclaim.[28] It is too late to raise a question as to the proper parties after the case has been submitted to the chancellor for decision.[28a]

Remedies

Certiorari: The common law writ of certiorari which, at least in Tennessee, was applicable in civil as well as in criminal cases, is preserved in the Constitution of Tennessee; and the Supreme Court, Justice Tomlinson alone dissenting, has held that it cannot be enlarged so as to require or permit the courts to review the action of nonjudicial tribunals as in an equity appeal. The court can re-examine the proceedings only to determine whether the tribunal acted arbitrarily, fraudulently or illegally; the court cannot constitutionally weigh the evidence and make findings according to what it determines to be the preponderance of the evidence.[29] Likewise, the review of the action of a county beer board upon a matter within its jurisdiction is limited to an inquiry whether its findings are supported by substantial evidence.[30] The same is true as to the review of a decision of a tax equalization board.[31] But this restricted scope of review does not

27. Guidi v. City of Memphis, 263 S.W.2d 532 (Tenn. 1953).
27a. Buice v. Scruggs Equipment Co., 267 S.W.2d 119 (Tenn. App. E.S. 1953).
28. Scates v. Board of Com'rs. of Union City, 265 S.W.2d 563 (Tenn. 1954).
28a. Crass v. Walls, 259 S.W.2d 670 (Tenn. App. E.S. 1953).
29. Hoover Motor Express Co. v. Railroad & Public Utilities Commission, 261 S.W.2d 233 (1953). The proper scope of the writ is fully discussed in 195 Tenn. 593, 261 S.W.2d 233 (1953). The proper scope of the writ is fully discussed in Conners v. City of Knoxville, 136 Tenn. 428, 189 S.W. 870 (1916).
30. Caylor v. Butler, 263 S.W.2d 500 (Tenn. 1953).
31. Browning v. Alabama Great Southern R. Co., 195 Tenn. 252, 259 S.W.2d 154 (1953).

apply to statutory certiorari to review a judgment of a juvenile court. Such a court of a county is inferior to the circuit court and the circuit court of that county has appellate jurisdiction. Where there is no provision for appeal, the statutory writ will issue and the case will be retried *de novo* upon the merits; it is the equivalent of an appeal from a magistrate's court.[32]

Certiorari is a proper remedy to correct abuse of process by a sheriff in levying upon exempt goods, but the petition must state facts showing that the goods are exempt, either by specific description or by reason of facts set forth in the statute as entitling the petitioner to have the goods set aside as exempt.[33] And when, on the hearing of the petition, certiorari is denied, judgment in favor of the judgment creditor should be entered for the amount of the judgment, interest and costs.[34] But where a civil service employee is summarily discharged by the device of abolishing his office and recreating it under another name, a statute providing that certiorari is the exclusive remedy in the nature of an appeal from a ruling of a city board or official concerning the civil service status of an individual has no application. Since there was no preferment of charges or hearing, there was no record to review. The employee's remedy is by mandamus for reinstatement with back pay.[35] And where a petitioner, who has been cited by a circuit judge and a criminal court judge to show cause why he should not be punished for a contempt, seeks review of the order by the Supreme Court by certiorari and supersedeas, his petition is premature when made before hearing and final judgment.[36]

Contempt Proceedings: An interesting question was raised but not decided in *Gilbreath v. Ferguson.*[37] A circuit judge and a criminal court judge enjoined a named company and individual from making bonds in general sessions court at Kingsport. Judge Gilbreath of that court continued to approve bonds made by these enjoined parties, and was ordered to show cause why he should not be punished for contempt. The Supreme Court indulging the assumption that the injunction was authorized said: "If this authority should be exercised in the case at bar and the General Sessions Judge committed to jail for criminal contempt for taking bonds of the said bonding company, would it not result in closing the court for any and all purposes? The said judge could hardly be expected to hold court in the jail house of Sullivan County. These questions are yet to be answered if and when

32. Doster v. State, 195 Tenn. 535, 260 S.W.2d 279 (1953).
33. Keen v. Alexander, 195 Tenn. 564, 260 S.W.2d 297 (1953).
34. *Ibid.*
35. State *ex rel.* Paylor v. City of Knoxville, 195 Tenn. 318, 259 S.W.2d 537 1953).
36. Gilbreath v. Ferguson, 195 Tenn. 528, 260 S.W.2d 276 (1953).
37. *Ibid.*

the General Sessions Judge has been adjudged in contempt by the respondents."[38]

Declaratory Judgment: Where a government agency has contracted to indemnify a county against claims for damages for obstructing highways and the like, and persons who will be affected by closing a highway by the agency are uncertain as to their rights and remedies, an action for a declaratory judgment may be maintained.[38a]

Habeas Corpus: A person who is confined pursuant to a judgment of a court erected in violation of the Constitution of Tennessee is confined under a judgment that is absolutely void, and is entitled to release on habeas corpus. The Juvenile and Domestic Relations Court established by the Mayor and City Council of Nashville was created in violation of Article VI, Sections 1, 4 of the Constitution. Hence, a person confined pursuant to its judgment is entitled to be released.[39]

Mandamus: This is the proper remedy of a civil service employee who has been summarily discharged contrary to law and who is entitled to be reinstated.[40]

PRESUMPTIONS

The Tennessee courts continue to use the term presumption without precise definition. It is clear that when the basic fact is established and there is no evidence tending to prove the non-existence of the presumed fact, the trier of fact must find the existence of the presumed fact. Accordingly it was said in *Morrow v. Person,*[41] that the presumption that the subscribing witness to a will signed in the presence of the testator is conclusive in the absence of contrary evidence. In *Edgemon v. State*[42] the presumption of regularity of judicial proceedings was relied upon as establishing that the defendant was advised as to his right to counsel in the absence of anything in the record indicating otherwise; and in *Pruitt v. Cantrell*[43] this presumption established the validity of a judgment of a court of a justice of the peace, which was for an amount apparently beyond its jurisdiction. The presumption that the husband owned intoxicating liquor found in the family home was said to disappear "when there are facts and circumstances refuting the presumption, or at least it becomes a jury question to decide who owns the liquor." Earlier in the opinion the court indicated that the presumption could be overcome "by proof of circum-

38. *Ibid.*

38a. Stewart v. Sullivan County, 264 S.W.2d 17 (Tenn. 1953).

39. State *ex. rel.* Haywood v. Superintendent, Davidson County Workhouse, 195 Tenn. 265, 259 S.W.2d 159 (1953).

40. See note 35 *supra.*

41. 195 Tenn. 370, 259 S.W.2d 665 (1953).

42. 195 Tenn. 496, 260 S.W.2d 262 (1953).

