Vanderbilt Law Review

Volume 16
Issue 3 *Issue 3 - June 1963*

Article 23

6-1963

Procedure and Evidence -- 1962 Tennessee Survey

Edmund M. Morgan

Procedure and Evidence—
1962 Tennessee Survey

*Edmund M. Morgan**

---

*Frank C. Rand Professor of Law, Vanderbilt University; Royall Professor of Law Emeritus and former Acting Dean, Harvard Law School; Reporter, *ALI Model Code of Evidence*; member, Supreme Court Advisory Committee on Federal Rules of Civil Procednre; co-editor, Morgan, Maguire and Weinstein, *Cases and Materials on Evidence* (4th ed. 1957); author, *Basic Problems of Evidence* (1954).

I. PLEADING

A. *Demurrer*

1. *Construction of Pleading.*—Where the plaintiff's bill of complaint for specific performance of a contract for the purchase of a specified parcel of realty discloses on its face that the agreement was oral, the defendant may raise the defense of the statute of frauds by demurrer.[1]

1. Fortner v. Wilkinson, 357 S.W.2d 63 (Tenn. 1962).

The allegations of the facts of defendant's conduct in an occurrence or event resulting in harm to plaintiff's property caused by a collision of motor vehicles are not affected by adding an averment that this conduct was wantonly or grossly negligent. The conclusion of a pleader from matters properly pleaded in detail is usually disregarded.[2]

Yet where the defect is one that could have been reached by demurrer or motion and the opponent goes to trial without objection or pleads a special plea which presents for trial the indefinitely pleaded matter, the defect is cured by verdict or judgment in favor of the party whose pleading was originally defective.[3]

In *Ward v. University of the South*,[4] an action to recover damages for wrongful death, the complaint alleged that the university and three of its officials were negligent in not preventing a named student from having in his university dormitory room a firearm, contrary to the regulations of the university, and in not taking precautions to prevent students from purchasing firearms from one Baker, a seller of firearms, and that Baker was guilty of negligence per se in selling the particular firearm to the student. In one count it alleged that the negligence of the university and its officials was the proximate cause of the death of plaintiff's intestate caused by the negligent handling of the pistol by the student purchaser, and in a second count alleged that the negligence of Baker was the proximate cause. Each defendant demurred separately on several grounds. The demurrers for misjoinder of parties were sustained because each party acted independently, and the two counts were repugnant and irreconcilable. The demurrer of the university for failure to state a cause was sustained; it was held not responsible for the purchaser-student's act in violating the university regulations. Incidentally, the appellant failed to file an assignment of errors in his statement and brief, which covered 184 typewritten pages, and did attach exhibits which were not part of the pleadings. This case is another illustration of the liberality of the court in excusing violations of its own rules which would justify dismissal of the appeal but do not necessarily preclude consideration of the substantive problems involved.

Tennessee Code Annotated section 20-910 provides that a demurrer shall state the objection relied upon. In his complaint in chancery, a taxpayer asked recovery of amounts paid by him under protest. The respondent's demurrer set forth as his grounds that there are no equities which would entitle the complainant to recover interest or penalties paid under protest as a result of deficiencies under the

2. Fontaine v. Mason-Dixon Freight Lines, 357 S.W.2d 631 (Tenn. App. E.S. 1961).
3. Great Atl. & Pac. Tea Co. v. Lyle, 351 S.W.2d 391 (Tenn. App. E.S. 1961).
4. 354 S.W.2d 246 (Tenn. 1962).

Sales and Use Tax Law. The chancellor overruled the demurrer and allowed a discretionary appeal. The supreme court affirmed for the reason that the grounds stated in the demurrer were too broad and general to satisfy the requirements of the code provision.[5]

(a) *Res Ipsa Loquitur.*—Where the doctrine of *res ipsa loquitur* is applicable, the fact that the plaintiff has pleaded that specified relevant conduct of defendant was negligent does not overcome the effect of the doctrine; the generalization that specific allegations overcome or limit the general is disregarded.[6] There is conflict in the decisions on this subject. Statements in the opinions set forth some four different views, some of them going so far as to declare that by pleading specific negligence, the pleader abandons all reliance upon the doctrine. It is submitted that no satisfactory reason has been given for any such limitation, particularly if the facts stated constitute the basis for a logically justifiable inference of negligence.[7]

(b) *Nil Debet.*—Though Tennessee Code Annotated section 21-613 requires that an answer contain a clear and orderly statement of facts on which the defense is founded, a plea of nil debet interposed to a claim for reimbursement of money paid on a judgment by complainant is not a nullity and cannot be the basis of a decree pro confesso in favor of complainant.[8]

II. BURDEN OF PROOF AND PRESUMPTIONS

The current decisions do little to clear up the confusion caused by the use of the term presumption, though it is usually not too difficult to determine the effect intended to be given it in a particular case. In *Wofford v. State*,[9] for example, the court said that possession of a forged instrument by a defendant claiming an interest in it raised "a conclusive presumption that the possessor forged it or caused it to be forged" but immediately added that the defendant's testimony that it came to him in the mails in its present condition made his guilt a question for the jury. Thus, its effect was merely to put on the defendant the burden of going forward with evidence of the non-existence of the presumed fact. And in *Cutshaw v. Randles*,[10] the court held that the statutory presumption of code sections 59-820 to -859, from registration and proof of agency vanishes on the introduction of evidence tending to prove the non-existence of the presumed fact. This is probably a statement of the Thayer theory. And a

5. Blue Circle of Knoxville, Inc. v. Butler, 354 S.W.2d 770 (Tenn. 1962).
6. Southeastern Aviation, Inc. v. Hurd, 355 S.W.2d 436 (Tenn. 1962).
7. See PROSSER, TORTS §§ 42, 43, at 199, 214 (2d ed. 1955).
8. Harris v. Naff, 360 S.W.2d 6 (Tenn. 1962).
9. 358 S.W.2d 302 (Tenn. 1962).
10. 357 S.W.2d 628 (Tenn. App. E.S. 1961).

