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## I. Pleading

### *A. Demurrer*

*1. Construction of Pleading—(a) Conclusions.*—In an action by the administratrix of a decedent's estate the allegations in the complaint that the intestate had a policy of insurance on his life for $1,500 and was induced by the fraud of defendant to make defendant the beneficiary by which she was able to collect the money upon his death and "that this $1500 insurance money is the property of the estate and defendant is accountable

to complainant as administratrix of the estate" are sufficient as against a demurrer on the ground that the complaint fails to show any right or title in complainant to such proceeds.[1] This is a very liberal interpretation of general statements that might be condemned as mere conclusions of the pleader and is in accord with the general attitude of the supreme court to discourage delay on account of departures from the orthodox rules governing the form rather than the content of allegations.

*(b) Complaint—Violation of Statute.*—Plaintiff's complaint alleged that defendant left his automobile parked on the side of a busy highway without locking the ignition but leaving the keys therein (this was prohibited by statute[2]), that the car was stolen by one Joe Lane and that Lane in a grossly negligent manner drove into the rear of plaintiff's car and caused specified injury or damage. Defendant demurred on the ground that Lane's conduct was the efficient, intervening and proximate cause of the injury or damage. The ruling of the trial court sustaining the demurrer was reversed on appeal. The allegations in the complaint made it clear that the described conduct of Lane might have been foreseeable and if foreseeable, defendant's violation of the statute was the proximate cause of plaintiff's injury. Whether it was reasonably foreseeable by defendant was a question for a jury.[3]

*(c) General Allegation—Issue Made by General Issue.*—After alleging that defendant's place of business, wherein a bull owned by him was confined, was located in a populated area of a town, and several conclusions as to defendant's duty, plaintiff averred that defendant negligently permitted the bull to escape and roam unattended. Defendant's sole response was the plea of general issue. The evidence tended to prove that the bull escaped from the pen in which it was confined and that the negligent efforts of defendant and servants to bring the bull under control permitted it to escape from defendant's premises and to injure plaintiff, a pedestrian on a street of the town. The court held that this evidence was admissible and sufficient to support a verdict for plaintiff and judgment thereon. In the absence of a motion by defendant, the averment was sufficiently specific to justify the admission of all the evidence of the actions taken to recapture the bull.[4]

*(d) Scope of General Issue.*—On a plea of not guilty in an automobile intersection case, it was held that the defendant was entitled to rely on the defense of contributory negligence where the plaintiff failed to move to require the defendant to plead his defense specially.[5] This is the rule

1. Ferguson v. Moore, 348 S.W.2d 496 (Tenn. 1961).
2. TENN. CODE ANN. § 59-863 (1956).
3. Justus v. Wood, 348 S.W.2d 332 (Tenn. 1961).
4. Groce Provision Co. v. Dortch, 350 S.W.2d 409 (Tenn. App. M.S. 1961).
5. O'Keefe v. Walker, 350 S.W.2d 295 (Tenn. App. W.S. 1961).

approved by *Caruthers.*[6]

2. *Separate Counts—When Required—Failure To State Separately.*—The Tennessee Court of Appeals seems committed to the rule that where a single act of defendant causing a single injury violates both a statutory and a nonstatutory duty, the complaint must be framed in two counts, as if each violation constituted a separate cause of action.[7] In an action against a railroad for wrongful death, common law negligence and violations of the Statutory Precautions Act[8] were alleged in a single count. The court of appeals affirmed the refusal of the trial court to submit the issue of the violation of the act to the jury.[9]

*B. Plea in Abatement—Jurisdiction of Subject Matter in Ejectment*

In an action of ejectment for lands bordering on the Mississippi River, the defendant pleaded that the land in question was in the State of Arkansas. On the trial of the issue raised by this plea and denial, the question tried was whether the land was within the State of Tennessee at the pertinent period, about the year 1913. The chancellor found, after considering voluminous evidence, that the land was then in Arkansas. On appeal the court held that the evidence did not sustain the chancellor's finding but preponderated against it, at least as to part of the land, and remanded the cause to the chancery court.[10]

*C. Setoff and Counterclaim*

The supreme court, relying upon *Caruthers,* holds that in statutory setoff or recoupment the defendant must allege grounds sufficient to support an independent action and that the same is true as to equitable setoff.[11] This is certainly contrary to the rule developed by judicial decisions—the so-called common law rule—governing recoupment in most jurisdictions. Setoff had its origin in statute. In common law recoupment the defendant could not recover an affirmative judgment; it was purely defensive, and the same was true under the English setoff statutes.

*D. Amendment—Introducing New Cause—Relation Back—Effect on Period of Limitations*

In an action for workmen's compensation benefits, an amended petition, stating a new claim against new defendants, was filed on the last day before the statutory period was to expire. The petition, in the form of an order, was not signed by the judge until nine days later. In rejecting

6. CARUTHERS, HISTORY OF A LAWSUIT § 221 (7th ed. 1951).
7. See Little v. Nashville, C. & St. L. Ry., 281 S.W.2d 284 (Tenn. App. W.S. 1954), criticized in Morgan, *Procedure and Evidence—1956 Tennessee Survey,* 9 VAND. L. REV. 1050-51 (1956).
8. TENN. CODE ANN. § 65-1208 (1956).
9. Ori v. St. Louis-S.F. Ry., 348 S.W.2d 809 (Tenn. App. W.S. 1961).
10. Brown v. Brakensiek, 349 S.W.2d 146 (Tenn. App. W.S. 1961).
11. Combustion Eng'r Co. v. McFarland, 349 S.W.2d 138 (Tenn. 1961).

appellant's contention that the claim was barred by the statute of limitations, the supreme court held that the mere filing of the amended petition stopped the running of the statute.[12] The court started with the proposition that "a compensation suit is to all intents and purposes related to and almost identical with that of a suit in chancery."[13] A compensation action is commenced by the filing of a petition. In this case the amended petition was filed before any answer, demurrer or other pleading was filed, and at this stage of the litigation, on analogy to equity procedure, the amendment may be made as a matter of course without leave of court. This decision furnishes another example of the liberal attitude of the supreme court in the application of procedural rules in workmen's compensation cases.

## II. PARTIES—PROPER PARTIES—COMPLAINT IN CHANCERY TO RECONVEY PROPERTY SECURED BY FRAUD

The executor and the legatees named in a will of the testator, the validity of which has not been judicially determined, are not proper parties and have no standing to contest a later will or to attack by a complaint or bill in chancery inter vivos conveyances or transfers of property of the testator to his then wife on the ground that they were obtained by fraud or undue influence. But the chancellor has authority in such a situation to order the property impounded and to enjoin its disposition until the rights of the complainants as executor and legatees of the earlier will have been determined.[14]

## III. REMEDIES

### *A. Certiorari—Motion To Dismiss Petition—Demurrer*

A motion to dismiss a petition for certiorari is treated as a demurrer and the allegations in the petition are treated as true except those asserting propositions contrary to facts shown by the record. Thus where the record contains a return of service of process upon defendant an allegation to the contrary must be disregarded, for in Tennessee an "officer's return cannot be overcome by the oath of an interested party." The defendant's remedy is by an action in chancery to annul the judgment or by an action against the officer for a false return.[15]

### *B. Coram Nobis*

The writ of error coram nobis authorized and regulated by Tennessee

12. Bowling v. Whitley, 348 S.W.2d 310 (Tenn. 1961).
13. *Id.* at 312.
14. Crippled Children's Hosp. School v. Camatsos, 349 S.W.2d 178 (Tenn. App. W.S. 1960).
15. Royal Clothing Co. v. Holloway, 347 S.W.2d 491 (Tenn. 1961).