43. 264 S.W.2d 793 (Tenn. 1954).

stances indicating a possession on the part of the wife."[44] The results in these cases are in accord with the Thayer theory which is approved by Wigmore and the American Law Institute. By that theory the sole effect of a presumption is to put upon the party asserting the nonexistence of the presumed fact the burden of seeing to it that there is introduced sufficient evidence to justify a finding of such nonexistence. In the first two cases there was no such evidence; in the last the state had both the burden of introducing evidence and the burden of persuading the jury that the wife had possession. The evidence showing that it was found in the home was not enough because that raised the presumption of ownership and possession in the husband. The additional evidence as to the exact place where found and the conduct of the wife was sufficient to justify a finding of her possession; that satisfied the only burden created by the presumption, and left the case to be decided as if there had never been any presumption in the case. On the evidence, the question of her possession was for the jury.

EVIDENCE

Objection: Although Tennessee has a rather unique practice which permits a party deliberately to withhold objection to inadmissible evidence and then insist on having it stricken at any time before submission of the case to the trier,[45] yet it applies the generally accepted doctrine that an objection to the reception in evidence of a document which contains both admissible and inadmissible material is ineffective; the objection must be limited to the inadmissable material.[46] It is believed that the same procedure would be required with reference to an objection to oral testimony.[47]

Exclusion for Reasons of Extrinisic Policy: Evidence that a defendant is insured against loss for liability for his conduct is inadmissable as tending to prove his conduct blameworthy, but where it is relevant upon another issue, as where it tends to show a relevant relationship between the insured and another, it is receivable. The jury should be warned that it is not to be used on the issue of negligence.[48]

Impeaching a Verdict: Where four cases were consolidated for trial and the jury returned a separate verdict for the defendant in each, testimony by three of the jurors to the effect that no verdict was reached in one of the four is inadmissible since the bill of exceptions shows that the jurors in reporting in each case stated that they had agreed upon the verdict.[49] And jurors cannot be heard to impeach

44. Morrison v. State, 263 S.W.2d 504 (Tenn. 1953).
45. See Caruthers, History of a Lawsuit § 336 (7th ed., Gilreath, 1951).
46. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
47. *Cf.* Miller v. State, 80 Tenn. 223 (1883).
48. Olson v. Sharpe, 259 S.W.2d 867 (Tenn. App. E.S. 1953).
49. Davidson v. Barger, 259 S.W.2d 541 (Tenn. App. M.S. 1953).

their verdict by testifying that they were influenced in reaching it by a misunderstanding of the law as a result of the argument of counsel and the trial judge's ruling and instructions thereon.[50] Cases of this sort are to be sharply distinguished from those involving the privilege of a juror to have his deliberations and votes in the jury room kept secret.[51]

Photographs: The trial judge has a large discretion in ruling upon the admissibility of photographs of the place in which a relevant event occurred. Where the evidence indicates that an offered photograph does not represent the place in the same condition as it was at the time the event occurred, his ruling excluding the photograph will not be disturbed on appeal.[52]

Opinion: See *Expert Witness, infra* p. 908.

Illegally Obtained: In applying the Tennessee rule that evidence secured by violation of the constitutional prohibition against unreasonable search and seizure is inadmissible, the Supreme Court has held in effect that a properly issued warrant loses its efficacy after one search has been conducted under its authority. Consequently goods discovered and seized in a second search under the same warrant are inadmissible in evidence, although nothing was taken in the earlier search.[53] The prohibition does not apply to prevent seizure of contraband packages left by defendant in a yard beside the house of another.[54] A person may agree in advance to a search which would otherwise be forbidden, and he does so with respect to a search of his automobile for illegally taken game by accepting a hunting license, even though the automobile has reached a point outside the hunting area on its return therefrom.[55] This seems an eminently fair and sound result. Where a person whose property has been seized and forfeited as contraband seeks to have it returned, and in the proceeding admits that the property was being used in the course of conduct which made it contraband, he is not entitled to the return of his property. This, of course, is an entirely different question from that of admissibility in evidence of the property wrongfully seized. For example, if it is illegal to possess certain articles and they are seized in violation of the constitutional provision, there is no reason why a court should sanction their further illegal possession by requiring

50. Garner v. State *ex rel.* Askins, 266 S.W.2d 358 (Tenn. App. M.S. 1953).
51. See Clark v. United States, 289 U.S. 1, 53 Sup. Ct. 465, 77 L. Ed. 993 (1933).
52. Strickland Transportation Co. v. Douglas, 264 S.W.2d 233 (Tenn. App. W.S. 1953).
53. McDonald v. State, 195 Tenn. 282, 259 S.W.2d 524 (1953).
54. Templeton v. State, 264 S.W.2d 565 (Tenn. 1954).
55. Hughes v. State, 195 Tenn. 290, 259 S.W.2d 527 (1953).

them to be returned. The same reasoning may justify refusal to return a vehicle which transported the illegal article if the offense consists of transporting it, but that is somewhat more difficult to justify for possession of the vehicle is not an offense, and the right to confiscate it depends upon evidence which was secured as a consequence of the prohibited search, even if not by using the wrongfully seized article as evidence. Yet it seems settled law in Tennessee that if the owner of the vehicle in which the contraband was taken by wrongful search and seizure admits possession of the contraband, the fact that it was taken in violation of his constitutional right does not entitle him to the return of the vehicle.[56] The precedents upon which this doctrine is based put further limits upon the protection afforded an accused. As explained in *Kelley v. State*,[57] they stand for the doctrine that error in admitting evidence secured by unlawful search and seizure will not work a reversal of a conviction if there is "independent evidence elicited either from the defendant or elsewhere which of itself is sufficient to justify a conviction." There is, as yet, no attempt to define "independent evidence." Will it include evidence discovered by using the wrongfully seized material as a clue, or must it come from a wholly independent source? Is the accused's testimony in attempting to have the illegally secured evidence suppressed or to regain possession of the forfeited vehicle independent evidence, or should it be characterized as "a fruit of the poisonous tree?"[58]

In connection with all rulings on evidence it must be kept in mind that in order to secure a reversal on appeal, it must affirmatively appear that an error duly excepted to and preserved for review was prejudicial. Hence if the trial judge charges the jury to disregard evidence erroneously received or if a special verdict or finding makes it clear that the fact which the inadmissible evidence tends to prove is immaterial, the error is harmless.[59]

Parol Evidence Rule: The *Restatement of Contracts* provides in Section 228: "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted," and Section 237 declares that "the integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject matter." Section 229 says that if a writing interpreted according to the usual standards does not appear to be an integration of a part only but to be an integration

