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Procedure and Evidence – 1961 Tennessee Survey

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PROCEDURE AND EVIDENCE—1961 TENNESSEE SURVEY

EDMUND M. MORGAN*

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Anyone who has reviewed the decisions of our courts for ten years cannot fail to be impressed by the carelessness or ignorance or both of many members of the bar and the efforts of our appellate courts to find a way, if possible, to make the lawyer's blunders in procedure as little costly as possible to the client. A notable example is found in *McEwan, Gearinger, Banks & Hutcheson v. Lookout Mountain Hotel, Inc.*¹ Counsel had made so many blunders in attachment proceedings and pleas in abatement that the court characterized the case as a comedy of errors and remanded it with directions that would permit a presentation of the case on the merits. In numerous opinions where an appeal is ineffective because of seemingly inexcusable blunders of counsel, the court has treated the record as that in a writ of error,² and at times it has found the really serious problem presented in the technical record. But in some instances the mistakes are such as to be incurable and the court is helpless to save the client. Thus in a workmen's compensation case with a foreign corporation as the defendant employer, the original mistake in naming the wrong insurance carrier was curable, but eliminating it destroyed the court's jurisdiction over the employer, and the attempted service of process upon the substituted carrier was such as to be totally ineffective under the statute. The court could do nothing but dismiss the action, even though on the merits the plaintiff had recovered judgment.³

In this article no mention is made of the numerous reiterations of the rule that in considering a motion for a directed verdict, the trial court must deny the motion where there is any material evidence that would warrant a jury in finding against the moving party. Nor is there noted the many, many applications of the courts' settled practice to deny a petition to rehear which merely reargues matters which counsel insist were improperly decided after argument and full consideration.⁴

Again, it must be said that this survey is in most respects a mere "horizontal digest." Thus far the editors have received no suggestion for changing its character. It is hoped that those who read it will express an opinion as to whether it should deal only with new problems presented by the current decisions.

1. 338 S.W.2d 601 (Tenn. 1960).

2. See *Brister v. Brubaker's Estate*, 336 S.W.2d 326 (Tenn. App. W.S. 1960) (failure to perfect appeal).

3. *General Acc. Fire & Life Assur. Corp. v. Kirkland*, 338 S.W.2d 549 (Tenn. 1960).

4. See, e.g., *Tennessee Tufting Co. v. Potter*, 337 S.W.2d 601 (Tenn. 1960).

I. PLEADING

A. Demurrer

1. *Law of Sister State.*—Where in an action for damages for personal injuries suffered in a sister state the law of that state is not pleaded, it will be presumed to be the same as that of Tennessee. The court did not stress this point and noted that the law of the sister state appeared in a cited case to be the same as that of Tennessee. It made no reference to Tennessee Code Annotated sections 24-610, -613 regarding proof or judicial notice of foreign law.⁵

2. *Written Undertaking—Verbatim.*—When an answer sets out verbatim a written agreement signed by defendant, the defendant on demurrer cannot question the fact or content of the writing, nor can he claim a lack of knowledge of it or assert a denial of its execution by him.⁶

3. *Setting for Argument.*—In interpreting Tennessee Code Annotated section 20-912, the court has held that it is discretionary with the trial judge to dismiss the action if the plaintiff fails to set the demurrer for argument. This was done by the judge in a workmen's compensation case, and the supreme court found no abuse of discretion, for the technical record showed no irregularity, and plaintiff had filed no bill of exceptions.⁷

B. Answer—Special Defenses

In an action involving the custody of a child, the complaint alleging in effect assault and battery of *P* by *D*, *D*'s answer was a denial. *D* sought to introduce evidence (1) that *P* had assaulted *D* in the controversy in which the alleged battery occurred and (2) that in a contempt proceeding in which *D* was charged with disobeying an order concerning the custody of the child, the chancellor had discharged *D*. The court held that neither of these defenses was subject to proof under the answer. Each was the proper subject of a special defense.⁸

C. Plea in Abatement—Jurisdiction of Subject Matter

After pleading lack of jurisdiction of the subject matter, defendant withdrew the plea and answered on the merits. The effect of thus proceeding was a waiver of the plea to the jurisdiction, but since the question concerned a matter of which the parties could not by consent

5. *March v. Fowler*, 340 S.W.2d 881 (Tenn. 1960).

6. *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960).

7. *Edingbrough v. Sears, Roebuck & Co.*, 337 S.W.2d 13 (Tenn. 1960).

8. *Roberts v. Hickson*, 343 S.W.2d 108 (Tenn. App. 1960).

confer jurisdiction upon the court, the opinion shows a full consideration of the defendant's contention and its lack of merit.⁹

But a motion to be permitted to withdraw an answer and to demur on the ground that the court of chancery had no jurisdiction may be properly denied unless challenged, as provided in Tennessee Code Annotated section 16-616, by a plea in abatement, demurrer, or motion to dismiss. It is too late to make such a challenge, as a matter of right, after interposing an answer on the merits. And a denial of a motion to be permitted to plead a late demurrer is reversible only for abuse of discretion. In this connection it is to be remembered that the chancellor is empowered to treat an issue as if he were a circuit judge in the absence of a timely challenge to jurisdiction.¹⁰

D. Amendment—Demurrer

P's original bill alleged (1) the terms of an agreement which gave plaintiff an option to sue for breach or to retain the amount deposited by the purchaser, and (2) an offer by *P* to credit the amount deposited upon any award of damages for *D*'s refusal to buy. On defendant's demurrer to the bill, *P* asked leave to amend by striking the allegation of the offer and inserting (1) a statement of deposit of the sum with a real estate broker and (2) an averment that the allegation of the option was mistaken. The court held that the allegation of the option was clear and limited plaintiff's choice of action, that the amendment was plainly inconsistent with the terms of the option and the allegations of the original bill. The demurrer was properly sustained and the motion to amend was properly denied.¹¹

E. Counterclaim—Against State

In an action in which the state seeks an injunction against the misuse of an abandoned entrance to a limited access highway by an abutting owner, it does not thereby consent to be sued in a cross-bill by the defendant seeking (1) to enjoin the state commissioner of highways from maintaining an obstruction to the abandoned entrance and (2) to require the building of another access road to the highway.¹² It must be remembered that Tennessee has no provision for a compulsory counterclaim, and consent of the state to be sued is not readily implied.

II. PARTIES

1. Capacity To Sue—Corporation.—A corporation, the charter of

9. *Martin v. Dealers Transp. Co.*, 342 S.W.2d 245 (Tenn. App. W.S. 1960).

10. *Kneeland v. Bruce*, 336 S.W.2d 319 (Tenn. App. W.S. 1960).

11. *G. H. Swope Bldg. Corp. v. Horton*, 338 S.W.2d 566 (Tenn. 1960).

12. *State v. Williams*, 343 S.W.2d 857 (Tenn. 1961).

which has been forfeited, has no capacity to sue in an action against a defendant for damages for the destruction of chattels owned by the corporation before its dissolution. The interest of the corporation in the chattels passed to the stockholders. After revocation of its charter, the corporation had no legal existence for the purpose of action as plaintiff.¹³

2. *Capacity To Be Sued—Action by Wife Against Husband.*—A wife has no capacity to sue her husband for an injury negligently inflicted by him upon her during marriage. In truth, in Tennessee she has no substantive right to remuneration for such injuries. Consequently, a later divorce, while creating capacity to sue, does not create any right to remuneration. Hence a demurrer to a plea in abatement to a complaint alleging negligent injury to the plaintiff wife during marriage and a subsequent annulment of the voidable marriage was properly sustained. This decision makes it clear that the facts stated constituted a defense on the merits and not a dilatory defense.¹⁴ The court made no point of the misnomer of the defense, and it would have been an obvious waste of time to make the case turn upon it.

III. REMEDIES

A. *Certiorari—Scope of Remedy*

1. *To Election Commissioners.*—The writ of certiorari will not be granted on petition of private citizens complaining of wrongful conduct by public officials unless the complaining citizens aver a special interest or a special injury not common to the general public, and it will not be granted to determine the qualification of a member of a county election commission for the office. It is said that this matter of qualification rests entirely with the election commission.¹⁵

2. *Writ to Public Service Commission.*—The public service commission is an administrative body and not a court. On certiorari the court cannot examine the sufficiency of the evidence to support the commission's finding or decision, except to determine whether the commission acted arbitrarily or in excess of its jurisdiction or otherwise illegally. Tennessee Code Annotated section 65-229 (d) has been adjudged entirely ineffective to authorize the court to weigh the evidence. The commission's decision is final if supported by any material evidence.¹⁶

13. *Bland v. Knox Concrete Prods., Inc.*, 338 S.W.2d 605 (Tenn. 1960).

14. *Gordon v. Pollard*, 336 S.W.2d 25 (Tenn. 1960).

