Procedure and Evidence – 1958 Tennessee Survey

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Pleading

Construction and Sufficiency on Demurrer: A pleading must be construed in the light of matters judicially noticed; an allegation of facts from which the inference of the existence of an essential fact is no more reasonable or is less reasonable than an inference of its non-existence is not the equivalent of an allegation of that essential fact. These two orthodox generalizations sustain the decision in Thornton v. Carrier.1 A statute authorized the City of Memphis to construct a port and harbor and declared the project to be a governmental activity. The City's contract for the project with a private contractor required him to carry liability insurance for the protection of the City and others. A complaint against the City, the contractor and his insurance carrier alleging injury in the course of his employment as an employee of the contractor inflicted by the latter's illegally equipped bulldozer, was held to state no cause of action (1) against the City, or (2) against the contractor (other than under the Workmen's Compensation Act), or (3) against the insurance carrier, in the absence of an allegation that the liability policy covered the City's liability for injuries to the contractor's employees in performing a governmental activity.

Same: In a malpractice action against physician D, who treated P for an injury suffered in the course of P's employment as an employee of M, an allegation in D's plea in abatement that P and D were fellow servants of M and that D was retained to treat M's employees for injuries is a sufficient allegation of the matters so averred; it is immaterial that D was also engaged in general practice.2

Demurrer—Specification of Grounds: In Tennessee general demurrers have been abolished; a demurrer must state or describe in specific terms the alleged defect upon which the demurrant relies. Thus in an action against a Pension Board for money due, a demurrer to the bill of complaint specifying only the failure to allege a ground of

1. 311 S.W.2d 208 (Tenn. App. W.S. 1957).
2. Garrison v. Graybeel, 308 S.W.2d 375 (Tenn. 1957).
recovery does not raise the question whether the decision of the Pension Board is made final and conclusive by a pertinent statute.³

Counter-claim or Cross-declaration: Under Tenn. Code Ann. § 20-1007 counterclai ms are permissive, not compulsory. A defendant has the choice of interposing his claim in his answer or of instituting a separate action to enforce it. Therefore, where A sues B for damages arising out of a collision between automobiles, B’s plea in abatement on the ground of another action pending for the same cause is subject to demurrer if it alleges only the pendency of an action previously brought by B against A for damages arising out of the same collision. A pleading setting out these same facts would be a sufficient reply to a properly pleaded plea of another action pending for the same cause.⁴

Amendment—Oral Pleadings—Effect of Trial: In Tennessee the courts are especially liberal in permitting amendments in order to avoid arrest of judgment after trial and verdict. This doctrine is discussed and applied in the opinion in Shay v. Harper.⁵ The action was brought in the court of a justice of the peace. The writ was fatally defective for failure to state a cause of action. At the trial in the circuit court on appeal, counsel and court stated to the jury that the only question for trial was, which driver was guilty of negligence causing the injury. (Counsel had orally agreed on the amount of damage.) After verdict for plaintiff, the circuit court held, on motion in arrest of judgment, that the oral pleadings had amended the defect in the writ and the issue made by the amended pleadings had been fully tried. Judgment for plaintiff was affirmed.

Same—Adding New Parties Plaintiff: In an action for wrongful death brought by the administrator of the intestate’s estate, an amendment which adds as parties plaintiff the next of kin for whose benefit the action is brought does not change the cause of action and is properly allowed.⁶

PARTIES

Proper Parties—Action for Wrongful Death: In an action for the wrongful death of a married woman, the proper party plaintiff is her husband and not her administrator, and he may properly bring it in his individual capacity and as her administrator and as next friend of their four children.⁷

Same—Tenants in Common: Where the lessor is responsible for

³. Pless v. Franks, 308 S.W.2d 402 (Tenn. 1957).
⁴. Colella v. Whitt, 308 S.W.2d 369 (Tenn. 1957).
⁵. 303 S.W.2d 335 (Tenn. 1957).
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injuries suffered on account of a specified defect in the premises by an invitee of the lessee, and the lease is made by tenants in common, the Tennessee rule classifies the lessors as joint tortfeasors. Consequently the injured plaintiff may maintain his action against one or more of the lessors at his option. Such a lessor may not object to non-joinder of the other tenants in common. It is worth noting that the court concedes that the authorities are in conflict. It discusses only the cases cited in 39 American Jurisprudence, asserting that two of the three decisions are squarely inconsistent with the text, which adopts the contrary view. An examination of the opinion, however, makes the Court's interpretation of them very doubtful. Gould, Pleading (6th ed.), page 390, in reliance upon English, New York and Massachusetts cases, agrees with the doctrine rejected by the Court.

Same—Necessary Parties: In an action for a declaratory judgment against a utility district as to the rights of a property owner in a utility district to contract with another public utility for water service, the bondholders of the former district are not necessary parties.

Remedies

Certiorari—Common Law and Statutory—Non-judicial Tribunal—Requisites of Petition: At common law certiorari from an inferior court or non-judicial tribunal is granted only where the inferior court or tribunal acted (1) beyond its jurisdiction or (2) arbitrarily, fraudulently or illegally. It does not issue for mere error or irregularity in the proceedings. Under Tenn. Code Ann. § 27-802 it is a proper remedy when no appeal is provided. The petition must show a meritorious case. Where it shows that the petitioner was present at a hearing before the real estate commission upon the issue of revocation of his license, which closed with leave to him to submit further matter within thirty days, and fails to show any action by him within the thirty days or any excuse for non-action, the petition to the circuit court is insufficient, and it was reversible error to grant it. The case must be returned to the real estate commission for enforcement of its decision.

Same—Same—Decision of City Clerk: Certiorari is properly granted from the decision of the city clerk in determining that petitions for the recall of certain municipal officials, filed pursuant to the provisions of a private act, were not signed by the requisite number of qualified persons and in refusing to certify the petitions to the election com-

This remedy is authorized in this instance by both the common law and the Tennessee statutes. The circuit court properly found the clerk's action to be arbitrary, illegal and beyond his jurisdiction. Even though mandamus would have been an appropriate remedy and though an appeal would have been available under the statute, the common law writ of certiorari was properly granted.\textsuperscript{11}

\textbf{Same—Judgment of Court of General Sessions—Time for Filing:} When certiorari is to be used as a substitute for appeal from a judgment of a court of general sessions, the petition must be filed at the first term of the circuit court after the rendition of the judgment or the petition must set forth facts showing sufficient cause for the delay.\textsuperscript{12}

\textit{Coram Nobis:} A writ of error coram nobis is a new action.\textsuperscript{13} It is not available to a defendant to review a judgment or decree pro confesso on the ground of his lack of knowledge of the decree until after his discharge in bankruptcy, where there is no showing of accident, fraud or mistake which prevented defendant from making a defense. A defendant who fails to appear after service of summons is not entitled to notice of plaintiff's intention to take a decree pro confesso.\textsuperscript{14}

\textit{Declaratory Judgment:} Where defendant in an action to quiet title files a cross-bill which sets up title in himself, the cross-bill may properly be treated as a petition for a declaratory judgment. The defendant in the cross-bill may be given declaratory relief if the evidence entitles him to it. In chancery the plaintiff is entitled to any relief which defendant's answer reveals even if plaintiff in his bill did not ask for it.\textsuperscript{15}