person questioning the good faith of a public official in the performance of his official functions is met with a presumption to the contrary. Thus the official action of a board of education of the county in passing upon appointments and assignments of positions is presumed to have been taken in good faith.[11]

In stating that the ownership of a building raises a presumption of occupancy by the owner even where there is some evidence that occupancy may be by others, the court seems to have meant that the presumption did not lose all force by reason of the reception of this evidence. Something more was required, but just what is left uncertain. It may mean that in the circumstances ownership would justify a finding of occupancy.[12]

The constantly repeated statement that killing with a dangerous weapon raises a presumption of malice seems to mean that such a killing is the basis for an inference and the basic fact of a presumption. The receipt of evidence tending to prove lack of malice—accident or self defense—makes the question one for the jury.[13]

Hogue v. Kroger Co.[14] is an illustration of the bad policy of drafting a statute with such terms as prima facie evidence and its use by the court as the equivalent of presumption which has to be overcome by evidence. The question, raised in an action in equity to restrain a sale at a price below the allowable statutory minimum, turned on whether the value of trading stamps given by competitors was to be counted in determining the allowable minimum price and its effect as a basis for a finding of unlawful intent.

III. Judicial Notice

The cases in which the Tennessee courts have applied the doctrine of judicial notice present no novel situations. In determining that a demand for a jury trial was timely, the court noticed that all public buildings and public offices are usually closed on Labor Day; this includes the office of the Clerk of the Circuit Court.[15] It also needed no evidence to find that Huntingdon is less than 35 miles from Jackson and that sunset at Huntingdon was not later in that city than in Jackson on December 4, 1959. This was important in a trial involving a collision with an unlighted bicycle at 5:15 P.M. on that date.[16]

Concerning matters of law, it is no longer doubted that United

11. Mayes v. Bailey, 352 S.W.2d 220 (Tenn. 1961).
12. Evans v. State, 354 S.W.2d 263 (Tenn. 1962).
13. Cooper v. State, 356 S.W.2d 405 (Tenn. 1962); Neely v. State, 356 S.W.2d 401 (Tenn. 1962).
14. 356 S.W.2d 267 (Tenn. 1962).
15. Arp v. Wolfe, 354 S.W.2d 799 (Tenn. App. E.S. 1956).
16. Chandler v. Nolen, 359 S.W.2d 591 (Tenn. App. W.S. 1961).

States statutes are subjects of judicial notice. They need not be introduced into evidence, and they may properly be referred to by the trial judge in his charge to the jury.[17] But the Supreme Court of Tennessee will not take judicial notice of the rules of any other court in this state. Hence, unless the rules, if any, of a circuit court specifying the time in which a notice for a new trial must be made after verdict or decree are proved and incorporated in the bill of exceptions or are found in the minutes of the court, the supreme court will not entertain a motion to strike a motion for a new trial on the ground that it was not timely made. Such a motion itself will be stricken.[18] But the supreme court in a disbarment proceeding will take judicial notice of prior proceedings impeaching a judge in the Senate and may use the findings of the Senate in determining whether the judge should be disbarred.[19]

IV. EVIDENCE

A. *Relevance*

1. *Reputation.*—In *Chaffin v. State*[20] defendant and decedent were parties to a boundary dispute. In an enconnter between the two, defendant killed decedent; defendant relied on self-defense. Evidence was received of the reputation of decedent as a man of violence and of threats by him against defendant which had been communicated to defendant. Defendant testified that he knew decedent carried a pistol. He offered also to prove threats by decedent against others, including adjoining land owners, and decedent's reputation for carrying a pistol, and his disputes with others. The offer was rejected unless defendant was connected with these disputes. After conviction of voluntary manslaughter, defendant appealed. In affirming, the supreme court held the offered evidence inadmissible under the accepted rule that evidence of specific acts tendered to show the actor's disposition to be used as a basis for inferring his guilt of an offense charged is inadmissible for reasons of extrinsic policy.

B. *Hearsay*

1. *Opinion.*—A certificate of a physician as to the physical and mental condition of a patient, which is made as a private record for the patient's attorney and was never filed in any court in any prior proceeding, was and is hearsay and is inadmissible. In a long review

17. Rush v. Lick Creek Watershed Dist., 359 S.W.2d 582 (Tenn. App. E.S. 1962).
18. Shettles v. State, 352 S.W.2d 1 (Tenn. 1961).
19. Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961).
20. 354 S.W.2d 772 (Tenn. 1962).

of the voluminous record in a carelessly tried case showing misconduct of both counsel, the court indicated that many of the rulings, if erroneous, were harmless and upheld the ruling on the inadmissibility of opinion evidence. Such a case puts an undue burden upon the court below. Except as a guide to the trial court on a new trial, it seems to serve no purpose justifying its publication.[21] It is full of statements of settled rules such as those governing the requisites for the direction of a verdict.

Where on cross-examination a party introduced evidence of the opinion of the witness as to the testator's condition on the date of his execution of the codicil of a will, he is precluded from objection to its admissibility. The fact that the direct examination made no reference to testator's condition on that date may affect the scope of cross-examination permitted over objection, but it has no bearing upon the right to have the admitted evidence considered by the trier.[22] And a lay witness who has described the physical appearance of the testator and the stated circumstances from personal observation over a long period of time is competent to testify as to his opinion of the testator's unsoundness of mind. If he does so in an answer responsive to a question, the answer will not be stricken because contrary to what counsel expected.[23]