15. *Buford v. State Bd. of Elections*, 334 S.W.2d 726 (Tenn. 1960).

16. *City of Whitwell v. Fowler*, 343 S.W.2d 897 (Tenn. 1961); *Blue Ridge Transp. Co. v. Pentecost*, 343 S.W.2d 903 (Tenn. 1961).

3. *Common Law and Statutory Writs.*—The common law writ is embodied in Tennessee Code Annotated section 27-801; the statutory writ in lieu of an appeal in section 27-802. The common law writ is not applicable to review an order of a trial judge denying an accused's right to take depositions of the state's witnesses or to inspect the reports of the Federal Bureau of Investigation. This is an interlocutory order within the court's discretion. The writ has never been employed to inquire into the correctness of a judgment rendered where the court had jurisdiction.¹⁷ This is true in a habeas corpus proceeding, the prayer of which is to be allowed bail.

B. Mandamus—To County Court—Ministerial Duty

Under Tennessee Code Annotated section 49-201 (5) the county court has a duty to issue bonds upon an affirmative vote of the majority in a referendum election previously ordered by the court, and has no discretion to refuse to do so. Mandamus is the proper remedy. The sole question for argument before the chancellor was whether the duty was legislative, discretionary, or ministerial.¹⁸

C. Quo Warranto—Burden of Proof and Presumptions

In a quo warranto attacking the validity of an ordinance relating to annexation of territory to a city, the burden of showing its invalidity is upon the party alleging invalidity. The court says also that there is a presumption of its validity, but the relation between the presumption and the burden of persuasion is not discussed. The court distinguishes cases of this character from those seeking to oust an official from office.¹⁹

D. Writ of Error Coram Nobis—Bill in Equity—Jurisdiction of Chancery

In a bill in equity the complainant executrix alleged that she was prevented by fraud of the defendant from filing timely exceptions in the county court to claims against the estate and from interposing proper defenses. The chancellor sustained defendant's plea that chancery had no jurisdiction, after the complainant by amendment sought by a writ of error coram nobis relief from the county court's judgment for the claimants. The supreme court affirmed. The writ of error coram nobis lies only in the court in which the judgment was entered; therefore, the chancery court is without jurisdiction to en-

17. *McGee v. State*, 340 S.W.2d 904, 906 (Tenn. 1960); *Ivey v. State*, 340 S.W.2d 907 (Tenn. 1960).

18. *Lamb v. State*, 338 S.W.2d 584 (Tenn. 1960).

19. *State ex rel. Senff v. City of Columbia*, 343 S.W.2d 888 (Tenn. 1961).

tain this bill as a writ of error coram nobis. As a bill in equity, the record shows a hearing but nothing as to the evidence; and on the record the plaintiff had a plain, adequate, speedy remedy by appeal to the court of appeals or to the supreme court.²⁰

E. Declaratory Judgment

1. *To Determine Construction or Validity of Statute.*—Tennessee Code Annotated section 49-105, as amended in 1957, authorizes an action by one political subdivision against another in the same county or against the county without the consent of the commissioner of education. Hence an action by the Board of Education of Memphis City Schools may be maintained against Shelby County for a judgment declaring unconstitutional a statute in so far as it affects the distribution of school funds.²¹

2. *Pending Action of Same Issues.*—Claimant had filed two claims against an estate in county court and the county judge at his request had ordered one claim nonsuited without prejudice; claimant had signed a release for the other and the executrix had appealed from the order of nonsuit. She then sought in the circuit court a declaratory judgment for adjudication of the claims with a trial by jury. On defendant's motion the court dismissed the action. On appeal the dismissal was sustained. Plaintiff had a speedy, adequate remedy in the pending case by simply filing exceptions to the claim and following the remedy provided in Tennessee Code Annotated sections 30-517, -518.²²

IV. BURDEN OF PROOF AND PRESUMPTIONS

A. Burden of Proof

1. *Allocation.*—In an action for malicious prosecution the plaintiff has the burden of persuading the trier of malice and of lack of probable cause.²³ In a workmen's compensation case the claimant has the burden of proving to the trier the causal connection between his work and the injury—in this case a heart attack. The only question on appeal from the finding of the trial judge is whether it has any substantial evidence to support it.²⁴

2. *Venue in Criminal Case.*—The burden of persuasion on the issue of venue in a criminal case is that on an issue in an ordinary civil

20. *Rowan v. Inman*, 338 S.W.2d 578 (Tenn. 1960).

21. *Board of Educ. v. Shelby County*, 339 S.W.2d 569 (Tenn. 1960).

22. *Trice v. Cheatham*, 344 S.W.2d 358 (Tenn. 1961).

23. *Cohen v. Ferguson*, 336 S.W.2d 949 (Tenn. App. M.S. 1959).

24. *Jakes v. Union Carbide Nuclear Co.*, 334 S.W.2d 720 (Tenn. 1960).

action. It is usually said that venue must be proved by a preponderance of the evidence, for proper venue is not an ingredient of a criminal offense.²⁵

B. Presumptions

1. *Presumption of Innocence—On Appeal From Conviction.*—It is frequently said that in Tennessee on appeal from a judgment of conviction the presumption of innocence is replaced by the presumption of guilt. What is meant is that the appellant has the burden of persuading the court that on the record the preponderance of the evidence is against the verdict of guilty.²⁶

2. *Presumption of Regularity and Legality.*—In extradition proceedings when the Governor has granted extradition there is a presumption that all the preliminary papers and proceedings were in due form.²⁷ An officer having a writ of execution is legally authorized to issue a garnishment summons only after he has been unable to find in his county personal property of the debtor sufficient to satisfy the execution; consequently when he issues such a summons, there is a presumption that he has been unable to find such property.²⁸

3. *Res Ipsa Loquitur.*—The authorities are in some conflict as to whether a situation which makes applicable the doctrine of *res ipsa loquitur* creates a presumption. It is the Tennessee view that it merely makes the question of negligence one for the jury; it does not affect either the burden of producing evidence or the burden of persuasion.²⁹

4. *In Will Contest—Undue Influence.*—In Tennessee the establishment of the fact that the principal beneficiary was in a confidential relationship with the testator and caused the will to be drafted and executed creates a presumption that the beneficiary exercised undue influence upon testator and casts upon the beneficiary the burden of persuading the trier of fact by a preponderance of the evidence that he did not exercise such influence.³⁰

V. EVIDENCE

A. Objections

1. *Necessity—Form.*—Where inadmissible evidence has been ad-

25. *Norton v. State*, 343 S.W.2d 361 (Tenn. 1961).

26. *Farmer v. State*, 343 S.W.2d 895 (Tenn. 1961); *Anderson v. State*, 341 S.W.2d 385 (Tenn. 1960).

27. *State v. Turner*, 338 S.W.2d 558 (Tenn. 1960).

28. *General Truck Sales v. Simmons*, 343 S.W.2d 884 (Tenn. 1961).

29. *Capital Airlines v. Barger*, 341 S.W.2d 579 (Tenn. App. E.S. 1960).

30. *Kelley v. Brading*, 337 S.W.2d 471 (Tenn. App. E.S. 1960).

mitted without objection, and evidence in rebuttal is received over objection, the error, if any, is harmless.³¹ This case suggests the problem raised when one party introduces inadmissible evidence, either without objection or over objection by the adverse party. Is inadmissible evidence to be received for the adversary over objection in rebuttal? The authorities are in conflict.

2. *Form of Objection.*—The objection to the admissibility of written or printed matter must be specific and state the grounds upon which the objector is relying. A pamphlet dealing with safety regulations concerning so-called manlifts which had been adopted by the Department of Labor of Tennessee was offered in evidence by plaintiff; defendant objected on grounds variously stated to the effect that these regulations had no legal effect in Tennessee. The court held the objection not sufficiently specific and charged the jury in effect that this evidence was to be considered only in determining the standard of safety that an ordinarily prudent person would observe under similar conditions.³² The ruling as to the relevance of the evidence is in accord with the great majority of decisions. Of course a compliance with general practice may or may not constitute due care.

B. Opinion—Expert Opinion—Hypothetical Question

Where an objection to a hypothetical question is made on the ground that the stated hypothesis is incomplete, the burden is upon the objector to point out what has been omitted.³³ A hypothetical question which assumes the existence of a fact as to which no evidence has been received is properly rejected on objection.³⁴

C. Hearsay

1. *Generally.*—The rules governing the admissibility of hearsay evidence are applicable in a workmen's compensation case. A finding based solely on inadmissible hearsay received over objection is unsupported and must be reversed.³⁵ This, of course, must be distinguished from a finding based on hearsay to which no objection has been made, for in that event the evidence is entitled to be considered for what it is intrinsically worth.

