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Procedure and Evidence -- 1960 Tennessee Survey

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PROCEDURE AND EVIDENCE—1960 TENNESSEE SURVEY

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INTRODUCTION

This survey is in large part merely what Professor Chafee once characterized as a horizontal digest. In the previous survey a request was made that interested members of the Bar advise the Editor-in-Chief of this *Review* whether the character of the annual survey of this subject should be changed. The request is repeated herewith.

In this connection it should be said that it is difficult to frame satisfactory comments on the work of our courts in this field without knowledge of the contents of the record. The opinions are of such varied character in many important respects that their bearing upon the efficient administration of justice in general can not be evaluated. To what extent the members of the court other than the opinion writer have a real acquaintance with the record cannot be known. The practice in the various states differs radically. In the New Jersey Supreme Court, at least while Chief Justice Vanderbilt was presiding, each member of the court had, before argument, studied the record and briefs and had noted the problems on which he needed help from the oral argument. In the Supreme Judicial Court of Massachusetts, neither the record nor the briefs are studied by any member of the court before argument, and are seldom studied thereafter except where the argument has left some matter unsolved. In some others only the opinion writer reads the record; consequently his interpretation of it must be accepted by the other members except where the oral argument has left a contrary impression. And a reading of the opinions during a period of about ten years has made it reasonably clear to this surveyor that many statements in opinions cannot have met the approval of some members of the court. Where the result, on the whole, seems satisfactory the content of the opinion is rarely adversely criticised. As a result this survey leaves very much to be desired. In some instances where there have been "trials by newspaper" which to an outsider seem to make a really fair trial almost, if not quite, impossible, no satisfactory comment can be ventured without a careful examination of the record. And such a comment is scarcely to be recommended, for the

chief purpose of a survey is to present the judicial pronouncements which may furnish some sort of guide to probable future action by the courts.

I. Pleading—Demurrer

1. Operation and Effect.—A demurrer is addressed to a pleading and presents an issue of the sufficiency of the averments of fact therein to call for a response in denial or avoidance. The pleading may include the contents of an accompanying writing incorporated therein by reference, but is neither aided nor harmed by an accompanying writing, designated as an exhibit, which is not so incorporated.[1]

The commonly used generalization that a demurrer admits the truth of all well-pleaded allegations of fact is inaccurate and misleading unless qualified. The admission is effective only for the purpose of testing the sufficiency of the allegations. In truth a demurrer is merely a default on the facts and raises only an issue of law. When it is overruled with leave to plead, it ceases to have any effect if later pleadings are interposed. This is made clear in a recent decision. The chancellor had held in overruling a demurrer that a specified averment in the bill was sufficient. After defendant had answered denying this averment, the chancellor heard the evidence and found for defendant. The court of appeals held specifically that his ruling upon the demurrer did not prevent him from finding the fact to be contrary to the well-pleaded averment.[2]

2. Slander—Special Damage.—A complaint which alleges the utterance, in the presence of others, of defamatory statements which do not charge plaintiff with the commission of a crime or misdemeanor, and does not allege special damages resulting therefrom, is demurrable. An allegation that the uttered statements were "you are drunk. . . . You are drunk and you were driving that car under the influence," is insufficient to charge a crime or misdemeanor in the absence of averment that the incident occurred on a public highway in the State of Tennessee. Hence such an allegation without an averment of resulting special damage fails to state a cause of action.[3]

3. Motion to Dismiss and Quash in Habeas Corpus.—A motion to dismiss the petition in habeas corpus and to quash the writ is properly considered as a demurrer. When the petition stated no ground for the issuance of the writ, the motion was properly granted even though a return was filed.[4]

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1. Holland Bros. Elec. Co. v. M. W. Kellogg Co., 326 S.W.2d 649 (Tenn. 1959).
2. Slomovic v. Tennessee Hosp. Serv. Ass'n, 333 S.W.2d 564 (Tenn. App. M.S. 1959).
3. Smith v. Fielden, 326 S.W.2d 476 (Tenn. 1959).
4. State *ex rel.* Tines v. Bomar, 329 S.W.2d 813 (Tenn. 1959).

II. PARTIES

1. Class Suits—Representative Suit for Vacation Pay.—Where a class suit is brought for vacation pay based on length of term of continuous employment by a group of employees acting for themselves and other employees similarly situated, each employee has a separate claim for a specific amount. No employee is claiming a share in a fund in the custody or control of the court or of the defendant. Such a suit is appropriate where the parties are so numerous as to make it impracticable to bring them all before the court and there is a common question of law or fact affecting the several rights and a common relief is sought. This in effect is the kind of action provided for in Federal Rule of Civil Procedure 23(a) (3). Obviously a judgment therein cannot affect any member of the class who is not a party to the action. The court is not empowered to order the defendant to pay into court the total possible amount for which defendant may become liable. This is the kind of situation which Chafee classifies as "Invitation to Come In."[5] The proper procedure is to provide for intervention by any member of the class and to fix a time within which intervention will be allowed. Such was the disposition of such an action by the Tennessee Supreme Court in *Textile Workers Union v. Brookside Mills, Inc.*[6] Each employee party to the action was entitled to judgment in his favor for the amount found due to him.

2. Answer and Cross-bill Bringing in New Parties.—*P*, subcontractor, sued *D* for money on an account. *D* answered that *P*'s claim was for work done by *P* as subcontractor of a contract between *C* and *D*, and *P* as such subcontractor of *C* performed defectively to *D*'s damage, and asked that the answer be treated as a crossbill against *C* and prayed judgment against *C*. *C* answered and asked that its answer be treated as a crossbill against *P*. The court held that under Tennessee Code Annotated section 21-620 new parties may be brought in upon a crossbill and that *C*'s answer should be treated as a separate crossbill against *P*. Since all the claims grew out of the same transaction, the bill, answer and crossbill should be tried together.[7]

III. REMEDIES

A. Certiorari

1. From Order of Commissioner of Finance and Taxation—Scope of Review by Circuit Court.—On certiorari by the registered owner

5. See CHAFEE, SOME PROBLEMS IN EQUITY, ch. VII (1950) discussing and disapproving FED. R. CIV. P. 23.
6. 326 S.W.2d 671 (Tenn. 1959).
7. Ralph Rogers & Co. v. Allied Constr. Co., 326 S.W.2d 428 (Tenn. 1959).

and conditional vendor of an automobile to review an order of seizure and condemnation by the Commissioner of Finance and Taxation the only issues for the circuit court are (1) whether the Commissioner acted illegally, arbitrarily or fraudulently or (2) whether there was material evidence to support his order. When on examination of the evidence the supreme court finds that the Commissioner would have been justified in determining that the conditional vendor had not made a sufficient investigation of the vendee's reputation and that the vendee was operating the automobile in transporting liquor, the judgment of the circuit court reversing the order of the Commissioner must be reversed.[8]

2. From Denial of Claim for Recovery of Seized Property by Director of Game and Fish Commission.—The sole remedy for the recovery of property seized and confiscated by the Game and Fish Commission is by filing a claim with the Director of the Commission, and by certiorari to the circuit court from an adverse decision, as provided by Tennessee Code Annotated sections 51-711,-712. Hence an order of the circuit court for the return of property thus seized, made after and because of acquittal of the criminal charge on which the seizure was based, is erroneous and must be reversed on appeal.[9]

3. Declaratory Judgment as Alternative.—Parties aggrieved by action of the Board of Accountancy are entitled to have it reviewed by certiorari,[10] but where the board has granted an applicant a license to practice as a public accountant, certiorari is not the exclusive remedy. A suit for a declaratory judgment against the board and the applicant, declaring that the board has no right to grant to the applicant a license to practice may be properly entertained.[11]

B. Coram Nobis—Supersedeas

The writ of coram nobis is authorized and regulated by statute in Tennessee,[12] and the judge may or may not order it to operate as a supersedeas.[13] One ground for the writ for relief from the judgment is that the defendant, petitioner, was prevented from making his defense by surprise, accident, mistake or fraud without fault on his part.[14] A demurrer to the petition seeking the writ on this ground is properly overruled when it: (a) alleges that petitioner had appeared in the action and had filed a demurrer to the complaint, and

8. Boyd v. General Motors Acceptance Corp., 330 S.W.2d 13 (Tenn. 1959).
9. State v. McCrary, 326 S.W.2d 473 (Tenn. 1959); TENN. CODE ANN. §§ 51-709, -712, -715 (1956).
10. TENN. CODE ANN. §§ 27-901, -902; 62-125, -135 (1956).
11. Coleman v. Blackburn, 333 S.W.2d 562 (Tenn. 1960).
12. TENN. CODE ANN. §§ 27-701 to -708 (1956).
13. TENN. CODE ANN. § 27-703 (1956).
14. TENN. CODE ANN. § 27-702 (1956).

after the demurrer had been overruled, had failed to answer because of assurances by plaintiff's (claimant's) attorney that the suit would be dismissed and (b) sets out a meritorious defense.[15]

C. Habeas Corpus—Sufficiency of Petition

The petition for a writ of habeas corpus alleged that the judgment that defendant, petitioner, was guilty of rape, was void because the indictment charged that the offense was committed on April 25, 1957, while the proof showed that it was committed on April 24, 1957. The petition was so fatally defective that had judgment been rendered for the petitioner, it would have been subject to reversal on motion in arrest. Hence, an order dismissing the petition and quashing the writ was affirmed.[16]

IV. BURDEN OF PROOF AND PRESUMPTIONS

1. Burden of Proof of Agency.—Where *P* is suing *D* on a contract made with *P* by *A* as alleged agent for *D*, the burden is upon *P* to persuade the trier of fact that *A* was acting within the scope of his authority as agent for *D*. This may be proved by circumstantial evidence, including evidence of what *A* had previously done with the knowledge and consent of *D*.[17]

2. Alibi in Criminal Prosecution—Measure of Persuasion.—There is much misleading and confusing language in the Tennessee opinions concerning the burden of proving the so-called defense of alibi. The language in *Smith v. State*[18] adds to it. The court there said that "the defense of alibi, like any other fact in the trial of a criminal prosecution, must be clearly, certainly and fully established by the proof, and these facts, that is, of an alibi, are left to the jury, with other proof in the cause." It is no doubt true that the Tennessee courts have approved the practice of charging that defendant has the burden of proving an alibi, but they have also ruled that it is error to refuse to explain what is meant thereby as bearing upon the issue of guilt. On request the judge must instruct the jury that if the proof, including that of alibi, raises a reasonable doubt of defendant's guilt, he must be acquitted, and nowhere is it intimated that his proof of alibi must be established by the measure of persuasion applicable to propositions of fact provable by the prosecution. Indeed, quite the contrary is true, and it is said to be the better practice

15. White v. Adams, 325 S.W.2d 236 (Tenn. 1959).
16. State *ex rel.* Tines v. Bomar, 329 S.W.2d 813 (Tenn. 1959).
17. Rich Printing Co. v. Estate of McKellar, 330 S.W.2d 361 (Tenn. App. W.S. 1959).
18. 327 S.W.2d 308 (Tenn. 1959).

not to charge on the defense of alibi as a separate defense.[19]

No one has yet been able to explain how a jury can apply an instruction which requires a positive finding of absence from the scene of the crime on the issue of alibi by any measure of persuasion and yet must acquit if the evidence of alibi, when considered with the evidence, raises a doubt as to guilt.