Code Annotated sections 27-701 to -708 is limited to "errors of fact in proceedings of which the person seeking relief has had no notice, or which he was prevented by disability from showing or correcting, or in which he was prevented from making defense by surprise, accident, mistake, or fraud, without fault on his part." It does not reach errors of law as when the mistake consists in following the advice of counsel given in the proceeding at a hearing before commissioners and approved by them. That the action taken in reliance upon the advice resulted in great harm is immaterial.[16]

### *C. Injunction—Against Prosecution of Civil Action—Adequate Remedy at Law*

A valid total defense against the claims of a plaintiff in a pending action at law constitutes an adequate remedy at law. Thus, where a plaintiff has brought an action to recover on two insurance policies and the insurance company after the incontestable clause in each policy had gone into effect files a bill seeking to cancel the policies and enjoin prosecution of the action on the ground of fraud in the inducement, a demurrer to the bill will be sustained.[17]

### *D. Conflicting Decisions—Different Divisions of Court of Appeals*

If there is a conflict between the decisions of one section of the court of appeals and those of another section, the remedy is by a proceeding before the court of appeals en banc. Such a proceeding may be held when the presiding judge determines that it is necessary or desirable.[18]

## IV. Burden of Proof and Presumptions—Presumptions

In two opinions the supreme court has applied the rule that an official of government knows the statutory law of the state and has obeyed it in a situation to which it was applicable. Thus, the court took judicial notice of the statute creating the Community Services Commission for Nashville and Davidson County and presumed that the commission had obeyed the law in the performance of its duties;[19] in an election contest it applied the same presumption to the action of election officials in counting and marking absentee ballots.[20] In neither case did the court discuss the procedural effect, if any, of the presumption upon the burden of persuasion.

16. Nailling v. State, 346 S.W.2d 247 (Tenn. 1961).
17. National Burial Ins. Co. v. Evans, 347 S.W.2d 34 (Tenn. 1961).
18. Womaek v. Caldwell, 349 S.W.2d 795 (Tenn. App. E.S. 1961).
19. State v. City of Nashville, 345 S.W.2d 874 (Tenn. 1961).
20. Dixon v. McClary, 349 S.W.2d 140 (Tenn. 1961).

## V. JUDICIAL NOTICE

In *State v. Nashville*[21] the supreme court, after reciting the generally accepted rules concerning judicial notice of acts of the legislature and of notorious facts, had to solve the problem of the extent of its power and duty to notice judicially the report of the community services commission, created by a private act of 1951, for the purpose of making an investigation and study of specified matters in Nashville and Davidson County and of making a detailed report of its findings which were to be filed as a public record in designated places. It held that the private act was to be judicially noticed, with its provisions creating the commission and defining its duties; the same was true as to the existence and content of the filed report. But what of the propositions and conclusions stated in the report? Was each of them to be accepted as indisputable? Or was the judicially noticed proposition merely that statements in the report furnished a rational basis for legislation by the legislative bodies of Nashville and Davidson County on the assumption that the conditions in fact existing therein were substantially as stated? The majority of the court assumed that the propositions stated in the report were true and that this assumption was subject to be defeated by evidence to the contrary; but the allegations in the bill or complaint to the contrary were not evidence and must be disregarded. The allegations of the bill considered in the light of the judicially known matters made it clear that the trial of an issue raised by evidence would result at best only in the conclusion that the truth of the judicially noticed proposition was reasonably debatable; and a legislative body may accept as true and as a basis for legislation any reasonably debatable proposition concerning relevant existing conditions.

It is submitted that the real basis of the doctrine of judicial notice is that our courts are established for the purpose of resolving gennine disputes and have no power to decide mere hypothetical disputes or moot issues, and that to allow an indisputable proposition to be judicially disputed is to resolve a moot issue. The acceptable analysis in the instant case, it is suggested, is that the report is a public document and that evidence of the statements therein are admissible under the official statements exception to the hearsay rule as tending to prove the truth of the matters stated. The legislative bodies of the city and county may, therefore, enact ordinances and other legislative measures on the theory that the conditions are as represented in the report.

## VI. EVIDENCE

### *A. Relevance*

*1. Real Evidence—Experiments.*—In a criminal prosecution for murder

21. 345 S.W.2d 874 (Tenn. 1961).

it became important to determine the distance between the weapon and the body of the victim at which powder burns might have occurred. Experiments made with the fatal weapon with the same type of powder and ammunition in the presence of the jury would furnish data from which the jury could draw conclusions dependent only upon what they personally perceived. But they would have to depend upon the testimony of others to determine whether or not the same type of powder and ammunition was used; and without such testimony the personally perceived experiments would be irrelevant. If the experiments occurred outside the presence of the jury, the jury would have to depend entirely upon the testimony of others both as to the identity of the weapon and the kind of powder and ammunition as well as the results of the experiment. Consequently, it is inaccurate to apply the term real evidence in such a situation, if by that term we mean that the evidence is such that its relevant quality is perceptible by the trier of fact by the use of his own senses. Consequently, evidence of experiments conducted outside the presence of the jury is inadmissible in the absence of testimony tending to show that the conditions of the experiment were similar to those at the event in issue in all controlling particulars. The requisites are usually expressed in terms of "substantial similarity," a phrase of exasperating indefiniteness.[22]

2. *Other Crimes.*—Defendant was convicted of killing in the perpetration of a robbery. Evidence was admitted over his objection of a writing by him stating that he had planned to hold up a truck, rob the truck driver and then kill him, that he had missed the opportunity to do this, that he then went to the home of a couple who, he knew, kept money in the house, robbed the wife and then killed her. His objection was to the reception of that part of the statement which concerned the truck driver. The court held that the trial judge's ruling was correct on the ground that the evidence tended to prove criminal intent and a scheme or plan to obtain money by murder.[23]

The opinion refers to the general rule and seven recognized exceptions as stated in *Mays v. State*.[24] Both in England and the United States the rule is usually stated in terms of an absolute general exclusion of evidence of other crimes or wrongs subject to a group of exceptions. Professor Julius Stone has demonstrated that the decisions both in England and the United States make it clear that evidence of other crimes or wrongs is rejected only where it is relevant solely as tending to prove his disposition to commit such a crime or wrong, or crimes or wrongs generally, as a basis for an inference that he committed another crime.[25] This view is

22. Rhea v. State, 347 S.W.2d 486 (Tenn. 1961).
23. Sims v. State, 348 S.W.2d 293 (Tenn. 1961).
24. 145 Tenn. 118, 238 S.W. 1096 (1921).
25. Stone, *The Rule of Exclusion of Similar Fact Evidence: England,* 46 HARV. L.

adopted in Uniform Rule of Evidence 55 and provides that such evidence is admissible where relevant to prove some other material fact including absence of mistake or aceident, motive, opportunity, intent, preparation, plan or identity.