2. *Exceptions—(a) Confessions.*—Where objection is made to evidence of a confession by a party on the ground that it was improperly

31. Harper v. State, 334 S.W.2d 933 (Tenn. 1960).

32. Jack M. Bass & Co. v. Parker, 343 S.W.2d 879 (Tenn. 1961).

33. Mason & Dixon Lines, Inc. v. Gregory, 334 S.W.2d 939 (Tenn. 1960).

34. Moon v. Johnston, 337 S.W.2d 464 (Tenn. App. E.S. 1959).

35. Mason & Dixon Lines, Inc. v. Gregory, 334 S.W.2d 939 (Tenn. 1960).

induced, the judge alone determines admissibility and if the evidence is received, the jury is the judge of its weight but has nothing to do with the question of admissibility. This orthodox rule still prevails in Tennessee.³⁶ There are many cases in other jurisdictions which have modified this rule by giving to the jury some functions with reference to admissibility. These have been strongly disapproved by Wigmore.

(b) *Mental Condition of Confessor*.—Uniform Rule of Evidence 63(6) requires as a condition of admissibility of a confession a finding by the judge that the accused when making the statement was conscious and capable of understanding what he said and did. This does not seem to be inconsistent with cases holding, as does Tennessee, that the fact that the accused was drunk at the time does not render the confession inadmissible but affects only its weight.³⁷ The rule is doubtless intended to cover situations which thus far have not occurred in Tennessee, so far as shown by the decisions, namely, confessions while accused is under the influence of drugs which are inaccurately classed as "truth serum," or while accused is asleep.³⁸

(c) *Confession of Accomplice*.—It goes without saying that a confession by one other than the accused is as against the accused mere hearsay and is inadmissible against him except on a showing which would make confessor a speaking agent of the accused. This problem is most frequently met where one accused is on trial with an alleged accomplice as a co-defendant. The confession of the accomplice is admissible against the accomplice co-defendant. In almost every case it will be received, accompanied by a cautionary instruction that it is to be used only against the accomplice. An example of this accepted practice is found in *Smith v. State*.³⁹

(d) *Reputation—Character—Issues*.—Evidence of reputation as proof of good character of accused in a criminal case, if offered by him, is admissible on the issue of guilt when it concerns a relevant trait of character, and if accused is a witness, on the issue of credibility. When an accused had lived in a community from birth to adult manhood, and after an absence of five years had returned and lived there for several months before the alleged offense, it was reversible error to reject evidence of his good character in that community before the period of absence and after his return. This was especially true when the offense charged was a sex offense with a female twelve

36. *Kyle v. State*, 344 S.W.2d 537 (Tenn. 1961).

37. *Harper v. State*, 334 S.W.2d 933 (Tenn. 1960).

38. See Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 *YALE L.J.* 315 (1953).

39. 338 S.W.2d 610 (Tenn. 1960).

years of age whose testimony was uncorroborated except by her statements to others.⁴⁰

VI. WITNESSES

1. *Competency—Dead Man Statute.*—In an action involving the validity of a claim against the estate of a decedent, the administrator called the claimant as his witness. On cross examination the witness was permitted over objection to testify to conversations with the decedent notwithstanding the requirement of exclusion of such evidence by Tennessee Code Annotated section 24-105. As a preliminary question on an appeal by the claimant from an adverse judgment, the court considered the admissibility of this testimony and held that the county judge was right both in his ruling on admissibility and in his finding on the whole evidence against the claimant.⁴¹ The testimony was a proper part of the cross examination of the administrator's witness.

2. *Credibility—Falsus in Uno.*—A charge to the jury that it is their duty to disregard entirely the uncorroborated testimony of a witness who may be found to have sworn falsely upon a material matter is reversible error. The statement in the charge "you will disregard entirely" is in effect mandatory. It is true that the jury may disregard such testimony. The court regards the mandatory instruction as a violation of the proponent's constitutional right of trial by jury.⁴²

3. *Privilege—Privilege Against Self-Incrimination.*—It is not the duty of the sheriff when an accused surrenders to him to inform accused of his right to refuse to answer and that what he says may be used against him. Tennessee Code Annotated section 40-1101 imposes this duty upon the committing magistrate; without an applicable statute there is no such duty.⁴³ This, of course, is not to say that if he declines to answer under a claim of privilege not to criminate himself, he can be required to do so, even when his criminatory answer is only an admission as distinguished from a confession.

VII. PAROL EVIDENCE RULE

1. *Parol Evidence Rule.*—The courts of Tennessee frequently purport to give effect to the generalization that extrinsic evidence is

40. *Strader v. State*, 344 S.W.2d 546 (Tenn. 1961).

41. *Cotton v. Roberts' Estate*, 337 S.W.2d 776 (Tenn. App. M.S. 1960).

42. *Shook & Fletcher Supply Co v. City of Nashville*, 338 S.W.2d 237 (Tenn. App. M.S. 1960).

43. *Cordell v. State*, 338 S.W.2d 615 (Tenn. 1960).

inadmissible to vary the terms of an unambiguous writing or the plain meaning of a writing.⁴⁴ This may be a very convenient method of phrasing the result after the court has heard and considered the extrinsic evidence and finds that it should be given no operative effect. But the actual operation of such a rule is shown in a recent case. The defendant insurance company had issued a five-year policy upon a description of the insured premises as a "two story block and brick Tourist dwelling and office containing 11 units," with permission to make "alterations, additions and repairs." The issue was whether this description in the policy and its renewal covered an adjoining dwelling acquired two years after the date of the original policy and then converted into three motel units. The court stressed the failure of the assured to make any change in the renewal policy or to show any knowledge on the part of the insurance company (through its agent) and held the additional units not covered.⁴⁵ Why not declare that the language was too clear to require construction or to permit extrinsic evidence?

Our courts also frequently state that the parol evidence rule applies only to the parties to the writing and not to a controversy between one of the parties to the writing and a stranger. The leading text writers insist that where the issue is what legal relations were created by the writing between the parties to it, the parol evidence rule operates with full effect. This subject is involved in the case of *Memphis Street Ry. v. Williams*,⁴⁶ which is reviewed in the section on contracts in this *Survey*.

2. *Condition—Oral Agreement of Conditional Delivery.*—As between the original payee and one who signs as a co-maker at payee's request, an agreement that the co-maker shall be only an accommodation maker is valid and effective. Thus, where a payee was unable to procure a discount of a note by a bank on the credit of the maker and defendant at his (payee's) request signed as accommodation maker, the arrangement was provable by parol and defendant incurred no liability to the payee.⁴⁷

VIII. JUDICIAL NOTICE

1. *Where Applicable.*—Thayer pointed out that the courts applied the doctrine of judicial notice "wherever the process of reasoning has a place and that is everywhere." A good illustration is found in the

44. *Greene County Tire & Supply Inc. v. Spurlin*, 338 S.W.2d 597 (Tenn. 1960).

45. *McKee v. Potomac Ins. Co.*, 344 S.W.2d 366 (Tenn. 1961).

46. 338 S.W.2d 639 (Tenn. App. 1959).

47. *Cross v. Miner*, 338 S.W.2d 619 (Tenn. 1960).

opinion of Judge Howard in the *Capital Airlines* case.⁴⁸ In 1935 the court had held that it judicially noticed that it was a common and not an unusual occurrence for airplanes to stall and fall in operation without the intervention of the operator, and the doctrine of *res ipsa loquitur* had no application in such a situation. Judge Howard noted the marked progress in airplane construction and operation since 1935 which made the reasoning in the earlier precedent inapplicable and applied the doctrine in a case of a totally unexplained crash of an airplane as it approached the landing runway. He did not use the phrase "judicial notice."

2. *Matters of Common Knowledge.*—The supreme court has taken judicial notice that "recapping or repairing of automobile and truck tires is a common type of business likely to be found in most counties of the state." It weighed this fact in considering the validity of a promise of a seller not to compete with the buyer within a designated area.⁴⁹ And in determining what rights, if any, an abutting owner had to direct access to a limited-access highway, it took judicial notice that limited-access highways are being constructed throughout this country, variously designated as freeways, throughways, express ways, parkways or belt lines, and that they are essential to public welfare and progress.⁵⁰

IX. JURISDICTION AND VENUE

A. Jurisdiction

1. *Of Person—Under Hit-and-Run Statute.*—The non-resident parents of a minor who joined in signing the minor's application for a license to operate a motor vehicle in Tennessee (Tennessee Code Annotated section 59-704, 1959 Supplement) are subject to service of process in an action for injuries inflicted by him in driving as licensee under Tennessee Code Annotated section 20-224 as amended, by service upon the secretary of state.⁵¹ (But it should be noted that they are relieved of liability on filing with the department of safety proof of the minor's financial responsibility with respect to the accident which is the basis of the action.)