A justiciable controversy exists where there is a dispute between the owner of property and a public utility district as to whether the owner may contract with another public utility for water service on more advantageous terms.\textsuperscript{16}

\textit{Interpleader:} A bill of interpleader lies only by a petitioner who is a disinterested stakeholder. Hence it is not a proper remedy for the executor and trustees under a will seeking a decree of distribution between a life tenant and representatives of the corpus of the estate.\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{11} Roberts v. Brown, 310 S.W.2d 197 (Tenn. App. W.S. 1957).
\item \textsuperscript{12} Buell Gray Motors, Inc. v. Furburn's Garage, 308 S.W.2d 410 (Tenn. 1957).
\item \textsuperscript{13} Carver v. Crocker, 311 S.W.2d 316 (Tenn. App. M.S. 1957).
\item \textsuperscript{14} United States F. & G. Co. v. Reese, 301 S.W.2d 535 (Tenn. 1957).
\item \textsuperscript{15} Bedford County Hospital v. County of Bedford, 304 S.W.2d 697 (Tenn. App. M.S. 1957).
\item \textsuperscript{16} Chandler Inv. Co. v. Whitehaven Utility District, 311 S.W.2d 603 (Tenn. App. W.S. 1957).
\item \textsuperscript{17} McPadden v. Blair, 304 S.W.2d 93 (Tenn. App. W.S. 1958).
\end{itemize}
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Same—Jurisdiction over Parties—Non-resident Beneficiary: The limitations upon the availability of interpleader are illustrated in American Nat'l. Ins. Co. v. Newland.\textsuperscript{18} The policy originally issued named as beneficiary the insured’s sister, a resident of Texas. After her death, upon his representations to the company that the policy had been lost, he received a substitute in which, at his request, the named beneficiary was his daughter, a resident of Tennessee. After the insured’s death, both the daughter and the sister’s administrator claimed the proceeds of the policy. The insurance company paid the proceeds into court, making the daughter and the Texas claimant defendants. The latter pleaded in abatement lack of service of process. The court held that personal service was essential. The action could not be regarded as in rem for the distribution of a fund, the non-resident’s interest in which was subject to attachment. It should be noted also that the company might possibly have been independently liable to each beneficiary on the policy in which she was named beneficiary. The advantages of interpleader under the Federal Interpleader Act where $500 or more is involved are strikingly apparent in such a situation. Unfortunately, the amount involved was only $499.10.

Quo Warranto—Ouster Act—When Moot: Both at common law and under the Tennessee statute, Tenn. Code Ann. § 23-2801, the intervention of the Attorney General or District Attorney is requisite for the maintenance of quo warranto. Under the Ouster Act\textsuperscript{19} the prescribed number of private citizens may maintain the action for the ouster of an official, but the proceeding becomes moot at the expiration of his term of office.\textsuperscript{20} In like manner, if the writ is instituted against the incumbent of the office of County Judge and the judgment rendered against him is appealed, the proceeding against him becomes moot at his death, and the appellate court will not retain jurisdiction to determine the constitutionality of the statute authorizing the proceeding in lieu of impeachment.\textsuperscript{21}

Same—Same—Grounds: In quo warranto proceedings under Tenn. Code Ann. § 23-2801, acts done by defendant during his immediately proceeding term of office cannot be made the basis for a judgment of ouster. The same is true under the Ouster Act.\textsuperscript{22}

Same—to Test Validity of Ordinance—Time Limitation: The statute authorizing quo warranto proceedings to test the validity of an ordinance for annexation of territory to a municipality\textsuperscript{23} requires that

\textsuperscript{18} 303 S.W.2d 332 (Tenn. 1957).
\textsuperscript{19} TENN. CODE ANN. § 8-2702 (1956).
\textsuperscript{20} State ex rel. Wallen v. Miller, 304 S.W.2d 654 (Tenn. 1957).
\textsuperscript{21} State ex rel. West v. Kivett, 308 S.W.2d 833 (Tenn. 1957).
\textsuperscript{22} State ex rel. Chitwood v. Murley, 308 S.W.2d 405 (Tenn. 1957).
\textsuperscript{23} TENN. CODE ANN. §§ 6-308, 319 (1956).
they be begun prior to the time when the ordinance becomes operative. A proceeding once dismissed cannot be reinstated after the operative date, and the statute allowing action to be brought within one year after a voluntary dismissal or nonsuit has no application.24

**Summary Correction of Errors after Judgment:** Under Tenn. Code Ann. § 20-1512 the court may within twelve months after judgment correct mistakes or omissions “where there is sufficient matter apparent on the record, the papers in the cause or entries of a presiding judge by which to amend.” This does not authorize a trial judge to amend a judgment in reliance upon matter not so apparent. An amendment stated to be made upon the judge’s independent recollection is unauthorized and of no effect.25

**Presumptions and Burden of Proof**

*Presumptions—Generally:* In a previous note in this Review, a multitude of Tennessee cases dealing with presumptions are collected and analyzed, and the confusing and confused state of the law is made glaringly apparent.26 In the decisions of the past year there is no indication of any attempt to bring order out of the existing chaos. It may perhaps be sufficient to brush off objections by saying that the court generally, if not always, reaches a result that works substantial justice; but this is in effect to say that there is no need for a rule which will enable the trial judge and counsel to predict the ultimate result, and that in all situations where a presumption plays an important part, the expense in time and money of an appeal is unavoidable.

*Same—Law of Sister State:* While the statute Tenn. Code Ann. §§ 24-607, 610 requires the court to take judicial notice of the law of sister states, yet it is not required to do so unless a party’s intention to rely upon it is brought to the attention of the court and of the adversary. In the absence of any showing either by judicial notice or by evidence, a Tennessee court presumes the law of a sister state to be identical with that of Tennessee. Thus where it appears that the law of Indiana governs concerning the effect of registration of an automobile, the court will presume that there is an Indiana statute identical with the pertinent Tennessee statute.27

*Same—Compliance by City with Governing Law:* In determining what provisions of the general education act govern the City of Jackson, there is a presumption that the city has complied with applicable

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24. Brent v. Town of Greenville, 309 S.W.2d 121 (Tenn. 1957).
provisions of its charter and the amendments thereto. This is true as to the requirement for levying a school tax annually.

Same—Undue Influence by Fiduciary: The presumption that the beneficiary of a bequest to one standing in a fiduciary relationship to a testator was secured by undue influence does not usually arise where the beneficiary is a child or adopted child of the testator. The parent is presumed to be the dominant party. Thus in Hollis v. Thomas29 the Court of Appeals held that the Chancellor had committed reversible error in holding that this presumption operated to cast the burden of proof upon the beneficiary that she, an adopted daughter, had not exercised undue influence upon her foster mother to procure the bequest. But where it was shown that a deed by a wife conveying all her interest in an estate in the entirety to her husband, to take effect at her death, was executed at his insistence and on his representation that the survivor of the two would take the entire estate, he was the dominant party, the presumption of fraud or undue influence arose and the burden was upon him or his successor in interest to prove that she was fully and correctly advised of the purpose and effect of the deed and that it was voluntarily and understandingly made.30