*(a) Previous Sex Offenses.*—Evidence of similar offenses (taking indecent liberties with the prosecutrix, a child nine or ten years of age) is admissible in corroboration of her testimony as to the offense charged.[26] The relevance of this evidence as tending to show accused's disposition towards this child is clear, and there should be no objection to its reception on the basis of the generally accepted rule excluding evidence of other crimes. In this connection the opinion holds admissible the child's testimony that she told a companion about an earlier offense some six months after it happened. The opinion does not make clear the exact ground on which it was received. This is not a case where failure to complain is evidence of consent, for consent is not in issue; nor can it be said that this statement was made under stress of nervous excitement so as to be admissible as spontaneous. It might be regarded as anticipatory rehabilitation if the accused denies that he committed the offense. If, as the opinion seems to say, the delay goes only to the credibility of the statement as evidence of its truth, then the evidence was clearly hearsay and the decision represents an extension of the hearsay exceptions in sex offenses.

### *B. Hearsay*

*1. Exceptions—Adopted Admissions.*—It is too clear for comment that a statement made by one other than the defendant, accusing the defendant of having done a criminal act, is unmitigated hearsay and evidence thereof is inadmissible against him. But if the statement was made in the presence of the accused and he understood what the stater said, evidence is admissible of the conduct of the defendant in the face of the accusation, in so far as it tends to show that defendant believed the statement to be true. And the same is true if the defendant in whose presence the statement is made is not mentally normal but does realize the import of the statement. This is often true when the evidence shows that the accused was intoxicated.[27] Where the defendant has remained silent, it is usually said that he has adopted the statement as his own. And many courts apply the rule to situations where the accused makes an equivocal response, though it is obvious that his language does not indicate an adoption or approval of the statement. In sueh a case it may furnish the basis for a reasonable inference that he believed it to be true, and if so the evidence should be received. Uniform Rule of Evidence 63(8)(b) makes admissible against

REV. 954 (1933); Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

26. Wilkerson v. State, 348 S.W.2d 314 (Tenn. 1961).

27. Oliver v. State, 348 S.W.2d 325 (Tenn. 1961).

a party to the action statements of which the party with knowledge of the contents thereof has, by words or other conduct, manifested his adoption or his belief in its truth.

*2. Declaration Against Interest—Availability of Declarant.*—In an election contest evidence that the custodian of the voting machines involved had said that he had tampered with the machines was rejected by the trial judge as pure hearsay. In affirming the supreme court cited a case rejecting evidence of statements against penal interests, and distinguished such statements from admissions by a party.[28] Obviously the record and argument of counsel did not adequately present the problem as to the policy of extending the orthodox exception of declarations against interest to include declarations against penal interest.

### *C. Opinion*

*1. Expert Opinion—(a) Requisite in Malpractice.*—The determination by the trier of fact of the issue of skill exercised by a surgeon performing an operation such as one of "disc surgery" is "controlled exclusively by expert testimony." In the absence of such testimony that the proximate cause of the plaintiff's condition was the negligent conduct of the defendant physician or surgeon, a judgment for the defendant is mandatory.[29] This is the settled rule in the absence of statute. It has been subject to much adverse comment in cases where an operation has resulted in very serious injury to the patient. Much of the comment is based on the notion that the medical profession frowns upon those members who are willing to testify against their fellows. Of late the comment has concerned the reluctance of liability insurance companies to write policies covering practitioners who have given such testimony. Whether these comments are supported by reliable data is problematical.

*(b) Mental Capacity—Ultimate Issue.*—In a contested will case, reception of the testimony of a medical witness who had attended the testator, in answer to a question based on supposed facts, that he "would not think" the testator capable of transacting business at the time his holographic will was written was not reversible error. The question was not asked concerning capacity to make a will, and the court in its instructions carefully distinguished capacity to transact business from capacity to make a will.[30]

### *D. Parol Evidence Rule—Interpretation*

Where an integrated bilateral contract contains one printed paragraph and two additional typewritten paragraphs each dealing with the continuance and termination of the contract, the typed paragraphs will be

28. Sartin v. Stinecipher, 348 S.W.2d 492 (Tenn. 1961).
29. Redwood v. Raskind, 350 S.W.2d 414 (Tenn. App. W.S. 1961).
30. Bruster v. Etheridge, 345 S.W.2d 692 (Tenn. App. M.S. 1960).

construed most strongly against the party who drafted them and evidence of the intention of that party as to their meaning is inadmissible.[31] This decision represents the generally accepted rule on both points.

The meaning of a unilateral document and particularly of a will is to be determined by considering its entire content. Where the language used in a will considered as a whole indicates that its draftsman was highly skilled in the use of technical legal phrases and their meaning, a provision which leaves the testatrix's real estate to the next of kin of her husband is not to be determined by the nature of the property devised, whether real or personal, where the intention is made clear by the context, and the chancellor was correct in construing next of kin to mean "nearest in blood relationship" and not heirs. And the court of appeals had no basis for ruling that the preponderance of the evidence was against the chancellor's interpretation.[32]

### *E. Witnesses*

*1. Competency—(a) Connection With Tribunal—Juror.*—Testimony of a group of jurors that they did not intend to find the defendant guilty of the offense for which he was sentenced is inadmissible. On a motion for a new trial, the affidavits of nine jurors so asserting were rejected.[33] This case is to be distinguished from those in which the jurors assert that they all orally agreed to a particular verdict and that there was a mistake in reducing it to writing or in reporting it to the court.

*(b) Mental Immaturity.*—A child nine years of age at the time of the alleged offense and ten years at the time of the trial is competent as a wituess against defendant charged with taking indecent liberties with her. Her failure to mention the occurrence for six months affects only her credibility.[34] The current cases make it clear that the chronological age of a child is not decisive of his competency to testify. The test is "whether he is sufficiently intelligent to observe, recollect and narrate the facts, and has a sense of obligation to speak the truth."[35]

*(c) Infamy.*—The common law rule disqualifying as a witness a person who has been convicted of a felony has been abolished in most jurisdictions. Prior to the enactment of Tennessee Code Annotated section 40-2712 a person convicted of specified offenses was incompetent. Thereafter the disqualification was removed in all litigation not pending at the time of its enactment.[36]

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31. Associated Press v. WGNS, Inc., 348 S.W.2d 507 (Tenn. App. M.S. 1961).
32. Fariss v. Bry-Block Co., 346 S.W.2d 705 (Tenn. 1961).
33. Strunk v. State, 348 S.W.2d 339 (Tenn. 1961). The subject of a juror's competency to impeach the verdict of the jury of which he was a member is discussed in MORGAN, BASIC PROBLEMS OF EVIDENCE 76-77 (1961).
34. Wilkerson v. State, 348 S.W.2d 314 (Tenn. 1961).
35. Jackson v. Commonwealth, 301 Ky. 562, 565, 192 S.W.2d 480, 481 (1946).
36. Strunk v. State, 348 S.W.2d 339 (Tenn. 1961).