3. Venue in Criminal Prosecution.—The burden of proving the venue in a criminal prosecution is upon the state. But the measure of persuasion is the same as in an ordinary civil action, usually stated as "by a preponderance of the evidence." What is meant, it is submitted, is that the trier must find the state's proposition of fact, that the offense occurred within the designated territory, to be more probably true than not. The statement refers to the means by which the jury is to be persuaded. Of course, the required evidence may be circumstantial.[20]

4. Presumption of Innocence—On Appeal from Conviction.—The accused is entitled to the benefit of the presumption of innocence in the trial of a criminal prosecution; but after a verdict of guilty approved by the trial court and judgment thereon, the presumption no longer prevails. On appeal the accused is said to be presumed guilty, and in order to prevail on appeal, he has the burden of persuading the appellate court by the preponderance of the evidence that he is not guilty.[21] It is worth noting again that the Tennessee rule which condemns the direction of a verdict for an accused and does not authorize an appellate court on reversal of a conviction to order judgment for defendant does not signify that he is without protection against nnjustified verdicts. First, the judge is, in effect, a thirteenth juror, and is bound to set aside a verdict of guilt if he would not as a juror have voted for the verdict. Further, the supreme court will review the evidence and if it finds the preponderance against the verdict, will reverse the judgment. Finally, if the court believes that there is no case against the accused, it will recommend that the case be "nolle prossed."

5. Affirmative Defense—Capacity of Foreign Corporation To Sue.—The defendant who relies upon the defense that plaintiff is a foreign corporation and has not been domesticated has the burden of persuading the trier of fact on this issue in an action by the corporation upon a promisory note.[22] This is universally true, for this defense is in abatement. The statute does not purport to affect the validity of

19. See Odeneal v. State, 128 Tenn. 60, 157 S.W. 419 (1913).
20. Hopper v. State, 326 S.W.2d 448 (Tenn. 1959).
21. Smith v. State, 327 S.W.2d 308 (Tenn. 1959).
22. Shoenterprise Corp. v. Butler, 329 S.W.2d 361 (Tenn. App. M.S. 1959).

the contracts made within the state by the corporation.

6. Consideration for Promise—Statutory Presumption—Prima Facie Evidence.—Under a statute making a writing, signed by the party to be bound by the promise or undertaking therein, prima facie evidence of consideration, the Tennessee court has said that the writing raises a presumption which the signer has the burden of overcoming.[23] Whether this refers to the burden of going forward with the evidence or the burden of persuading the trier does not appear. Since no evidence was introduced, the allocation of the former burden was decisive.

7. Statutory Presumption or Prima Facie Evidence Re Motor Vehicles.—The legislature in 1957 amended the statute in an attempt to clarify or harmonize some of the decisions regarding the effect to be given to the fact of ownership of a motor vehicle upon the issue of responsibility for its operation on a specified occasion. The amended statute[24] provides that proof of ownership of a motor propelled vehicle shall be prima facie evidence that: (1) it was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which the injury or cause of action arose and (2) it was then and there being operated by the owner or by the owner's servant for the owner's use and benefit and within the course and scope of his employment. The expressed legislative intent is that the statute be given a liberal interpretation. The Court of Appeals Middle Section has indicated that the effect to be given to the provision is not to be determined by whether or not "prima facie evidence" creates a presumption. And this is a wise decision in view of the hopeless conflict in interpretations of that word. The legislative intent seems clear, as the court holds, that the truth of the stated propositions is not destroyed by evidence to the contrary which is contradicted or comes from witnesses whose credibility is subject to question.[25] It is suggested that the statute should be construed as making ownership of the vehicle establish the stated propositions of fact (1) unless and until the evidence to the contrary is such as to require a directed verdict, in which event the court will direct a verdict for the owner, or (2) unless and until evidence to the contrary has been introduced which would justify a finding that the stated propositions are untrue, in which event the question is for the jury.

Whether in this situation the burden of persuasion should be on

23. Douglas v. General Motors Acceptance Corp., 326 S.W.2d 846 (Tenn. 1959); TENN. CODE ANN. § 47-1702 (1956).
24. TENN. CODE ANN. § 59-1037 (1956).
25. Sadler v. Draper, 326 S.W.2d 148 (Tenn. App. M.S. 1959).

the owner is a question of policy. It may well be that the expressed intent that the statute be liberally interpreted indicates that the burden be put upon the owner.

Prior to the amendment the Court of Appeals Western Section held that the statute put upon the owner the burden of going forward with credible evidence of lack of authority or consent, and that the burden was not satisfied if there was any substantial evidence to the contrary or to discredit the contrary witness by his own statement or other contradictory proof. In this situation, it was said, the statutory presumption remains in the case. Whether this meant that such evidence made the issue one for the jury is not clear.[26]

V. Judicial Notice

The current judicial opinions deal with propositions of stated specific facts, frequently the result of generalized knowledge. Thus the court has taken judicial notice (1) that three days give ample time for papers mailed in Memphis to arrive in mail delivered in Nashville;[27] (2) that a candidate for Governor of the state or for United States Senator selects and appoints his campaign manager;[28] (3) that "Chas." is an abbreviation for "Charles," used in a record of conviction of crime in a sister state;[29] (4) that it is customary for an insured to accept and keep insurance policies without reading them;[30] (5) that a narrative bill of exceptions is almost always less nearly complete than one including a stenographic report of the testimony;[31] (6) that the yellow lines painted on the inclines on the highway are put there to warn motorists and others to stay in their own lane and that the upper ends of these lines are at the place where a view is available over the crest;[32] and (7) that a county or municipality which purchases its power from TVA would lose in collectible taxes much that would be assessable against and collectible from a privately owned power company if it did not receive an equivalent amount from TVA.[33] But a Tennessee court may not judicially notice as true the proposition that a pinball machine is necessarily a gambling device within the terms of a

26. Moore v. Union Chevrolet Co., 326 S.W.2d 855 (Tenn. App. W.S. 1958).
27. Personal Loan & Fin. Corp. v. Guardian Discount Co., 332 S.W.2d 504 (Tenn. 1960).
28. Rich Printing Co. v. Estate of McKellar, 330 S.W.2d 361 (Tenn. App. W.S. 1959).
29. Cumbo v. State, 326 S.W.2d 454 (Tenn. 1959).
30. Henry v. Southern Fire & Cas. Co., 330 S.W.2d 18 (Tenn. App. W.S. 1958).
31. State v. Stewart, 326 S.W.2d 688 (Tenn. App. W.S. 1959).
32. Cawthorn v. Mayo, 325 S.W.2d 629 (Tenn. App. W.S. 1959).
33. Rutherford County v. City of Murfreesboro, 326 S.W.2d 653 (Tenn. 1959).

municipal ordinance, since it may be used or played upon for innocent purposes.[34]

In *Shell Oil Co. v. Blanks*[35] the court, in effect, treated the mortality tables published in Tennessee Code Annotated as judicially known to be prima facie correct, for it held it no error to allow counsel to read from them in his argument to the jury though they had not been offered in evidence.

VI. EVIDENCE

A. Relevance

1. Introductory.—It is commonly said that the one rule of evidence subject to no exception is that irrelevant evidence is inadmissible. As James Bradley Thayer insisted, the law has no mandate to the logical faculties. Relevance is determined not by rules of law but by rules of logic. It is confusing to speak of legal relevance as contrasted with logical relevance, although many judicial opinions do use the phrase when rejecting logically relevant evidence.

Relevance denotes a relationship between facts. The existence of fact *A* is relevant upon the issue of the existence of fact *B*, if the existence of *A* makes it more likely or probable that *B* exists than it would be if *A* did not exist. If so, then evidence tending to prove that *A* exists is relevant as tending to prove that *B* exists. The relationship or lack of it between fact *A* and fact *B* is a matter of human experience.

2. Testimonial Evidence.—In litigation where the dispute concerns a matter of fact, one party will have the so-called burden of establishing the truth of a proposition which states the existence or nonexistence of a fact. The fact will very rarely occur in the courtroom in the presence of the trier of fact. It will have occurred at a previous time and its occurrence will usually be the subject of testimony by witnesses who perceived it or some other matter which tends to show it. (Of course, this means that the witness asserts that he perceived; he may in truth be mistaken or falsifying.) In such event it is obvious that, whether or not conscious of the process, the trier of fact must interpret the language of the witness, determine the sincerity of the witness in making the communication, consider the factors affecting the memory or purported memory of the witness, and decide how far the observation or perception of the witness coincided with what was open to perception by him.

34. Smith Amusement Co. v. Mayor & Board of Comm'rs of Chattanooga, 330 S.W.2d 320 (Tenn. 1959).
35. 330 S.W.2d 569 (Tenn. App. E.S. 1959).

3. Real Evidence.—Where a relevant quality of a tangible is perceptible by the trier of fact, the tangible is admissible in evidence. Though testimonial evidence may be required to establish its relevance, the relevant quality needs no testimony to make it apparent to the trier; he need not rely upon the capacity of anyone else to determine its perceptible quality or qualities. It is said to be real evidence, for it is itself the "res" or thing. It is what it is and nothing else, and what it is and its significance are for the trier. Experiments performed in court are, of course, real evidence of what is observable by the trier; but the significance of what is thus observable depends upon the testimonial evidence that the exhibition is substantially identical with what happened on a former occasion and is in dispute. An experiment performed out of court is not real evidence and testimonial evidence is required to describe the experiment and to establish that it was a substantial repetition of the original. Thus evidence of an experiment performed at the scene of a motor vehicle accident in conditions substantially the same as at the time of the accident is admissible even though the automobile used was not the same but had the same pertinent characteristics.[36]

4. Direct and Circumstantial.—Where the witness testifies to his perception of an operative fact, his testimony is said to be direct evidence; where he testifies to his perception of a fact which is a basis for an inference or series of inferences of the existence or non-existence of an operative fact, his testimony is termed circumstantial evidence. Thus evidence of defendant's flight from the scene of a crime is circumstantial evidence of his guilt. The inference from the objective conduct, flight, is the subjective condition, belief or consciousness of guilt, and the inference from the belief is to the conduct which caused the belief; namely, commission of the offense. There is much talk and repeated assertion in judicial opinions to the effect that a trier of fact may not base an inference upon an inference. If this means that a trier may not find the existence of fact *C* when he has found first the existence of fact *A* and inferred therefrom the existence of *B* and thence inferred the existence of *C*, then it is clearly erroneous. Every attempt to sustain the validity of the generalization results only in verbal justification of the result, whether or not a careful analysis would demonstrate a valid reliance upon the last of a series of inferences. The effect of the formula is often avoided by a judicial declaration that the finally inferred fact was properly found by a consideration of all the evidence. The opinion in *Gable v. Tennessee Liquified Gas Co.*[37] recognizes the rule but

36. Luckey v. Gowan, 330 S.W.2d 45 (Tenn. App. W.S. 1959).
37. 325 S.W.2d 657 (Tenn. App. W.S. 1957).

as usual makes no attempt to apply it according to its literal terms. It finds the result justified by the circumstantial evidence and all reasonable inferences to be drawn therefrom.