56. Dickinson v. Ross, 264 S.W.2d 800 (Tenn. 1954).
57. 184 Tenn. 143, 197 S.W.2d 545 (1946).
58. *Cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319 (1920); Nardone v. United States, 308 U.S. 338, 341, 60 Sup. Ct. 266, 84 L. Ed. 307 (1939).
59. Olson v. Sharpe, 259 S.W.2d 867 (Tenn. App. E.S. 1953).

of the whole, it is subject to the rule as a complete and final expression of the whole contract. In such a situation evidence of inconsistent oral agreements contemporaneous with the making of the writing or writings is inadmissible. The application of these generalizations to commercial transactions presents difficult problems. In *Seaton v. Dye*,[60] a grantor and four grantees executed the following writings: (1) a warranty deed by the grantor to the grantees, (2) a note for $6,000 and a mortgage trust deed of the granted property by the grantees to Cumberland College, (3) a series of notes and a second mortgage trust deed by grantees to grantor for $7500. The chancellor found as a fact that at the time of the execution of these documents the grantor and grantees orally agreed that the grantor and grantees would cooperate in efforts to negotiate a sale of the property to other persons; that if successful in negotiating a sale at a price more than sufficient to pay the first mortgage debt of $6000 and the second mortgage notes, the surplus would be divided between them five ways, each to receive one-fifth of the surplus; that if unsuccessful in negotiating a sale for an amount sufficient to pay both indebtednesses, the grantor would not seek or be entitled to hold the grantees or any of them, for any deficiency on said second mortgage indebtedness. The action by the grantor against the grantees was to recover a deficiency judgment contrary to the express terms of this oral agreement. The court held that the oral agreement contradicted the writings and was totally ineffective and evidence thereof was inadmissible. Obviously the oral agreement was directly contrary to the terms of the notes secured by the second mortgage; obviously also the writings were a complete integration of the transaction between the grantees and Cumberland College. But as between the other parties to this undertaking, the parts of the agreement as to resale and division of profits were nothing unusual and the agreement might well fall within Williston's suggested test, "whether the parties so situated generally would or might do so."[61] And this is reasonable because the side agreement does not contradict or modify the writing. But the note and mortgage on their face are complete agreements covering this particular part of the transaction, and the decision is in accord with the great majority of decisions dealing with promises to pay money.[62]

It is a generally accepted rule that a recital of consideration in a deed may be shown to be false and that the real consideration may be proved by parol. The recital is often explained as intended only as an acknowledgment of receipt and not part of the agreement; a reference to an extrinsic matter and therefore subject to be proved wherever relevant. Accordingly where a deed which reserved a life

60. 263 S.W.2d 544 (Tenn. App. E.S. 1953).
61. 3 WILLISTON, CONTRACTS § 638 (Rev. ed. 1936).
62. See 3 CORBIN, CONTRACTS § 587 nn. 45, 46 (1951).

estate to the grantor recited a receipt of $3000 as consideration, it was proper to show that no money was paid and that the real consideration was an agreement to support the grantors during their lives while on the granted property.[63] It is also an established doctrine in most jurisdictions that a conveyance by a deed absolute on its face may be shown by oral evidence to be a mortgage.[64] It is likewise well settled in Tennessee that an oral agreement to hold in trust land conveyed by a general warranty deed is valid and effective.[65] The various attempts to explain why these results are not direct violations of the parol evidence rule require unusual mental gymnastic ability. The fact remains that the courts in these instances receive and give effect to parol evidence which proves that a writing apparently complete on its face is only a partial integration of a larger transaction, and which does contradict a specific term of the writing.

Ambiguity, Patent and Latent: The courts of Tennessee, like many others, have had their trouble with Lord Bacon's maxim which forbids the use of oral evidence to explain or resolve a patent ambiguity. In *Anderson v. Sharp*[66] a writing signed by two members of a church read in part: "We undersigned agree to pay A. D. Lee" (etc. for services in giving a certain program). "It is further understood that the program is under the auspices of the church." When Lee sued for breach of the signers' agreement, they insisted that they had signed only as agents for the church. The court found the writing ambiguous and permitted defendants to prove by oral evidence that they were to incur no personal liability. It is interesting to contrast this decision with that in *Lazarof v. Klyce,*[67] and to note that the assumption that such an ambiguity patent on the face of the instrument is a condition of admissibility of the oral evidence. In *White v. Kaminsky,*[68] however, the court began its discussion of the applicable law with the flat assertion that parol evidence is inadmissible to resolve a patent ambiguity; it is admissible only to resolve a latent ambiguity. The note in question and the accompanying mortgage or trust deed was for $1025 with interest at 6% from a specified date, payable in instalments of $50 each on the 12th day of each month with the terminating date so fixed as to require twenty-two payments. The specified sum and interest amounted to $1084.15—the required instalments amounted to $1100. The court solemnly declared without detailed explanation that the ambiguity was latent, and that parol evidence was admissible

63. Goodwin v. Goodwin, 260 S.W.2d 186 (Tenn. App. M.S. 1953).
64. See 9 WIGMORE, EVIDENCE § 2437 and cases in n. 1 (3d ed. 1940).
65. *Ibid.* But note that the Statute of Frauds may make an oral agreement ineffective.
66. 195 Tenn. 274, 259 S.W.2d 521 (1953).
67. 195 Tenn. 27, 255 S.W.2d 11 (1953), commented on in 6 VAND. L. REV. 1028, 1144 (1953).
68. 264 S.W.2d 813 (Tenn. 1954).

to show that the real agreement was for $1025 and 6% interest only. Of course, the decision is clearly correct. The parol evidence rule does not exclude evidence that a mistake was made in reducing the agreement to writing, and it is fairly obvious that the parties either in computing the amount or in fixing the terminating date made a clerical mistake. Furthermore, as to the total amount to be paid the writing produces an uncertainty or ambiguity of such a character as to call for parol evidence under Section 231 of the *Restatement of Contracts.* And finally where one construction of an instrument would make it illegal (here for usury) and the other will make it valid, the latter will prevail. But it approaches absurdity to designate such an ambiguity as latent. Williston says that Bacon's maxim has sometimes been applied to written contracts and agreements, but that it has chiefly given trouble in the interpretation of wills. "Certainly so far as contracts and agreements are concerned, it may be wholly disregarded." The *Restatement of Contracts* entirely disregards the maxim. It is high time that the Tennessee Court do likewise, and thus avoid the necessity of verbal juggling. As to wills the court listens to all evidence as to the testator's situation, his personal relations and the subject matter to be devised, and construes the will in the light of all these circumstances. This may result in what the court may call reforming the will (an obviously impossible procedure), but which is merely giving it a reasonable construction.[69]