*(d) Impeachment—Bad Conduct Discharge.*—In a prosecution for murder evidence that a witness for the state had been separated from the military forces by a bad conduct discharge was rejected in the absence of a showing that the bad conduct involved an act of moral turpitude.[37]

*(e) Prior Contradiction.*—The prosecuting attorney may properly ask a witness for the state whether she had not, a few minutes before taking the stand, made to him and another person statements about material facts contrary to her testimony. But he may not (and in this instance did not) offer any evidence that she had made such a statement.[38] In this case the prosecutor followed the generally approved practice. On the extent to which a party is entitled to impeach his own wituess, there is much confusion in the opinions. The earlier cases seem strictly to prohibit impeachment.

## VII. Jurisdiction and Venue

### *A. Over Person—Service of Process—Foreign Corporation*

Plaintiff sued the International Salt Company, a New Jersey corporation with its principal place of business in Pennsylvania, for damages for breach of contract. The action was brought in the Shelby County Circuit Court. An attempt was made to obtain personal jurisdiction over the defendant by service upon one Williams, the sole salesman of the defendant in Shelby County, as "the chief agent of the corporation, residing in the county where the action is brought . . . ."[39] Williams engaged in regular and continuous solicitation on behalf of the defendant. He signed all the order blanks which then had to be accepted in Pennsylvania; all payments and adjustments were handled by the corporation directly although on at least two or three occasions Williams called to dun persons owing on past due accounts, and on one occasion he was given a check in payment of a past account which was forwarded directly to the defendant. Williams could handle the defendant's products only; he displayed samples, distributed company literature, and operated a company automobile. In 1960 the defendant corporation "made" approximately $10,000 from sales to wholesale grocery houses in the western district of Tennessee alone. On these facts, the Tennessee Supreme Court held that Williams was a "mere soliciting agent" and therefore the defendant was not "doing business" in Tennessee.[40] The court affirmed the order of the trial court sustaining a plea in abatement on the ground that the service was void.[41]

The "solicitation plus" rule, relied upon by the Tennessee court, was

37. Rhea v. State, 347 S.W.2d 486 (Tenn. 1961).
38. *Ibid.*
39. Tenn. Code Ann. § 20-217 (1956).
40. Tenn. Code Ann. § 20-220 (1956).
41. Tucker v. International Salt Co., 349 S.W.2d 541 (Tenn. 1961).

first announced by the United States Supreme Court in 1907.[42] It was one of the many distinctions as to what constituted "doing business" sufficient to subject a foreign corporation to state-court jurisdiction.[43] The mere solicitation of orders that could be accepted or rejected outside the forum state was not considered "doing business";[44] but, if there were additional activities, such as continuous negotiations to settle claims, the assertion of jurisdiction would not offend due process.[45] In 1945 the United States Supreme Court in *International Shoe Co. v. Washington*[46] rejected the "doing business" test in favor of an interest analysis: "[D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[47] In *McGee v. International Life Insurance Co.*,[48] it was held that a California court was able to assert jurisdiction over a Texas insurance company in a suit by a resident beneficiary despite the fact that the defendant had no office or agents in California, the insured had been solicited by mail, the contract was delivered in California, and the premiums were mailed to the home office in Texas.

In the present case, since the solicitations by the agent were "a regular course of activity," it would seem that Tennessee has the power to assert jurisdiction over the defendant.[49] But even if this power exists, it does not necessarily mean that it must be exercised. A state is perfectly free to decline to expand its jurisdiction to the limits of the federal constitution.[50] Consequently, the present decision could mean that the Tennessee statutory phrase "doing business" is to be interpreted more narrowly than the permissible limits of the due process clause of the fourteenth amendment. The

42. Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907). See International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

43. See Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts,* 25 U. CHI. L. REV. 569, 584-86 (1958); *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909, 922-23 (1960).

44. Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907).

45. St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913).

46. 326 U.S. 310 (1945).

47. *Id.* at 316.

48. 355 U.S. 220 (1957).

49. See, *e.g.*, Lewis Mfg. Co. v. Superior Court, 140 Cal. App. 2d 245, 295 P.2d 145 (Dist. Ct. App. 1956); WIS. STAT. ANN. § 262.05(4) (1958); Revision Notes, WIS. STAT. ANN. § 262.05 (Supp. 1961); see generally *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909, 998-1008 (1960). Continuous and substantial solicitation had been held to be sufficient activities for state-court jurisdiction even before *International Shoe.* See Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.); American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28 (1928); Hutchinson v. Chase & Gilberts, Inc., 45 F.2d 139, 141 (2d Cir. 1930) (L. Hand, J.).

50. See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

difficulty with the opinion, however, is that it seems to rest on a misconception of the import of the decisions of the United States Supreme Court.[51] The *International Shoe* opinion explicitly rejected the prior notions that state-court jurisdiction hinges on the quantitative nature of the defendant's activities as reflected in the "doing business" and corporate "presence" theories of jurisdiction.[52] "Whether due process is satisfied must depend rather upon the quality and nature of the activity in the relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[53] Because of this misconception, the Tennessee court never reached the decisive question of statutory construction: if a foreign corporation regularly solicits business in Tennessee, and a cause of action arises out of these activities, is it within the policy of the Tennessee statute to assert jurisdiction over the corporation? If the assertion of jurisdiction is within the statutory policy, should the langnage of the statute be construed to take on new meaning as jurisdictional concepts become more flexible?[54]

51. The court apparently construed *International Shoe* to be limited to suits for unemployment compensation taxes and *McGee* to actions based on state interests in specially regulating certain types of activities. See Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); Hess v. Pawloski, 274 U.S. 352 (1927). The court's reliance on Hanson v. Denckla, 357 U.S. 235 (1958) seems particularly inappropriate. In that case it was held that in order for a nonresidcnt defendant to be subject to the jurisdiction of the state there must "be some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state . . . ." *Id.* at 253-54. *Cf.* International Harvester Co. v. Kentucky, 234 U.S. 579, 587-89 (1914). The probability that a misreading of the United States Supreme Court decisions was the basis of the present decision is strengthened by the Tennessee court's failure to cite Banks Grocery Co. v. Kelley-Clarke Co., 146 Tenn. 579, 243 S.W. 879 (1922), which adopted the "solicitation plus" rule of Green v. Chicago B. & Q. Ry., 205 U.S. 530 (1907). The *Banks* decision was cited by both briefs on the appeal.

52. See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 510 (2d Cir. 1960).

53. 326 U.S. at 319.