5. *Similar Occurrences.*—That *P* later secured liability insurance not only upon trucks but also on trailers used with the trucks from an insurance company doing business within the state, is a relevant fact as tending to show that the agent who wrote *P*'s insurance had authority to write the same kind of insurance covering *P*'s trailer trucks, and evidence of that fact was admissible to contradict or impeach the testimony to the contrary by the latter agent.[38]

6. *Prior or Contemporary Conduct in Same Series.*—On a charge of contributing to the delinquency of a minor, evidence is admissible of defendant's earlier conduct in his continuous dealings with the minor, and evidence of her contemporary complaint to a minister of the gospel while defendant was still engaged in course of those dealings is receivable in corroboration. As to this latter, it is not clear whether the evidence was admitted to prove the truth of the facts stated or only to prove the fact of the complaint.[39]

7. *Tending To Prove Motive.*—In a prosecution for grand larceny, on the issue of felonious intent, evidence is admissible that various implements commonly used in the forcible opening of a safe were found in defendant's car. The safe had been moved from the office in which it was usually located into the main part of the building.[40]

8. *Other Crimes.*—While evidence of crime other than that with which defendant is charged is inadmissible against him, still defendant cannot object to evidence offered by the state of such other offenses as were inquired about by his own counsel on his direct examination.[41]

9. *Character Evidence.*—In an action by a mother for the seduction of her daughter, where the only contested issue was the amount of damages, evidence of bad reputation of the mother and insinuation on cross-examination of serious misconduct of the daughter were relevant, but the failure of the mother to offer character witnesses affected only the amount of damage suffered, and the verdict of $20,000 for plaintiff indicated that the jury had found against defendant on the matter of reputation, and that the insinuations had been properly considered as increasing the damage.[42] In cases of

38. Henry v. Southern Fire & Cas. Co., 330 S.W.2d 18 (Tenn. App. W.S. 1959).
39. Birdsell v. State, 330 S.W.2d 1 (Tenn. 1959).
40. Caruso v. State, 326 S.W.2d 434 (Tenn. 1958).
41. Birdsell v. State, 330 S.W.2d 1 (Tenn. 1959).
42. Graham v. Smith, 330 S.W.2d 573 (Tenn. App. E.S. 1959).

this kind the court generally is reluctant to interfere with the verdict on account of its amount.

B. Hearsay

1. Admissions—Introductory.—At the outset it is essential to distinguish between judicial admissions and non-judicial or extra-judicial admissions. A judicial admission is conclusive; it removes the admitted proposition of fact from the realm of dispute in the case. It may be made by the pleading of the party or by a stipulation. To enable a party to introduce evidence contrary to his judicial admission, he must first withdraw or modify it and for this the consent of the court is required. His extra-judicial admission is not conclusive, but is received as tending to prove the truth of the matter admitted. Evidence of such a statement seems always to have been receivable since the introduction of evidence at a trial was first permitted. The fundamental theory is that evidence of any and all relevant conduct of a party is admissible when offered against him.

2. Judicial Admissions—Pleadings.—Where plaintiff in his complaint alleged that the cause of his driving as he did in this instance was that he was blinded by the lights of an approaching car, he cannot be permitted over objection to testify to facts in clear conflict with this allegation.[43] The court went on to say that the plaintiff himself was estopped, and that the credibility of his witnesses testifying to the inconsistent facts was certainly affected by the allegation in the complaint. If the allegation was a judicial admission, it was conclusive so long as it was not withdrawn or amended, and there was no pertinent issue to be tried. If so, then all evidence to the contrary of the allegation was inadmissible under the pleadings. This does not mean that plaintiff should not be permitted to amend if he can show that the allegation was inadvertently or mistakenly made. Whether the trial court should have treated the situation as if plaintiff had been permitted to amend is quite another question.

3. Exceptions—(a) Extra-Judicial Admissions.—On the trial of accused for embezzlement under a statute denouncing embezzlement by a public officer, a previous statement by the accused ("I took it and spent it on my family") is receivable in evidence against him as an admission, and his later payment of the amount in question is an admission by conduct. This evidence is sufficient to sustain the verdict and judgment of conviction, especially since the defendant did not testify.[44] If this statement is to be regarded as a confession,

43. Woods v. Meacham, 333 S.W.2d 567 (Tenn. App. W.S. 1959).
44. Blackwood v. State, 325 S.W.2d 262 (Tenn. 1959).

requiring corroboration, the requirement was obviously satisfied.

(b) Vicarious Admission—Predecessor in Title.—On the issue whether the previous use of a driveway covering part of defendant's land had been permissive or adverse, evidence of declarations by plaintiff's predecessor in title while in possession that the use was permissive was receivable against plaintiff.[45] This is an application of a well-settled rule, though obviously plaintiff never had any opportunity to cross-examine the predecessor and there is no requirement that he should have had any previous knowledge that the statement had been made.

(c) Mortality Tables.—Mortality tables are admissible in evidence as tending to prove the life expectancy of the plaintiff as bearing upon the amount of damage suffered by him from injuries resulting in alleged partial permanent disability.[46]

(d) Admission That a Third Party Expressed a Relevant Opinion.—In a prosecution of a defendant (Reynolds) for conspiracy to kill certain named persons and for felonious assault with intent to murder, a witness was permitted to testify that a short time before the case was set for trial this defendant had told her that he had been advised by the "Teamsters' Union" to go before the congressional committee then investigating so-called labor racketeering and "take the Fifth Amendment." The court said: "This was competent because it was another circumstance which the jury could consider to determine the guilt or innocence of the defendant Reynolds." For this amazing statement the court gave no reason. It is now generally held that evidence of a claim of privilege against self-incrimination is not admissible as tending to prove his guilt. But even if this court holds otherwise, how did the "union" give the advice; certainly there is no suggestion that there was such official conduct by the union as a body. Consequently this can mean only that some unnamed person or persons gave the advice. In either case, even assuming that the advisors were honest, it is at best a statement of opinion founded upon undisclosed data, and the admission that he had been given the advice could not reasonably be construed as indicating that he believed it to be true. Any careful analysis would have disclosed that this evidence was entirely incompetent. Whether its reception was cause for reversal is quite a different question.[47]

45. Pyron v. Colbert, 328 S.W.2d 825 (Tenn. App. W.S. 1959).
46. Shell Oil Co. v. Blanks, 330 S.W.2d 569 (Tenn. App. E.S. 1959).
47. Smith v. State, 327 S.W.2d 308 (Tenn. 1959).

C. Opinion

1. Insanity—Lay Opinion—Required Foundation for Admissibility.—The opinion of a lay witness that testator was insane must be based on facts personally perceived by him, and facts which have only a scintilla or glimmer of value as tending to prove insanity do not suffice. Nor is opinion based on such insufficient data aided by similar opinion evidence of other witnesses whose observed facts have no greater probative value.[48]

2. Expert Witness—Value—Admissibility and Weight.—The reasonable value of the services of an attorney for an intervenor who set up two notes payable to intervenor in proceedings under a creditors' bill is a question for the court. The Master allowed ten per cent of the amount due on the notes. The attorney assigned error in that the amount should have been fifteen per cent. Opinion evidence of three reputable attorneys that the amount should be at least fifteen per cent was admissible but was not conclusive though uncontradicted. Approval of the Master's finding by the Chancellor was not erroneous.[49]

D. Best Evidence Rule

1. Summaries of Original Worksheets.—Multigraphed audits compiled and edited by third persons without producing the original worksheets and compilation were received over objection and the ruling was conditioned upon producing and making available to defendant the originals prepared by the witness. If there were any error, it was cured where the originals were produced on the second day of the trial and made a part of the record.[50] Of course, the originals were real evidence of their contents.

2. Official Acts of Quarterly Court.—The official records of the quarterly court are in themselves the action of the court and the sole admissible evidence of it. This does not mean that where purported action was oral and was relied upon by a party, it is impossible for the court to ratify the transaction by a later official record. The later official record constitutes the action of the court.[51]

E. Parol Evidence Rule

1. Contemporaneous Contradictory Promise.—Where plaintiffs entered into a written agreement with definite stipulations and terms and as a part thereof executed and delivered their promissory note,

48. Curry v. Bridges, 325 S.W.2d 87 (Tenn. App. W.S. 1959).
49. Harriman Welding Supply Co. v. Lake City Lightweight Aggregate Corp., 330 S.W.2d 564 (Tenn. App. E.S. 1959).
50. Blackwood v. State, 325 S.W.2d 262 (Tenn. 1959).
51. Bozeman v. State, 330 S.W.2d 553 (Tenn. 1959).

the fact that after considering the matter for a few days they decided that the whole agreement was impractical was no ground for rescission, and the oral assurance of the other contracting party that they would not have to pay the note was entirely ineffective.[52] This is an application of the orthodox rule. There was no claim of fraudulent inducement.

2. Parol Evidence of Title.—In a criminal prosecution for cutting timber from the lands of another without the consent of the owner of the timber, the state must prove either actual possession of the land by the alleged owner or constructive possession under color of title, or must deraign his title from the state or from a common source, and this deraignment must be evidenced by writings. Oral testimony is insufficient.[53] In reaching this result the court disapproved *Pepper v. Gainsboro Telephone Co.*[54]

3. Parol Evidence To Identify Person Named in Document.—In an action brought in Tennessee on a judgment rendered in Virginia against the judgment debtor after purported service upon a Tennessee motorist under the Virginia hit-and-run statute, evidence that statutory notice by mail was delivered to the father of the motorist whose name was identical with that of the motorist, and that in the Tennessee action the summons was served on the father, was receivable upon the appearance by the motorist to attack the Virginia judgment for lack of due process. The sheriff's return in the pending action was not conclusive as to the identity of the judgment debtor.[55]

F. Weight and Sufficiency

1. Negative Testimony.—Testimony of a witness that he did not hear a whistle or bell as the train in question approached a crossing is not to be disregarded where it appears that he was in position to hear the sound of the whistle and of the ringing of the bell had they occurred, and his testimony may be credited over positive testimony of other witnesses that they did hear the whistle and bell.[56]

2. Expert Opinion.—Upon the issue whether a workman had a seizure of vertigo, the testimony of an expert that there was a fifty per cent probability that he could have had such a seizure is insufficient to justify a finding. No fault can be found with this result, but the court's statement that it constitutes "no evidence whatsoever"

52. Kilgore v. Hix, 327 S.W.2d 474 (Tenn. 1959).
53. Yates v. State, 332 S.W.2d 186 (Tenn. 1960).
54. 1 Tenn. App. 175 (M.S. 1925).
55. Keene v. Wilkerson, 325 S.W.2d 286 (Tenn. App. E.S. 1959).
56. Poe v. Atlantic Coast Line R.R., 326 S.W.2d 461 (Tenn. 1959).

is obviously inaccurate, for the opinion states a relevant proposition of fact.[57]

G. Witnesses

1. Examination—Offer of Proof.—Where an objection had been interposed and sustained on the ground that the accused could not show on cross-examination of the prosecuting witness the terms of the oral agreement which was integrated in a written contract, the witness was then asked: "How did you expect to pay Mr. Miller?" The trial judge sustained the objection. On appeal the court stated that the record did not show the expected answer and that if the objection was erroneously sustained, the error was not ground for reversal. It is generally said that when an objection is sustained to a question on direct examination, the proponent must inform the court in some proper manner what he expects the answer of the witness to be. Otherwise on a "new trial," if granted, the answer may be of no value on the issue. But on cross-examination the examiner is in no position to state more than what he would like to have the answer tend to show. And there is no obligation to do more than show that the question calls for a relevant answer.[58]