Same—Signature to Will by Mark: Where an illiterate testator signs by mark a writing which purports to be his will, there is a presumption that he did not understand its content. This presumption was dissipated where (a) one of the attesting witnesses testified that he wrote the will in accord with the testator's directions as his attorney and that he read it aloud to the testator in the presence of the other attesting witness, and (b) both testified that the testator then executed it, and (c) other witnesses testified that the testator later told them of the contents of the will but claimed to be dissatisfied with them. This testimony also satisfied the proponent's burden of proof of due execution.31

Same—Statutory Presumption of Scope of Employment of Registered Owner: In the case of Bell Cab & U-Drive-It Co. v. Sloan,32 the Tennessee Supreme Court said that this statute created a "bare rebuttable" presumption which was dissipated by the testimony of the owner that he had lent the car to the employee for his personal use. There was left, however, evidence of the registration plus other indicia of scope of employment so as to make the question one for

32. 193 Tenn. 352, 246 S.W.2d 41 (1952).
the jury. In *Smith v. Phillips*, where both the owner and the employees testified that the car was taken by the employee without the knowledge or consent of the owner, the presumption was held by the court of appeals not to be dispelled because these witnesses were impeached, and the court declared it would remain in full force if the jury should disbelieve their testimony. If the former case correctly states the law and "bare rebuttable presumption" means presumption as defined by Thayer and Wigmore, it disappears as soon as evidence is introduced which would justify a finding of the non-existence of the presumed fact, and the case is to be submitted to the jury as if no presumption has ever existed. Creditable evidence means evidence to which a trier could reasonably give credit, not evidence actually credited by the trier. Of course the basic fact, registration in the owner's name, remains for whatever logical value it may have, to be used with all other evidence properly introduced. The *Phillips* case, however, makes the presumption persist if the evidence to the contrary is disbelieved. This theory has been suggested in other jurisdictions in a few cases which have been later repudiated. The same appellate judge wrote the opinion in *Phelan v. Phelan*.

**Same—Common Law Presumption of Settlement:** In the *Phelan* case, *supra*, at the time of the conveyance by plaintiff to defendant of a one-half interest in certain real estate for a recited consideration of $4500 cash, defendant delivered to plaintiff his promissory note for $4000. In an action on the note evidence of sums due defendant from plaintiff was received and the jury in chancery found that these sums were due, that the transaction of conveyance and delivery of the note was not a complete settlement, and that neither plaintiff nor defendant understood it to be a complete settlement. The Chancellor found the facts accordingly and gave plaintiff judgment only for the balance of the sum sued for after deduction of the amount of the set-offs. On appeal the court held applicable the common law presumption that the note was in full settlement of all then existing obligations between the parties. The court's language lumped presumptions and inferences and explained that those which are generally called bare or arbitrary presumptions "disappear and become functus officio upon the introduction of creditable evidence, however slight, in contradiction thereto. Presumptions or inferences such as the presumption of settlement in the case at bar continue as evidence in the case throughout the trial and are to be weighed by the jury along with all the other evidence in the case." (Citing only two Tennessee Appeals cases which put the statutory presumption from registration

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33. 309 S.W.2d 382 (Tenn. App. W.S. 1956).
34. 309 S.W.2d 387 (Tenn. App. W.S. 1956).
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of an automobile in the former group and the well-known Bryan case35 which concerns the presumption against suicide.) "Therefore, we think His Honor's charge was defective in failing to charge the jury that the burden of proof was on the defendant, R. E. Phelan. Likewise we think he should have gone further and charged the jury that the presumption of complete settlement continued until the jury was satisfied by a preponderance of the evidence that the two items of indebtedness . . . were not contained or settled in the execution of the $4000 note."35

Same—Killing with a Dangerous Weapon: The presumption that the killing of decedent by defendant by use of a dangerous weapon was intentional and not accidental is not dissipated by the testimony of defendant, who was the only eye witness, that he was so drunk that he does not know what happened.37

Comment on the Foregoing Nine Cases: In the Schenk and Johnson cases the presumed fact was taken as established since no evidence to the contrary was introduced. In Hollis the real question was what constituted the basic fact of the presumption, while in Howell that fact was established, and the effect of the presumption was to fix the burden of persuasion. In Murray the introduction of contrary credible evidence completely dissipated the presumption; but in Smith the presumption that was classified in Phelan as one which disappears "upon the introduction of creditable evidence, however slight, in contradiction thereto" was held to persist unless and until that evidence was not only creditable but actually credited. And in Phelan the applicable presumption was held to be evidence and also to fix the burden of persuasion. It would be difficult to find elsewhere in one year's decisions in a single jurisdiction illustration of the imposibility of prediction by counsel or trial judge of the procedural effect of any apparently applicable presumption. It is submitted that the time is ripe for Tennessee to give serious consideration to the advisability of adopting legislation embodying Rules 701-704 of the American Law Institute Model Code of Evidence or Rules 13-16 of the Uniform Rules of Evidence.

Presumption of Lost Grant: In the midst of this confusion it is refreshing to find an opinion which clearly distinguishes between a situation where uninterrupted possession under a claim of title properly serves as the basis for an inference of a lost grant, whether or not it has developed into a presumption and where it clearly cannot be held within the rule which creates title by adverse possession. In

37. Lewis v. State, 304 S.W.2d 322 (Tenn. 1957).
his famous essay on Presumptions,38 James Bradley Thayer explained the origin of the rules governing prescription: “The familiar doctrine about prescription used to be put as an ordinary rule of presumption; in twenty years there arose a prima facie case of a lost grant or of some other legal origin. The judges at first laid it down that, if unanswered, twenty years of adverse possession justified the inference; then that it ‘required the inference,’ i.e., it was the jury’s duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was announced as a rule of property, to be applied absolutely.” In Eckhardt v. Eckhardt,39 Judge Felts, speaking for the Court, used this process to support a finding of the Chancellor that sole possession by a tenant-in-common for the period of prescription when unanswered, furnished at the least the basis for an inference of a lost grant and title in the possessor. As the opinion points out, this result is supported by Tennessee decisions dating at least from 1853.40

**Burden of Proof—Replevin:** In an action of replevin by an executor for a brooch specifically devised by the testator against a defendant having possession and claiming title by gift, the burden of persuasion is upon the defendant.41 Since title in plaintiff is an essential allegation in an action of replevin, this result is difficult to sustain logically, for the evidence of gift is no more than affirmative evidence in proof of a negative defense. It may well be that since the facts are peculiarly within the knowledge of the donee, it is fair and good policy to put the burden on him.

**Evidence**

**Relevance—Remote—Speculative:** In determining the market value of a parcel of real estate in condemnation proceedings, its value in the light of all uses to which it may be put is to be considered, but not its future value if put to a possible particular use. Thus evidence of opinion as to the value it would have if divided into lots in a subdivision laid out according to a specified plat is too speculative and likely to be misleading, and should be excluded.42

**Same—Similar Occurrences:** In an action to recover architect’s fees, defendant’s contention was that the plaintiff had not conformed to the terms of the contract as to the maximum cost of the planned

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42. Davidson County Bd. of Educ. v. First American Nat’l. Bank, 301 S.W.2d 905 (Tenn. 1957).
building. Evidence that the plaintiff had had a like controversy with two other persons concerning plans which he had contracted to draw for them was properly excluded. It is obvious that such evidence would raise collateral issues which might require a trial of two other actions if it was to have any appreciable logical value, and the mere fact that the disputes had arisen would have no bearing upon the issue in the case at bar.