Judicial Notice: The current Tennessee decisions as to judicial notice are generally orthodox. Courts of general jurisdiction do not ordinarily judicially notice municipal ordinances but they may do so when in the territorial jurisdiction of the court it is a matter of common knowledge or notoriety.[70] In the category of matters so commonly known as to be indisputable are (1) the facts that in Tennessee cities of the size of Chattanooga the police have and use short wave radios and that persons engaged in the business of towing wrecked automobiles get information of wrecks by tuning in on the short wave, and rush to the scene; [These judicially noticed facts are pertinent in considering the validity of city ordinances regulating the conduct of that business.][71] (2) that a deranged patient in a hospital should be watched if put in a place where he might harm himself;[72] and (3) that the residue left in tanks used to store petroleum products is explosive.[73] Under the relevant Uniform Judicial Notice Act, Tennessee courts take judicial notice that Indiana has adopted a statute similar to the

69. Greer v. Anderson, 259 S.W.2d 550 (Tenn. App. M.S. 1953).
70. Guidi v. City of Memphis, 263 S.W.2d 532 (Tenn. 1953).
71. City of Chattanooga v. Fanburg, 265 S.W.2d 15 (Tenn. 1954).
72. Rural Education Ass'n v. Anderson, 261 S.W.2d 151 (Tenn. App. M.S. 1953).
73. Gatlinburg Const. Co. v. McKinney, 263 S.W.2d 765 (Tenn. App. E.S. 1953).

Uniform Reciprocal Support Act which is adopted in Tennessee, authorizing the Governor to order extradition of an accused even though the act constituting the offense was done outside the state seeking accused's rendition.[74] But it is distinctly unorthodox for a state court to declare that it will not take judicial notice of an applicable regulation promulgated under the Defense Production Act of 1950. The decision in which the court asserted its refusal was amply justified because it was first brought to the court's attention in a motion for a new trial in which the regulation was claimed to be newly discovered evidence.[74a]

WITNESSES

Preferred Witness: Tennessee accepts the orthodox view that when an attesting witness to a will is shown to be dead, his attestation may be proved by testimony as to his handwriting and signature.[75] This is in effect using the hearsay statement of the attester as evidence that the testator signed in his presence, although the hearsay quality of the evidence is rarely mentioned if indeed it is recognized. There is and should be no question that if an attester who is present and verifies his signature does not remember the details of so doing, testifies that he would not have signed unless he had done so in the presence of the testator and at his request, his testimony will justify a finding of proper attestation by him.[76]

Qualification of Witness for Opinion: The qualification of a witness as an expert in determining the speed of a motor vehicle from skidmarks is to be decided by the trial judge. The subject matter is proper for expert opinion evidence.[77] The owner of a chattel is competent to testify to its value.[78]

Impeachment: Tennessee seems to accept the orthodox view that prohibits a party from impeaching his own witness, but it makes the usual limitation that the forbidden impeachment does not include evidence tending to prove the non-existence of the fact the existence of which the witness has asserted. Thus where the witness testified that he had no interest in a corporation, the party presenting him was permitted to introduce corporate records showing the contrary, and to prove the authenticity of the records by testimony of the witness himself.[79] The jury should not be instructed that they may disregard

74. State *ex rel.* Bryant v. Fleming, 195 Tenn. 419, 260 S.W.2d 161 (1953).
74a. Buice v. Scruggs Equipment Co., 267 S.W.2d 119 (Tenn. App. E.S. 1953).
75. Morrow v. Person, 195 Tenn. 370, 259 S.W.2d 665 (1953).
76. *Ibid.*
77. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953). The opinion furnishes a good example of the method of demonstrating expertness on this subject.
78. McKinnon v. Michaud, 260 S.W.2d 721 (Tenn. App. W.S. 1953).
79. Gillespie v. Federal Compress & Warehouse Co., 265 S.W.2d 21 (Tenn. App. W.S. 1953).

all of the testimony of a witness if they find that he has testified falsely as to any material fact. That is not a proper statement of the *falsus in uno* doctrine.[80]

Effect of Failure to Call: Failure to call a witness so circumstanced as to be friendly to a party is the basis for an inference that, if called, his testimony would be unfavorable. Thus, when a physician who had examined plaintiff at defendant's request was not called by defendant, it was a fair inference that his testimony would corroborate that of plaintiff's physician.[81]

TRIAL

Jurisdiction over Person—Service of Process: No service of summons upon a party plaintiff is necessary when defendant files a proper cross-claim.[82] By Section 8575 of the Code an action is begun by suing out summons whether or not it is executed. Actions for personal injury must be brought within one year, but this does not mean that service of process must be made within the year. Under Section 8671 a non-resident motorist may be served by service upon the Secretary of State, and since this service can always be made regardless of whether the motorist is within or without the state, his absence from the state does not toll the statute under Section 8581.[83] There is nothing in Section 8671 which otherwise affects the running of the statutory period. But there is a definite limitation upon the right to serve the Secretary of State. By the fiction of making the Secretary the defendant's agent for service of process and limiting the duration of the agency to one year, service made after the year even in a pending action is unauthorized and ineffectual. In other words, this privilege of subjecting the non-resident personally to the jurisdiction of the Tennessee courts while he is without its territorial borders is strictly limited by the terms of the statute which creates it.[84] If the Secretary were the real agent of the non-resident, it would be immaterial to the validity of the service whether the Secretary notified the defendant, but a statute of this sort which fails to require such a notice is unconstitutional.[85]

Incidentally, the Supreme Court has held that the Secretary's indorsement upon the original process has the same effect as the return of the sheriff.[86] It is unimpeachable. In Tennessee the common law rule prevails, that a party to an action cannot in that action be heard

80. McKinnon v. Michaud, 260 S.W.2d 721 (Tenn. App. W.S. 1953).
81. White v. Seier, 264 S.W.2d 241 (Tenn. App. E.S. 1953). See also Strickland Transportation Co. v. Douglas, 264 S.W.2d 233 (Tenn. App W.S. 1953).
82. Harbison v. Welch, 195 Tenn. 191, 258 S.W.2d 755 (1953).
83. Arrowood County v. McMinn, 173 Tenn. 562, 121 S.W.2d 566 (1938). All references to the Code are to TENN. CODE ANN. (Williams 1934).
84. Tabor v. Mason Dixon Lines, Inc., 264 S.W.2d 821 (1954).
85. Wuchter v. Pizzutti, 276 U.S. 13, 48 Sup. Ct. 259, 72 L. Ed. 446 (1928).
86. Tabor v. Mason Dixon Lines, Inc., 264 S.W.2d 821 (1954).