2. Competency—Interested Survivor.—On the issue of whether testator had promised to pay a bonus for the year 1957 to each of three employees, claimants, there was circumstantial evidence tending to show such promises. Each of the claimants offered to testify that the testator had made such a promise to each of the others individually; the report does not show any offer of testimony of a promise made to all three as a group. On analysis it is obvious that no employee had any interest in the claim of any other, and unless his offer to testify as to the other promises was for the purpose of supporting his own claim, he could not be said to be an interested survivor as to the claim of another. Yet the court treated the promises as a joint promise and held each claimant incompetent. It upheld the judgment of the county court in favor of each plaintiff on the ground that it was sufficiently supported by the other evidence.[59]

3. Impeachment—Judgment of Conviction.—The Tennessee courts have adopted the majority view that a witness may be impeached by evidence that he has been convicted of a crime, that the conviction may be shown by testimony of the witness on cross-examination, and that the pendency of an appeal does not destroy its admissibility. It is said that the crime must be one involving moral turpitude. Whether

57. Bledsoe County Highway Dept. v. Pendergrass, 330 S.W.2d 313 (Tenn. 1959).
58. Miller v. State, 332 S.W.2d 179 (Tenn. 1960).
59. Durham v. Webb, 330 S.W.2d 355 (Tenn. App. W.S. 1959).

an assault with intent to commit "murder in the second degree" involves moral turpitude depends upon the circumstances—but certainly "pistol whipping" a young girl does involve moral turpitude.[60]

VII. JURISDICTION AND VENUE

A. County Court

1. Wills Administration.—Where a previously appointed administrator resigned after discovery of a will and appointment of executor and submitted his account in which he failed to list as assets of the estate the sum of $5000 received by him from the testator a short time before testator's death, the executor filed formal exceptions to the account. The county court clerk and the county judge overruled the exceptions. On appeal the circuit court affirmed on the ground that it had no authority to determine the issue of fact. The court of appeals reversed and on certiorari the supreme court held that the statute[61] required a trial de novo on appeal of all chancery cases and cases in the nature of a chancery proceeding. The case was properly remanded to the circuit court which had jurisdiction to try it as if the proceedings had been commenced in that court.[62]

2. Wills Contest.—Where a will is presented for probate in solemn form and opposing parties appear to contest it, the county court must immediately transfer the cause to the circuit court. Hence when proponent petitioned for probate of a will in solemn form and an opposing party presented for probate in solemn form a later will containing a provision revoking all former wills, this constituted a contest and both petitions should have been certified to the circuit court. It was error for the county court to probate the first will, and the circuit court on appeal should have held the decree of probate void. The contest was of the first will and not of the second.[63]

B. Court of General Sessions Created by Private Act—Sumner County—Power to Increase Jurisdiction

Under Article XI, section 19 of the Tennessee Constitution, the jurisdiction of a court of general sessions created by private act cannot be increased by legislative act alone. Such a legislative act must require that it be approved either by a two-thirds vote of the local legislative body of the county or by a majority of the voters voting in an election in the county. The legislative Act of 1957 (Ch. 203,

60. McGee v. State, 332 S.W.2d 507 (Tenn. 1960).
61. TENN. CODE ANN. § 27-408 (1956).
62. Teague v. Gooch, 333 S.W.2d 1 (Tenn. 1960).
63. *In re* Ambrister, 330 S.W.2d 330 (Tenn. 1959).

Private Acts 1957) purporting to amend the private act is void.[64]

C. Chancery

1. Inherent Jurisdiction—Control of Bar.—Courts of chancery, as well as the supreme court, have inherent power to investigate alleged unethical practices of members of the bar and to appoint special commissioners for that purpose.[65]

2. Limit of Jurisdiction—Amount Involved.—A suit to enjoin the collection of a tax judgment and have it declared void is necessarily a suit in chancery, and if the amount involved is less than fifty dollars, a chancery court has no jurisdiction to entertain it. The fact that there are numerous other similar judgments does not avoid the limitation as to each judgment debtor. The court suggested that the tax payer is not without remedy since common law certiorari is available.[66]

3. Quia Timet To Determine Disputed Boundaries.—Where the bill alleges that plaintiff has conveyed one tract of land by deed warranting title and seisin, and the boundary is uncertain because one line of boundary was formerly recognized and another is now claimed, chancery has jurisdiction to determine the dispute.[67] It seems reasonably clear that there is no adequate remedy at law, even by the statutorily enlarged action of ejectment. Chancery should furnish a remedy in the nature of a declaratory judgment.

D. Continuing Jurisdiction

A court which renders a decree of divorce has no power to deprive itself of its statutory authority to retain control of the decree.[68]

E. Acquisition of Jurisdiction—Enforcement of Mechanic's Lien

In a suit to enforce a mechanic's lien, the action must be commenced within ninety days after notice of the lien to the owner of the premises, and the lien is enforced "by attachment upon petition at law or bill in equity filed under oath." The levy of the attachment is the commencement of the suit. The issuance of the writ is without effect until levy thereunder. Hence a writ issued within the ninety-day period but not levied until after the period has expired does not satisfy the statutory requirement.[69]

64. Durham v. Dismukes, 333 S.W.2d 935 (Tenn. 1960).
65. *Ex parte* Chattanooga Bar Ass'n, 330 S.W.2d 337 (Tenn. 1959).
66. Tritschler v. Cartwright, 333 S.W.2d 6 (Tenn. App. M.S. 1959).
67. Patterson v. T. J. Moss Tie Co., 330 S.W.2d 344 (Tenn. App. W.S. 1959).
68. Thomas v. Thomas, 330 S.W.2d 583 (Tenn. App. E.S. 1959).
69. Knoxville Structural Steel Co. v. Jones, 330 S.W.2d 559 (Tenn. App. E.S. 1959).

F. Supreme Court—Power To Revise Sentence

Where the accused is sentenced to a term of imprisonment, the supreme court has constitutional authority to grant a petition that the time spent by defendant in jail awaiting trial be counted as part of the time specified in the sentence. Mr. Justice Tomlinson dissented from this proposition where the sentence is fixed by the jury and the statute specifically authorizes the trial judge to take such action. The dissent assumes that the matter is regulable by statute and is not controlled by any constitutional mandate.[70]

VIII. TRIAL

A. Right to Jury Trial

1. In Criminal Prosecution.—Even if an accused may validly waive trial by jury in a criminal case, no waiver is effective as to the imposition of a fine exceeding fifty dollars. Article VI, section 14 of the Tennessee Constitution provides: "No fine shall be laid on any citizen of this State that shall be in excess of $50 unless it shall be assessed by a jury of his peers." Hence if on a jury-waived trial the judge finds defendant guilty and is of opinion that a fine of more than $50 should be imposed or if the statute prescribes a minimum of more than $50, he must impanel a jury to fix the fine within the limits required by the applicable statute.[71]

2. Question of Law—Unlawful Search and Seizure.—It is clear that the question of whether a search and seizure was unlawful so as to require the evidence procured thereby to be held inadmissible is for the judge and not for the jury. Hence if in a jury-waived trial if the evidence thus procured is essential to support a finding of guilt, the judge should acquit the defendant.[72]

3. Procedure in Habitual Criminal Charge—Separate Trial of Charge.—Defendant was charged with third-degree burglary and with being an habitual criminal. The trial judge at the close of the State's evidence on the burglary charge submitted the case to the jury without mention of the habitual criminal count. After the jury returned a verdict of guilty, the judge then submitted the evidence of three prior convictions on the habitual criminal count to the same jury but did not on this count submit anything as to the immediately preceding conviction. The defendant objected that the count separately considered in this way entitled him to additional peremptories. The supreme court approved the trial judge's action

70. Douglass v. State, 330 S.W.2d 8 (Tenn. 1959).
71. State v. Moore, 332 S.W.2d 176 (Tenn. 1960).
72. *Ibid.*

and held that the habitual criminal count did not charge a capital offense and did not entitle defendant to fifteen peremptory challenges.[73] It seems too clear for argument that this procedure afforded defendant ample protection. The indictment gave him fair notice of the offense charged; no evidence of the former convictions prejudiced the consideration of the burglary charge, and a completely separate trial of the habitual criminal charge would have served no useful purpose or given defendant any appreciable advantage.

4. In Chancery.—The supreme court has dispelled the uncertainty created by *Doughty v. Grills*[74] concerning the right to a trial by jury of a suit over which a common law court had no jurisdiction and in which there is no constitutional right to a jury. In that case the court of appeals declared that a verdict by the jury approved by the chancellor in an action for an injunction was advisory only, that on appeal the review was a de novo proceeding and that the correct finding was contrary to the verdict. Now in *Moore v. Mitchell*[75] the supreme court interprets the statutory phrase "elsewhere excepted by law"[76] as denoting "excepted by other statutes." In effect, it also includes actions or suits "which by their very nature must necessarily be inappropriate for submission to a jury such as contempt for violating an injunction or cases of a complicated and intricate nature involving mixed questions of law and fact such as laches or estoppel." Therefore when a party has demanded trial by jury of six specified issues, it is error for the chancellor to withdraw them from the jury and make findings on each of them in favor of defendant if a trier of fact could reasonably have found for the plaintiff on one or more of the decisive issues. In short, the jury in equity has exactly the same function under the statute as to each issue as a jury in a strictly legal action.[77] But when the chancellor, after refusing to empanel a jury at the request of a party and to submit to it a group of issues, has empanelled a jury of his own motion, he may submit to it only such questions of facts as he desires.[78]

B. Selection of Jurors—Challenges—Peremptory

Granting to the state an additional peremptory after the jury had been sworn, and allowing it to be exercised to remove a juror who was accepted while defendant had an unexercised peremptory constitutes error, but whether it is prejudicial depends upon the cir-

73. Beeler v. State, 332 S.W.2d 203 (Tenn. 1959).
74. 37 Tenn. App. 63, 260 S.W.2d 379 (E.S. 1952).
75. 329 S.W.2d 821 (Tenn. 1959).
76. TENN. CODE ANN. § 21-1011 (1956).
77. Henry v. Southern Fire & Cas. Co., 330 S.W.2d 18 (Tenn. App. W.S. 1958).
78. McDade v. McDade, 325 S.W.2d 575 (Tenn. App. E.S. 1958).

cumstances. The court ruled it harmless within the harmless error statute on the authority of *Nelson v. State*,[79] in which the court reviewed the previous decisions and pointed out that the allowance of even one extra peremptory may be cause for reversal and the allowance of as many as three may not be so, depending largely on whether the finally selected jurors were fair and impartial and whether the rejected juror was for special reasons highly desirable for the accused. In the instant case the trial judge exercised a sound discretion in allowing the extra peremptory.[80] It seems good policy to bear in mind that a party is not entitled to have a particular juror sit in his trial, but to be careful to apply this principle only where it will not operate as an unjust discrimination against him. This is especially true if he is the defendant in a criminal prosecution.