**Same—Other Crimes:** In a prosecution for conspiracy between a money lender and a building contractor to commit usury, the device used to exact usury was to furnish money by the lender for repairs to be made by the contractor and to have the latter collect an exhorbitant charge and turn over the excess or a portion of it to the former. As tending to show that the arrangement in the case at bar was not due to mistake, evidence was properly received of a similar arrangement made with another victim about the same time. It is usually said that the accepted rule rejects evidence of other offenses save in exceptional cases. An examination of the multitudes of decisions involving this rule and its exceptions makes it clear that *Uniform Rule 55* states the existing law. This in effect makes such evidence inadmissible to prove the actor’s disposition to commit crime as the basis for an inference that he committed the crime charged but makes it "admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity." The specification does not purport to be exhaustive, but merely illustrative. It does include practically all of the more frequently occurring situations.

**Same—Liability Insurance:** Tennessee, like practically all other jurisdictions, holds it reversible error to inform the jury by evidence or statement of counsel that the defendant carries liability insurance covering the transaction in question, for the reason that its relevance as tending to prove the quality of defendant’s conduct is slight and its prejudicial effect is great. It may seem unrealistic to enforce such a rule when it is well settled that on voir dire counsel may, if acting in good faith, question jurors as to their interest in any liability insurance company, and particularly in actions for damages against motorists, when both the court of appeals and the supreme court have said that every intelligent juror knows that it is customary for owners to carry automobile liability insurance. Where the fact of insurance against liability is essential to the action against a state agency exercising a governmental function, it must be alleged in the complaint

44. Aymett v. State, 310 S.W.2d 480 (Tenn. 1958).
45. See Thomason v. Trentham, 178 Tenn. 37, 154 S.W.2d 792 (1941); Bourne v. Barlar, 17 Tenn. App. 375, 67 S.W.2d 751 (M.S. 1933).
and if controverted, must be proved. Still, if this allegation is admitted, then the liability of defendant for negligent injury to the extent of the insurance coverage is not in issue, and it is discretionary with the court to determine whether the jury may be so informed. Although it is the usual practice for plaintiff to read the complaint as part of his opening statement, the trial judge may in his discretion prevent him from reading the allegation of insurance in an action for personal injuries alleged to have been caused by the negligence of the driver of a "school bus." 46

*Opinion—Qualification of Witness:* An embalmer of twenty years' experience, after describing the wounds on the body of decedent, may properly be permitted to testify as to the cause of the death. 47

The attending physician of a testatrix may state his opinion that she was of sound mind, without first stating the facts upon which his opinion is based. 48 This ruling is justified whether or not the physician was qualified as an expert, for it is generally agreed that a layman who has had sufficient contacts with another and opportunity to observe his conduct may testify that in his opinion, the other is or was sane, though if he proposes to testify that the other is or was insane, he is usually required to state the facts upon which his opinion is based.

*Same—Same—Subject Matter:* The opinion of an insurance agent, whether or not an expert, as to the interpretation of a so-called comprehensive policy, is inadmissible in evidence. The construction of a writing in evidence is exclusively for the trial judge. 49

*Same—Expert—Radar:* A sufficient foundation for the testimony of a police officer as to the speed of an automobile as shown on the radar screen in his car is laid (a) by testimony of an expert witness who (1) explains the theory and operation of a radar machine, (2) asserts that if tests made before and after a specified time showed the machine in question to be accurate, it would be accurate during the interval, and (3) that the necessary information as to its proper operation is not complicated and that little training in its operation is required; and (b) by testimony that the police officer had three hours initial training followed by six months' experience in its use. The court cites and approves the reasoning and result in *State v. Dantonio*, 50 and

47. *Owens v. State*, 308 S.W.2d 423 (Tenn. 1957).
characterizes the opinion as “a complete brief on the question of the use of radar in speeding cases...”

**Hearsay—Hearsay Opinion:** In an action against the owner of a truck for damages caused by a collision of the truck with plaintiff’s tractor, defendant’s defense was that the driver of the truck had stolen it, and he offered evidence of the arrest, indictment and conviction of the driver for the offense of using the car without defendant's consent. The evidence was properly rejected. There is a conflict of authority as to whether evidence of a judgment of conviction is admissible as tending to prove the facts essential to the conviction when offered against the convict in a later civil action. No case has been found which suggests that it is admissible against any other person, but Uniform Rule 63 (20) would make a judgment adjudging a person guilty of a felony admissible wherever relevant to prove any fact essential to sustain the judgment. See also Rule 521 of the American Law Institute Model Code.

**Same—Exception—Declaration Against Interest:** Declarations of a person since deceased that she had deeded her property to named grantees were receivable as evidence of the facts declared. They were declarations against her proprietary interest, but declarations in her will made some years later that the deed had never been delivered and that it had been filed for record by mistake were inadmissible, self-serving hearsay. And her attempt to devise the granted premises by will could not operate to rescind the deed.

**Parol Evidence Rule—Varying or Contradicting Writing:** The official record of a quarterly county court is conclusive as to the official action of the court. It cannot be supplemented by parol evidence of the action taken. Any action of the court is legally ineffective which is not made a part of the record.

**Same—Construction of Writing:** In construing a will so as to ascertain the intention of the testator, evidence of all the circumstances in which and with reference to which it was made by the testator is admissible.

In like manner in determining whether a policy of insurance covering several automobiles was an open or valued policy as to one of them, evidence was admissible that in the negotiations the specific amount for which this one was to be insured was mentioned and that no amount was mentioned concerning any of the others.

WITNESSES

Witnesses—Competence—Dead Man Statute: In an action in replevin by the executor of a decedent's estate for a chattel which was the subject of a bequest, the defendant, who claimed as a donee, was incompetent to testify to conversations with the testatrix concerning the alleged gift.57

JUDICIAL NOTICE

Domestic Law—Private Acts Constituting Municipal Charters: Private Acts constituting municipal charters and amendments thereto are subject to judicial notice. This is illustrated in Johnson v. City of Jackson58 and Thornton v. Carrier.59

Matters of Common Knowledge—Specific Fact: The court judicially knows that state highway no. 70 leading from Nashville to Lebanon is a paved highway upon which traffic is very heavy.60

Same—Generalized Knowledge: In determining whether plaintiff was guilty of contributory negligence, the court takes judicial notice that "the running board of a truck is not a suitable place for a passenger to ride."61

Same—by Jury—Geographical Facts—Location of Private Building: In a prosecution for breaking and entering in the night time, venue may be proved by circumstantial evidence, but total failure of proof is fatal in the absence of judicial notice. A jury sitting in Bristol, Tennessee, may judicially know that the City of Bristol is located partly in Tennessee and partly in Virginia, but not that the Medical Pharmacy Center, a private business house, is located in Bristol, Tennessee.62

JURISDICTION AND VENUE

Chancery—Circuit—Juvenile Courts—Subject Matter: In counties having a Juvenile Court, neither the Circuit Court nor Chancery has jurisdiction to adjudge a child to be an abandoned child except in a proceeding for adoption of the child. The Juvenile Court has exclusive jurisdiction to make such an adjudication in all but the excepted cases.63

Same—Same—Transfer: The statute which provides for the transfer of cases in equity from the Circuit Court to Chancery has no application to an action for legal relief brought in the Circuit Court, merely