2. *Jurisdiction of Subject Matter—(a) Actions Against Commissioner of Department of Insurance.*—Only the courts of Davidson County have jurisdiction of actions or proceedings against the com-

48. *Capital Airlines v. Barger*, 341 S.W.2d 579 (Tenn. App. 1960).

49. *Greene County Tire & Supply Inc. v. Spurlin*, 338 S.W.2d 597 (Tenn. 1960).

50. *State ex rel. Moulton v. Williams*, 343 S.W.2d 857 (Tenn. 1961).

51. *Leggett v. Crossnoe*, 336 S.W.2d 1 (Tenn. 1960).

missioner of insurance and banking. Hence, when the chancery court of Shelby County granted certiorari to review a cease and desist order of the commissioner and refused to quash the writ and dismiss the proceedings, the supreme court granted certiorari in lieu of an appeal. It entered a decree dismissing the proceedings in the Shelby County court.⁵²

(b) *Concurrent Jurisdiction—Chancery Court and Circuit Court.*—The chancellor has jurisdiction under Tennessee Code Annotated section 16-692 of actions triable in circuit court except actions for unliquidated damages for injuries to person, to character, or to property. It has jurisdiction to try an action for damages for fraud or deceit.⁵³

(c) *Priority.*—A court which first secures jurisdiction of an action of which another court has concurrent jurisdiction retains the action. Consequently when an action of unlawful detainer is properly begun before a justice of the peace, a bill in equity to enjoin the proceedings before him is subject to demurrer, and a temporary injunction previously granted therein is properly dissolved upon the chancellor's decree sustaining the demurrer and dismissing the suit.⁵⁴

(d) *Continuing Jurisdiction—Juvenile and Domestic Relations Court.*—The Juvenile and Domestic Relations Court of Knox County is a single court. It has jurisdiction of a proceeding to have a child declared delinquent and to award temporary custody of the child to the grandmother. It retains jurisdiction over the child adjudged delinquent or dependent until the child reaches majority. No other court, including a criminal court in a habeas corpus proceeding, has power to change the child's custody or make orders concerning it without the consent of the juvenile court.⁵⁵

3. *Continuing Jurisdiction in Eminent Domain.*—In 1955 in an eminent domain proceeding the jury of view determined the amount due for a parcel of land containing several smaller contiguous parcels. In 1959 the owner of one of the smaller parcels petitioned to have the case restored to the docket to determine how the amount should be distributed between the several owners. The trial judge ruled that he had no jurisdiction. The supreme court, reversing, held that the court retained jurisdiction to determine the boundaries of the smaller parcels and distribute the award accordingly.⁵⁶

52. *Delta Loan & Fin. Co. v. Long*, 336 S.W.2d 5 (Tenn. 1960).

53. *Kneeland v. Bruce*, 336 S.W.2d 319 (Tenn. App. W.S. 1960).

54. *Robinson v. Easter*, 344 S.W.2d 365 (Tenn. 1961).

55. *Kidd v. State ex rel. Moore*, 338 S.W.2d 621 (Tenn. 1960).

56. *City of Maryville v. Waters*, 338 S.W.2d 608 (Tenn. 1960).

4. *Jurisdiction of Supreme Court in Criminal Case.*—The supreme court in a criminal case has the power to revise the action of the trial judge but where the function of fixing the punishment is vested by statute in the jury, it has no power to revise. If the sentence imposed by the jury is within the limits fixed by the statute, it cannot be considered excessive.⁵⁷

5. *On Certiorari to Court of Appeals.*—The supreme court has jurisdiction on certiorari from the court of appeals to review only its final judgments and decrees. It has no jurisdiction to review interlocutory orders in a civil case.⁵⁸

6. *To Issue Certiorari To Review Interlocutory Order of a Lower Court.*—The supreme court has jurisdiction to issue the common law writ to review an interlocutory order or decree of a lower court only where (1) the court has exceeded its jurisdiction or (2) where in the judgment of the court there is no other plain, speedy or adequate remedy and the case is one of merit. Where the pleading of petitioner disclosed that the controversy was one over which the circuit court had jurisdiction under Tennessee Code Annotated sections 30-509 to -525, including the question whether the claim involved had been fully paid as alleged, the supreme court will not grant the writ but will remit petitioners to their usual remedy by appeal. Where the lower court has jurisdiction of the subject matter, error in its exercise is not remediable by certiorari.⁵⁹

B. Venue—Waiver of Right To Change

Where the court has jurisdiction of the subject matter but the venue is wrong, a defendant by going to trial waives his right to have the venue changed. The prescribed venue is not an element of jurisdiction in a civil action.⁶⁰ This is the generally recognized rule in the interpretation of statutes regulating venue in civil actions.

X. TRIAL

1. *Motion for Continuance—Required Supporting Affidavits.*—A motion for a continuance on the ground of absence of a material witness must be supported by affidavits of counsel and moving party showing the expected testimony, the diligence used to secure the absentee's attendance and further matter concerning him. An oral motion during trial, unsupported by affidavits, is properly denied.⁶¹

57. *Broyles v. State*, 341 S.W.2d 724 (Tenn. 1960).

58. *State-Wide Sales Fin. Corp. v. Long*, 337 S.W.2d 239 (Tenn. 1960).

59. *Hewgley v. Trice*, 340 S.W.2d 918, 921 (Tenn. 1960).

60. *Kelley v. Brading*, 337 S.W.2d 471 (Tenn. App. E.S. 1960).

61. *Neal v. State*, 334 S.W.2d 731 (Tenn. 1960).

But the refusal to postpone a hearing in a will contest to secure the deposition of the proponent and chief beneficiary who was ill at the time set for taking the deposition upon the issue of the exercise of undue influence by the proponent was error. Whether or not it was an abuse of discretion will depend upon other evidence at the new trial ordered on other grounds.⁶²

2. *Examination of Witness—Inadmissible Testimony Volunteered.*—Where a witness on direct examination volunteers a prejudicial opinion in an answer to a perfectly proper question of the prosecuting attorney, and where the court (1) promptly sustains the objection, (2) the attorney immediately “withdraws that,” and (3) the judge then instructs the jury to disregard the statement of the witness, the court does not commit reversible error in denying defendant’s motion for a mistrial.⁶³

3. *Motion To Reopen After Close of Testimony.*—A motion to reopen after the close of the testimony to permit the moving party to offer further evidence may be granted or denied within the discretion of the trial judge. Thus, he may properly reopen to allow the proponent of a will to call the third subscribing witness.⁶⁴ But it is an abuse of discretion to continue a case after the close of the testimony to enable counsel to go to a distant city and bring back a witness where it appears (1) that counsel knew of the existence of the witness while he was at the place of trial and (2) the content of his testimony was known to the trial attorney’s firm and (3) the presence of the witness could then have been ascertained. But the appellate court after reviewing the entire record in detail held that the error did not affirmatively appear to have affected the verdict and affirmed the judgment entered on the verdict.⁶⁵

4. *Instructions to Jury—Requested Instruction.*—In *Harper v. State*⁶⁶ the court repeats and applies the settled rule, which counsel so often fail to observe, that a trial judge may refuse a requested instruction unless it is strictly accurate.

5. *As to Jury’s Function in Criminal Case.*—In *Cordell v. State*⁶⁷ the court, speaking through Justice Swepston, makes a careful explanation of the Tennessee rule which makes the jury the judge of the law in criminal cases. The trial judge had charged: “The law makes it the duty of the court to give in charge to the jury the law

62. *Kelley v. Brading*, 337 S.W.2d 471 (Tenn. App. E.S. 1960).

63. *Cordell v. State*, 338 S.W.2d 615 (Tenn. 1960).

64. *Kelley v. Brading*, 337 S.W.2d 471 (Tenn. App. E.S. 1960).

65. *Higgins v. Steide*, 335 S.W.2d 533 (Tenn. App. W.S. 1959).

66. 334 S.W.2d 933 (Tenn. 1960).

67. 338 S.W.2d 615 (Tenn. 1960).

relative to the case on trial; and of the jury to carefully consider all the evidence delivered to them on the trial, and under the law given them by the court, render their verdict with absolute impartiality." In upholding the judgment of conviction, the court said: "It is (1) the duty of the court to give in charge to the jury the law relative to the case; (2) the duty of the jury to consider carefully all the evidence; (3) to consider it under the law as given them by the court; if not, why charge the law at all; and (4) actually the charge is exactly in accord with the charge approved in *Ford v. State*, 101 Tenn. 454, 461 and 462, 47 S.W. 601."