C. Dismissal or Abandonment of Claim

A defendant who has pleaded a set-off but informs the court that he has brought a separate action for the same claim and offers no evidence to support the set-off, has thereby abandoned the set-off and cannot thereafter assert that the trial judge erred in over-ruling the plea.[81] This ruling seems so obviously correct as to cause amazement that it should ever have been seriously questioned.

D. Instructions

1. Requests for Instructions—Requisites.—The instruction which a party requests the court to give must be accurate and complete. Thus in an action by a flying school against an advanced student for negligently destroying a plane in an emergency landing, there is no error in refusing to charge that a flying school assumes responsibility for the competence and skill of a student in flying a plane in the course of instruction without adding the qualification "unless the student violated the instructions given in respect to the particular operation in which he was engaged at the time of the alleged negligence." Obviously the unqualified proposition requested would convey a totally wrong impression to the jury as to the respective obligations of the plaintiff and the defendant.[82] And the judge need not give the requested instruction even if accurate when he covers the same matter adequately in his general charge.[83]

2. Curative Instructions.—Where a witness on direct examination

79. 200 Tenn. 462, 292 S.W.2d 727 (1956).
80. Hopper v. State, 326 S.W.2d 448 (Tenn. 1959).
81. John H. Moore & Sons v. Adams, 324 S.W.2d 499 (Tenn. App. M.S. 1959).
82. Morton v. Martin Aviation Corp., 325 S.W.2d 524 (Tenn. 1959).
83. Luckey v. Gowan, 330 S.W.2d 45 (Tenn. App. W.S. 1959).

gave to a proper question an unresponsive answer which was both inadmissible and highly prejudicial, an order striking the answer and an instruction promptly given directing the jury to disregard it may justify the refusal to declare a mistrial. In such a case the ruling is largely within the discretion of the trial judge.[84] The same is true where an improper answer is asked which does not indicate the expected answer but does reveal that the witness testified in another trial, and the judge instructed the jurors to disregard all references to an earlier trial.[85] But when plaintiff's attorney deliberately injected into a personal injury action the fact that defendant was insured against liability and argued for its admissibility in evidence, the misconduct was not cured by counsel's belated apology and the trial judge's instruction to the jury to disregard the entire matter.[86] In view of the attitude of the Tennessee courts toward the supposed effect upon jurors of knowledge of liability insurance, and the repeated decisions condemning counsel for intentionally disclosing its existence, the result was to be anticipated. It might be suggested that the treatment of this subject by courts generally is totally unrealistic in current conditions. It is almost a matter of current notoriety that practically all financially responsible motorists and operators of business of any importance do carry liability insurance.

3. Burden of Proof.—Under section 24-515 of the Tennessee Code if it is shown that a bailee received the bailed chattels in good condition and returned them in damaged condition, the bailee has the burden of introducing evidence that the damage was not due to his negligence or other fault. But when the bailor's complaint alleges specific acts of negligence of the bailee and the judge charges clearly that the burden is on the bailor to prove the truth of these allegations, it is not error for the judge to charge that under the statute the defendant must show the damage was not due to his fault or negligence. Taken as a whole the instruction puts on the bailor-plaintiff the burden of persuading the trier of fact and on the defendant the burden of producing evidence.[87] It must be clear that these two portions of the charge were inconsistent and confusing. If the burden is only one of producing evidence, the jury has nothing to do with the problem of its satisfaction; if it affects the weight to be given the evidence when introduced, the question then arises as to the propriety of charging on the weight of the evidence. But as so often happens in Tennessee, in opinions dealing with so-called

84. Graham v. Smith, 330 S.W.2d 573 (Tenn. App. E.S. 1959).
85. O'Brien v. State, 326 S.W.2d 759 (Tenn. 1959).
86. Woods v. Meacham, 333 S.W.2d 567 (Tenn. App. W.S. 1959).
87. Morton v. Martin Aviation Corp., 325 S.W.2d 524 (Tenn. 1959).

"prima facie evidence" and presumptions, the instant decision is not enlightening.

4. Contents—(a) Completeness—Matters in Issue.—The judge should confine his instructions to the matters which are litigated or subject to litigation in the case. This is particularly true in criminal cases. It is reversible error to instruct a jury to consider a charge against defendant which is not included in the indictment.[88] But if the instructions treat a proper issue meagrely, they are not for that reason erroneous. The party desiring greater particularity must call the matter to the judge's attention so as to afford him an opportunity to supply the alleged omissions.[89] The courts have so stated again and again, but with little apparent effect upon many members of the bar.

(b) In Criminal Cases.—The rule in criminal prosecutions that the judge must give the standard instruction on circumstantial evidence is not applicable where there is direct evidence of the fact charged.[90]

(c) Effect of Stipulation of Fact.—A stipulation of fact takes the objective fact out of the realm of dispute, but where reasonable men might draw different inferences from the fact, it is for the jury to draw the inference. Thus, where the stipulated fact was specified objective conduct of an injured party, whether the conduct constituted negligence and whether it was the proximate cause of the injury were questions for the jury which should have been subject of proper instructions by the trial judge.[91]

E. Motion For Directed Verdict

1. Distinguished from Demurrer to Evidence—Time for.—In *Sadler v. Draper*[92] the court took occasion to state the distinction between a common law demurrer to evidence and a motion for a directed verdict under modern practice. The demurrer could be interposed only after the party having the burden of persuasion (usually the plaintiff) had rested; it had to be in writing and correct in form. If it was so, then the opposing party was required to join and the only issue was whether on the evidence and all inferences to be drawn therefrom a jury would be justified in finding a verdict for the party having that burden. If yes, then there must be a finding for him; if no, there must be a finding for the opposing party. The only issue left after the demurrer was overruled was as to the amount of

88. Church v. State, 333 S.W.2d 799 (Tenn. 1960).
89. Luckey v. Gowan, 330 S.W.2d 45 (Tenn. App. W.S. 1959); Woods v. Meacham, 333 S.W.2d 567 (Tenn. App. W.S. 1959).
90. Birdsell v. State, 330 S.W.2d 1 (Tenn. 1959).
91. Woods v. Meacham, 333 S.W.2d 567 (Tenn. App. W.S. 1959).
92. 326 S.W.2d 148 (Tenn. App. M.S. 1959).

damage. On the issue of liability no evidence could be introduced by either party. A motion for a directed verdict may usually be made only at the close of all the evidence and if it is overruled, the moving party may present his argument to the jury. When the court permits a defendant to make the motion at the close of plaintiff's evidence and denies the motion, the defendant may introduce evidence but must renew the motion at the close of all the evidence; otherwise, the previous ruling is not reviewable. Similarly where there are two defendants and both of them properly move for a directed verdict at the close of plaintiff's case, and the motions are denied, if one defendant immediately rests while the other proceeds to offer evidence, the one must renew his motion at the close of all the evidence and, as against him as well as against the other, the court must consider all the evidence. If the evidence introduced by the second defendant adversely affects the case of the first defendant, it will prevent a directed verdict for him. Thus, in an action brought against defendants as master and servant, at the close of plaintiff's evidence the master rested and his motion for a directed verdict was denied. Thereafter testimony was introduced in behalf of the servant affecting the issues as to the relationship between the defendants and the alleged master's liability. The failure of the master to renew his motion at the close of all the evidence had the same effect as if he had waived the motion.[93]

2. *The Scintilla Rule.*—The usual test for determining the motion is whether a reasonable jury could find more than one way. If the court is of opinion that a jury might reasonably find in favor of the party having the burden of persuasion, a motion for a directed verdict for the opponent will be denied. In considering a motion to direct a verdict for the party having that burden, it must be remembered that the credibility of witnesses is for the determination of the jury, but where no reasonable jury could fail to find for him and the facts established by the evidence raise a presumption of the ultimate fact involved, the opponent's introduction of evidence which, if believed, would constitute only a scintilla or glimmer of probative value is not sufficient to meet the presumption or preclude a directed verdict. These propositions were applied in a will contest in which contestant attacked a will on the grounds of testator's incapacity. The will was duly executed in the presence of respectable, intelligent witnesses in accord with all requirements of the applicable statute. The evidence of no substantial value was a recitation of trivial instances of testator's conduct and some lay opinion based thereon.[94]

93. Sadler v. Draper, 326 S.W.2d 148 (Tenn. App. M.S. 1959).
94. Curry v. Bridges, 325 S.W.2d 87 (Tenn. App. W.S. 1959).

3. Effect of Party's Own Testimony.—Plaintiff, a girl 16 years old, after testifying generally as to the accident in question, denied categorically and in detail the truth of every allegation of specific acts of negligence contained in her pleading and declared that she knew nothing concerning its contents. The trial judge directed a verdict for defendant as against her. The court of appeals affirmed.[95] The only noteworthy feature of this situation is that counsel had the intrepidity to assign the ruling as error. The only possible justification for his filing a pleading containing these allegations is his probable reliance upon statements of others without checking them by consulting plaintiff herself. Certainly he could never justify signing such a complaint if rule 11 of the Federal Rules of Civil Procedure were in force in Tennessee.

4. In Criminal Prosecution.—Even where there is no dispute as to the existence of a fact which constitutes a necessary element of a crime, an instruction that the fact exists is reversible error. The court has consistently refused to consider the harmless error doctrine as applicable in this situation.[96] This may be justified by the theory that in all prosecutions the jury and not the judge is to determine all matters affecting guilt. But it is difficult, if not impossible, to understand why our Tennessee courts disapprove the practice of entertaining a motion for a directed verdict of acquittal. Yet this disapproval is constantly reiterated and of course makes inapplicable any claim of error in the ruling of a trial judge denying such a motion.[97]

F. Verdict

1. Special Interrogatories.—In a personal injury action the trial judge has discretion to determine whether or not to submit special issues to the jury. Certainly where the issues are not numerous or complicated, he does not abuse his discretion in refusing to do so.[98]

2. Polling Jury—Effect of Answer.—On the polling of the jury by the trial judge, one juror answered that he "had gone along" with the others; the trial judge construed this answer as meaning that the juror had reluctantly agreed only because of the persuasion of the other eleven, and held the verdict a proper verdict of all twelve. His ruling was approved.[99] To have held otherwise would have opened to question every verdict reached only after long deliberation, and would make difficult sustaining any verdict reached by a jury after first reporting a disagreement.

95. Wagner v. Niven, 332 S.W.2d 511 (Tenn. App. W.S. 1959).
96. Hooper v. State, 325 S.W.2d 561 (Tenn. 1959).
97. Church v. State, 333 S.W.2d 799 (Tenn. 1960).
98. Shell Oil Co. v. Blanks, 330 S.W.2d 569 (Tenn. App. E.S. 1959).
99. Donahue v. George, 329 S.W.2d 836 (Tenn. App. W.S. 1959).