60. Edwards v. State, 304 S.W.2d 500 (Tenn. 1957).
because the defendant has set up an equitable defense or because the facts as developed by the evidence would have justified bringing the action either in Chancery or in the Circuit Court. Furthermore, in such a case the Circuit Judge is not empowered to act as Chancellor. If the defendant is to challenge the jurisdiction, he must do so by demurrer.\textsuperscript{64}

\textit{Same—Personal Jurisdiction—Appearance by Counsel}: A county attorney has no authority to enter a general appearance for the county where there has been no service of process. Both his agreement with the administrator of an estate made in the Probate Division of the Chancery Court of Hamilton County to compromise an alleged tax liability of the estate and the decree entered pursuant to the agreement must be set aside.\textsuperscript{65}

\textit{Same—Same—Service of Process}: An action under the Workmen's Compensation Act may be brought directly against the insurance carrier either in the county where the workman resides or in the county where the accident occurred. If in the former, the carrier must be legally subject to service there. But a foreign insurance carrier which maintains no office in Tennessee and has designated no agent for service resident in Tennessee may be served by serving the State Commissioner of Insurance. He is the agent for service in an action brought anywhere in the state.\textsuperscript{66}

\section*{Trial}

\textit{Motion for Continuance}: The ruling of a trial judge in denying a motion for a continuance will be reversed only for an abuse of discretion. That defendant had personal knowledge that a witness would be unavailable and failed so to inform his counsel in time to secure the deposition of the witness shows a lack of due diligence and justifies denial of the motion.\textsuperscript{67}

\textit{Same—Time to Plead after Amendment at Trial}: Where an amendment to a pleading is made at the trial, the denial of a motion for a continuance to enable the opponent to determine whether to demur or plead thereto will be sustained on appeal in the absence of a showing of prejudice. Tenn. Code Ann. § 20-170, which allows a period of two days to plead or demur, has no application.\textsuperscript{68}

\begin{itemize}
  \item \textsuperscript{64} Hamilton Nat'l. Bank of Chattanooga v. Champion, 303 S.W.2d 731 (Tenn. 1957).
  \item \textsuperscript{65} Hamilton Nat'l. Bank v. Richardson, 304 S.W.2d 504 (Tenn. App. E.S. 1957).
  \item \textsuperscript{66} T. H. Mastin & Co. v. Loveday, 308 S.W.2d 385 (Tenn. 1957).
  \item \textsuperscript{67} Morrow v. Drumwright, 304 S.W.2d 313 (Tenn. 1957).
  \item \textsuperscript{68} Friendship Tel. Co. v. Russom, 309 S.W.2d 416 (Tenn. App. W.S. 1957).
\end{itemize}
Voir Dire Examination of Jurors: The trial judge in the exercise of his discretion may permit questions, asked in good faith, to be put to a prospective juryman concerning his interest in a liability insurance company.69

Opening Statement—Content: In an action against a county board of education for damages for an injury caused by one of its servants in the performing of a governmental function of the board, an allegation in the complaint that the board carried insurance applicable to liability for the injury is essential, but unless the allegation is denied, plaintiff may not properly read that part of the complaint or otherwise inform the jury of the fact in his opening statement.70

Same—Effect—Direction of Verdict: Where the opening statement for plaintiff makes it clear that he has no cause of action against a defendant, the trial judge may properly direct a verdict for the defendant. Thus, when plaintiff alleges an injury caused by the negligent conduct of a contractor or his servant while performing for the City of Memphis a governmental function of the city, the trial judge committed no error in directing a verdict in favor of the city.71 This decision is well supported by the authorities. It will be noted that the statement affirmatively demonstrated the lack of a cause against the city. Its fault was not a mere omission to state an essential fact. In that event the record would have to show that plaintiff had been given a fair opportunity to remedy the defect and had failed to do so.

Order of Proof—Discretion of Judge: The trial judge has a wide discretion in determining the order of proof and in denying or permitting a party to reopen his case. Thus, he may permit the proponent in a will contest to reopen his main case and offer in evidence to the jury the paper writing constituting the alleged will.72

Theory of Trial: Where a party has tried a case on a definite theory he cannot on appeal seek a reversal on the contention that he would have been entitled to prevail had he tried it on a different theory. Plaintiff's theory at the trial was that he was entitled to a lien for the full amount due for materials from the contracting builder, notwithstanding payment by the owner to the builder of the full contract price. On appeal it was held that he could not predicate error on the theory that he was entitled to a lien for his proportionate share of the full contract price and that the owner was not entitled to credit

70. Wilson v. Maury County Bd. of Educ., 302 S.W.2d 502 (Tenn. App. M.S. 1957); see comment in text at note 46 supra.
for sums paid other lienors beyond their respective proportionate shares.\textsuperscript{73}

\textit{Dismissal or Non-suit—Voluntary—When Permitted:} A party may not take or be permitted to take a voluntary non-suit or dismissal after the jury has retired to consider its verdict, and the trial judge erred in allowing the plaintiff to do so. The court, however, has the power to correct the error by setting the order aside and restoring the case to the docket.\textsuperscript{74} Query, does this disposition not result in giving the plaintiff the same opportunity to retry the case as if he had acted before submission, and does it not give him also the benefit of not having to begin anew? In a similar case in Missouri, the court held that the dismissal must be entered on the record as a dismissal with prejudice.\textsuperscript{75}

\textit{Same—Compulsory—Waiver:} Where a defendant, after denial of his motion to dismiss for insufficiency of evidence, offers evidence in his own behalf, he waives the error, if any, in the denial.\textsuperscript{76} This rule is almost universally applied. In a few instances it has been modified by questionable legislation.

\textit{Direction of Verdict—In Criminal Case:} In Beadle v. State\textsuperscript{77} the court says: “The jury is the judge of the law as given by the court, in other words the court acts as a witness as to what the law is in a criminal case and the jury are the exclusive judges of the facts. . . . We do not approve the practice of a directed verdict in this State on behalf of the accused. Knowling v. State, 176 Tenn. 56, 138 S.W.2d 416.” Neither in the case at bar nor in the cited case is any reason given for the disapproval. In Caruthers, \textit{History of a Lawsuit},\textsuperscript{78} section 19 of article I of the Constitution is said to supply the reason. Consequently it would seem to be proper for the judge to advise the jury that as a matter of law, the evidence is insufficient to support a verdict of guilty, but that the final decision rests with them. He would then be acting as a witness as to what the law is. Of course, in such a situation he would have determined in advance that as a juror he would not vote for a verdict of guilty, for surely he would not disregard what he individually believed to be the law. And under our thirteenth juror rule, he would be bound to set aside the verdict and grant a new trial if the jury should return a verdict of guilty. Furthermore, if the supreme court agreed with the trial judge as to the insufficiency of

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\item \textsuperscript{73} Thomas v. Noe 301 S.W.2d 391 (Tenn. App. E.S. 1956).
\item \textsuperscript{74} Beene v. Cook, 311 S.W.2d 596 (Tenn. App. M.S. 1957).
\item \textsuperscript{75} Fenton v. Thompson, 352 Mo. 199, 176 S.W.2d 456 (1943).
\item \textsuperscript{76} Friendship Telephone Co. v. Russom, 309 S.W.2d 416 (Tenn. App. W.S. 1957).
\item \textsuperscript{77} 310 S.W.2d 157, 159 (Tenn. 1958).
\item \textsuperscript{78} Page 402, § 363 (7th ed. 1951).
\end{itemize}
the evidence, it would order the verdict set aside under the accepted rule that it will not permit a verdict of guilty to stand, if convinced that it is contrary to the preponderance of the evidence. Thus, in Tennessee we have this curious result: if an accused is once put to trial under a sufficient indictment, he must take the risk of an adverse verdict regardless of the sufficiency of the evidence against him and must rely for partial protection upon later action by the trial judge or the supreme court or both. How many trials must he endure in a situation where the prosecutor is stubborn and the issue is one on which the settled prejudices of the community are for all practical purposes controlling?