It seems obvious that hereafter a trial judge will need no further instruction in framing his charge upon the respective functions of the judge and jury in compliance with the requirement in article II, section 19 of the Tennessee Constitution that "the jury shall have the right to determine the law and the facts, under the direction of the court." There can be no reason for repeating such mistakes as charging the jury that they "cannot disregard the law as given by the court."⁶⁸

6. *Written in Criminal Case.*—The requirement of Tennessee Code Annotated section 40-2516 that every word of the charge in a criminal case must be in writing was not violated where the charge as written contained an inapplicable instruction with lines drawn through it indicating that it was stricken. The stricken portion, even if legible, did not constitute a part of the charge and no prejudice to the accused resulted.⁶⁹

7. *Submitting Issue Not Made by Pleadings or Evidence.*—In an action for wrongful death the court submitted to the jury (1) an issue as to Town's employing an inexperienced, reckless and childish man as a policeman and (2) an issue on the prohibition of shooting in an effort to recapture a misdemeanant. The first issue was made by the pleadings but there was no evidence upon it; the second was not made by either the pleadings or the evidence. The court held that the charge was prejudicially erroneous in both respects.⁷⁰

(a) *Ambiguity.*—In a trial of an action of a son for his personal injuries and an action by his father for expenses and loss of services, the charge as to damages in the son's action included "loss of time and decreased capacity for earning as may be proven," and in the father's action included "loss of services as may be proven." De-

68. *Scott v. State*, 338 S.W.2d 581 (Tenn. 1960).

69. *Tomlin v. State*, 339 S.W.2d 10 (Tenn. 1960).

70. *Mayor of Town of Morristown v. Inman*, 342 S.W.2d 71 (Tenn. App. E.S. 1960).

fendant's objection was that the charge allowed double recovery as to the son's earnings. The court held that this interpretation was not the only reasonable meaning and that the defendant should have requested a clarifying instruction. Otherwise there was no showing of prejudicial error.⁷¹

(b) *Mandatory Instruction—Directed Verdict.*—In an action for wrongful death resulting from injuries in a collision of automobiles plaintiff presented only two witnesses neither of whom saw the collision. One of them testified that after the collision defendant's truck was on its proper side of the unmarked center line and the other that a portion of the truck extended across that line. There was no evidence as to the speed, relative weight of the vehicles, or any other relevant data. The trial judge granted defendant's motion for a verdict in his favor. On appeal the court of appeals reversed. On certiorari the supreme court agreed with the trial judge and reversed the judgment of the court of appeals. The relative positions of these colliding vehicles after the collision did not of itself furnish the basis for an inference of their positions before the collision.⁷²

XI. VERDICT

A. *General—Complaint With Several Counts*

Under the common law rule as generally accepted, a general verdict for plaintiff whose complaint contained several counts for the same injury must be supported by evidence sufficient to justify the finding on all counts. This, because it was impossible to determine that the jury had not found for plaintiff upon the unsupported count. In Tennessee the rule is otherwise; if there is evidence sufficient to support any count, an objection that there is no evidence to support the verdict must be overruled.⁷³ The defendant may protect himself by requesting a separate finding on each count.

B. *Error in Directing Verdict*

1. *Validity of Non-Unanimous Verdict.*—After the jury had failed to agree during pending deliberations, the parties agreed to accept a verdict by a majority of the jury. After verdict by seven jurors for plaintiff and judgment thereon, defendant moved for a new trial on the ground that the court had wrongfully denied his motion for a directed verdict. The appellate court held that the motion should have been granted assuming that the stipulation was valid; Judge

⁷¹ Mullins v. Murphree, 345 S.W.2d 505 (Tenn. App. M.S. 1960).

⁷² McCollum v. Guest, 343 S.W.2d 359 (Tenn. 1960).

⁷³ Smith Packing Co. v. Tinnin, 340 S.W.2d 929 (Tenn. App. M.S. 1960).

Carney dissented on the ground that the stipulation was void as against public policy. The right to a trial by a jury of twelve is not subject to waiver.⁷⁴ The majority opinion is in accord with the overwhelming weight of authority. The right to trial by jury in a civil case is a personal privilege which may be waived.

2. *Special Verdict by Answers to Interrogatories.*—In *Holcomb v. Steele*,⁷⁵ two women, H and S, riding in one car were injured in a collision of the car with another car driven by a third woman, X. The finding of the jury in an action by H against S in which attorney A intervened was that in handling the claim of H, the intervenor A was guilty of negligence which would have resulted in prejudice to H had A not been discharged by H. In answer to another question they found that A did not solicit employment to handle the claim of H against X. The court held that the findings were not inconsistent and that the first above-mentioned finding was conclusive that the negligent conduct of A was a breach of his duty to his client and a bar to his claim for fees.

C. Polling the Jury—Method

Under Tennessee Code Annotated section 20-1324 the manner in which the trial judge conducts the poll is within his discretion. All that is essential is that the answer of each juror shall indicate with reasonable certainty that the verdict is his own.⁷⁶

XII. JUDGMENT

A. What Constitutes Judgment—Award by State Board of Claims

An award by the state board of claims to a claimant for injuries inflicted by a state highway patrolman has the effect of a judgment. Claimant's acceptance of the amount awarded operates as the satisfaction of a judgment and bars a later action against an alleged joint tortfeasor for damages caused by the joint tort.⁷⁷ Obviously the award is not strictly a judgment, but its receipt is full satisfaction of the claim against the state. Should the analogy to be followed be that of a release or that of a covenant not to sue?

B. Res Adjudicata

1. *Decision in Habeas Corpus—Effect of Failure To Appeal.*—Where in a habeas corpus proceeding by a petitioner imprisoned pursuant to

74. *Cohen v. Ferguson*, 336 S.W.2d 949 (Tenn. App. M.S. 1959).

75. 342 S.W.2d 236 (Tenn. App. E.S. 1958).

76. *Smith v. Weitzel*, 338 S.W.2d 628 (Tenn. App. M.S. 1960).

77. *Schoenly v. Nashville Speedways, Inc.*, 344 S.W.2d 349 (Tenn. 1961).

a judgment of conviction the court held the judgment void and remanded petitioner for trial under the pending indictment, there was no proceeding pending under the statute under which the petitioner was indicted. Consequently, when that statute was repealed, the petitioner was no longer triable under the indictment. The saving clause in Tennessee Code Annotated section 1-301 was not applicable to keep the repealed statute in force as to petitioner's offense.⁷⁸

2. *Effect of Consent Decree.*—A consent decree operates as res adjudicata between the parties and is not subject to attack by any of them except for fraud or mistake.⁷⁹

3. *Records of Previous Litigation on Disbarment Proceedings.*—The records of previous cases in which the attorney was a party or an attorney for a party are not conclusive as to the facts stated or litigated therein. They are receivable as evidence against him to be considered upon the issue of his fitness to practice.⁸⁰

4. *Reasons Stated for Decision.*—Where costs were awarded to an unsuccessful contestant in a wills case by the court of appeals on the ground that in the circumstances it was conceivable that the contest might result in benefit to the estate, the judgment was final as to the award, but not as to the fact asserted to be conceivable.⁸¹

C. Judgment—When Effective—Ambiguity in Record Date

At the conclusion of the hearing in a divorce action on June 9, 1953, the court orally announced judgment of divorce but the formal decree was not entered on the minutes until June 17, 1953. There was an ambiguity as to the applicability of Rule 12 of the Chancery Court of Shelby County providing that the court may permit decrees to become effective as of the time of the decision. This ambiguity was resolved by parol evidence and the record was corrected by a *nunc pro tunc* order in 1960 making the decree effective as of the time of its entry on June 9, 1953.⁸² This made valid the marriage of one of the parties on the afternoon of June 9, 1953.

XIII. MOTIONS FOR NEW TRIAL—GROUNDS

A. Misconduct in Jury Room

In Tennessee objective misconduct in the jury room is a ground for a new trial and may be shown by testimony of members of the

78. *Stinson v. State*, 344 S.W.2d 369 (Tenn. 1961).

79. *Burton v. Burton*, 343 S.W.2d 867 (Tenn. 1961).

80. *Tennessee Bar Ass'n v. Berke*, 344 S.W.2d 567 (Tenn. App. M.S. 1960).

81. *In re Eppinger's Estate*, 336 S.W.2d 28 (Tenn. 1960).

82. *McCown v. Quillin*, 344 S.W.2d 576 (Tenn. App. W.S. 1960).

jury. Thus, in an action against a county official, statements made in the jury room during the deliberations of the jury concerning their own experiences and the alleged generally known unjustifiable conduct of the officials of the county, of which defendants were officials, was in effect receiving testimony of persons not sworn as witnesses and not subject to cross examination. Denial of defendants' motion for a new trial was reversible error.⁸³

1. *Quotient Verdict.*—Determining the amount of damages by an agreement to abide by the quotient of the sum total of the separate amounts submitted divided by the number of jurors is reversible misconduct and a verdict returned pursuant to the agreement cannot stand. But such a verdict reached without a previous agreement to abide by it is not objectionable.⁸⁴ In the case at bar the judgment on the verdict was reversed for other reasons, so that this statement is useful only as a guide for the jury at the new trial. Making such an agreement obviously constitutes objective misconduct.