to impeach the sheriff's return. His remedy at law is an action against the sheriff for a false return. But in an action in equity he may attack a judgment as having been rendered without jurisdiction over his person. The attack is on the basis that the judgment is utterly void, not that the defendant was prevented from interposing a defense, for he need not allege or prove that he had or has a defense.[87] The federal courts have not allowed an attack on the marshal's return even in equity, and the majority of the state courts which do allow such an attack require the defendant to show that he has a good defense.[88]

Service upon a defendant by publication in a divorce action is insufficient to support a judgment for alimony and support money, but a defendant may confer jurisdiction retroactively by acquiescence or by estoppel, as where he complies with the judgment in order to escape contempt proceedings while he is within the state or in order to avoid prosecution for desertion after having been brought into the state by extradition proceedings.[89]

Jurisdiction of Subject Matter—Ecclesiastical Matters: A court of equity has no jurisdiction to order or conduct an election of a pastor of a church. The removal of an incumbent pastor and the election of his successor are purely ecclesiastical functions.[90]

Local Actions: Actions for damage to, or to determine the validity of a deed covering, real property are local actions, and must be brought in the county in which the realty is located, and while a court of equity has power to enjoin a defendant who is personally before it from doing acts outside the territorial jurisdiction, it cannot do so where the injunction can be granted only by determining the title to realty outside the territory.[91]

Divorce: A court cannot by a decree deprive itself of its statutory power to modify a provision for support of wife and child. Consequently a decree which accepts and includes the provisions of the agreement of the parties as to a payment "in lieu of any further support or maintenance for" the wife and child cannot prevent the court upon a proper showing from later making a different provision for support and maintenance.[92]

Venue—Distinguished from Jurisdiction: The statutory provisions for bringing divorce actions in specified counties, as applied to resi-

87. Ridgeway v. Bank of Tennessee, 30 Tenn. 522 (1851), followed in Myers v. Wolf, 162 Tenn. 42, 34 S.W.2d 201 (1931).
88. See text and cases in 3 FREEMAN, JUDGMENTS § 1229, pp. 2556-2561 (5th ed. 1925).
89. Chappell v. Chappell, 261 S.W.2d 824 (Tenn. App. E.S. 1952).
90. Mason v. Winstead, 265 S.W.2d 561 (Tenn. 1954).
91. Carter v. Brown, 263 S.W.2d 757 (Tenn. 1953).
92. Doty v. Doty, 260 S.W.2d 411 (Tenn. App. W.S. 1952).

dents, governs venue only. They do not affect the jurisdiction of the subject matter. Hence even a proceeding which directly attacks as void a judgment because rendered in a county in which neither party resided must fail.[93]

Venue—Generally: A defendant who files a cross-claim in an action in a county other than that of his residence waives his right to object to the venue.[94]

The provision of Public Acts 1953, c. 34, that in tort actions, where parties are residents of the state but reside in different counties, the action may be brought in the county where the cause of action arose applies to causes which arose before the passage of the Act as well as to those which arose thereafter.[95]

Justice's Court: Where a party brings replevin in a court of a justice of the peace and in his bond makes no allegation of the value of the chattel replevied, he cannot later claim that its value was in excess of the then applicable statutory limit of the court's jurisdiction in replevin actions. The judgment also will be so interpreted as to sustain jurisdiction, when any excess may be explained as due to accrued interest or costs or both.[96]

Loss by Appeal: The chancellor has no power to rehear a cause after an appeal from his decree to the Court of Appeals has been perfected.[97]

Consolidation for Trial: Where four pending cases all grew out of the same collision of automobiles, the trial judge may in the exercise of a sound discretion order them consolidated for trial. His ruling will not be interfered with unless it is made to appear that the joint trial resulted in prejudice to a complaining party.[98]

Right to Counsel: Where two defendants in a criminal case went to trial without counsel, and the record is silent as to whether each was advised as to his right to counsel but shows that one defendant conducted an intelligent cross-examination of witnesses with respect to his own case and that of his codefendant, the conviction should be affirmed.[99] The presumption of regularity prevails to indicate that each was so advised, and the record shows that absence of counsel was apparently not prejudicial.

Right to Jury: If a party to a civil action does not demand trial by jury in his pleadings or does not make his demand and have entry

93. Kelley v. Kelley, 263 S.W.2d 505 (Tenn. 1953).
94. Harbison v. Welch, 195 Tenn. 191, 258 S.W.2d 755 (1953).
95. Dowlen v. Fitch, 226 S.W.2d 357 (Tenn. 1954).
96. Pruitt v. Cantrell, 264 S.W.2d 793 (Tenn. 1954).
97. First State Bank v. Stacey, 261 S.W.2d 245 (Tenn. App. M.S. 1953).
98. Davidson v. Burger, 259 S.W.2d 541 (Tenn. App. M.S. 1953).
99. Edgemon v. State, 195 Tenn. 496, 260 S.W.2d 262 (1953).

thereof made on the record on the first day of the trial term, he waives his right to a jury. In a will contest the proceeding in circuit court is a new action and the demand must be made therein. In the absence of such a demand, it is error to try the case by jury, but if the verdict is set aside and a new trial ordered, the error is cured.[100] Where a cause is removed to the circuit court from the juvenile court by certiorari and defendant is entitled to a trial *de novo,* he is also entitled to trial by jury as in any criminal case.[101]

Right to Jury in Chancery: The chancellor may of his own motion empanel a jury after the hearing is begun and before the evidence is completed, in which event the findings of the jury are advisory only.[102] Where a party demands a trial by jury in chancery, his right thereto is governed by statute,[103] for there is in Tennessee no common law or constitutional right to an action properly brought in equity.[104] In *Doughty v. Grills*[105] the court gave extended consideration to the interpretation of the limiting provisions of the statute, "save in cases involving complicated accounting . . . and those elsewhere excepted by law or by provisions of this Code." The action was for an injunction against solicitation by laymen of legal business for attorneys at law, and the court focused attention upon the phrase, "elsewhere excepted by law." That phrase was said to confer no right to trial by jury in any action in which it was not a matter of right at common law at the time of the adoption of the Constitution. The holding that the verdict of the jury was advisory only was not essential to the decision, for there were other grounds stated upon which it could properly have been upheld. The history of the statute and the former cases interpreting it are fully discussed in a note in this *Review.*[106] The conclusion of the court is supported by implication in the decisions that the findings in a chancery cause, *approved by the chancellor,* have the same effect as a jury verdict in a law court.[106a]

It remains only to observe that if the interpretation of the court is correct, except for actions for unliquidated damages to person or property, the Court of Chancery in Tennessee is, for all practical purposes, functioning in the same manner as a so-called Code Court in a jurisdiction in which the distinctions between actions at law and suits in equity are abolished. This raises the query whether the time is not