2. *Spontaneous Statement Exception.*—In *King v. State*,[24] a prosecution for rape, the trial court admitted evidence of declarations of the prosecutrix made (1) to a neighbor about two hours after the event, (2) to police officers within five hours, and (3) to her husband the next morning. In affirming the conviction the supreme court pointed out that the prosecutrix had testified and seemed to emphasize the fact that the former statements were "confirmatory of her credibility." There are several theories on which evidence of fresh complaint in rape has been held admissible. If the complaint was made while she was still suffering from nervous shock caused by the attack, the evidence is admissible for the truth of the matter asserted as an exception to the hearsay rule, whether she has or has not testified. If she has not testified, it still may be admitted also on the ground of anticipatory rehabilitation of an apparent self-contradiction involved in lack of complaint. If she has testified, the evidence is still admissible for the truth of the complaint, since the spontaneous statement exception to the hearsay rule does not require a showing of unavailability of the declarant. If she has been impeached, the evidence is still admissible for both purposes. The subject is fully

21. Schlickling v. Georgia Conference Ass'n Seventh-Day Adventists, 49 Tenn. App. 412, 355 S.W.2d 469 (W.S. 1961).
22. Arp v. Wolfe, 354 S.W.2d 799 (Tenn. App. E.S. 1956).
23. *Ibid.*
24. 357 S.W.2d 42 (Tenn. 1962).

treated by Wigmore.[25]

3. *Assertion of Agency.*—An assertion by a declarant that he was the agent or servant of defendant in a specified activity is, standing alone, inadmissible hearsay, but when there is evidence tending to prove the asserted relationship, entirely independent of this assertion, evidence of the assertion is admissible. It is often said to be receivable because in corroboration of the other evidence. In the instant case the court found no such other evidence but found contrary uncontradicted evidence, so that the trial judge should have directed a verdict for defendant. The person causing the alleged injury to plaintiff's property, a truck driver, was not then acting as an agent or servant of the defendant.[26]

4. *Photographs.*—Still photographs of a relevant place may be received in evidence if a competent witness testifies that they fairly represent the appearance of that place as it was at a specified time.[27] A similar rule applies to maps, diagrams and models. The courts are generally liberal in dealing with matters of this sort, and very few practitioners need to be told of the dangers of misrepresentation by the use of lighting, the angle and height at which the camera is set, and misuse of the film.

5. *Parol Evidence Rule.*—Where a promissory note payable in weekly instalments with interest on the unpaid balance is usurious on its face, parol evidence is not admissible to show that the word "interest" was meant to include interest and other charges so as to make the note valid and enforceable.[28]

V. JURISDICTION AND VENUE

A. *Over Subject Matter—Commencement of Action*

At the request of plaintiff's attorney, the clerk of the court drafted a summons; pursuant to his instructions the clerk did nothing further. He put the summons in "the safe"; later the defendant's attorney procured it from the clerk and took it to his office for the purpose of having copies made to send to his clients. Thereafter, on December 7, 1960, plaintiff filed his declaration with the clerk; on that date the summons and declaration were delivered to a deputy sheriff for service and were served. This was more than 13 months after plaintiff was injured. The supreme court, reversing the court of appeals, held that the action had not been commenced within the time limited

25. WIGMORE, EVIDENCE §§ 1134-40 (3d ed. 1940).

26. Heywood Feed Ingredients, Inc. v. State, 356 S.W.2d 605 (Tenn. App. W.S. 1961).

27. Great Atl. & Pac. Tea Co. v. Lyle, 351 S.W.2d 391 (Tenn. App. E.S. 1961).

28. Rush v. Chattanooga DuPont Employees' Credit Union, 358 S.W.2d 333 (Tenn. 1962).

by the statute. That the plaintiff acted in good faith was immaterial. The court had not acquired jurisdiction of the cause.[29]

The amended motor vehicle statute, section 20-224 of the code, provides that the secretary of state is the agent to accept service of process for a non-resident motorist in any civil action for injury or damage caused by the motorist's operation of a vehicle on the highways of this state. The duration of the agency is for one year and such further period as may be necessary to enable the secretary to complete the service if the process is sued out prior to the expiration of the year and forwarded to him with reasonable dispatch. The injury in the case at bar occurred October 8, 1960; summons was issued and complaint filed October 5, 1961, and forwarded to the secretary. It reached him eight days after the end of the year. The trial judge ruled that the secretary's agency had expired and dismissed the action; the supreme court reversed. It pointed out that the amendment had been enacted to overcome the result reached in earlier cases construing the statute as prescribing a mandatory condition of the right of action rather than as a statute of limitations.[30]

The Criminal Court of Hamblin County had jurisdiction to try a 15-year-old boy on the charge of rape. When he was found not guilty of rape, it was held to have no power to consider the charge of the lesser included offense of assault with intent to know carnally a female under the age of twelve years. It must remand the case to the juvenile court.[31]

A statute authorizing service of process upon a corporation in a place in which an agency or office of the corporation is located is applicable as of the time service is made. It is immaterial that the location is only temporary and not intended to be maintained permanently. The numerous activities of the corporation reduced the question to one of venue only under the applicable venue statute.[32]

The Court of General Sessions of Sullivan County is a court of inferior jurisdiction and has no legal power to decree forfeiture of office of an elected official, and in so far as it adjudged ouster from office, its judgment was void and of no legal effect.[33]

Plaintiff brought action to set aside her deceased husband's Nevada divorce decree and to be appointed to administer his estate and to receive the widow's pension from the Veterans' Administration. She set forth in detail statements as to her marriage to him, their living together for nine years and his absence for 23 years without tidings, and his securing the divorce by false representations; there is no

29. Robertson v. Giant Food Mkt., Inc., 358 S.W.2d 338 (Tenn. 1962).
30. Anderson v. Outland, 360 S.W.2d 44 (Tenn. 1962).
31. Greene v. State, 358 S.W.2d 306 (Tenn. 1962).
32. Atchison, T. & S.F. Ry. v. Ortiz, 361 S.W.2d 113 (Tenn. App. W.S. 1962).
33. Sams v. State, 356 S.W.2d 273 (Tenn. 1962).