Same—In Favor of Party Having Burden of Proof: In a will contest where the issue was the authenticity of the paper writing offered as the will, and there was some evidence tending to throw suspicion upon its authenticity, the uncontradicted testimony of the beneficiary and the two attesting witnesses did not justify the judge in taking the issue from the jury and directing a verdict.9

But upon the issue whether a notice had been mailed as distinguished from an issue of its receipt by the addressee, the court held that the testimony of the addressee that the notice had not been received did not support a ruling refusing to direct a verdict that it had been mailed, where there was uncontradicted evidence (1) of the custom of the sender’s office to file copy of the notice and notation only after the notice had been mailed, (2) the presence of such copy and notation in its files, and (3) official receipt of the United States post office of the notice for mailing.80 This, notwithstanding approval of the contrary verdict by the trial judge and the court of appeals. The other evidence showed that the notices were taken to the post office by a porter and that twenty such notices were mailed per day. Query, if the porter presented twenty such notices with twenty receipts at one time to the receiving clerk at the post office, is there no ground for a reasonable finding that the failure of an alleged addressee to receive the letter may have been due to mistake of the receiving clerk in checking the receipt rather than miscarriage of the mails?

Charge to Jury—Necessity for Request: Dorrity v. Mann81 furnishes only another instance of the futility of assigning error in the charge on the ground that it was meagre or incomplete in the absence of a request to give supplemental instructions.

Misconduct of Counsel: In a prosecution for murder, the prosecuting attorney sought a verdict of guilty "of the highest grade of felonious homicide." In his argument he read to the jury the provision of Tenn. Code. Ann. § 40-3613 on the Power to Parole and declared that its effect was to make a 99-year sentence no more than a life sentence. On objection the trial judge instructed the jury to disregard this statement. The supreme court held this part of the argument to be such serious misconduct that the charge did not cure it, and set aside the conviction.\textsuperscript{82}

Misconduct of Jurors—Communications with Third Party: In an action for damages against an employee of a county, a third person informed two of the jurors in a private conversation that the county carried liability insurance and their verdict would cost the defendant nothing. On hearing of a motion for a new trial these jurors testified that for this reason they had agreed to a larger verdict. The supreme court held it reversible error for the trial judge to deny a new trial on this showing of prejudice resulting from the misconduct.\textsuperscript{83}

Effect of Disregard of Erroneous Instruction: Where the record shows that the jury disregarded an erroneous instruction that they should not consider certain evidence and returned a verdict supported by that evidence and other relevant evidence, the appellate court will consider all the evidence in determining the correctness of the trial court's refusal to direct a verdict.\textsuperscript{84}

Judgment—Res Judicata—Collateral Estoppel

Judgment or Decree—When Effective: An opinion of a chancellor stating his findings and order in a case is not effective and has no binding force until the decree is entered thereon. Hence, if the case is to be disposed of by his successor, there should be a trial de novo.\textsuperscript{85} But a judgment duly entered after trial by a judge without a jury is entirely valid even though the findings and entry were made after the expiration of sixty days. The statute requiring them to be made within that period is directory, not mandatory.\textsuperscript{86} And a decree entered on the minutes of the court, though not signed by the chancellor, is valid, notwithstanding the lack of signature. Tenn. Code. Ann. § 16-106 providing that the minutes shall be read each morning and signed by the judge is directory only.\textsuperscript{87}

\textsuperscript{82} Graham v. State, 304 S.W.2d 622 (Tenn. 1957).
\textsuperscript{83} Littrell v. Smith, 311 S.W.2d 204 (Tenn. 1958).
\textsuperscript{84} Beene v. Cook, 311 S.W.2d 596 (Tenn. App. M.S. 1957).
\textsuperscript{85} Bedford County Hospital v. County of Bedford, 304 S.W.2d 697 (Tenn. App. M.S. 1957).
Same—Res Adjudicata—Adoption Proceedings: Where a proceeding for adoption by a petitioner in one county results in awarding custody of the child to the Welfare Department in that county because of procedural defects in the proceeding, the award is not an adjudication on the merits. It does not bar a new proceeding in another county for the adoption of the child by the same petitioner, but the Welfare Department should be given an opportunity to appear and oppose the petition on the merits.88

Same—Collateral Estoppel: Where on an appeal the court of appeals finds that a designated writing was a will and not a deed, the finding does not estop the parties from proving the contrary (on remand) where the writer was not a party to the previous appeal. The finding is to be regarded merely as a precedent in point.89

Same—Same: According to the Restatement of Judgments the term res adjudicata is applicable only to a final determination of the cause of action in litigation. The term collateral estoppel is applied to a final determination of an issue of fact actually litigated and is conclusive in any later action on another cause between the same parties and their privies. Each party is said to be estopped as against the other to dispute the earlier finding, but the estoppel must be mutual save in one situation; viz., where the prior action is against a person primarily liable, as an indemnitor, and the finding is in his favor, it is conclusive in another action by the same plaintiff against the person secondarily liable as the indemnitee. Thus, where a plaintiff brings action against a servant for injuries alleged to have been caused by his wrong and judgment is rendered in favor of the servant, the plaintiff’s later action against the master on the ground that the servant’s wrong was done in the scope of his employment so as to render the master liable therefor is barred by the former judgment. The reason given is that otherwise either the master, if held liable, will be barred from recovery over against the servant or the servant will be held liable indirectly for conduct for which he was previously held not liable. This reason has no application where the first action is against the master and results in a judgment in his favor. Recently the Supreme Court of Tennessee, confronted with this problem, reached a result contrary to the restatement and held that a judgment in favor of the master barred a later action against the servant for the same wrong.91 It stated that its decision is in accord with the weight of authority. It certainly has the support of commentators,

90. §§ 96-99.
91. Caldwell v. Kelly, 302 S.W.2d 815 (Tenn. 1957).
who argue that plaintiff has had his day in court on the issue against
the master in a trial when it was to his interest to present his case
as completely as possible.

**Appeal and Error**

*What is Appealable—Methods of Review:* No appeal lies from an
order of a chancellor overruling a petition to rehear, but the record
may reveal some other applicable method of review. A writ of error
coram nobis is a new suit and requires security for costs or the filing
of a so-called pauper's oath, and cannot serve as an appeal or regular
writ of error, but the record on an attempted but improper appeal,
when accompanied by proper bond, may be treated by the court of
appeals as a writ of error. There is no right of a party or the sureties
on his bond to appeal after the expiration of the statutory period.

*Same—Discretionary Appeal:* The chancellor has no power to grant
a discretionary appeal from his order which overrules a motion based
on the pleadings and refuses to dissolve a temporary injunction. His
authority is limited by Tenn. Code. Ann. § 27-305 to the situations
specified in the statute.