G. Taxation of Costs—Motion To Retax

A motion by defendant for retaxing costs awarded against him will not be entertained in the supreme court. It must be made in the court which taxed the costs.[100]

IX. JUDGMENT

1. Final—What Constitutes—In Justice Court—Splitting.—Plaintiff brought action for property damage in a court of the justice of the peace, alleging negligent injury to his automobile in a collision with defendant's car. While the trial was continuing it appeared that defendant was a conditional vendee of the car and that attachment of it in a justice's court was unauthorized. The judge endorsed "on the back of the warrant a judgment for $200 in favor of plaintiff" and thereupon "defendant left the court-room." The plaintiff's request that the action be dismissed was granted. It does not appear how long an interval elapsed between defendant's leaving and plaintiff's request. In a later action by plaintiff in the circuit court for injuries to his car and to his person, the court held that the justice's endorsement on the warrant did not constitute a final judgment. After verdict and judgment for $2500 in favor of plaintiff, the supreme court held that the endorsement was a final judgment, and that the dismissal was totally ineffective. By reference to the statutory provision which authorizes plaintiff to dismiss before final submission to the court "and not afterwards"[101] the court must have assumed that the case had been "finally submitted" when defendant left the court room, although it is obvious that the magistrate considered its decision only tentative, and that the proceeding had not terminated so far as the plaintiff and the magistrate were concerned. The court applied the rule established in Tennessee and a majority of states that damage to plaintiff's person and property by a single wrongful act creates a single cause of action, and that a judgment in an action seeking to recover for either is a complete defense to a later action for damage to the other.[102]

2. Final Judgment in Criminal Prosecution for Violation of Game Law.—When a defendant has been acquitted of a criminal charge for violation of the game laws by certain specified conduct, the judgment has no effect upon a proceeding by him to recover from the state the property seized or condemned as contraband on account of that specified conduct. The statutory proceeding before the Director of the Fish and Game Commission for the recovery of such property is

100. Kasper v. State, 333 S.W.2d 934 (Tenn. 1960).
101. TENN. CODE ANN. §§ 20-1311 to -13 (1956).
102. Staggs v. Vaughn, 325 S.W.2d 277 (Tenn. 1959).

separate and distinct from any action or proceeding for the criminal prosecution for violation of the statute forbidding the taking of fish or game.[103]

3. Costs—When Properly Included—Divorce.—In a divorce action the chancellor may properly award to the wife a sum of money as counsel fees, but they are not to be taxed as costs and included as such in the judgment or decree.[104]

X. MOTION FOR NEW TRIAL

A. Contents—Form

In Tennessee practice there is no motion for judgment notwithstanding the verdict as a remedy for error in refusing to direct a verdict. The motion in Tennessee, as at common law, is directed only to the sufficiency of the common law record and is usually available only to a plaintiff when defendant's pleadings show no defense so that plaintiff is entitled to a default judgment. But on a motion for a new trial on the ground of error in denying a motion for a directed verdict, the remedy is the same as that directly provided for by statute in most states. In *Pickard v. Ferrell*[105] the court of appeals treated a motion to set aside the verdict and to enter judgment for the moving party as if it were a motion for a new trial for error in refusing to grant his motion to direct a verdict. This is an illustration of the usual attitude of Tennessee appellate courts in looking to substance rather than form in most procedural controversies.

B. Grounds For New Trial

1. Irregularities Affecting the Jury.—It is no ground for a new trial that the jury in a criminal case took their meals in the common dining room of a hotel and occupied several separate rooms during the night when each of them testified that no one even tried to talk to him and that he did not discuss the case with anyone.[106] The old common law rule that any separation vitiated the verdict has been generally abandoned. Some prejudicial effect of the separation must be shown. The same is true where the officer having custody of the jurors has left them unattended while procuring food or clothing for them. The fact that they may have had an opportunity to hear a broadcast of the news is insufficient to require the trial judge to declare a mistrial or to grant a new trial when the record shows

103. State v. McCrary, 326 S.W.2d 473 (Tenn. 1959).
104. Raskind v. Raskind, 325 S.W.2d 617 (Tenn. App. W.S. 1959).
105. 325 S.W.2d 288 (Tenn. App. W.S. 1959).
106. Blackwood v. State, 325 S.W.2d 262 (Tenn. 1959).

nothing further concerning the incident.[107]

2. *Misconduct of Juror.*—A juror on the voir dire examination stated that he had formed no opinion concerning the accident in question. On the hearing of a motion for a new trial he testified that he knew of a blinking red light at the scene of the accident and used his knowledge of it in considering the evidence. The trial judge, while holding the juror free from conscious fault, found him to be not a fair and impartial juror and granted the motion. On appeal the court of appeals reversed. On certiorari the supreme court held that the court of appeals was in error in ruling that the trial judge had abused his discretion in granting the new trial.[108] It is rather clear that the juror's testimony did not show his answer as to forming or expressing an opinion to be false or mistaken. The real problem was whether, on recalling seeing the blinking light and finding its pertinence to the issue of negligence, he should have revealed the matter to the trial judge.

3. *Verdict Against the Evidence.*—In most jurisdictions it is clear that in granting a new trial on the ground that the verdict is contrary to the evidence, the trial judge has a wide discretion. Because he has seen and heard the witnesses, his decision will be supported although the written record may show a preponderance in favor of the verdict. But he may refuse to grant a new trial when he disagrees with the verdict but finds that the record contains evidence which a reasonable jury could believe and which, if believed, would support the verdict. In Tennessee, however, if the judge, had he been a juror, would not have voted for the verdict as rendered, it is his duty to set the verdict aside and grant a new trial. He is said to be the thirteenth juror. Consequently, when the judge grants a new trial because dissatisfied with the verdict, his ruling is not reviewable.[109] This anomalous doctrine is so thoroughly a part of the Tennessee system that its reiteration in an opinion is not worth noting. But it may be well to call attention to it as a desirable safeguard against erratic jury verdicts where the record shows no objective reversible error. It connteracts in a great measure the impediments to judicial control of jury action imposed by the prohibition of comment by the judge upon the weight of evidence or credibility of witnesses, and the prohibition against direction of verdicts of acquittal in criminal prosecutions.

4. *Excessive Damages.*—Where the verdict is not so excessive as to indicate passion or prejudice, the fault of excess may be cured by

107. O'Brien v. State, 326 S.W.2d 759 (Tenn. 1959).
108. Meacham v. Woods, 325 S.W.2d 281 (Tenn. 1959).
109. Dykes v. Meighan Constr. Co., 326 S.W.2d 135 (Tenn. 1959).

a remittitur. Thus, where the jury returned a verdict of $2,450 for plaintiff's personal injuries and $750 for the destruction of his motorcycle, and the undisputed evidence showed the value of the motorcycle to be $371, counsel for plaintiff suggested that the error could be cured by remittitur on defendant's motion for a new trial, and the judge then accepted the verdict. On the later motion by defendant, the judge denied the motion on condition that plaintiff remit the excess. On appeal from the judgment after remittitur, the court of appeals affirmed on the ground that there was no showing of passion or prejudice.[110]

5. Punitive Damages.—In an action for seduction of plaintiff's 16-year-old daughter, evidence offered by defendant of previous misconduct by the daughter and of grave misconduct by the mother was met by denials and by explanations of apparently unfavorable incidents. The jury were justified in awarding compensatory and punitive damages, and a verdict for a large sum did not indicate passion or prejudice requiring a new trial.[111]

C. Requisites of Order Disposing of Motion

After verdict for plaintiff, defendant's motions for a new trial were duly made, and the trial judge, following conclusion of the arguments at the hearing thereon, orally stated that the motions were overruled and on the court files of the cases made notation of his ruling on each motion. Before the orders overruling the motions were entered on the minutes, the trial judge died. His successor entered on the minutes a recital of the notations made by the judge and then an order and judgment that the motions "are in all respects overruled and denied." The court of appeals held that the order of the successor was void. The trial court "speaks only through its minutes." The statute requiring a new trial where the trial judge dies "prior to the hearing of the motion for a new trial"[112] has no application. The case was to be "restored to the docket for trial as upon a continuance."[113] Does this work any different result from what would be reached if the statute were applicable? Why should the trial judge's written endorsement upon the files have not been treated as effective in this situation where all substantial requirements relevant to the determination of such a motion had been fulfilled?

110. Fitzsimmons v. Brock, 330 S.W.2d 563 (Tenn. App. E.S. 1958).
111. Graham v. Smith, 330 S.W.2d 573 (Tenn. App. E.S. 1959).
112. TENN. CODE ANN. § 17-117 (1956).
113. Jackson v. Handell, 327 S.W.2d 55 (Tenn. App. E.S. 1959).

XI. Appeal and Error

A. In Forma Pauperis—In What Actions Allowed

On appeal from a judgment of a general sessions court which was for a specific sum of money or the return of specified chattels to the possession of which plaintiff was entitled, the circuit court ruled that appellant was required to file an appeal bond and could not appeal in forma pauperis because he still retained the chattels. On further appeal the supreme court held that since plaintiff had given no replevin bond, the action had been properly treated as in detinue and defendant was entitled to retain the chattels during the appeal. To prevent his wrongful disposition of the chattels during that period, plaintiff's remedy was to apply for a pertinent order.[114]

B. Preliminary Requisites—Bill of Exceptions

1. Time for.—The statute, providing that when the last day of the prescribed thirty-day or ninety-day period falls on a Sunday the period is extended an additional day,[115] is retroactive. It applies to proceedings pending at the time of the passage of the statute as well as to those begun thereafter.[116] But a decree against the petitioner in a habeas corpus proceeding which allowed him 45 days to perfect his appeal did not extend the prescribed thirty-day period for filing his bill of exceptions. On appeal from the decree, a bill of exceptions filed after this period had expired cannot be considered. The court can review only the technical record.[117]

2. When Required.—Where a stipulation of facts is entered on the technical record and is complete in itself, no bill of exceptions is necessary. But where exhibits are attached to the stipulation which the trial judge must consider, a bill of exceptions is required. It must be filed within thirty days unless within that period a longer time is fixed by the court; otherwise it cannot be considered on appeal.[118] But when the circuit court on common law certiorari entered judgment ordering a beer board to return to petitioner the license which it had revoked, the facts (a) that the court's judgment was based on stipulated facts and (b) that no additional evidence could have been introduced in the circuit court did not excuse appellant from the requirement of a motion for a new trial. That no bill of exceptions was necessary because of the adequacy of the technical record in the case did not change the result; the appeal was dismissed.[119]

114. Swan v. Williams, 330 S.W.2d 557 (Tenn. 1959).
115. Tenn. Code Ann. § 27-111 (1956).
116. O'Brien v. State, 326 S.W.2d 759 (Tenn. 1959).
117. State v. Bomar, 329 S.W.2d 813 (Tenn. 1959).
118. Industrial Credit Co. v. Beckman, 333 S.W.2d 563 (Tenn. 1960).
119. Shelton v. Mooneyhan, 326 S.W.2d 825 (Tenn. 1959).