100. Wrinkle v. Williams, 260 S.W.2d 304 (Tenn. App. E.S. 1953).
101. Doster v. State, 195 Tenn. 535, 260 S.W.2d 279 (1953).
102. Lawson v. Cooper, 263 S.W.2d 763 (Tenn. App. E.S. 1953).
103. TENN. CODE ANN. §§ 10574-10580 (Williams 1934).
104. This is not to say that there is no such right of a defendant where the action in chancery is one which in the absence of statute could be entertained only in a court of law.
105. 260 S.W.2d 379 (Tenn. App. E.S. 1952).
106. 7 VAND. L. REV. 393 (1954).
106a. Buice v. Scruggs Equipment Co., 267 S.W.2d 119, 122 (Tenn. App. E.S. 1953).

near at hand, if not already here, when Tennessee should seriously consider the adoption of a system like that provided in the Federal Rules of Civil Procedure. If the right to trial by jury is the same in circuit court and chancery, and if a litigant may maintain his action in either court, why the expense of maintaining two systems, and why the burden upon practitioners of learning one method of procedure for use in state courts and another for use in the federal courts?

Qualifications of Jurors: A juror is not disqualified to serve in an action for damages for personal injuries merely because he has previously served in other actions of the same kind.[107] Even if a juror, who has been examined by the court and found eligible, but who has been peremptorily challenged by defendant, is through innocent mistake of court and counsel called later and permitted to serve throughout the trial, the verdict will not be set aside. The error is harmless.[108] When a trial is begun anew after adding a new defendant, and a number of jurors already called and found eligible are treated as if recalled, such jurors as are not challenged by either defendant are competent members of the jury.[109]

Voluntary Nonsuit: After the judge has announced that he is sustaining defendant's motion for a directed verdict made at the close of plaintiff's evidence, it is too late for plaintiff to take a voluntary nonsuit. The judge may proceed and order the jury to return a verdict for defendant.[110] Likewise in such a situation a judgment of dismissal entered against plaintiff estops him from maintaining a new action.[111]

Motion for Directed Verdict: The error, if any, in denying defendant's motion for a directed verdict made at the close of plaintiff's evidence is waived when defendant presents evidence. If the motion is renewed at the close of all the evidence, it is to be considered as if the former motion had not been made.[112]

Charge to Jury: Where a request to charge the jury is inaccurate[113] or is so drawn that its conditional clause requires a finding for which there is no support in the evidence, it is properly refused.[114] But where the judge submits an issue upon which there is no substantial evidence, the error is harmless if the general verdict is supported by evidence upon issues properly submitted.[115] And where a jury returns into

107. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
108. England v. State, 264 S.W.2d 815 (Tenn. 1954).
109. *Ibid.*
110. O'Brien v. Southern Bell Tel. & Tel. Co., 259 S.W.2d 554 (Tenn. App. M.S. 1953).
111. Patterson v. Ridenour, 263 S.W.2d 537 (Tenn. 1953).
112. City of Memphis v. Uselton, 260 S.W.2d 293 (Tenn. App. W.S. 1953).
113. McKinnon v. Michaud, 260 S.W.2d 721 (Tenn. App. W.S. 1953).
114. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
115. Shew v. Bailey, 260 S.W.2d 362 (Tenn. App. E.S. 1951).

open court and requests further instructions and the trial judge complies with the request, he may, after exceptions taken thereto, recall the jury of his own motion to correct or amplify his previous instructions.[116] Where instructions as given are merely inadequate or incomplete, a party in order to predicate error thereon must call the matter to the court's attention and request further instructions.[116a]

Verdict or Finding: A general verdict for plaintiff is not vitiated when there is sufficient evidence to support a single count, even though other counts which there was no evidence to support were submitted to the jury. This, of course, is contrary to the orthodox rule, which proceeds on the theory that it is impossible to determine upon which count the jury based its verdict. The Tennessee theory is that the general verdict is the equivalent of a separate verdict for the same party on each count.[117]

In a criminal contempt proceeding tried by the chancellor for wrongful interference with the execution of the chancellor's orders in an adoption proceeding, the chancellor acts as both judge and jury. His finding cannot be disturbed on review if supported by substantial evidence, and his is the function of determining the credibility of the witnesses.[118]

Inconsistent Verdicts: Verdicts which exonerate an employee and charge his employer with responsibility for the employee's conduct under the doctrine of *respondeat superior* are inconsistent. But a special verdict charging the employer with responsibility for his personal negligence in failing to provide a watchman to give warning of the conduct of his operations is not inconsistent with a verdict finding the employee not guilty of negligence during the operations. Even if the employee were guilty of negligently performing the work, the employer has no ground of complaint if the finding that the employer's failure to provide the watchman was a proximate cause of plaintiff's injury is supported by substantial evidence.[119]

Polling the Jury: The trial judge or clerk should poll the jury in a criminal case upon demand by the defendant; but it is not reversible error for him to instruct counsel for defendant to do so himself. If counsel fails or refuses to comply, the defendant has no ground of complaint.[120]

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116. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
116a. Buice v. Scruggs Equipment Co., 267 S.W.2d 119 (Tenn. App. E.S. 1953).
117. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953); Shew v. Bailey, 260 S.W.2d 362 (Tenn. App. E.S. 1951); White v. Seier, 264 S.W.2d 241 (Tenn. App. E.S. 1953). See TENN. CODE ANN. § 10343 (Williams 1934).
118. *In re* Adoption of Myers, 265 S.W.2d 12 (Tenn. 1954).
119. Olson v. Sharpe, 259 S.W.2d 867 (Tenn. App. E.S. 1953).
120. England v. State, 264 S.W.2d 815 (Tenn. 1954).

Judgment, Res Adjudicata: Where the judge announces his decision to direct a verdict for one of two defendants and plaintiff proceeds with evidence against a remaining defendant and thereafter takes a voluntary nonsuit, a judgment entered in favor of the first defendant is res adjudicata and bars a later action against him.[121] If an issue of fact is actually litigated and is finally determined between the parties in one action, the finding is conclusive between the same parties upon the same issue in another action. Thus where, in a contest of a third will between the proponent thereof and a contestant, the issue whether a revocation of that will was procured by the fraud of a designated person was definitely decided, the proponent of the earlier will cannot raise against the contestant therein the same issue in a later proceeding to probate the second will propounded on the theory of dependent relative revocation.[122] While it is true that a judgment exonerating a party primarily liable for an alleged wrong will bar an action by the same plaintiff against a party secondarily liable therefor, the judgment in favor of a defendant on the ground that the plaintiff's own conduct was responsible for his harm will not estop him in other situations from maintaining an action against another party for the same harm suffered in the same occurrence. Thus a judgment for defendant in an action against a servant for an injury alleged to have been caused by the servant's negligence will bar the plaintiff therein from maintaining an action for the same injury against the servant's master, but a judgment for one of two defendants whose negligent conduct is claimed to have caused plaintiff's injury will not bar an action against the other even though the first judgment was based upon a finding that plaintiff's own negligence contributed to cause his injury.[123] The orthodox rule requires both for res adjudicata and so-called estoppel by judgment that the parties be the same or be privies of the parties to the prior action. The exception which makes the benefit of the first judgment or finding accrue to the party secondarily liable is based upon the proposition that if the party secondarily liable is required to pay, he is entitled to be indemnified by the party primarily liable. "If a judgment against the claimant were not res judicata in a subsequent action against the indemnitee, either the indemnitee would be required to pay without the possibility of indemnity against the indemnitor, or the indemnitor would be required to make indemnity for a claim which, in an action by the claimant against him, had been found not to exist. Obviously it would be unfair to the indemnitee to bind him by a judgment for the claimant in the first proceeding, since he was not a party."[124] The same principle,