averment that the husband ever owned any property in Tennessee. The defendant, the second wife, pleaded in abatement that she was a non-resident of Tennessee and a resident of Los Angeles, California, that attempted service of process was made only by publication, and that the divorce was granted in a named judicial district court in Nevada. The court held the plea in abatement effective. There was no basis for its exercise of jurisdiction over the defendant or for jurisdiction over property.[34]

A private act, section 2-1902 of the code, provides that in an election contest the Law Court of Ducktown and the Circuit Court of Polk County have concurrent jurisdiction, except that when one material defendant resides within the Ducktown district, the Law Court of Ducktown has exclusive jurisdiction. In an action in which such Ducktown residents were among the defendants, but were dismissed as parties before trial, the jurisdiction of the Ducktown court was no longer exclusive.[35]

VI. TRIAL

A. *Jury*

1. *Right to Trial by Jury.*—The respondent in a disbarment proceeding is not entitled to trial by jury.[36]

2. *Eligibility of Jurors—Voir Dire Examination.*—Where a juror on voir dire answered "yes" to the question whether she was acquainted with the opposing party's attorney, she was under no duty to disclose that she was a member of a Sunday School class taught by the attorney. She was not thereby disqualified nor was she shown to have been prejudiced in his favor. On appeal the court begins with a presumption in favor of regularity and fairness of the trial and of the validity of the judgment.[37]

3. *Instructions.*—The former uncertainty as to the right or duty to poll the jury is now regulated by statute.[38] The judge is under no duty to poll unless requested to do so by the prosecution or defense. It is salutary practice for the judge to repeat the charge approved in *Rogers v. State*,[39] "the court is the proper source from which you are to get the law. In other words, you are judges of the law as well as the facts under the direction of the court."[40]

It goes without saying that a requested instruction inapplicable

34. Graham v. Graham, 352 S.W.2d 445 (Tenn. 1961).
35. Dixon v. McClary, 349 S.W.2d 140 (Tenn. 1961).
36. Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961).
37. Sears v. Lewis, 357 S.W.2d 839 (Tenn. App. E.S. 1961).
38. TENN. CODE ANN. §§ 20-1324, -1325 (1956).
39. 196 Tenn. 263, 265, 265 S.W.2d 559 (1954).
40. Hardin v. State, 355 S.W.2d 105 (Tenn. 1962).

under the evidence which has been received should not be given. Thus, where defendant was on trial under an indictment for grand larceny and there was no evidence which would support a finding that the amount involved was less than $100, there was no error in refusing to charge on a lesser included offense; this was especially true since the request was not in writing.[41]

B. *Order of Proof*

The order of proof is within the trial judge's discretion. Ordinarily he should not admit evidence of defendant's confession in a criminal trial until evidence of the corpus delicti of the offense charged has been received. It is no abuse of discretion if, after the receipt of the confession, the necessary evidence is received. The error if any was thereby cured and rendered harmless.[42] The judge may permit the state in rebuttal to repeat testimony or evidence received in its main case.[43]

The trial judge had sequestered the witnesses in a criminal prosecution because they had been interviewed by the prosecutor; at the close of the state's case defendant's motion for a directed verdict had been denied; defendant then took the stand and on cross-examination conceded that he had made a written statement concerning an important matter. In rebuttal the state was permitted to call a sequestered witness. On appeal the supreme court made it clear that a witness is not rendered incompetent by sequestration or by a violation of the sequestering order. The trial judge has discretion in dealing with such a situation.[44]

C. *Witnesses*

1. *Judge's Discretion To Hear.*—It is not error for the trial judge to permit a witness to be cross-examined concerning his past marital condition or prior disgraceful conduct. It is within the court's discretion to permit the jury to hear on cross examination of a witness statements of the facts of his personal history.[45]

In a proceeding to condemn a specified parcel of land, a qualified expert witness testified as to his opinion based on his experience as to its value. It is no abuse of discretion for the trial judge to refuse to hear evidence from him as to the sale price of one parcel of similarly situated property. The court pointed out that the evidence

41. Reynolds v. State, 358 S.W.2d 320 (Tenn. 1962).
42. Miller v. State, 358 S.W.2d 324 (Tenn. 1962).
43. Hardin v. State, 355 S.W.2d 105 (Tenn. 1962).
44. Nance v. State, 358 S.W.2d 327 (Tenn. 1962).
45. Cooper v. State, 356 S.W.2d 405 (Tenn. 1962).

is relevant, but it is better practice to leave this sort of evidence to cross-examination.[46]

D. *Verdict*

1. *Directed Verdict.*—Where the record shows that the judge should have directed a verdict for the defendant, misconduct of the jury in reaching that verdict is harmless to the losing party.[47]

2. *Special Verdict.*—The court is under no obligation to submit a special verdict to the jury or to clarify instructions which are deemed to be ambiguous or capable of being misunderstood unless requested to do so.[48] And in reviewing the evidence in such a case the court of appeals applied the accepted rule—"take the strongest legitimate view of all the evidence in favor of the prevailing party, disregard contrary evidence and indulge all reasonable inferences in favor of the verdict."[49]

In an instructive opinion dealing with the use of special verdicts and answers to special questions, the supreme court first determined that plaintiff in an action for personal injuries had a right to have submitted to the jury all issues of fact made by the pleadings and the evidence. After much evidence had been received, the trial judge selected one of the several issues made by the evidence and framed a question to be answered upon that issue. He submitted that question to the jury with an instruction that if they answered it in the negative, it would dispose of the whole case. Under the evidence an answer either way would have been supportable and only the negative would have disposed of the whole case. The jury returned a negative answer. On appeal from the judgment the supreme court reversed. The use of the device of special verdicts is not within the uncontrolled discretion of the judge, and the judge's action was a clear inducement to the jury to return a negative answer.[50]

VII. JUDGMENT

A. *Res Adjudicata—Splitting*

Plaintiff in December 1959 brought action against defendants alleging that they had damaged his property by casting foul vapors upon his premises during the period October 1, 1957 to October 1, 1959. By amendment he specified damages in the period October 1,

46. State *ex rel.* Moulton v. Blake, 357 S.W.2d 836 (Tenn. App. E.S. 1961).
47. Dan v. Bryan, 354 S.W.2d 483 (Tenn. App. W.S. 1961).
48. Rush v. Lick Creek Watershed Dist., 359 S.W.2d 582 (Tenn. App. E.S. 1962).
49. *Ibid.*
50. Harbison v. Briggs Bros. Paint Mfg. Co., 209 Tenn. 534, 354 S.W.2d 464 (1962).