C. Scope of Review

1. Simple Appeal—(a) Decree in Equity—Trial Without a Jury.—On a simple appeal in equity, review by an appellate court includes both issues of law and issues of fact; the court considers the record on the facts de novo. Where at the trial the evidence is oral a bill of exceptions is required, but no motion for a new trial is necessary. There is a presumption that the judgment is correct on the facts, but if the appellate court finds that the evidence preponderates against it, the presumption is overcome. Such is the procedure provided by statute in Tennessee[120] in all actions tried without a jury. And it is in accord with the practice in many code states where issues of fact are tried by oral evidence or by evidence partly oral and partly presented by written depositions. In classic English equity practice all evidence was by written depositions and there was no presumption on appeal in favor of the findings by the lower officer or tribunal. The current practice is described in *Lowe v. Caledonian-American Ins. Co.*[121] In ruling on claims against a decedent's estate, the hearing is without a jury by the probate judge, and review is by a simple appeal whether or not the testimony is oral.[122]

(b) Effect of Finding of Trial Judge Approved by Court of Appeals.—Where the evidence was uncontroverted and the trial judge has found that defendant was not guilty of actionable negligence and that the plaintiff was contributorily negligent, and the court of appeals has concurred, the supreme court does not review the evidence de novo but considers only whether there is any material evidence to support the findings and whether the conclusions of law are correct.[123]

2. Workmen's Compensation Case.—In an appeal from the decree of the chancellor in a workmen's compensation case, the supreme court determines only (1) whether there is any evidence in the record to support his finding and (2) whether he has committed any error of law.[124]

3. Complicated Account.—In an action to recover a balance due on a complicated account, the chancellor empanelled a jury as demanded by the defendant. At the close of the evidence plaintiff moved that no issue be submitted to the jury because the issues were too complicated to be determined by a jury and included mixed issues

120. TENN. CODE ANN. § 27-303 (1956).
121. 324 S.W.2d 420 (Tenn. App. M.S. 1959). See also Gable v. Tennessee Liquified Gas Co., 325 S.W.2d 657 (Tenn. App. W.S. 1957).
122. Rich Printing Co. v. Estate of McKellar, 330 S.W.2d 361, (Tenn. App. W.S. 1959).
123. Overbey v. Poteat, 332 S.W.2d 197 (Tenn. 1960).
124. American Bridge Div., United States Steel Corp. v. McClung, 333 S.W.2d 557 (Tenn. 1960).

of law and fact. The chancellor granted the motion and disposed of the case in a written opinion. The supreme court held that the review was to be as on a simple appeal de novo with a presumption in favor of the correctness of the findings.[125] The contract was in writing and, of course, its interpretation was for the judge. But the facts involved in the account were in dispute. Even under the Tennessee statute there is no right to a trial by jury of an issue involving an intricate and complicated account.

4. Divorce Action—Omission of Finding.—In a divorce action it was a part of the plaintiff wife's case to prove that she had no knowledge that her husband's former marriage had not been dissolved; there was no bill of exceptions and the chancellor made no express finding in her favor. On appeal the court of appeals held that the decree in her favor required the assumption that the chancellor had made the finding by inference.[126]

5. Evidence Erroneously Excluded.—Where defendant's mental and emotional attitude toward members of his family was relevant as to his capacity to execute the contract sought to be set aside, the chancellor erred in excluding proffered expert psychiatric opinion evidence. The court on a simple appeal considered the evidence de novo including that erroneously excluded. In the particular situation, the error was harmless, for the probative value of the excluded opinion was slight.[127]

D. Discretionary Appeal

In an action on a sworn statement of account, *D* answered that *P*'s claim was for a balance alleged to be due from *D* under a contract between *D* and *C* for work performed thereunder by *P* as a subcontractor of *C*, and that the work was defectively done to *D*'s damage in a stated amount and asked judgment against *C* for that amount and that the answer be treated as a crossbill against *C*. *C* answered the crossbill and asked that his answer be treated as a crossbill against *P*. On *P*'s motion to dismiss *C*'s crossbill or to grant a severance, the chancellor granted a severance and allowed *C* a discretionary appeal. On motion to dismiss the appeal the supreme court held that a discretionary appeal will not be dismissed where allowance of the appeal will furnish the chancellor a guide to final disposition of the case. Here the crossbills were properly interposed, for a new party may be brought in on a crossbill, and, as to *C*'s crossbill, its consideration and disposition would settle the entire controversy. Since

125. Town of Alamo v. Forcum-James Co., 327 S.W.2d 47 (Tenn. 1959).
126. Hill v. Hill, 326 S.W.2d 851 (Tenn. App. W.S. 1958).
127. McDade v. McDade, 325 S.W.2d 575 (Tenn. App. E.S. 1958).

all the disputes arose from the same transaction, it was highly desirable that they be settled in one proceeding; hence, it was an abuse of the chancellor's discretion to order a severance.[128]

XII. RECORD ON APPEAL

1. Inconsistent Provisions—Effect of.—On appeal the technical record of the trial included a recital of the contents of the verdict, and the bill of exceptions recited the verdict as reported by the jury. Insofar as the recitals were inconsistent, the bill of exceptions was controlling.[129] And a recital in the bill of exceptions that it contains all the evidence will be disregarded where it affirmatively appears that other evidence was introduced which might have been material. Hence, on such a record the supreme court considers not whether there was sufficient evidence to support the judgment against the defendant county but whether on the record any judgment against defendant properly could have been entered.[130] Likewise a finding of fact by the chancellor which has no evidence in the record to support it will not be considered.[131]

2. Omission of Material Details—Effect.—Alleged error in the misconduct of prosecutor in his final argument cannot be considered where the argument is not set forth in the record;[132] and where the record on appeal shows that the court gave instructions to the jury but the instructions are not copied in the transcript of the trial record, the court of appeals must assume that they were in all respects correct.[133] Even if the instructions do appear, an alleged error therein is no ground for reversal if there appears to have been no objection at the trial, no reliance on it as a ground for the motion for a new trial, and no pertinent assignment of error.[134] It would be a most unusual case in which an appellate court would pay any attention to an attempt to secure consideration of such an alleged error.

3. Inclusion of Improperly Authenticated Matter.—Where the probate judge disallowed a claim and was absent from the state on the last day for claimant to move for an extension of time to file a bill of exceptions, the special judge acting in his place made an order extending the time. Within the extended time the claimant filed his bill of exceptions and it was included in the record on appeal. On motion to strike the bill from the record, the court of appeals held

128. Ralph Rogers & Co. v. Allied Constr. Co., 326 S.W.2d 428 (Tenn. 1959).
129. Church v. State, 333 S.W.2d 799 (Tenn. 1960).
130. State v. Stewart, 326 S.W.2d 688 (Tenn. App. W.S. 1959).
131. *Id.* at 697.
132. Caruso v. State, 326 S.W.2d 434 (Tenn. 1958).
133. Pickard v. Ferrell, 325 S.W.2d 288 (Tenn. App. W.S. 1959).
134. Barnard v. Binns, 326 S.W.2d 676 (Tenn. App. M.S. 1959).

the order of the special judge void and proceeded to consider the appeal on the technical record only, which included the probate judge's findings of fact.[135] Only the probate judge had the power to sign such an order.

4. Diminution of Record—Amendment of Record.—An amendment to a pleading cannot be permitted in the supreme court, and to allow a defendant to crave oyer of a writing so as to make it a part of the trial record would have the same effect. Hence, to grant diminution of the record for that purpose would be futile.[136] This device for supplementing the record on appeal cannot be used to change the trial court's record. And the record on appeal cannot be amended by filing in the appellate court materials which should have been included in a bill of exceptions. Thus affidavits in support of a motion for a new trial are not part of the technical record and cannot be made part of the record on appeal by filing in the appellate court an affidavit of the judge that they were all the evidence introduced at the hearing of the motion.[137]

5. Assignment of Error—(a) Necessity for—Time for Filing.—Where the chancellor has denied a discretionary appeal, the error, if any, will not be considered when the record on appeal contains no assignment of error for this ruling.[138] But failure to file assignments within the time prescribed by the rules of the appellate court will be excused if sufficient explanation for the failure is shown as, for example, illness of counsel or excusable ignorance of inexperienced counsel.[139]

(b) Specification.—An assignment that the decree in favor of the employee in a workmen's compensation case is contrary to the law and evidence is too general to be considered by the supreme court.[140]

6. Disposition on Appeal—(a) Judgment Contrary to Verdict.—When on his motion for a new trial the defendant assigns error in the trial judge's refusal to grant his motion for a directed verdict, and the appellate court finds that on all the evidence in favor of plaintiff no reasonable jury could have found against defendant, the appellate court will enter judgment for the defendant. Thus the same result is accomplished as under the typical statute in code states

135. *In re* Lewis Estate, 325 S.W.2d 647 (Tenn. App. W.S. 1958).
136. Holland Bros. Elec. Co. v. M. W. Kellogg Co., 326 S.W.2d 649 (Tenn. 1959).
137. Baldwin v. State, 325 S.W.2d 244 (Tenn. 1959).
138. McDade v. McDade, 325 S.W.2d 575 (Tenn. App. E.S. 1958).
139. Hopper v. Davidson County, 333 S.W.2d 917 (Tenn. 1960); Tedesco v. General Motors Acceptance Corp., 326 S.W.2d 837 (Tenn. App. W.S. 1958).
140. American Bridge Div., United States Steel Corp. v. McClung, 333 S.W.2d 557 (Tenn. 1960).

which provides specifically for judgment notwithstanding a verdict as the remedy for error in refusing to direct.[141]

(b) Where Record Contains Wayside Bill of Exceptions.—Where defendant files a wayside bill of exceptions to an order granting plaintiff a new trial, and on the new trial plaintiff secures a verdict and judgment, the court, on appeal from the judgment, first considers the errors alleged in the wayside bill. If it finds that the order granting the new trial was erroneous, it restores the original verdict and orders judgment thereon. This means that the alleged errors in the record of the second trial are not considered. But such a judgment in the court of appeals is subject to review on certiorari; and if the supreme court holds that the trial judge was correct in granting the new trial, the appeal is still pending in the court of appeals and the supreme court will remand the case to the court of appeals for consideration of the record on the second trial.[142]

XIII. UNITED STATES DISTRICT COURT CASES

1. Presumptions.—There is a strong presumption that the officials of a state acted properly in placing the name of a candidate upon the official ballot.[143]

2. Evidence—(a) Hearsay—Official Record—Judgment.—In an action to recover certain assets of the bankrupt debtor from defendant creditor, to whom the debtor had delivered them in payment of the creditor's claim, on the ground that the transfer was an unlawful preference, the judgment in the bankruptcy proceeding adjudging the debtor a bankrupt is inadmissible as tending to prove his insolvency as against the creditor who was not a party to the proceeding.[144]

(b) Opinion.—Evidence by a witness who, so far as the record shows, had incomplete information as to the extent of the assets owned by another at a given date, that in his opinion that other was then insolvent is inadmissible.[145]

3. Jurisdiction of Person—Service of Process.—Where a complaint against a non-resident motorist was filed in the United States District Court for the Eastern District of Tennessee four days before the termination of one year after the alleged injury, the agency of the

141. Cawthorn v. Mayo, 325 S.W.2d 629 (Tenn. App. W.S. 1959).
142. Meacham v. Woods, 325 S.W.2d 281 (Tenn. 1959); Dykes v. Meighan Constr. Co., 326 S.W.2d 135 (Tenn. 1959).
143. Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958).
144. Allender v. Southeast Tractor & Equip. Co., 178 F. Supp. 413 (M.D. Tenn. 1959).
145. *Ibid.*

Secretary of State to receive process as provided by statute continued so long as necessary to complete the service. If action was begun within the year, the agency of the Secretary expired at the end of the year, except where further time was needed to enable him to complete service of process. Thus where (1) the clerk of the court delivered the summons and complaint to the marshal and he by mistake mailed them to the marshal in the district of defendant's residence instead of serving them on the Secretary of State, and (2) discovery and correction of the mistake delayed service on the Secretary and mailing to defendant for a period thirty-three days after the end of the year, the court held the delay excusable and denied defendant's motion to quash.[146]

4. Jurisdiction of Subject Matter—(a) Habeas Corpus—Condition Precedent.—The accused in a criminal prosecution in the Tennessee trial court objected to the admission of a confession on the ground that it had been coerced. The judge after hearing outside the presence of the jury held that it was not improperly secured and admitted the evidence. The state supreme court affirmed the judgment of conviction. On appeal from the decision of the district court denying a writ of habeas corpus, the court of appeals held that the accused, as petitioner in habeas corpus proceedings, could not raise the same issue and said further that he must first exhaust all state remedies including a petition for habeas corpus addressed to a state judge.[147] *Query,* is the availability of the remedy of habeas corpus in a state court within the rule requiring exhaustion of state remedies?