B. Newly Discovered Evidence—Sufficiency

Newly discovered evidence which would be admissible only to impeach the testimony of a witness at the trial is of itself an insufficient ground for granting a new trial, even in a criminal case.⁸⁵

XIV. APPEAL AND ERROR

A. What Is Appealable

1. Where a defendant has confessed judgment for fine and costs with sureties under Tennessee Code Annotated section 40-3202, an attempted appeal by him, whether allowed or not, is a total nullity and has no effect upon the judgment or its finality.⁸⁶

2. Under Tennessee Code Annotated section 70-310 an appeal lies to the supreme court from the judgments and decrees of the Chancery Court of Davidson County in a proceeding by the stream pollution board to compel compliance with its orders. Hence the board's petition to the supreme court for certiorari and supersedeas will be denied when the petition for the writ and the record contain only the pleadings including the defendant's cross claim.⁸⁷

B. Necessary Preliminaries

1. *Prayer for Leave To Appeal—Necessity.*—There must be in

83. *Travelers Indem. Co. v. Hoard*, 340 S.W.2d 260 (Tenn. App. E.S. 1960).

84. *Mayor of Town of Morristown v. Inman*, 342 S.W.2d 71 (Tenn. App. E.S. 1960).

85. *Harper v. State*, 334 S.W.2d 933 (Tenn. 1960).

86. *McInturff v. State*, 338 S.W.2d 564 (Tenn. 1960).

87. *Tennessee Stream Pollution Bd. v. Resha*, 343 S.W.2d 877 (Tenn. 1961).

form a prayer for leave to appeal and an allowance of appeal. In truth the record recital of the prayer and allowance is usually the recital of events that do not occur. Where within the time prescribed for perfecting an appeal the judge entered an order reciting that defendant "for good cause shown is allowed until March 15, 1960, to perfect his appeal and file bill of exceptions" there is a necessary implication that the appeal was prayed and granted.⁸⁸ And where the trial judge refuses leave to appeal, the aggrieved party is not without a remedy. Where the trial judge refused leave to appeal after sustaining defendant's demurrer, plaintiff was granted certiorari by the court of appeals, which held that the order sustaining the demurrer was erroneous; the judgment was reversed and the cause remanded.⁸⁹

2. *Time—After Correction of Mistake in Technical Record.*—Where an error is apparent on the face of the technical record, as the miscalculation of the product of two specific numerals set forth in the record, it may be corrected at any time, even after final judgment. The correction is effective as of the date of the original decree, and the time for the motion for a new trial or rehearing begins to run from that date. After the expiration of the prescribed period, the trial court has no power to entertain such a motion, and any order then made granting the motion is of no effect. Final judgment must be entered for the correct amount. (Tennessee Code Annotated sections 27-201, -1512).⁹⁰

(a) *For Order Extending Time for Bill of Exceptions.*—An order extending the time for filing a bill of exceptions beyond thirty days must be made and filed within the thirty days. If made and filed or left for filing within that period, it may be entered on the minutes later, *nunc pro tunc*. But the judge has no authority to grant an extension after the expiration of the thirty-day period; an order timely made but not filed within the period is void and must be stricken.⁹¹

3. *Bill of Exceptions—Necessity—Effect of Lack.*—To authorize review of any errors not appearing in the technical record, a bill of exceptions is necessary. In the absence of such a bill the court will consider only the technical record and limit its action to errors appearing therein.⁹² Thus, in an election contest the supreme court on appeal from the decree of the chancellor will affirm the decree where there is no bill of exceptions and no error is revealed in the

88. Gray v. State, 336 S.W.2d 22 (Tenn. 1960).

89. McHendry v. Anderson, 344 S.W.2d 769 (Tenn. App. W.S. 1960).

90. Moore v. Brannan, 341 S.W.2d 382 (Tenn. 1960).

91. Thomas v. State, 337 S.W.2d 1 (Tenn. 1960).

92. Holcomb v. Steele, 342 S.W.2d 236 (Tenn. App. E.S. 1958).

technical record.⁹³ Incidentally, it is very important to observe what items the Tennessee courts hold to be part of the technical record. They do not agree with the orthodox common law decisions.

4. *Motion for New Trial*—(a).—An appeal to the supreme court in a workman's compensation case is not an equity appeal but an appeal in the nature of a writ of error. A motion for a new trial is a preliminary requisite, and the absence of such a motion is a ground for dismissing the appeal.⁹⁴ Tennessee Code Annotated section 27-303 is not applicable.

(b).—In *Green v. State*⁹⁵ the supreme court found a conflict between the provisions of Tennessee Code Annotated section 27-303 and those of Tennessee Code Annotated section 40-2907, both of which were included in the 1950 Code Supplement. The latter specifically requires a bill of exceptions and a motion for a new trial in proceedings for revocation of a suspended sentence, and is not modified by section 27-303 which is generally applicable to non-jury trials. Hence a motion to dismiss an appeal from a decision revoking the suspension of a sentence on the ground of failure to move for a new trial was granted.

(c).—In a prosecution for unlawful receipt and possession of intoxicating liquor in which the liquor had been seized by state officers, the defendant at the trial demanded production of the seized liquor and the court ordered production. On the prosecution's failure to obey the order for the reason stated by the prosecuting attorney—that it was impossible then to identify that liquor because it had been commingled with other confiscated liquor—the court dismissed the action. The State appealed, and defendant moved to dismiss the appeal on the ground of failure to move for a new trial. The motion was granted, though the court said that "all the foregoing is reflected by a minute entry signed by the trial judge." The opinion indicates that this minute entry was deemed not a part of the technical record.⁹⁶

(d).—Tennessee Code Annotated sections 29-303, -304 are not applicable to common law certiorari proceedings to chancery to review action of a city commission in rezoning property, for the chancellor can look only to the evidence introduced before the commission for the purpose of determining whether the commission acted fraudulently, illegally or in excess of its jurisdiction. The commission is an administrative body, and the courts have no power to try the matter *de novo* as in a simple appeal. Hence the rule requiring a

93. *Freeman v. Felts*, 344 S.W.2d 550 (Tenn. 1961).

94. *Hyter v. Wheland Co.*, 338 S.W.2d 571 (Tenn. 1960).

95. 340 S.W.2d 916 (Tenn. 1960).

96. *State v. McCandless*, 343 S.W.2d 907 (Tenn. 1961).

motion for a new trial as a prerequisite to an appeal from the trial court's decision on certiorari is applicable wherever the court was required to consider the evidence even for a limited purpose as in this case.⁹⁷

XV. SCOPE OF REVIEW

A. *Certiorari to Administrative Tribunal*

On certiorari to an administrative tribunal and decisions of the original reviewing court and further review by higher courts, the question is whether the administrative tribunal acted fraudulently, illegally or in excess of its jurisdiction. Thus on common law certiorari to review a decision of a city commission in charge of rezoning,⁹⁸ or on a decision of the Tennessee Railroad and Public Utilities Commission,⁹⁹ or a decision of the commissioner of finance and taxation,¹⁰⁰ the court in examining the sufficiency of the evidence considers only whether there is any material evidence in support of the decision, for only if it is wholly without support would the tribunal or officer be acting illegally.

B. *Certiorari to Lower Court*

The writ will not be issued to review interlocutory orders or decrees of a lower court where it appears that the lower court had jurisdiction of the subject matter and its action constituted only an error in its exercise of its jurisdiction.¹⁰¹

C. *On Appeal in Non-Jury Action*

On appeal from a judgment or decree tried without the intervention of a jury, the court in applying Tennessee Code Annotated section 27-303 will consider the case de novo as on a simple appeal, with a presumption that the judgment is correct unless it finds that the preponderance of the evidence is otherwise. In a divorce action in which the chancellor heard all the witnesses and observed their attitude and demeanor on the stand, the court of appeals declared that appellant must show that the decree was contrary to the *clear preponderance* of the evidence. The court gave *great weight* to the chancellor's conclusions.¹⁰² It must be observed that "clear preponderance" and "great weight" describe only the attitude of the reviewing court in the particular case. Literally, of course, every preponderance is clear; and the weight of an imponderable is imaginary.

97. *City of Memphis v. Sherwood Bldg. Corp.*, 343 S.W.2d 869 (Tenn. 1961).

98. *Ibid.*

99. *Associated Transp., Inc. v. Fowler*, 337 S.W.2d 5 (Tenn. 1960).

100. *Little v. McFarland*, 337 S.W.2d 233 (Tenn. 1960).

101. *Hewgley v. Trice*, 340 S.W.2d 918, 921 (Tenn. 1960).

102. *Smith v. Smith*, 339 S.W.2d 326 (Tenn. App. W.S. 1960).