1957, to October 1, 1958, only; he recovered judgment on the amended complaint and received satisfaction by payment in full. To a new action seeking to recover for the period October 1, 1958, to October 1, 1959, the court ruled that this judgment was a bar to claims to all damages accruing prior to the commencement of the action of December 1, 1959. He is not permitted thus to split what the court regards as a single action for a continuing wrong.[51] He may recover in later actions for damages done after December 1, 1959. It has been persuasively argued by Professor Cleary of Illinois that this results in a windfall to the defendant, and that the bar should be lifted if plaintiff first pays to the defendant all expenses incurred by him that are caused by plaintiff's failure to include his whole claim in one action.[52]

In a workmen's compensation proceeding it appeared that the applicable statutory period of limitations had expired before commencement of the proceedings. The claimant's contention was that the representative of the liability insurance company carrying the risk, in negotiating with the injured employee, had induced him not to bring action within the statutory period. The trial judge heard evidence upon the issue made by the company's denial, found that the representative had so induced plaintiff and proceeded to award compensation. The supreme court on appeal held the judge's finding conclusive because supported by substantial evidence and estopped the insurance company from relying upon the defense that the action was barred by expiration of the statutory period.[53] Where the claimant's action was dismissed on a jurisdictional ground or on other grounds than on the merits, the judgment of dismissal is not a bar to a later action for the same injury. In such circumstances under the applicable Tennessee statute, the later action may be brought within one year from the time of entry of the judgment of dismissal.[54] This offers a measure of protection to the injured workman against the carelessness or ignorance of counsel, but it also furnishes an opportunity for abuse.

The Tennessee Senate acting in an impeachment proceeding—hearing testimony and considering evidence as to conduct of the respondent—exercised judicial power. Its findings and judgment were conclusive and entitled to full faith and credit in the courts of Tennessee.[55]

In an earlier action the state had sought to compel the Quarterly

51. Henegar v. International Minerals & Chem. Corp., 209 Tenn. 355, 354 S.W.2d 69 (1962).
52. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).
53. American Mut. Liab. Ins. Co. v. Baxter, 357 S.W.2d 825 (Tenn. 1962).
54. General Acc. Fire & Life Assur. Corp. v. Kirkland, 356 S.W.2d 283 (Tenn. 1962).
55. Schoolfield v. Tennessee Bar Ass'n, 209 Tenn. 304, 353 S.W.2d 401 (1961).

County Court to issue school bonds, and the resulting trial jury found that the court had not proceeded under Tennessee Code Annotated section 49-201. In a later action by a number of taxpayers to enjoin the sale of the school bonds, the county demurred. The trial court sustained the demurrer. The supreme court affirmed and held that the decree in the earlier action did not require that it be recognized as binding in this action either as res adjudicata or as an application of the doctrine of stare decisis. The error assigned relied on the application of the latter.[56]

The real estate agent who was principal on the required statutory bond was acquitted of the offense of fraudulent breach of trust in a specified transaction. The decision on appeal as interpreted by the chancellor in a later action against the sureties on the bond was that the money involved in that transaction belonged to the defendant since he had earned it as compensation. The supreme court held that this dictum had no application in the case against the sureties either as res adjudicata or as the law of the case.[57]

B. *Nonsuit*

1. *Will Contest.*—In a will contest a contestant may not take a nonsuit without prejudice, and if he purports to take such a nonsuit, the court will proceed, take evidence and make its findings on the merits. Its decree will be res adjudicata in any further proceedings to propound the same will or to contest it.[58]

2. *Eminent Domain.*—Under the statute[59] applicable to eminent domain proceedings, where the county had done no more than file its petition and move for a jury of view, it was entitled to have its motion for nonsuit granted.[60]

C. *Dismissal*

Where an insuror against liability settles and compromises an action brought against the insured for personal injuries and causes judgment of dismissal to be entered, the judgment is no bar to the injured's claim against the insured, unless he participated in the settlement. In the case at bar a pertinent statute[61] required express consent in writing after the cause of action arose.[62]

56. Miller v. Warren County, 209 Tenn. 457, 354 S.W.2d 433 (1962).
57. Clements v. Pearson, 209 Tenn. 223, 352 S.W.2d 236 (1961).
58. Arnold v. Marcom, 352 S.W.2d 936 (Tenn. App. M.S. 1961).
59. TENN. CODE ANN. §§ 20-1311, -1313 (1956).
60. Williams v. McMinn County, 209 Tenn. 236, 352 S.W.2d 430 (1961).
61. TENN. CODE ANN. § 23-3001 (1956).
62. City of Chattanooga v. Ballew, 354 S.W.2d 806 (Tenn. App. E.S. 1961).