121. Patterson v. Ridenour, 263 S.W.2d 537 (Tenn. 1953).
122. Wrinkle v. Williams, 260 S.W.2d 304 (Tenn. App. E.S. 1953).
123. Hammons v. Walker Hauling Co., 263 S.W.2d 753 (Tenn. 1953).
124. RESTATEMENT, JUDGMENTS § 96, comment *a* (1942).

if applied to joint tortfeasors in a situation in which there is a right to contribution by one against the other, would make the judgment against one limit the amount recoverable in a later action by the plaintiff against another. This raises interesting questions which have not yet been answered in Tennessee.[125]

MOTIONS FOR NEW TRIAL

Grounds—Misconduct Affecting Jury: It is misconduct affecting the jury when a party to the action enters the jury room while the jurors are present even before they have been finally given the case. But where the party's conduct was due to ignorance and inadvertence with no design to influence the jury, and nothing tends to show any prejudice, the trial judge's denial of a motion for a new trial will not be reversed.[126] The same is true where the alleged misconduct was that of two officers of the court who were in the jury room for a very few minutes after the jury retired but before they began their deliberations.[127] The mention by a bystander of the likelihood of liability insurance in the presence of a few jurors, one of whom casually heard it without fully appreciating its possible significance, will not require a new trial unless it is shown that the juror was probably influenced by it.[128]

In Tennessee it seems still to be the law that dispersal of the jury in a capital case even before they have been given the final charge is reversible error, but where a group of jurors have dispersed and the trial is begun anew and these jurors treated as if recalled and defendant has opportunity for challenging them, this rule has no application.[129]

Misconduct of Counsel: Objection to improper remarks of counsel in his final argument to the jury must be taken promptly. A motion for a mistrial on that ground made after the jury has retired for its deliberations comes too late.[130] Where the objection was promptly made accompanied by a motion for a mistrial, and the court sustained the objection, counsel withdrew the remark and the court charged the jury in his general charge to disregard it, the failure to rule on the motion or its denial was not error.[131]

Newly Discovered Evidence: Tennessee enforces the universally ac-

125. See RESTATEMENT, RESTITUTION §§ 86-102 (1937); American Motorists Ins. Co. v. Vigen, 213 Minn. 120, 5 N.W.2d 397 (1942).
126. Shew v. Bailey, 260 S.W.2d 362 (Tenn. App. E.S. 1951).
127. England v. State, 264 S.W.2d 815 (Tenn. 1954).
128. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
129. England v. State, 264 S.W.2d 815 (Tenn. 1954).
130. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
131. Garner v. State *ex rel.* Askins, 266 S.W.2d 358 (Tenn. App. M.S. 1953).

cepted rule that a motion for a new trial on the ground of newly discovered evidence must be supported by a showing that it was discovered after the trial and could not have been discovered in time for use at the trial by the exercise of due diligence, and that the evidence must not be merely contradictory or impeaching or cumulative. And rarely, if ever, will a new trial be granted for newly discovered expert evidence.[132] Evidence discovered after agreement for a directed verdict has been closed but before the verdict has been directed cannot serve as a ground for such a motion.[133] A regulation promulgated under the Defense Production Act of 1950 which was promulgated almost a year before defendant's answer was filed cannot be considered newly discovered evidence.[133a] It was not evidence and the slightest diligence would have discovered it.

Appeal and Error

What is Reviewable: A decree of divorce is subject to appeal by the divorce proctor of the county in which it is rendered under the applicable statute, which is designed to protect not the rights of the parties but the interests of the public.[134] But a ruling which overrules a demurrer to a plea in abatement is not a final judgment and is not appealable,[135] and a court of law has no power to grant a discretionary appeal from a ruling not determinative of the whole case.[136] A decision of a juvenile court which is a court of inferior jurisdiction is reviewable by the circuit court, in the same manner as in an appeal from the court of a justice of the peace.[137]

By What Court: Where the chancellor disposed of a case by considering facts alleged in an exhibit attached to a demurrer and purported to sustain the demurrer, the decree was based on evidence and not on demurrer. Hence review on appeal was properly by the Court of Appeals and not by the Supreme Court.[138]

Formal Requisites, as to Time: The provision limiting the time for filing a bill of exceptions is mandatory. The trial judge has no authority to approve depositions and exhibits as additions thereto, after the prescribed period has elapsed.[139]

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132. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953).
133. O'Brien v. Southern Bell Tel. & Tel. Co., 259 S.W.2d 554 (Tenn. App. M.S. 1952).
133a. Buice v. Scruggs Equipment Co., 267 S.W.2d 119 (Tenn. App. E.S. 1953).
134. Schneider v. Schneider, 260 S.W.2d 290 (Tenn. App. W.S. 1952).
135. Harbison v. Welch, 195 Tenn. 191, 258 S.W.2d 755 (1953).
136. *Ibid.*
137. Doster v. State, 195 Tenn. 535, 260 S.W.2d 279 (1953).
138. Doty v. Doty, 260 S.W.2d 411 (Tenn. App. W.S. 1952).
139. Anderson v. Sharp, 195 Tenn. 274, 259 S.W.2d 521 (1953).

In like manner the time for petition to the Supreme Court for certiorari to the Court of Appeals is fixed by statute, and neither the court nor a member thereof has power to allow a petition after the expiration of the period fixed. A petition for an extension of time fixed in an earlier order must be made within the period prescribed in the order; otherwise the court has no jurisdiction to grant it.[140]

Formal Requisites, as to Bond: Where a defective bond on appeal is filed within the prescribed time, if the defects are not such as to make it void, the appeal is not nugatory, and if judgment goes against the appellant, the sureties on the bond are liable thereon.[141]

Scope of Review: In the broad appeal under Code Section 9036[142] from the decree of the chancellor in an action for demurrage charges, the Court of Appeals reviews the law and the facts and renders such decree as the chancellor should have rendered.[143] But on review of a decree removing a clerk of court from his office by summary proceedings under Code Sections 10076-10081,[144] there is no appeal as in chancery, and no appeal in the nature of a writ of error. An abortive attempt to appeal as in chancery will, however, be treated as a writ of error without supersedeas.[145] Here as in so many other instances the court cuts through mere technical procedural distinctions which are not due to mandatory provisions.