54. *Compare* Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803, 805-06 (1956), *with* Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958) *and* Carl F. W. Borgward G. M. B. H. v. Superior Court, 51 Cal. 2d 72, 330 P.2d 789 (1958). See Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 658-59 (1959). Referring to the *Jahn* and *Borgward* decisions, Justice Traynor said: "Even antiquated statutes, however, may be so geared to the due process clause of the United States Constitution as to lend themselves to interpretation in accord with the mutations in that clause. One might note by way of illustration how the California courts have interpreted an 1872 statute authorizing service of process on foreign corporations doing business in the state. They have reasoned that doing business was adopted as a test not for immunity but for jurisdiction, consonant with the then tenor of the due process clause. Any test of jurisdiction geared to its then tenor and expressed in pliant langnage was therefore no more than illustrative of service of process in accord with the jurisdictional conccpts of that period. As those concepts became more flexible the courts found that the wording of the 1872 statute yielded a correspondingly flexible meaning."

*B. Over Subject Matter*

*1. Circuit Court—Election Contest.*—On an appeal from a judgment of the Circuit Court of Polk County in an election contest, it was urged that it was error for the circuit court to try the case because under Tennessee Private Acts of 1911, chapter 413, the Law Court of Ducktown had exclusive jurisdiction.[55] In rejecting this contention the supreme court held that the grant of jurisdiction to the Ducktown Law Court is concurrent with the general jurisdiction of the Circut Court of Polk County,[56] unless the express provision for exclusive jurisdiction in the law court is met.[57] Under the private act, the law court had exclusive jurisdiction "in all cases at law of a civil character"[58] "only where at least one material defendant resides within its territorial limits."[59] In the present case, the jurisdiction of the circuit court was sustained because the suits against four of the defendants who resided in the law court's territory were dismissed, leaving only defendants who resided in the circuit court's territory.

*2. Chancery.*—The chancery court has jurisdiction of a claim by the administrator of a decedent to recover money alleged to belong to the estate against a person who had received it as executrix of a will of decedent which had been judicially determined not to be the will of decedent. The complaint alleged that the defendant had received the money as the result of fraud. On demurrer to the complaint the chancellor ruled correctly that the statute giving the county court jurisdiction over the distribution of the estates of decedents does not deprive chancery of its inherent jurisdiction over the administration of such estates, and this is subject to no doubt where there is a question as to the authority of the executor.[60]

*3. Supreme Court—Moot Issue.*—The supreme court has no authority to render advisory opinions and will not hear moot issues. Hence in a habeas corpus proceeding it will dismiss an appeal by petitioner as moot when he is no longer in custody.[61]

## VIII. TRIAL

*A. Right to Jury Trial*

*1. Action for Injunction and Damages.*—In an action in which plaintiff

55. Tenn. Priv. Acts 1911, ch. 413, § 2 provides "that the Law Court of Ducktown shall have exclusive general eommon law jurisdiction, original and appellate, in all cases at law of a civil character wherein the defendant is a resident . . . in said districts named in the first section of this Act . . . ."

56. TENN. CODE ANN. § 2-1902 (1956) provides that "the circuit court hears and determines all contests of the election of sheriffs . . . ."

57. Dixon v. McClary, 349 S.W.2d 140 (Tenn. 1961).

58. See note 55 *supra*.

59. 349 S.W.2d at 143.

60. Ferguson v. Moore, 348 S.W.2d 496 (Tenn. 1961).

61. State *ex rel.* Lewis v. State, 347 S.W.2d 47 (Tenn. 1961).

sought an injunction and damages, it appeared that plaintiff was not entitled to an injunction; it appeared, however, that defendant, without instituting condemnation proceedings, had taken rights of the plaintiff in a portion of a stream by diverting it. The chancellor properly retained jurisdiction to determine the amount of the damages. He appointed the clerk and master to hear evidence and determine the issue of damages and report. Plaintiff without objection participated in the hearing. The supreme court held that the findings of the master approved by the chancellor were effective against plaintiff, although he would have been entitled to a jury trial on the issue of damages had he requested it.[62]

*2. Severance for Trial.*—Where three persons were named as defendants in an indictment and all were charged as principals, the denial of a motion for a separate trial by one of them was not error.[63]

*3. Consolidation for Trial.*—The ruling of the trial judge consolidating for trial two or more offenses charged against defendant will not be disturbed on appeal in the absence of an affirmative showing that defendant was prejudiced thereby. And this is true although the offenses occurred on different dates and had no connection in fact with each other.[64]

### *B. Instructions to Jury*

*1. Statutory Requirement of Writing.*—A writing setting forth instructions to the jury containing lines drawn through some words indicating deletions was not misleading, though those words were still legible, and was properly submitted to the jury. The opinion made no reference to the statute requiring every word of the charge to be written.[65]

*2. Request To Charge—(a) When Necessary.*—Where two defendants were on trial charged with the same offense, omission to instruct the jury that they might find one of them guilty and acquit the other was not error in the absence of a request even if there was evidence which would support such an instruction.[66]

*(b) Request for Clarifying Instruction.*—Where the trial judge admitted the results of a blood analysis showing an alcoholic content of 23% by a qualified chemist and his statement that the medical and legal professions considered an alcoholic content of over 15% as "having tendencies of intoxication," the omission of any reference to the applicable statute[67] and the presumption created by it was not error. The judge correctly charged that if the defendant uses an intoxicant "to the extent that it

62. Evans v. Wheeler, 348 S.W.2d 500 (Tenn. 1961).
63. Stallard v. State, 348 S.W.2d 489 (Tenn. 1961).
64. Bullard v. State, 348 S.W.2d 303 (Tenn. 1961).
65. Strunk v. State, 348 S.W.2d 339 (Tenn. 1961).
66. *Ibid.*
67. TENN. CODE ANN. § 59-1033 (1956).

impairs his vision, the free exercise of his mind, or the free use of his body and limbs so that it is calculated to and does interfere with his driving and operation of a motor vehicle, then he would be guilty . . . and you would so find." If defendant desired a qualifying instruction, he should have made a specific request.[68]

*3. Refusal of Request—When Proper.*—A refusal of a request by defendant to charge that the jury might find defendant guilty of a "lesser included offense" was correct where the evidence made it clear that he was either guilty of the offense charged or guilty of no offense.[69] The opinion assumes that the judge is bound to charge concerning "lesser included" offenses where the evidence would support a pertinent finding.

### *C. Directed Verdict*

*1. Effect of Evidence Received After Defendant Has Rested.*—An accused cannot limit the prosecution's case against him to the evidence introduced before he rested. Evidence introduced thereafter against other defendants may be considered against him.[70] If defendant's motion for a directed verdict at the close of the state's evidence had been granted, obviously he would have been out of the case and evidence received thereafter would have had no effect upon his case; but though there was no issue as between him and any one of his codefendants, still any evidence in the case properly received while he is still a party is usable regardless of its source.