VIII. Appeal and Error

A. *What Is Appealable*

A verdict is not the equivalent of a final finding—it is not appealable. It is merely an interlocutory finding and cannot be pleaded as res adjudicata on the issue of fact which it answers or resolves.[63]

B. *Preliminary Requisites*

The court of appeals may waive compliance with its own rules as to any matters of form with reference to the filing of papers required to perfect the appeal, provided that the record shows compliance in matters of substance.[64] But where the certificate of approval of the bill of exceptions to the order of the judge overruling the motion for a new trial bore no date, and there was no showing that it was made before the bill was filed, the bill of exceptions will be stricken on motion.[65] And in a civil action where the bill failed to show that it included all of the evidence, an assignment of error that the verdict was not sustained by the evidence was disregarded, as were assignments concerning admitting or rejecting specified testimony.[66] In this connection it must be borne in mind that an assertion of fact set forth in the bill of exceptions as a ground of a motion is not the equivalent of a statement that the fact exists or existed. It is like an allegation in a pleading, and is not the basis of an assignment of error.[67]

C. *Discretionary Appeal*

The chancellor may properly allow a discretionary appeal from an order dismissing an action to quiet title to a portion of a parcel of land condemned on behalf of the state for the purpose of constructing a bridge. The motion in the instant case had been made by the defendant commissioner of highways on the ground that the action was in essence an unauthorized action against the state. The supreme court agreed, and the order dismissing the action as to the commissioner was upheld.[68]

D. *Assignment of Error*

1. *Failure To Comply with Rules.*—If an appellant fails to comply with a rule as to stating his assignment of error but in another portion

63. Neely v. State, 356 S.W.2d 401 (Tenn. 1962).
64. F. Perlman & Co. v. Gillian, 49 Tenn. App. 486, 355 S.W.2d 638 (W.S. 1961).
65. Pennington v. General Motors Corp., 354 S.W.2d 479 (Tenn. App. M.S. 1961).
66. National Shirt Shop v. City of Nashville, 354 S.W.2d 264 (Tenn. App. M.S. 1961).
67. Dupes v. State, 209 Tenn. 506, 354 S.W.2d 453 (1962).
68. A. L. Kornman Co. v. Moulton, 360 S.W.2d 30 (Tenn. 1962).

of his brief sets out what should have been in the required statement, the court will consider the substance of the assignment. The brief made it clear that the assignment presented the question whether the alleged conduct of the defendant liability insurance company in the instant litigation amounted to bad faith so as to impose upon the defendant responsibility for a loss beyond the limits of its policy.[69] Where appellant's failure to file his assignments of error and brief within the prescribed time was due to a mistake in addressing mail containing them and the resulting delay of three days caused no harm or injustice to the opponent, the court will not dismiss the appeal.[70]

E. *What Constitutes a Final Decree*

Complainant sought injunctive relief against interference by defendant with collection of rents under a lease for a term of three years and secured a temporary injunction. Defendant's motion to dissolve the injunction was overruled and he appealed. The appellate court held that the overruling order was appealable as a final decree; the fact that the lease expired before decision on the appeal could be made did not render the case moot because of other proceedings in the case which concerned the final disposition of money that had been paid into the registry of the court.[71]

F. *Cross-claims—Basis for Appeal*

Where a party files a cross bill in which he has alleged that he had furnished the consideration for the conveyance to his wife and that she held the property conveyed as a resulting trustee for him, and the chancellor has found that title was taken in the wife's name for the purpose of defrauding cross-complainant's creditors so that no resulting trust arose, the cross complainant on appeal cannot base his cross claim on any other theory.[72]

G. *Scope of Review*

It is the accepted rule that the concurrent findings of the master and chancellor are conclusive in the court of appeals if supported by substantial evidence.[73] Findings of fact by a jury in a law action or by a jury in equity when approved by the chancellor are conclusive in

69. Perry v. United States Fid. & Guar. Co., 359 S.W.2d 1 (Tenn. App. W.S. 1962).
70. Trimble v. Holley, 358 S.W.2d 343 (Tenn. App. E.S. 1962).
71. Wooldridge v. Robinson, 352 S.W.2d 238 (Tenn. App. W.S. 1961).
72. Conner v. Holbert, 354 S.W.2d 809 (Tenn. App. E.S. 1961).
73. Oman Const. Co. v. City of Nashville, 353 S.W.2d 97 (Tenn. App. M.S. 1961).

the court of appeals if there is any competent substantial evidence in the record to support them.[74] And the fact that the testimony of some witnesses presented by the prevailing party was to the contrary is not controlling in the action at law. But a mere scintilla is not sufficient. In applying this test in equity the court reviewed at great length the evidence received at the trial of a bill to set aside a conveyance of a parcel of land to a church by plaintiff's sister. The only question submitted to the jury was: "Was Magdalena S. Fehn senile, feeble-minded, incompetent or unduly influenced at the time of the execution of the deeds to defendant September 1, 1953"? The answer was "Yes."[75] The court held that this and other findings were not supported by competent, substantial and convincing evidence such as a reasonable mind might accept as adequate to support a finding.[76] It is settled that in a suit of this kind, a finding may not be based upon a "mere preponderance" of the evidence, but how can the result of the application of the test in one case be used to determine the result which should be reached in another where oral testimony is received? Does the publication of opinions of this character serve any purpose except to appease the losing litigant or his attorney?

In an election contest the supreme court will affirm the decision of the trial court unless the record shows that the proponderance of the evidence is to the contrary. This is often stated in terms of presumptions although it is dealing with the burden of persuasion. The election officials are presumed to know the law and to have acted in compliance with it.[77] Furthermore, a person who holds office under a certified election return is ineligible to challenge the validity of that election even though he claims that certain ballots were excluded on account of duress exercised on the election officials.[78]

When the record indicated that more satisfactory evidence is available on the issues tried and if produced will enable the court to reach a more satisfactory result, the court remanded the cause for the reception of such evidence.[79] And where the record reveals that the issue, whether the driver of a truck involved in an accident was an employee of the owner of the truck or of the lessee, was tried and the verdict was supported by competent and substantial evidence, the court of appeals will affirm in the absence of a showing of error affecting the verdict by the trial judge.[80]

74. City of Chattanooga v. Ballew, 354 S.W.2d 806 (Tenn. App. E.S. 1961).
75. Schlickling v. Georgia Conference Ass'n Seventh-Day Adventists, 49 Tenn. App. 412, 420, 355 S.W.2d 469, 473 (W.S. 1961).
76. *Id.* at 480-82, 355 S.W.2d at 498-500.
77. Dixon v. McClary, 209 Tenn. 81, 349 S.W.2d 140 (1961).
78. *Ibid.*
79. Federated Mut. Implement & Hardware Ins. Co. v. Anderson, 351 S.W.2d 411 (Tenn. App. E.S. 1961).
80. F. Perlman & Co. v. Gillian, *supra* note 64.