*Same—Bill of Review:* A bill of review does not lie to review a
judgment of the court of appeals or of the supreme court on the ground
that the court of appeals determined an issue not made by the
pleadings. Review of a judgment of the court of appeals is by
certiorari, and of the supreme court by a petition to rehear. A bill
of review of a judgment of either of these courts lies only for
accident, fraud or mistake.

*Prerequisites—Petition and Order for Leave:* A petition for leave
to appeal and order granting it are prerequisites to an appeal in the
nature of a writ of error, but neither is required for a writ of error.
And where the record on a purported appeal complies with the requi-
sites for a writ of error, the supreme court will treat the appeal as
a writ of error.

*Scope of Review—Broad Appeal:* In a broad appeal from the decree
of a chancellor in an equity suit, the court of appeals reviews the
evidence and makes findings de novo. On certiorari from the court
of appeals the supreme court also reviews the evidence and makes

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93. Braden v. Clark, 310 S.W.2d 462 (Tenn. 1958).
95. Wolfe v. Hammer, 303 S.W.2d 716 (Tenn. 1957).

**Same—Trial in Chancery by Chancellor with Jury or with Master or Referee**: But where the chancellor tries the case with a jury which finds the facts on specified issues, and the chancellor approves these findings, they are conclusive on appeal. As to issues not submitted to the jury, the findings of the chancellor are re-examined de novo on appeal. The same is said to be true where the findings of fact of a master or referee have been approved by the chancellor. There the only question is whether there is any material evidence to support the findings, but in some cases the appellate court goes on to examine the evidence and conclude that it preponderates in favor of the findings.

**Same—On Certiorari to Chancellor from Board of Zoning Appeals**: Where an order of the Board of Zoning Appeals of Davidson County is reviewed on certiorari by the chancellor, he examines the record as to the facts to determine only whether it contains material evidence in support of the Board's order. If the decree entered by him reverses the order notwithstanding such evidence in the record, it will be reversed on appeal.

**Same—On Appeal or Writ of Error—Inadequacy of Damages**: Where the jury's verdict for a sum alleged to be inadequate has been approved by the trial judge, judgment entered thereon will not be reversed by the court of appeals unless the amount is so inadequate as to indicate passion, prejudice or unaccountable caprice. In applying this rule, the court will consider whether the damages which plaintiff is shown by the evidence to have suffered are subject to mitigation on account of negligence on his part. If so, a verdict which, without mitigation, would have been grossly inadequate cannot be disturbed. But, where the record makes it clear that there was no evidence of contributory negligence, the supreme court may reverse the judgment and order a new trial, notwithstanding affirmanse of the trial judge's decision by the court of appeals.

**Same—Revocation of Suspension of Sentence**: A proceeding to re-

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97. 302 S.W.2d 331 (Tenn. 1957).
VOKE SUSPENSION OF SENTENCE IS CLASSIFIED AS A CIVIL ACTION. THE JUDGMENT OR REVOCATION IS PRESUMED TO BE CORRECT AND IS TO BE AFFIRMED UNLESS SHOWN TO BE ARBITRARY OR CAPRICIOUS AND NOT SUPPORTED BY MATERIAL EVIDENCE.\textsuperscript{104}

**Record on Appeal—Requisites—Bill of Exceptions:** In the absence of a bill of exceptions, the court cannot consider alleged errors as to matters not appearing on the face of the technical record. Thus, in an election contest between private individuals to determine which one of them is entitled to the rights of the office, on appeal from the judgment of the county court to the circuit court, a bill of exceptions was essential as in other actions to secure a review of rulings not appearing on the face of the technical record. And the bill of exceptions must be filed within the statutory period if the Court is to consider it.\textsuperscript{105} Thus, in *Collier v. State*,\textsuperscript{106} the record showed that the court in denying defendant's motion for a new trial granted him forty-five days to prepare and file his bill and within the forty-five days but after the expiration of thirty days, the court extended the time so as to total fifty-nine days. The extension order was unauthorized and a bill filed within the extended time was of no effect. And any material filed after the expiration of the time for filing the bill cannot be treated as a bill of exceptions.\textsuperscript{107} But where a bill of exceptions properly authenticated by the trial judge was on file with the clerk at the time when the orders overruling the motions for a new trial were signed by the judge but the bill was not included in the record on appeal, the case was remanded for correction of the record under Tenn. Code. Ann. § 27-339. The inclusion of the bill in the corrected record is not subject to objection on the ground that it was filed too late.\textsuperscript{108} And a bill of exceptions in narrative form is sufficient though it omits testimony of several witnesses pursuant to stipulation of the parties.\textsuperscript{109}

**Same—Same—Compliance with Rules:** A copy of the original bill of exceptions, made by a reproducing process, complies with Rule 1 of the Court of Appeals.\textsuperscript{110}

**Same—Same—Sufficiency of Content of Bill to Present the Alleged Error:** From the record it appeared that on the motion for a new trial the error relied on was that "certain evidence" had been improperly submitted to the jury. This was not sufficiently specific to preserve

\textsuperscript{104} Hill v. State, 304 S.W.2d 619 (Tenn. 1957).
\textsuperscript{105} Brown v. Vaughn, 310 S.W.2d 444 (Tenn. 1958).
\textsuperscript{106} 308 S.W.2d 427 (Tenn. 1957).
\textsuperscript{107} Braden v. Clark, 310 S.W.2d 462 (Tenn. 1958).
for appeal the question whether the court erred in receiving evidence of a raid which occurred after the event which was the subject of the prosecution.\textsuperscript{111} On the other hand, a bill of exceptions certified by the trial judge as containing all the evidence material to the issues raised on appeal is a proper abridgement adequate to present the issue whether the trial judge was correct in ruling that plaintiff's contributory negligence was so clearly proved as to require a directed verdict for defendant. The omission of evidence as to the extent of the injuries, medical expenses and charts and diagrams did not prevent satisfactory consideration of the question.\textsuperscript{112}

\textit{Disposition of Case by Appellate Court—By Supreme Court in Criminal Case:} Under the liberal practice in Tennessee, the supreme court, after a review of the evidence and a determination that it did not support a verdict of murder in the second degree but demonstrated guilt of voluntary manslaughter, ordered that if the State consented, judgment of minimum punishment for manslaughter be entered; if the State did not consent, that defendant have a new trial.\textsuperscript{113}

\textit{Same—In Civil Case:} The trial judge granted judgment for defendant notwithstanding the verdict for plaintiff on the ground that plaintiff's negligence was the cause of his injuries. The court of appeals held that the evidence made the case one for the jury on the issues of defendant's negligence and plaintiff's contributory negligence, and that by his action the trial judge had approved the verdict and had erred on a matter of law only. It therefore restored the verdict and entered judgment thereon. On certiorari the supreme court reversed this judgment and ordered a new trial. The court of appeals has no power to restore a verdict which has been set aside by the trial judge for a wrong reason. This cannot be construed as an approval of the verdict.\textsuperscript{114}

\textit{Same—Court of Appeals—Remand:} In an appeal from the chancellor's decree in an ejectment suit, the court of appeals may remand the case to enable the petitioner to make a full presentation of his case when the record shows that he was erroneously prevented from doing so. Final disposition of the case by the court of appeals cannot justly be made on such a record.\textsuperscript{115}