*2. Performance of Condition—Notice of Vacancy or Nonoccupation of Insured Building.*—The policies of fire insurance upon a building and its contents excepted liability for loss occurring while the bulding "whether intended for occupancy by owner or tenant is vacant or unoccupied beyond a period of sixty days." The evidence showed that the building was "padlocked" pursuant to a decree of court and for 113 days thereafter and prior to its destruction by fire was used for nothing but storage. No notice of nonoccupancy was given to defendant insurance company or to its local agent. A news item in local newspapers concerning the padlocking was known to the local agent. Thirty days after the padlocking, the defendant company accepted payment of the amount still due on the premium of the policy covering the building. In an action to recover on the policy the trial judge directed a verdict for the defendant on the ground that the use of the building for storage and the occasional visits of the owner to the premises did not constitute occupancy and there was no evidence to justify a finding of actual or implied knowledge of the defendant of the continuing nonoccupancy of the building when it accepted the

68. Robinson v. State, 347 S.W.2d 41 (Tenn. 1961).
69. Strunk v. State, 348 S.W.2d 339 (Tenn. 1961).
70. Oliver v. State, 348 S.W.2d 325 (Tenn. 1961).

payment some thirty days after the padlocking. The court of appeals affirmed the ruling on appeal from the judgment.[71]

### IX. Judgment—Res Judicata—Splitting

While plaintiff's action against Knox County was pending for taking a strip of her land for road purposes and raising the grade of the road and draining it so as to cast water upon her land and damage the sewage disposal field for plaintiff's septic tank, plaintiff brought another action against the county for damages to her property growing out of the grading and draining of the road. After dismissal of this latter action and appeal to the circuit court, the action was tried by the circuit judge without a jury. The court found that plaintiff's property had been substantially damaged by the grading and draining and rendered judgment for her for $1,550. This judgment was affirmed by the court of appeals and certiorari was denied by the supreme court. After paying the judgment, defendant filed a plea setting up the judgment as a bar to the pending action. The trial judge sustained the plea.[72]

In a very interesting article[73] Professor Cleary has pointed out that one of the reasons for the doctrine of res judicata is that a defendant should not be harrassed by repeated trials of the same cause. The rule against splitting, he believes, is not a necessary corollary of this proposition. If the plaintiff is required, as a condition precedent to his second action, to reimburse defendant for the expense and inconvenience to which he has been put by the splitting, then he will not be unduly harmed. If in a particular case the application of the rule against splitting will cause the plaintiff substantial harm, the court in the exercise of a sound discretion should permit him to avoid the rule on compliance with such a condition. The other reasons of policy should give way to the fundamental purpose of a judicial trial, the just determination of a dispute between the litigants.

### X. Motion for New Trial—Grounds

#### *A. Misconduct of Juror—False Statement*

On motion for a new trial for misconduct of a juror in making false statement on *voir dire*, a witness testified that the juror had before being called made a statement indicating her belief that defendants were guilty; the juror denied it. The trial court's finding that the juror was a qualified juror was approved on appeal.[74] It is too clear for comment that in such a situation the trial judge's finding as to the credibility of the respective

71. Cashen v. Camden Fire Ins. Ass'n, 348 S.W.2d 883 (Tenn. App. E.S. 1961).
72. Hawkins v. Dawn, 347 S.W.2d 480 (Tenn. 1961).
73. Cleary, *Res Judicata Reexamined*, 57 Yale L.J. 339 (1948).
74. Stallard v. State, 348 S.W.2d 489 (Tenn. 1961).

witnesses will not be disturbed on appeal.

*B. Mistaken Interpretation of Jury's Findings*

In an eminent domain proceeding the jury found separately the value of the land taken, the incidental damages to the owner of the fee, the value of the lessee's unexpired lease thereon and the incidental damages for removing the lessee's fixtures and equipment, and the trial judge ordered judgment for the owner for the total sum. The supreme court reversed the judgment and ordered a new trial in which the jury should be instructed as to the award to be made (1) to the owner-lessor and (2) to the tenant-lessee.[75] On the face of the opinion it seems reasonably clear that there was no mistake in the findings of the jury, and that the error was solely in the conclusion of law to be drawn therefrom. If so, why should there be a new trial on the issue of fact? Evidently the court's examination of the record and the instructions revealed more sources of confusion than appear in the report.

## XI. APPEAL AND ERROR

*A. Preliminary Requisites*

*1. Time To Appeal—Final Judgment Rule—Finality of Judgment—Order of Remand.*—In a court of general sessions, after judgment by default was entered against defendants, the judge granted an appeal to the circuit court; after trial on the merits, the latter court dismissed the action. On appeal the court of appeals held that the appeal to the circuit court had been erroneously granted, reinstated the default judgment and remanded the case to the circuit court. Petition for certiorari to the supreme court was denied some eighteen months after the original order and remand. Within a month thereafter the circuit court granted certiorari to remove the case to the circuit court for trial; it denied a motion to dismiss the petition for certiorari, and some months later dismissed the action on the merits. From the judgment of dismissal plaintiff appeals in error. The decision on this appeal turns on the issue of whether the earlier decision of the court of appeals remanding the case to the circuit court was effective to restore the default judgment in the court of general sessions. The decision is that the remand to the circuit court for reinstatement of the general sessions judgment was not effective to restore the judgment until the order was filed in the circuit court. Consequently the action of the circuit court in issuing certiorari to the general sessions within one month after the order of remand was filed was timely and the objection that there was in that court nothing upon which the writ of certiorari could operate was without merit.[76]

75. Moulton v. George, 348 S.W.2d 129 (Tenn. 1961).
76. Rutledge v. Swindle, 348 S.W.2d 888 (Tenn. App. M.S. 1960).

*2. Motion for New Trial—Decision of Chancellor on Certiorari From Civil Service Commission.*—On certiorari to chancery from a decision of the civil service commission discharging an employee, the employee appealed. The chancellor's review is limited to the issue whether there is in the record material evidence in support of the commission's action, and the same is true on appeal. Nevertheless the court held that a motion for a new trial is a prerequisite to his right to appeal.[77] How in such a case where the chancellor can take no new evidence and is confined to examination of the record, a motion for a new trial can serve any useful purpose is very difficult to understand.

*3. Assignment of Error.*—Assignments of error not included in a motion for a new trial or otherwise brought to the attention of the trial judge will not be considered on appeal,[78] but the failure of appellant to comply with the rules of the appellate court will not be cause for dismissal of the appeal where the assignments of error are reasonably specific and the brief contains sufficient reference to pertinent materials.[79] It continues to be puzzling why our appellate courts should be required to pass upon matters which indicate counsel's ignorance of rules of practice that are well settled in Tennessee.