1. *Trial de Novo.*—On writ of error from the chancellor's dismissal of suit, the court of appeals reversed and the supreme court granted certiorari and reviewed the case de novo. The court assumed that the decree of the chancellor was correct and his findings were given great weight. In reviewing the record the court held that the evidence fully supported the chancellor's findings and conclusions of fact, and preponderated in favor of his decree, and remanded the case.[81] But on error from judgment of conviction for disturbing a religious assembly where the bill of exceptions was not filed on time, the court could consider only errors appearing in the formal record, and on a rehearing, only matter open to consideration at the original hearing.[82] Likewise in a workman's compensation case, the scope of inquiry concerning the lower court's findings of fact is limited to whether there is sufficient material evidence to support its finding. The supreme court does not try the case de novo.[83]

2. *Criminal Case*—(a) *Burden of Persuasion.*—In a criminal case where the defendant has been found guilty by the jury and the verdict has been approved by the trial judge, the defendant on appeal has the burden of showing that the verdict is against the weight of the evidence. This is a concomitant of the Tennessee rule that the trial judge is in essence a thirteenth juror.[84]

H. *Disposition on Appeal*

Where an examination of the record shows that the creditors of defendant husband in a divorce action had been enjoined from proceeding further in the circuit court, the circuit judge dismissed an intervening petition. The petitioner excepted and appealed to the supreme court. On motion to dismiss the appeal, the court examined the record to determine whether the case was moot and found that the issues had been fully determined, so that there was no place for intervention and dismissed the appeal.[85]

I. *Jurisdiction of Court of Appeals*

The court of appeals has no power to reinstate a verdict which the trial judge has set aside for the reason that he did not approve the result reached by the jury.[86]

81. Folk v. Folk, 355 S.W.2d 634 (Tenn. 1962).
82. Ford v. State, 355 S.W.2d 102, *rehearing denied,* 356 S.W.2d 726 (Tenn. 1962).
83. Huey Bros. Lumber Co. v. Kirk, 357 S.W.2d 50 (Tenn. 1962).
84. Staggs v. State, 357 S.W.2d 52 (Tenn. 1962).
85. American Nat'l Bank & Trust Co. v. Hon, 360 S.W.2d 20 (Tenn. 1962).
86. McCulley v. Cherokee Ins. Co., 359 S.W.2d 561 (Tenn. App. E.S. 1962) (four companion cases).

Complainants sought a decree that they were the owners of certain land by valid conveyances from decedent and that decedent left no estate of value. Respondent by cross-bill prayed judgment that these conveyances were invalid. On writ of error granted by the clerk of the supreme court, the court heard argument on the merits and on respondent's motion to dismiss the appeal. The record showed that the pleadings made several issues of fact which had not been resolved in the proceedings in the trial court, and the supreme court ordered the cause transferred to the court of appeals because only that court had jurisdiction to entertain the cause. The supreme court was without power to determine either the merits or to dismiss the appeal. It has jurisdiction only where the cause has been finally determined in the lower court on demurrer or other method not involving a review or determination of the facts.[87]

IX. United States Courts

The following cases of the United States District Court and of the United States Court of Appeals for the Sixth Circuit, are of interest to Tennessee lawyers.

A. *District Court*

1. *Pleading—Amendment—Relation Back.*—The original complaint was by the United States for forfeitures and double damages under the False Claims Act and for damages under the Commodity Credit Corporation Act for obtaining unauthorized loans. The amendment was filed after the prescribed statutory period had expired. The trial court ruled that the amendment to the statement of claim for forfeiture related back to the commencement of the action. These forfeitures were not penal so as to abate with the death of the wrongdoer. And the claim asserted in the amendment under the Commodity Credit Corporation Act is not the same as that alleged in the complaint under the False Claims Act. Hence the amendment is subject to the defense that the prescribed statutory period had expired as to claims not presented in the original complaint. The lapse of time between the time when the action was begun and the filing of the amendment (1952 to 1960) would make unavailable to defendant important relevant evidence that he might otherwise have had, as is shown by the death of the defendant.[88]

2. *Parties.*—In an action for infringement of a patent the licensee is

87. Bales v. McPhetridge, 209 Tenn. 334, 354 S.W.2d 60 (1962). See Tenn. Code Ann. § 16-408 (1956).

88. United States v. Templeton, 199 F. Supp. 179 (E.D. Tenn. 1961).

not an indispensable party if the record shows: (1) that his interest is distinct and severable, and (2) the court can in his absence render justice between the parties, and (3) the decree made in his absence will have no injurious effect upon his interest, and (4) the final determination, in his absence, will be consistent with equity and good conscience. In the instant case Judge Robert Taylor found all four conditions satisfied and held that the absent licensee was not an indispensable or necessary party.[89]

3. *Jurisdiction*—(a) *State Statute Determining.*—In determining whether the United States district court has jurisdiction of the subject matter or of the person of a litigant, the district court applies the rule evolved by judicial decisions or prescribed rules of federal procedure. Thus a Pennsylvania corporation which contracts to sell towers at a cost of over $9,000 and to do the work of installation in Tennessee is subject to substituted service as authorized by Tennessee Code Annotated section 48-923.[90]

(b) *Corporation Doing Business in State.*—On a motion to quash service of summons by defendant, a foreign corporation, the United States district judge heard oral testimony which revealed that defendant was a sales organization for selling swimming pools. It appointed dealers and distributors in Tennessee for subsequent sales, but it never solicited a sale; the dealer or distributor had a so-called franchise agreement in which he bound himself to sell and do other relevant things, but as an independent salesman. The district judge held that the activities of the corporation were sufficient to constitute carrying on business in Tennessee by the test applied in decisions of the United States courts.[91] It seems obvious that what the district judge meant was not that the federal decisions were applying the "doing business" test but rather the "sufficient contacts" test.