(b) Tucker Act.—An action by plaintiff to recover from the United States the proceeds of bonds owned by plaintiff received by the Collector of Internal Revenue in payment of taxes due from plaintiff's father is an action on a contract implied in law; *i.e.,* created by the law, and not one on a contract implied in fact; *i.e.,* logically inferred from the conduct of the parties and therefore the equivalent of an express contract. The Tucker Act [148] is applicable only to consensual contracts and not to obligations created regardless of the intention or consent of the obligor, though remediable in the contract action that is the successor of the common law action of general assumpsit.[149]

(c) Enjoining Assessment or Collection of Taxes.—When plaintiff alleges that a tax assessed against him should have been assessed against another, he has an adequate remedy at law in that he may pay under protest and sue to recover back the amount paid. Conse-

146. Proctor v. Hendrick, 174 F. Supp. 270 (E.D. Tenn. 1958).
147. Wooten v. Bomar, 267 F.2d 900 (6th Cir. 1959).
148. 28 U.S.C. § 1346(a)(2) (1958).
149. Holbert v. United States, 167 F. Supp. 179 (E.D. Tenn. 1958).

quently his case presents no exception from the statute[150] proscribing suits to enjoin the assessment or collection of taxes.[151]

(d) Federal Question—Removal from State Court.—In an action for wrongful death the plaintiffs alleged as the cause of the death negligent conduct of defendant in violating rules and regulations promulgated under the Federal Civil Aeronautics Act[152] but alleged nothing requiring interpretation of them. The complaint therefore did not reveal a federal question as a basis for jurisdiction of the United States district court and consequently did not warrant removal of the action from the state court.[153]

(e) Action Under Miller Act.—A foreign corporation not authorized to do business in Tennessee is nevertheless a proper party plaintiff in a United States district court in an action on a bond given under the Miller Act,[154] for the act provides that such an action must be brought in the name of the United States in a United States district court. This makes the Tennessee statute on the same subject inapplicable.[155]

5. Scope of Review—Referee Under Social Security Act.—The finding of the referee that the applicant for disability benefits was not disabled from engaging in a substantial gainful activity is final if supported by substantial evidence. Where the record includes such evidence, the government is entitled to summary judgment.[156]

XIV. SIXTH CIRCUIT COURT OF APPEALS

1. Remedies—Motion To Vacate Sentence.—A motion to vacate sentence cannot be used as a substitute for an appeal nor can it challenge the sufficiency of the evidence to support the sentence imposed by the court after a plea of guilty.[157]

2. Evidence—(a) Illegally Obtained.—Intoxicating liquors unlawfully seized by state officers without the knowledge of any officer of the United States is admissible in evidence, and where admitted without objection, the defendant may not on appeal assign its reception as error.[158] But the doctrine applied in this case has been rejected by the Supreme Court in decisions of June 27, 1960. The

150. INT. REV. CODE OF 1954, § 7421(a).
151. Nussbaumer v. United States, 175 F. Supp. 128 (M.D. Tenn. 1959).
152. 72 Stat. 737, 49 U.S.C. § 1301 (1958).
153. Dennis v. Southeastern Aviation, Inc., 176 F. Supp. 542 (E.D. Tenn. 1959).
154. 49 Stat. 793, 794 (1935), 40 U.S.C. § 270(a)-(d) (1958).
155. United States v. Milan Constr. Corp., 168 F. Supp. 255 (E.D. Tenn. 1958).
156. Chesney v. Flemming, 180 F. Supp. 437 (E.D. Tenn. 1960).
157. Clark v. United States, 273 F.2d 68 (6th Cir. 1959).
158. Nichols v. United States, 276 F.2d 147 (6th Cir. 1960).

majority of the Court in an opinion by Mr. Justice Stewart declare that since security of privacy guaranteed by the fourth amendment as against the United States is essential to a system of ordered liberty, the whole basis for making a distinction between a search made by a federal officer and one made by a state officer has been destroyed and that the question for a United States judge is whether the search, if made by a United States officer, would have been a violation of the fourth amendment; if so, then the evidence obtained by the search by a state officer is inadmissible. There was a strong dissent by Mr. Justice Frankfurter in which Justices Harlan, Clark and Whittaker joined.[159]

(b) Hearsay—(1) Deposition of Parties.—Where subcontractors who were parties gave testimony by deposition in discovery proceedings and afterward appeared at the trial as witnesses, the court ruled that the pretrial depositions were admissible only to affect their credibility. This was error for Federal Rule 26(d)(2) provides, in effect, that they are receivable and usable as admissions. But the error was harmless in this case for it appeared from the record that the jury credited the oral testimony of the witness and there was nothing in the depositions if used as affirmative evidence which could reasonably be considered as affecting the result.[160]

(2) Charts.—Where an expert witness produces charts, it is proper procedure to permit him to identify them, explaining them as summarizing his own testimony and that of other witnesses.[161] The opinion does not go into detail on this point, and it must be assumed that his qualifications and the sources of his information were not questioned.

(c) Witnesses—(1) Privilege—Identity of Informer.—The prosecution need not disclose the identity of an informer where the informer was in no way connected with the commission of the offense and there is no showing that disclosure of his identity would further defendant's defense.[162]

(2) Marital Privilege.—In a prosecution of defendant for a violation of the Mann Act,[163] the defendant has no privilege that the victim shall not testify against him even though she is now his wife. The majority of the Supreme Court in this case adopt this view of the courts of appeals of the several circuits that have passed upon the question, holding it applicable whether the victim was married to

159. Elkins v. United States, 80 Sup. Ct. 1437 (1960); Rios v. United States, 80 Sup. Ct. 1431 (1960).
160. Glenn v. United States, 271 F.2d 880 (6th Cir. 1959).
161. Barber v. United States, 271 F.2d 265 (6th Cir. 1959).
162. Pegram v. United States, 267 F.2d 781 (6th Cir. 1959).
163. 18 U.S.C. § 2421 (1958).

defendant at the time of the offense or later. In the *Hawkins* case[164] there was some suggestion in one opinion that the wife might have a privilege to refrain from testifying even though defendant had no privilege to prevent her from doing so. But that notion is now repudiated. In a prosecution for violation of the Mann Act neither the defendant nor his wife has any privilege that the wife shall not testify against him. Here she was the person transported although she was a participant in the plan to secure other prostitutes.[165]

(d) Weight—Sufficiency.—The testimony of an accomplice may be sufficient to support a verdict of guilty. It is good practice to warn the jury that such evidence is to be viewed with suspicion. The fact that the accomplice expects to profit personally by testifying goes only to the value of his testimony and is to be considered by the jury.[166]

Although it is generally true that inadmissible evidence received without objection is to be considered by the jury for what it is intrinsically worth, yet where evidence of declarations of one defendant, made out of the presence of the other, is received against the other without objection and without this inadmissible evidence a verdict of guilty could not be sustained, the court of appeals may notice this palpable error and reverse the judgment of conviction.[167]

3. Jurisdiction—Court of Appeals.—The court of appeals has no original jurisdiction to enjoin the warden of a Tennessee state penitentiary from interfering with a prisoner's preparation in prosecuting an appeal from an adverse judgment in a habeas corpus proceeding.[168]

4. Trial—(a) Objections to Evidence—Necessity.—Where a party makes no objection to the construction of a hypothetical question put to a witness, he cannot complain on appeal that the question was improperly framed. This is particularly true when the trial judge charged correctly on the consideration to be given to the expert opinion, leaving the jury free to exercise its untrammeled judgment as to its weight or value. The court relies upon *United States v. Johnson*[169] in which the opinion received was upon an ultimate issue for the jury.[170]

(b) Right of Trial by Jury—Waiver.—An accused may waive his right to a trial by jury with the consent of the court and the prosecut-

164. Hawkins v. United States, 358 U.S. 74 (1958).
165. Wyatt v. United States, 362 U.S. 529 (1960) (Warren, C.J., Black and Douglas, JJ., dissenting).
166. Nichols v. United States, 276 F.2d 147 (6th Cir. 1960).
167. Glenn v. United States, 271 F.2d 880 (6th Cir. 1959).
168. Wooten v. Bomar, 266 F.2d 27 (6th Cir. 1959).
169. 319 U.S. 503, 519 (1943).
170. Barber v. United States, 271 F.2d 265 (6th Cir. 1959); see also Nichols v. United States, 276 F.2d 147 (6th Cir. 1960).

ing attorney. When his waiver is in open court in a written stipulation signed by himself and his attorney and by an assistant United States attorney, the court may in its discretion refuse to allow him to withdraw the waiver. The offense charged was not a capital offense.[171]

5. *Judgment—Res Judicata—Double Jeopardy.*—A plea of guilty not withdrawn is a bar to a later prosecution for the same offense, but not for prosecution of another offense. Thus a plea of guilty to a charge of passing counterfeit money in Nashville on one occasion does not bar a prosecution for passing other counterfeit money on a later occasion in Memphis.[172]

6. *New Trial—Misconduct of Juror.*—Where a juror takes an unauthorized view of cattle, the value of which is an important issue, he is guilty of misconduct, but whether the misconduct was of sufficient gravity to require setting aside the verdict and granting a new trial is a matter to be decided by the judge in the exercise of his discretion.[173]

7. *Appeal and Error—(a) What is Appealable.*—No appeal lies from an order granting a new trial,[174] and the power to review an order overruling a motion for a new trial on the ground that the verdict is excessive is held to be very limited.[175] Why this is so in terms of power, it is very difficult to understand. Though it is doubtless good policy to be reluctant to interfere in such instances, there is little to be said in favor of limiting the authority of the court in this respect.

(b) Scope of Review—Finding of Fact.—The court of appeals in a case tried without a jury does not disapprove the findings of fact unless "clearly erroneous." A finding is not clearly erroneous unless the court on reviewing the entire evidence is left with a definite and firm conviction that a mistake has been committed; and the burden is upon the appellant to make this appear to the court.[176]

171. Riadon v. United States, 274 F.2d 304 (6th Cir. 1960).
172. *Ibid.*
173. Aluminum Co. of America v. Loveday, 273 F.2d 499 (6th Cir. 1959).
174. *Ibid.*
175. Montgomery Ward & Co. v. Morris, 273 F.2d 452 (6th Cir. 1960).
176. S. G. Johnson, Inc. v. Johnson, 266 F.2d 129 (6th Cir. 1959).