### *B. Scope of Review*

*1. Statutory Limitation.*—A landowner who had under the applicable statute[80] an opportunity to appear at a hearing before drainage commissioners appealed to the circuit court from the commissioners' finding that his lands would not be benefitted by the construction of a levee; the circuit court affirmed but on appeal the court of appeals reversed on the ground that the landowner had previously had no opportunity to show that the lands would not be benefitted by the levee. On certiorari the supreme court reversed the decision of the court of appeals. The court pointed to the previously determined constitutionality of the statute which provided that the court could increase, diminish, annul or affirm the apportionment and assessments, but was not competent to show that the lands assessed would not be benefitted by the improvement. Moreover, the constitution does not require more than one hearing, namely, the hearing before the commissioners. Therefore the circuit court had no authority or power to consider any evidence on the forbidden issues.[81]

*2. Findings of Chancellor and Court of Appeals.*—Where the chancellor concurs in the findings of the master that the property owner suffered

77. Rhem v. Civil Serv. Comm'n, 350 S.W.2d 292 (Tenn. App. W.S. 1961).
78. Wilkerson v. State, 348 S.W.2d 314 (Tenn. 1961).
79. Brown v. Brakensiek, 349 S.W.2d 146 (Tenn. App. W.S. 1961).
80. TENN. CODE ANN. § 70-901 (1956).
81. Moody v. Dyer County Levee & Drainage Dist. No. 1, 348 S.W.2d 328 (Tenn. 1961).

no damage by the diversion of a stream and the court of appeals has affirmed, the findings are conclusive upon review by the supreme court. In its opinion the court noted that in another action by this plaintiff against another defendant the same issue as in the case at bar was determined against the plaintiff. It held that the lower courts had correctly held that that determination was the law of this case.[82] Whether the court used the phrase "law of the case" in the sense that the court on a new review of the same cause between the same parties will not reexamine the decision on the same issue is not clear and a discussion of that doctrine would not be helpful.

*3. Remand to Lower Court With Directions.*—Where the court of appeals had refused to consider the bill of exceptions and the supreme court on review had remanded the cause to the court of appeals for consideration of the alleged errors specified in the bill, the court of appeals is bound to do so and will proceed as if the bill had been properly presented in the first instance. The court here uses the phrase "law of the case" without any explanation of the doctrine to which that phrase is generally applied.[83]

*4. Jury-Waived Trial—When Chancellor Sits as a Jury.*—By agreement of counsel the chancellor sat as a jury at the trial. In such a situation he permitted defendants to introduce their evidence after their motion to dismiss had been denied. On appeal from the judgment the scope of review is the same as that of an appeal in error from a judgment entered on the verdict of a jury.[84]

### *C. Disposition on Appeal*

*1. Judgment—Remand.*—In a condemnation proceeding the trial judge erroneously set aside an award of incidental damages on the ground that the condemnee was not entitled to incidental damages. Obviously the trial judge had not approved the verdict, and since he must act as a thirteenth juror, the court of appeals cannot enter judgment for the amount assessed by the jury but must remand the cause for a new trial.[85] In the absence of other reasons for remand, why should there be a new trial if the trial judge on remand corrected his error and approved the verdict?

*2. Test of Harmless Error—Refusal To Instruct.*—The refusal to give a requested instruction which is properly framed is harmless error unless if given it would have changed the result.[86] This is a very severe test. Under the generally accepted modern view which recognizes the harmless error doctrine, the test is whether a correct ruling would probably have had a substantial influence upon the result.

82. Evans v. Wheeler, 348 S.W.2d 500, 503, 506 (Tenn. 1961).
83. Redwood v. Raskind, 350 S.W.2d 414 (Tenn. App. W.S. 1961).
84. Melhorn v. Melhorn, 348 S.W.2d 319 (Tenn. 1961).
85. Sanders v. Sullivan County, 348 S.W.2d 909 (Tenn. App. W.S. 1960).
86. O'Keefe v. Walker, 350 S.W.2d 295 (Tenn. App. W.S. 1961).

## XII. United States District Court Cases

### A. Judgment

*1. Res Judicata—Identity of Parties.*—Where a party not named as defendant openly defended, supported and controlled litigation against defendant in which plaintiff sought an injunction, that party is bound by the judgment as if it had been formally named as a party defendant.[87] This rule is most frequently applied in patent litigation, as in this case.

*2. Judgment of Tennessee Court—Decision of Appeals Council Under Social Security Act.*—The judgment of the Tennessee court that a workman is permanently disabled is not binding upon the Appeals Council under the Social Security Act. Likewise, the conclusions of law by the Appeals Council are not binding upon the Tennessee district court in reviewing the findings of fact of the Council to determine whether the findings are supported by any substantial evidence.[88]

### B. Parties—Indispensable Party Defendant

In an action for a declaratory judgment that plaintiff had not been legally removed from his position as State Administrative Officer, Agricultural Stabilization Office, it appeared that the authority to appoint and remove was vested by law in the Secretary of Agriculture and those to whom he had delegated his authority. Any other subordinate would be unable to restore plaintiff to the position from which he had been wrongfully removed. Therefore the Secretary or one to whom he had delegated his authority was an indispensable party to this action; the incumbent who had ousted the plaintiff would not be such a delegate and would be unable to comply with any judgment ordering plaintiff's restoration to the position from which he had been wrongfully removed.[89]

### C. Trial—Dismissal Without Prejudice

In an action brought by plaintiff against the United States for recovery of income taxes paid, on the ground that they had been illegally assessed and collected, defendant answered alleging that the action was brought in the wrong district; plaintiff then moved for dismissal without prejudice in order that he might bring a new action against the District Director of Internal Revenue in the proper district. The court granted the motion over the objection of defendant. The court ruled that it had authority to grant the motion in the interest of justice and to impose terms which would prevent the imposition of expense and inconvenience upon the Government.[90]

87. Baltz v. Walgreen Co., 198 F. Supp. 22 (W.D. Tenn. 1961).
88. Martin v. Ribicoff, 195 F. Supp. 761 (E.D. Tenn. 1961).
89. Maupin v. Fry, 194 F. Supp. 867 (M.D. Tenn. 1961).
90. Stevenson v. United States, 197 F. Supp. 355 (M.D. Tenn. 1961).

## XIII. SIXTH CIRCUIT COURT OF APPEALS CASES

### *A. Grounds for New Trial—Newly Discovered Evidence*

In denying defendant's motion for a new trial after judgment of conviction, the trial judge said that the new evidence was "cumulative only" and "would not probably produce an acquittal," and "his testimony would not have changed the results of the trial." The court of appeals affirmed, pointing out that the new witness was a collaborator of defendant in the "acts which were found to be criminal." The trial judge's discretionary ruling, therefore, would not be disturbed.[91]

The trial judge, with the apparent approval of the court of appeals, purportedly applied a more rigid requirement than that usually applied by most courts. It is usually said that the rule as to cumulative evidence is subject to exception where the new evidence would probably have "substantial influence" upon the result. Even so, it is a rare instance when the appellate court disturbs the result of the exercise of the trial judge's discretion.

### *B. Appeal and Error*

*1. Preliminary Requisites—Objection at Trial.*—In a criminal prosecution the trial judge gave an instruction concerning the weight to be given to the testimony of an accomplice. Although no accomplice testified, the defendant made no objection to this instruction. Therefore he had no basis for an assignment of error on this ground.[92] This is a routine application of the Federal Rule of Criminal Procedure. Clearly this is no case of plain error to be noticed by the court of its own motion.