D. Appeal in Jury-Tried Cases

1.—In *Kent v. Freeman*¹⁰³ and *Hudson v. Freeman*, tried together, the court says that the question is whether there was evidence to sustain the verdicts. As to *Freeman*, the court reviews the undisputed evidence and holds that the sole proximate cause of the accident was negligence on the part of defendant's servant; as to *Hudson*, the court holds that the undisputed evidence compels the conclusion that the verdict for plaintiff for an inadequate sum was due to mistake, accident or caprice. The causes were remanded to the trial court "for a new trial or trials as the judge may decide," indicating that the question of consolidation of the actions for trial should be reconsidered. Why should there be a new trial in the *Freeman* case? Did the record indicate that on a new trial the question of remoteness of plaintiff's negligence might be one for the jury? It is hardly possible that new evidence could justify a finding as to the conduct of the defendant's servant and the physical data.

2.—In reviewing the ruling of the trial judge's order in a condemnation case, the court made a remittitur of 68¾ per cent of the amount of verdict for the plaintiff as shown by the narrative record on appeal approved by both counsel and by the trial judge. The court interpreted the trial judge's certificate as authenticating the inclusion of all the evidence upon the issue of the value of the property taken and incidental damages. It then reviewed all the evidence and found that the amount of the original verdict was less than 40 per cent of the average estimated value of the land and less than 75 per cent of the average amount of incidental damage as shown by the testimony. It therefore set aside the remittitur and entered judgment upon the original verdict.¹⁰⁴

3.—On appeal in reviewing the denial of a motion for a new trial for error in refusing to direct a verdict for defendant, the court will disregard testimony contrary to established physical facts. Where all other evidence is such that no reasonable trier could find any negligence of defendant, there is no room for the application of a comparative negligence doctrine authorized by statute. The court of appeals on such a record entered judgment for defendant.¹⁰⁵

XVI. RECORD ON APPEAL—CERTIFICATION OF BILL OF EXCEPTIONS

1.—A recital by the trial judge in an order entered of record that

103. 345 S.W.2d 252 (Tenn. App. M.S. 1960).

104. *Chapman v. Mayor of City of Milan*, 344 S.W.2d 773 (Tenn App. W.S. 1960).

105. *Camurati v. Sutton*, 342 S.W.2d 732 (Tenn. App. W.S. 1960).

a tendered bill of exceptions contained only that part of the evidence received at the trial which was heard on the motion for a new trial was conclusive; it justified the judge's refusal to sign the tendered bill.¹⁰⁶

2.—Unless the bill of exceptions recites that it contains all the evidence, the appellate court will presume that the verdict was supported by the evidence; but a verdict that is erroneous on its face is to be set aside—the verdict is part of the technical record. Thus, in an action for personal injuries a verdict for plaintiff “with no damages” must be set aside.¹⁰⁷

3.—Errors occurring during the trial will not be considered on appeal unless contained in the bill of exceptions. Thus if allegedly inadmissible evidence is received at the trial, and the record shows no exception to the receipt of the evidence and no motion to strike it or any part of it, the appellate court will not consider an assignment of error based on the admission of the evidence. There must be timely objection and exception so that the trial court will have an opportunity to make proper correction.¹⁰⁸ And the claim that an unauthorized person was permitted to enter the jury room during the deliberations of the jury cannot be heard in the appellate court on affidavits not incorporated in the bill of exceptions.¹⁰⁹

4. *Disposition by Appellate Court—(a) Remand—When Proper.*—Where it appears upon consideration of the writ of error that the execution of the decree of the appellate court can be more conveniently accomplished by the court below, the case will be remanded for entry of the decree. The usual practice is to enter the decree in the appellate court.¹¹⁰ But when the supreme court reverses a decision of the trial judge, there should be no remand for a new trial in order to allow the appellee to rely upon a theory of trial contrary to that on which the case was tried. The supreme court should enter the judgement which the trial court should have rendered.¹¹¹

(b) *Revision—To Cure Error in Rejection or Admission of Evidence.*—In a wrongful death action the trial court erroneously rejected evidence tending to prove lack of affection of decedent husband toward the beneficiaries, his wife and child, and affection of decedent for another woman. The court of appeals considered that

106. *Holcomb v. Steele*, 342 S.W.2d 236 (Tenn. App. E.S. 1958).

107. *Clements v. Veterans Cab Co.*, 344 S.W.2d 572 (Tenn. App. W.S. 1960).

108. *Anderson v. State*, 341 S.W.2d 385 (Tenn. 1960); *Life & Cas. Ins. Co. v. Jackson*, 342 S.W.2d 720 (Tenn. App. W.S. 1960).

109. *Arterburn v. State*, 344 S.W.2d 362 (Tenn. 1961).

110. *Brister v. Brubaker's Estate*, 336 S.W.2d 326 (Tenn. App. W.S. 1960).

111. *Clendening v. London Assur. Co.*, 337 S.W.2d 603 (Tenn. 1960).

its prejudicial effect upon the amount of the verdict would be cured by a remittitur of ten per cent. The jury's verdict was for \$125,000, the amount of the remittitur \$12,500. The supreme court avoided modifying the judgement of the trial court by a somewhat doubtful interpretation of the record.¹¹² In a prosecution for illegally possessing whiskey, the court erroneously admitted evidence that the accused was a well-known bootlegger. The jury found accused guilty and fixed his punishment at the maximum fine of \$500 and imprisonment for six months. The judge had not requested or authorized the jury to fix the punishment. The trial judge reduced the fine to the statutory minimum, and sentenced accused to imprisonment for six months. The supreme court held that though the admission of the prejudicial evidence influenced the jury's judgment as to sentence, yet so far as the fine was concerned, the judge's action cured the error. As to the imprisonment, though the record did not show that the judge disregarded the jury's verdict, the court held that the attempt to impose imprisonment was surplusage and that the judge's fixing the same term should be regarded as the exercise of his independent judgment, since he had heard the same evidence, and had he heard it in a proceeding to fix the sentence, it would have been relevant and competent.¹¹³

XVII. UNITED STATES DISTRICT COURT CASES

A. New Trial—Grounds—Misconduct of Jurors—Quotient Verdict

In support of the claim that the jury reached their verdict "by the gambling or quotient method" the defendant presented an affidavit deposing that a local lawyer had reported a double hearsay statement of one juror to the effect that the jurors had agreed to accept the quotient and had insisted that the one juror was bound by the agreement and could not object when he saw the amount of the quotient. The court held that this showing was insufficient to cause the court to interrogate each of the jurors as to the alleged agreement.¹¹⁴ The cases show that the federal courts are reluctant to inquire into conduct in the jury room affecting the verdict.

B. Jurisdiction and Venue

1. *Jurisdiction of Court—Diversity of Citizenship.*—An unincorporated labor union, though it has capacity to sue in its own name, is not a citizen of the state in which it has its principal place of

112. *Capital Airlines, Inc. v. Barger*, 341 S.W.2d 579 (Tenn. App. E.S. 1960).

113. *McInturff v. State*, 338 S.W.2d 564 (Tenn. 1960).

114. *Wyrosdick v. Southern Ry.*, 192 F. Supp. 810 (E.D. Tenn. 1961).

business. A United States District Court of Tennessee has no jurisdiction of an action in which the plaintiff and some members of the union are citizens of the same state.¹¹⁵

2. *Venue*—(a) *In Anti-Trust Cases*.—Where a foreign corporation has transacted business in the district where the plaintiff was at the time of the transaction and still is a resident, and the corporation is continuing to close up the business done therein, it is subject to action therein though it is no longer an inhabitant of that district after having removed its principal place of business to another district.¹¹⁶

(b) *Change of Venue—To What District*.—In *Ragsdale v. Price*,¹¹⁷ Judge William E. Miller, applying the doctrine of *Hoffman v. Blaski*,¹¹⁸ held that under United States Code title 28, section 1404 (a) an action brought in a United States court in Tennessee is not subject to removal to the Northern District of California when the defendant was not present in California at the time of action brought though the plaintiff was a resident of California and the alleged injuries occurred there.

C. *Appeal and Error—Scope of Review*

In an action to review a decision of the Secretary of the Department of Health, Education and Welfare under United States Code title 42, section 405 (g), the court may not re-examine the action of the referee except to determine whether there was substantial evidence to support his findings and whether he correctly applied the pertinent rule of law.¹¹⁹ In this connection the case of *Philip Carey Mfg. Co. v. Taylor*, noted below, should be consulted.

XVIII. SIXTH CIRCUIT COURT OF APPEALS CASES

A. *Presumptions—Unexplained Absence for Seven Years*

Under the Railroad Retirement Act the retired employee is entitled to an annuity for life and upon his death a lump sum is payable to specified survivors. When the employee has disappeared and has not been heard from thereafter, the presumption is that he was alive for seven years after his disappearance and died at the end of that period. Hence the persons entitled to take his personal property

115. *Stein v. American Fed'n of Musicians*, 183 F. Supp. 99 (M.D. Tenn. 1960).