4. *Judgment.*—In actions arising out of a collision of automobiles, driver *A* and his passenger each brought a separate action against the estate of motorist *B*. The actions were consolidated for trial and verdicts therein rendered for defendant. Later the administrator of *B* brought action in the United States district court against driver *A*, *M*, the owner of the car *A* was driving, as owner and as master of driver *A*, and two others both as owners and also as masters. In the later action plaintiff moved as against these defendants for summary judgment upon the issue of liability. The motion was denied. The court held that in the previous verdict and judgment for defendant there was no necessary finding that plaintiff therein was negligent.[92]

89. Cold Metal Process Co. v. Aluminum Co. of America, 200 F. Supp. 407 (E.D. Tenn. 1961).
90. Shuler v. Wood, 198 F. Supp. 801 (E.D. Tenn. 1961).
91. Smith v. Lancer Pools Corp., 200 F. Supp. 199 (E.D. Tenn. 1961).
92. Thomas v. Fertick, 200 F. Supp. 851 (E.D. Tenn. 1962).

B. *Court of Appeals*

1. *Burden of Proof and Presumptions.*—The plaintiff pleaded and offered evidence on five separate specifications of negligence of defendant in an airplane crash. Both parties agreed that the real issue related to the speed of the plane. There was no error in refusing to charge that the doctrine of *res ipsa loquitur* was applicable. The former decisions that the doctrine applies to all crashes of airplanes in flight have been disapproved. Changed conditions and later experience have made the doctrine obsolescent if not obsolete.[93]

The rule that the failure of a party to call an available witness is the basis for an inference that evidence presented by the witness would not further that party's case or would be unfavorable to him has no application where the potential witness is (1) available to both parties or (2) if called would naturally be favorable to one party unless he has peculiar knowledge of the pertinent facts and would present evidence which would do more than merely corroborate the evidence of witnesses who have testified.[94]

2. *Motion for New Trial.*—A mother and four children were injured in a two-car collision. The father as plaintiff received an adverse verdict. He alone was liable for the expenses incurred for medical care and treatment. The damages were for pain and suffering only; none of the injuries were permanent. The jury awarded separate damages to each of the injured. The motion for a new trial was on the ground that the amount awarded to each of the injured was inadequate. The motion was denied. In affirming judgment on the verdicts, the court of appeals said: "There is no measure by which the amount of damages for pain and suffering can be ascertained. In reality, the translating of pain and suffering into money is the result of conjecture permitted by law."[95] This is a frank statement of the truth which most courts are unwilling to acknowledge formally.

3. *Trial—Misconduct of Juror.*—After the jury had retired the trial judge and counsel for defendant were informed that during the trial one juror had given the other jurors certain information. Neither party made any objection or motion for a mistrial, and the judge took no action. On appeal from judgment on the verdict, the court of appeals considered the information and held that of itself it was of sufficient importance to make the conduct of the juror cause for reversal, but held that the failure of counsel to request any action by the trial judge made this irregularity no ground for reversal.[96]

4. *Jurisdiction—Identity of Corporation.*—Defendant *B* corporation,

93. Gafford v. Trans-Texas Airways, 299 F.2d 60 (6th Cir. 1962).
94. *Ibid.*
95. Cross v. Thompson, 298 F.2d 186, 187 (6th Cir. 1962).
96. Keymon v. Tennessee Towing Co., 296 F.2d 785 (6th Cir. 1961).

sued as a Texas corporation, was summoned by service upon *A* as manager. *A* appeared for the *B* corporation, incorporated in Tennessee, and by affidavit alleged that the *B* corporation was incorporated in Tennessee and that he (*A*) had no relationship at all with the *B* corporation of Texas. The district judge dismissed the action. The court of appeals held: (1) the appearance of the Tennessee corporation by *A* was totally unauthorized, and (2) affidavits by *A* raised an issue as to the identity of the defendant sued and that issue was to be tried. Hence it was error to dismiss the action.[97]

The crucial issue in a prosecution for unlawful possession of intoxicants was the identity of the driver of the car transporting them. Counsel on both sides stated that such was the fact. They did not question the fact that the contents of the car were cartons containing the intoxicants in bottles and that they were non-tax paid; both counsel and the trial judge so stated. The judge charged that if the jury found that defendant was the driver of the car, they should find him guilty. He did not submit the question whether the contents were non-tax paid or whether they were intoxicants. The judgment of conviction was reversed and the cause remanded. Citing Rule 52(b), Rules of Criminal Procedure, the appellate court stated: "It was necessary . . . that the Government prove . . . that the circumstances were such as to constitute possession by appellant of the contents of the cardboard carton and that the carton contained nontaxpaid whiskey. . . . No matter how conclusive the evidence may be . . . the trial judge cannot make the finding or withdraw the issue from the jury."[98]

5. *Appeal and Error—Amendment To Admit Evidence.*—The trial judge committed reversible error in refusing to receive evidence of a witness that he heard the crash of a collision between an automobile and the train at a crossing but did not hear any bells or whistle. It was for the jury to determine whether he would have heard had the whistle been blown or the bell rung. The court should have permitted an amendment making evidence admissible although plaintiff had been negligent in failing to discover it.[99] This is another instance of the court's great liberality in insisting that amendments be permitted which would make admissible potential evidence sufficient to prevent a directed verdict. It certainly encourages careless work by counsel.

97. Castleman v. Alamo Plaza, Inc., 296 F.2d 521 (6th Cir. 1961).
98. United States v. McKenzie, 301 F.2d 880, 882 (6th Cir. 1962).
99. Green v. Baltimore & O.R.R., 299 F.2d 837 (6th Cir. 1962).