*2. "Erie" Doctrine—Jury Verdicts.*—In *Byrd v. Blue Ridge Electric Co-op.*,[93] the United States Supreme Court re-examined the doctrine of *Erie R.R. v. Tompkins*[94] as elaborated in *Guaranty Trust Co. v. York*.[95] *Erie* held that the definition of state-created rights and obligations by state courts was binding on the federal courts in diversity suits. *Guaranty Trust* said that the application of the *Erie* doctrine did not depend on whether the rules in question were labeled "substantive" or "procedural" but on whether the state rule would be "outcome determinative": the federal court in diversity must follow the state rule if that rule would significantly affect the result of the litigation. *Byrd* rejected the outcome test in favor of an interest analysis. In holding that a federal court should not apply a state rule which had altered the common law judge-jury relationship, the Court developed a two-step analysis: is the state rule an "integral part"

91. Ashe v. United States, 288 F.2d 725 (6th Cir. 1961).
92. United States v. Dorsey, 290 F.2d 893 (6th Cir. 1961).
93. 356 U.S. 525 (1958).
94. 304 U.S. 64 (1938).
95. 326 U.S. 99 (1945).

of the right created by state law?[96] If it is not, does "the objective that the litigation should not come out one way in the federal court and another way in the state court"[97] outweigh the federal interest in its rule? In *Byrd* it was held that the state rule was not an integral part of the state right and that the distribution of the functions between judge and jury was an "essential characteristic" of the federal system of administering justice.

The *Byrd* analysis was applied in a recent decision of the court of appeals. The plaintiff, a New Jersey resident, was severely injured while using a machine which his employer had purchased from the defendant, an Ohio corporation with its principal place of business in Tennessee. Suit was started in the United States District Court for the Eastern District of Tennessee on two theories: (1) negligence on the part of the defendant in designing the machine and (2) breach of implied warranty of the safety of the machine. The jury returned a general verdict in favor of the plaintiff. Thereafter the trial judge determined that he had erred in submitting the warranty claim to the jury and a new trial was granted. On appeal,[98] the court of appeals reversed and ordered the verdict reinstated and judgment entered thereon.[99]

The issue on appeal was whether the Tennessee "two issue rule" should have been applied by the federal district court.[100] The appellant urged that even if it was error to submit the warranty count to the jury, the negligence count was sufficient to sustain the general verdict and under Tennessee law a general verdict must be upheld if "there was at least one good count correctly submitted to the jury and supported by substantial evidence . . . ."[101] In accepting this contention, the court of appeals held that the application of the Tennessee rule would have a substantial effect on the outcome and that there was no countervailing federal interest. Applying the *Byrd* analysis, the state rule governed.

It would appear that the court of appeals was too quick to find no significant federal interest. The gist of *Byrd* is that state rules of practice cannot alter the decision-making process of the federal courts.[102] Thus, *Byrd* rested heavily on *Herron v. Southern Pacific Co.*[103] which held that the Conformity Act did not require the federal court sitting in diversity to

96. *Cf.* Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939) which held that state rules as to burden of proof are substantive for *Erie* purposes because they are an integral part of substantive rights.

97. 356 U.S. at 538.

98. An interlocutory appeal was allowed pursuant to 28 U.S.C. § 1292(b) (1958).

99. Tracy v. Finn Equip. Co., 290 F.2d 498 (6th Cir. 1961).

100. TENN. CODE ANN. § 20-1317 (1956) provides: "Verdict applied to good count. If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts."

101. 290 F.2d at 499.

102. See *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 147-50 (1958).

103. 283 U.S. 91 (1931).

be bound by a state constitutional provision making the jury the sole arbiter of contributory negligence. *Herron* cited with approval *Indianapolis & St. L.R.R. v. Horst*[104] which held that a federal court is not subject to state regulations requiring a jury to answer special interrogatories in addition to the general verdict, which rule has been followed since *Erie*.[105] Since federal law, not state law, governs the method of submitting issues to the jury, it follows that federal law and not state law must govern the evaluation of the jury verdict.[106] Both aspects of control over jury verdicts are interrelated. Both are part of the decision-making process and should be considered of equal importance in the federal courts. In the present case, the court of appeals should have applied the federal rule in evaluating the general verdict.[107]

*3. Affirmance of Order of Deportation by Court of Appeals—Motion in District Court To Reopen.*—After two judgments in the court of appeals affirming district court judgments upholding the order of deportation, appellant sought to reopen the case in the district court. Appellant had not petitioned for a rehearing in the court of appeals or for certiorari to the United States Supreme Court. The district court refused to entertain the motion without approval of the court of appeals. On petition for such approval the court held that the motion to reopen under Rule 60(b) cannot be used as a substitute for appeal.[108] Query: will petitioner's failure to exhaust his rights to move for a rehearing or for certiorari prevent consideration by resort to habeas corpus proceedings?

*4. Rejection of Evidence—Prejudicial Error.*—When on appellate review the court considers the value of evidence rejected by the trial judge and finds that it would not have been helpful to the jury, the judge's ruling will be upheld. It is not error to reject such evidence.[109]

*5. Reception of Evidence—Conditional Rejection of Evidence—Co-conspirators.*—After admitting evidence of a statement of conversations of appellant's codefendants, alleged to be co-conspirators, the trial judge charged: "[T]his alleged statement, alleged to be made by these men, will

104. 93 U.S. 291 (1876).

105. See 5 MOORE, FEDERAL PRACTICE 97 (Supp. 1961); 2B BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1052 (Wright ed. 1961).

106. See BARRON & HOLTZOFF, *op. cit. supra* note 105. Williams v. Powers, 135 F.2d 153 (6th Cir. 1943), a pre-*Guaranty Trust v. York* case, held that the Ohio "two-issue rule" did not apply in diversity. In other diversity cases, there is no mention that the *Erie* doctrine might require the application of state rules. Seo, *e.g.*, Lee v. Pennsylvania R.R., 192 F.2d 226 (2d Cir. 1951).

107. There might be some difficulty in determining what the federal rule is. *Compare* Salem v. United States Lines Co., 293 F.2d 121, 125 (2d Cir.), *aff'd in part, rev'd in part on other grounds*, 368 U.S. 811 (1962), *with* Lee v. Pennsylvania R.R., 192 F.2d 226 (2d Cir. 1951).

108. Williams v. Sahli, 292 F.2d 249 (6th Cir. 1961).

109. Louisville & N.R.R. v. Chesapeake & O. Ry., 295 F.2d 308 (6th Cir. 1961).

not be considered except with respect to their cases. Unless the jury finds, first, there was a conspiracy and, second, that these statements were made in furtherance of the conspiracy. If the jury so finds, then the jury will consider the alleged statement with respect to all of the defendants." The court of appeals approved this as "a clear and correct statement of the law of conspiracy."[110]

This is another example of an excellent trial judge's repetition of an approved formula—which will not stand analysis. It makes the jury an appellate tribunal on the admissibility of evidence, but requires it to find the defendant guilty before it can consider this evidence which is relevant only on the issue of guilt.

110. United States v. Dorsey, 290 F.2d 893, 894 (6th Cir. 1961).