116. *R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co.*, 192 F. Supp. 522 (E.D. Tenn. 1960).

117. 185 F. Supp. 263 (M.D. Tenn. 1960).

118. 363 U.S. 335, (1960). Comment in 14 VAND. L. REV. 646 (1961).

119. *Bowling v. Flemming*, 186 F. Supp. 421 (E.D. Tenn. 1960).

under the statute of distribution are entitled under the Act to the accumulated annuities and the lump sum payable at his death.¹²⁰ This decision as to the effect of the presumptions involved is not supported by most cases. The usual rule is that death is presumed at the expiration of the seven-year period but the time of the death is a subject of proof unaided by any presumption.

B. Jurisdiction—Federal Question—28 U.S.C. § 1331

The United States district courts have jurisdiction of an action in which it appears in the complaint that the validity, construction or effect of an act of Congress or other applicable federal regulation is involved. Where the complaint alleges only the refusal of a state official to apply the act or regulation, there is no jurisdiction even though the defendant's answer challenges the constitutionality of the act or regulation.¹²¹

C. Venue—Change of Venue—28 U.S.C. § 1404(a)

Judge Robert L. Taylor transferred an action brought in the Eastern District of Tennessee to the Southern District of Mississippi. It was common ground that the action might have been brought in Mississippi against the corporate defendant. At the time of the transfer there were individual defendants who could not have been served in Mississippi or in the eastern district. These defendants had been added by an amended complaint some six weeks after the filing of the original complaint; before making the motion to transfer, the plaintiff had filed notice of dismissal as to them but there had been no order of dismissal by the court. In a proceeding for a final writ of mandamus to require Judge Taylor to vacate the order of transfer and to prohibit the transfer, brought by the corporate defendants, the court of appeals held the transfer authorized by United States Code title 28, section 1404(a). It left undetermined the question whether the dismissal of the individual defendants was effective without an order of dismissal by the court, for the reason that the time of filing the original complaint was decisive.¹²²

D. Appeal and Error—Grounds of Appeal

1. Insufficiency of Evidence To Support Verdict—(a).—This ground is unavailable to appellant in the absence of a motion by appellant at the trial to direct a verdict in his favor.¹²³

120. *Tobin v. United States R.R. Retirement Bd.*, 286 F.2d 480 (6th Cir. 1961).

121. *Shelby County v. Fairway Homes, Inc.*, 285 F.2d 617 (6th Cir. 1961).

122. *Philip Carey Mfg. Co. v. Taylor*, 286 F.2d 782 (6th Cir. 1961).

123. *Southern Ry. v. Miller*, 285 F.2d 202 (6th Cir. 1960).

(b).—But in a criminal case the court under Federal Rule of Criminal Procedure 52(b) may notice plain error. Thus where the offense charged was uttering and publishing as true a forged and counterfeit writing, the evidence showed without dispute that the writing was an entirely valid Treasury check with no purported indorsement of the name of the payee but bearing only a written signature of another than the payee. The error in receiving a verdict of guilty was held by the court to be so obviously without support in the evidence that it should be noticed even though defendant had not moved for a directed verdict. The court remanded the case with instructions to enter final judgment of acquittal.¹²⁴

2. *Finding Clearly Erroneous*.—The court adopts the test of clear error as stated by the Supreme Court in *McAllister v. United States*.¹²⁵ "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a 'mistake has been committed.'" It finds the evidence amply sufficient to support the findings.¹²⁶

3. *Error at Trial—Misconduct of Party—Failure To Disclose to Judge*.—The refusal to grant a new trial because of the failure of the prevailing party to disclose to the judge that a son-in-law of a juror would be called as a witness for him was not an abuse of discretion under the circumstances disclosed on the motion for a new trial.¹²⁷

E. Record on Appeal—Findings of Fact—Necessary Finding

Where the findings of fact omit a finding necessary to enable the court properly to review the case on appeal, the judgement will be reversed and the case remanded for further proceedings, including the taking of further evidence if the parties so desire.¹²⁸

XIX. SUPREME COURT

It should be noted that *Rogers v. United States*¹²⁹ makes it clear that the question of whether a confession is true or not has no bearing upon the question of its admissibility under the due process clause, and its consideration in the ruling by a state court on the admissibility of a coerced confession is prejudicial error.

124. *Carr v. United States*, 278 F.2d 702 (6th Cir. 1960).

125. 348 U.S. 19, 20 (1954).

126. *Local 984, International Bhd. of Teamsters v. Humko Co.*, 287 F.2d 231 (6th Cir. 1961).

127. *Southern Ry. v. Miller*, 285 F.2d 202 (6th Cir. 1960).

128. *Atlantic Constr. Co. v. United States*, 279 F.2d 709 (6th Cir. 1960).

129. 81 Sup. Ct. 735 (1961).

XX. LEGISLATION

The following enactments of the Eighty-second General Assembly contain provisions relating to procedure or evidence and should be consulted and noted by members of the profession engaged in litigation.

A. Remedies

1. *Certiorari*.—In all legislation pertaining to the review of action by the various agencies, departments and boards, it is important to examine the pertinent enactment to ascertain whether any remedy is specified. For example:

(a).—In Tennessee Code Annotated section 57-209, passed February 22, it is provided that the sole and exclusive remedy for review of the commissioner's action upon an application for a liquor license or action in revoking a license is by statutory certiorari in lieu of an appeal with a trial de novo. This substitutes statutory certiorari for common law certiorari. The validity of the new provision may depend upon whether the commissioner's functions are administrative or quasi-judicial. See the decisions holding Tennessee Code Annotated section 65-229(d) "entirely ineffective" noted above, page 1359.

(b).—Tennessee Code Annotated section 49-3923, passed February 15, makes the action of the commissioner of education reviewable only by common law certiorari.

2. *Injunction*—(a).—Tennessee Code Annotated section 53-3609, passed February 21, provides that the state fire marshal may secure injunctive relief against engaging in business as a liquified petroleum gas dealer in violation of the terms of the chapter.

(b).—Chapter 235 temporarily authorizes any aggrieved person to seek an injunction against any further violation of the provisions regulating the sale and distribution of frozen desserts.

B. Evidence—Admissibility

1. *"Prima facie evidence"*.—Tennessee Code Annotated section 39-1950, passed February 14, denouncing the use of an expired or unauthorized credit card, phone number, credit number or other credit device, provides that presentation of such a card or number is prima facie evidence that the credit device is false, fictitious or counterfeit or that its use is unauthorized.

2. *Effect*.—Tennessee Code Annotated section 49-1405, amending Tennessee Code Annotated section 49-1405, requires the board of education to record data relative to tenure including date of employment, date when tenure attained, leaves of absence, etc. This act

makes admissible in all administrative and judicial proceedings a copy of the record certified by the commissioner. This is subject to challenge only for accuracy and authenticity as reflected by the records of the local board of education.

Tennessee Code Annotated section 38-702, passed March 1, sets up a post mortem division of the department of public health and provides for medical examiners. Tennessee Code Annotated section 38-710 makes the records of the division or transcripts thereof certified by the chief medical examiner receivable as "competent evidence in any court of the State of the facts and matters therein contained."

C. Jurisdiction and Venue

1. *Jurisdiction Over Person—Service of Process.*—Tennessee Code Annotated section 20-230, passed March 9, makes provision for service of process on non-residents who operate or maintain water craft upon the waters of this state similar to that provision which heretofore provided for service upon non-resident motorists. The chapter must be carefully examined. Its terms are not identical with the hit-and-run motorist statute.

2. *Venue—In Divorce Action.*—Tennessee Code Annotated section 36-804, passed March 8, repeals the provision in Tennessee Code Annotated section 36-804 which authorized action where defendant was found. It strikes the words "is found" from the clause "in which the defendant resides or is found, if a resident."

D. Miscellaneous

Tennessee Code Annotated section 40-2907, passed February 14, makes a radical, needed change in the procedure for revoking the suspension of a suspended sentence for violation of the conditions. At the earliest practicable moment after arrest, (1) inquiry into the violation is to be made, (2) the defendant must be present, (3) he is entitled to be heard and to be represented by counsel, and (4) he is given the right of appeal to the supreme court as in other criminal cases.

1. *Alternate Jurors.*—Tennessee Code Annotated section 22-242, passed February 21, provides that the present provisions of Tennessee Code Annotated section 22-222 are to remain effective in counties having 150,000 or more inhabitants.

2. *Qualification of Judges.*—Tennessee Code Annotated section 117-119, passed March 15, does away with the sorry spectacle presented in the contest over the election of Mr. Justice Felts. It requires members of the supreme court, of the court of appeals, chancery court, circuit courts and criminal courts to be authorized to practice law in the courts of Tennessee.