In an appeal from the chancellor's decree in a disbarment proceeding the Court of Appeals reviews the evidence to determine whether the chancellor has abused his discretion in fixing the punishment.[146]

Matters occurring after rendition of the judgment are beyond the scope of review.[147] Where such a matter renders the issue on appeal moot, the appeal will ordinarily be dismissed as in other situations,[148] but where the interests of the public are involved, the court may proceed to a decision of the question submitted. Thus the Court of Appeals will determine the constitutionality of the statute giving the divorce proctor the right to appeal and will determine whether the trial court has discretion to award an absolute divorce to a pregnant wife, even where the parties have remarried after the decree.[149]

Assignment of Error: An assignment of error is too general to require consideration of specifications urged when it complains merely

140. First State Bank v. Stacey, 195 Tenn. 386, 259 S.W.2d 863 (1953).
141. Arkansas Fuel Oil Co. v. Tanner, 195 Tenn. 553, 260 S.W.2d 286 (1953).
142. TENN. CODE ANN. § 9036 (Williams 1934).
143. Tennessee Cent. Ry. v. Cumberland Storage & Warehouse Co., 260 S.W.2d 208 (Tenn. App. M.S. 1953).
144. TENN. CODE ANN. §§ 10076-10081 (Williams 1934).
145. Trent v. State *ex rel.* Smith, 195 Tenn. 350, 259 S.W.2d 657 (1953).
146. State *ex rel.* Turner v. Denman, 259 S.W.2d 891 (Tenn. App. M.S. 1952).
147. Greenville Cabinet Co. v. Ramsey, 195 Tenn. 409, 260 S.W.2d 157 (1953).
148. State *ex rel.* Agee v. Hassler, 264 S.W.2d 799 (Tenn. 1954).
149. Schneider v. Schneider, 260 S.W.2d 290 (Tenn. App. W.S. 1952).

that the judgment is contrary to law and fact,[150] or that the decree was erroneous in not granting an injunction for the reasons set forth in the bill, the answer and the evidence.[151] Where the ground assigned for a new trial was that the verdict was against the weight of the evidence, but not the denial of a motion for a directed verdict made at the close of all the evidence, an assignment of error upon that ground is sufficient to require a consideration of the question whether a new trial should be granted but not sufficient to justify the court in determining whether judgment should be rendered in accord with the motion for directed verdict.[152] Matters objected to at the trial but not set out as grounds for a motion for a new trial may not be assigned as errors on appeal.[153] And an error properly assigned but not supported by the brief is deemed waived.[154]

Record on Appeal: The reports continue to show that counsel must be constantly reminded that unless the record contains a bill of exceptions on appeal in the nature of a writ of error or on writ of error, the appellate court can look only to the technical record and cannot consider the evidence or rulings thereon.[155] And if the bill of exceptions was not filed within the required time, it cannot be considered as a part of the record.[156] This means that as to matters occurring during the course of the trial and ruled upon by the trial judge, the ruling must have been excepted to and presented as a ground of a motion for a new trial.[157] It is because the nature of the proceeding is such that there is no record of the occurrences at the trial and no provision making possible a bill of exception that the action of a juvenile court is reviewable by a trial *de novo* in the circuit court.[158] Where the testimony in a chancery case is taken orally, a bill of exceptions is required as in a law case.[159]

The responsibility for inclusion in the bill of exceptions of all matter proper for inclusion upon which the appellant desires to rely is upon the appellant. Consequently a defendant cannot complain that he was deprived of his right to have his appeal in a criminal case fairly considered because the court reporter failed to include therein

150. Plastic Products Co. v. Cook Truck Lines, Inc., 195 Tenn. 463, 260 S.W.2d 178 (1953).
151. Gillespie v. Federal Compress & Warehouse Co., 265 S.W.2d 21 (Tenn. App. W.S. 1953).
152. City of Memphis v. Uselton, 260 S.W.2d 293 (Tenn. App. W.S. 1953).
153. O'Brien v. Southern Bell Tel. & Tel. Co., 259 S.W.2d 554 (Tenn. App. M.S. 1952); Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953); Greenville Cabinet Co. v. Ramsey, 195 Tenn. 409, 260 S.W.2d 157 (1953).
154. McKinnon v. Michaud, 260 S.W.2d 721 (Tenn. App. W.S. 1953).
155. Brown v. VanPelt, 263 S.W.2d 956 (Tenn. App. W.S. 1953); cases cited in notes 117 and 130 *supra*.
156. See note 139 *supra*.
157. Greenville Cabinet Co. v. Ramsey, 195 Tenn. 409, 260 S.W.2d 157 (1953).
158. Doster v. State, 195 Tenn. 535, 260 S.W.2d 279 (1953).
159. Lawson v. Cooper, 263 S.W.2d 763 (Tenn. App. E.S. 1953).

material requisite to bring a crucial point before the Supreme Court.[160] A motion or suggestion of diminution of the record comes too late when first presented in a petition to rehear.[161]

Where several cases were tried together and there was a separate transcript, a separate motion for a new trial and a separate assignment of error in each, the court properly ordered that only one bill of exceptions and one record be sent up. In such a situation each appellant may assign errors as if he had a separate record and a separate bill of exceptions.[162]

Where the decree of the chancellor afforded the appellant full opportunity to secure the same remedy as that sought and denied, the error, if any, was harmless.[163]

If a defendant in a criminal case whose sentence is suspended in whole or in part perfects an appeal, the suspension is thereby cancelled; and if the conviction is affirmed, the judgment will be ordered modified so as to limit the suspending provision.[164]

160. Alley v. Schoolfield, 195 Tenn. 541, 260 S.W.2d 281 (1953) (bill to enjoin execution of judgment).
161. Vaughn v. Gill, 264 S.W.2d 805 (Tenn. 1954).
162. Davidson v. Berger, 259 S.W.2d 541 (Tenn. App. M.S. 1953).
163. Waterhouse v. Perry, 195 Tenn. 458, 260 S.W.2d 176 (1953).
164. Helton v. State, 195 Tenn. 36, 260 S.W.2d 260 (1953); Edgemon v. State, 195 Tenn. 496, 260 S.W.2d 262 (1953).