\textit{Same—Same—Restoration of Amount of Verdict Remitted:} In determining whether to reinstate the amount remitted under protest at the suggestion of the trial judge, the court of appeals gives great

\begin{footnotesize}
\textsuperscript{111} Cloyd v. State, 308 S.W.2d 467 (Tenn. 1957).
\textsuperscript{112} Zanola v. Hall, 307 S.W.2d 941 (Tenn. App. 1957).
\textsuperscript{113} Hunt v. State, 303 S.W.2d 740 (Tenn. 1957).
\textsuperscript{114} Smith v. Tucker, 311 S.W.2d 807 (Tenn. 1958).
\textsuperscript{115} Carver v. Crocker, 311 S.W.2d 316 (Tenn. App. M.S. 1957).
\end{footnotesize}
PROCEDURE AND EVIDENCE

weight to the opinion of the trial judge; but where the amount so remitted is that added by the jury as a penalty because the judge erroneously ruled that the evidence did not justify finding facts which would authorize a penalty, the court of appeals will order restoration of the amount remitted.

Same—Supreme Court—Erroneous Ruling on Non-prejudicial Error: The trial judge in a condemnation proceeding erroneously admitted, on the issue of value, evidence of the assessed value of the property at a nominal amount and of the taxes paid. The court of appeals ordered a new trial on the ground that the amount of damages was inadequate because of the admission of this evidence. The supreme court held that the error was non-prejudicial and reversed the judgment of the court of appeals.

Assignment of Error—Grounds—Condition Precedent: An assignment of error in admitting certain evidence in a jury trial which was not set out in the motion for a new trial cannot be considered on appeal.

Same—Motion for New Trial: Defendants pleaded the applicable law of Indiana as to extent of liability. They made no request to charge and in their motion for new trial failed to assign as error this failure to charge. It was held that the question cannot be raised on appeal in error.

Where assignments of error are in questionable form, but the bill of exceptions contains a copy of appellant's grounds of motion for a new trial, the defects in the form will be aided by the bill and appeal will not be dismissed on account of such defects.

Same—Cross-assignment of Error on Certiorari: Cross-assignments of error come too late and cannot be considered when filed after argument in the supreme court.

Rehearing: The rules of the court of appeals require a petition for a rehearing to be filed within ten days after the filing of the court's opinion. A petition to rehear filed more than nine months after opinion filed, and after the petitioner had filed a petition for certiorari to the supreme court will not be considered.

118. Knoxville Housing Authority v. Bower, 308 S.W.2d 398 (Tenn. 1957).
Application of the Erie Rule: In *Louisville & Nashville Ry. v. Rochelle*, the Court assumed that the state law governs (a) the existence and applicability of a presumption and (b) the effect of a general verdict for plaintiff of damages in a specified sum where the complaint states several counts and one count is good. [Tennessee rejects the generally accepted rule at common law and holds that the entire sum is to be applied to the good count.] But the state law does not apply in determining the sufficiency of a pleading to raise the issue of last clear chance.

Remedies—Mandamus: The writ of mandamus to vacate a non-appealable order of a United States District Court should not be used as a device to accomplish piece-meal review by an appellate court. It may be properly used in extreme cases. It is settled that an order refusing trial by jury of an issue as to which a party has the Constitutional right to jury trial is interlocutory and not appealable, but the question is of such fundamental importance that an application for mandamus to require reversal of the order will be entertained. If on the facts presented, however, it appears that the issue is one of equitable cognizance, the final writ will be denied. Thus, if the issue concerns the right to rescind a contract and impose a constructive trust or to follow a trust res in the hands of a third person, the writ will not issue.

Same—Petition to Vacate Sentence: This petition under 28 U.S.C. § 2255 (1952) cannot be used as a substitute for appeal. The remedy for prejudicial effect upon jurors of undue publicity during the trial is a motion for a mistrial or other action by the trial judge and not a motion to vacate sentence. But where the petition alleges that the prosecution used perjured testimony, known to the prosecution to be perjured, and the United States has interposed no denial, the petitioner is entitled to a hearing.

Judicial Notice—Common Notoriety: That an unwarranted interruption of electrical power may cause serious and unnecessary economic loss, and possibly even loss of life, is within the realm of judicial notice.

Burden of Proof—Alibi: In a prosecution for possessing and con-

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124. 253 F.2d 730 (6th Cir. 1958).
126. Wingo v. United States, 244 F.2d 800 (6th Cir. 1957).
127. Dunn v. United States, 245 F.2d 407 (6th Cir. 1957).
128. City of Maryville v. Farmer, etc., 244 F.2d 456 (6th Cir. 1957).
cealing distilled spirits, defendants testified that at the time of the alleged offense they were in a jail in a specified county in another state. The prosecution's witness testified that they were at the scene when he found the spirits in question. It was held to be error to charge that if the jury had a reasonable doubt as to whether they were in the specified jail at the time the witness testified he found the liquor and saw them, they would not be guilty of the offense charged. The charge should have related to reasonable doubt as to whether they were present at the scene of the offense. A decision of this sort ought to put to rest the absurd exhibitions of mental gyrations found in some opinions holding that the burden of proving an alibi is upon accused and the burden of proving accused's presence at the scene of the crime is upon the prosecution, and that a charge so informing the jury contains no inconsistency.

Parol Evidence Rule: In Bowaters Southern Paper Corp. v. Brown, the trial judge in construing a written contract between the Corporation and a third party, a contractor, received evidence that might vary the terms of the contract but found nothing inconsistent with the writing. Hence, the court of appeals was not required to determine whether the Tennessee rule governing the subject was applicable. That rule was said to be that parol evidence to vary or contradict the terms of the writing is admissible in litigation between a stranger and one of the parties to the writing.

Witnesses—Credibility—Cross-Examination of Defendant: Cross-examination of a defendant as to the number of times he had been in a federal penitentiary for violating liquor laws, how many times he had been convicted and where he had been convicted in a named year for named offenses was improper and prejudicial. The questions must relate to specific convictions for felonies.

Trial—Charge to Jury: While it is not improper to allow the jury to have the indictment in the jury room during their deliberations, they should be clearly instructed that it is not evidence of the offense charged. A request for a specific instruction to this effect may in the court's discretion be denied if the general charge makes this point clear.

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Parol Evidence Rule: Where a transaction with respect to ownership and operation of a filling station included a lease by the owner of the premises to the plaintiff, a mortgage to a bank upon a loan to defendant

130. 253 F.2d 631 (6th Cir. 1958).  
132. Garner v. United States, 244 F.2d 575 (6th Cir. 1957).
secured also by assignment of the rental due under defendant's lease to plaintiff, and a back-lease from plaintiff to owner, parol evidence was admissible that the lease-back-lease arrangement was a security device to enable defendant to finance the operation of the filling station. And the rights and obligations of the parties are to be adjusted on that basis. 133

Jurisdiction and Venue: Under 28 U.S.C. § 1402(a) (1952), a corporation suing the United States to recover income taxes alleged to have been illegally assessed and collected may prosecute the action only in the judicial district where plaintiff resides; the orthodox interpretation of "residence" and "resides" as applied to a corporation in venue statutes makes it refer to the state of its incorporation. This meaning has not been modified with reference to Sec. 1402(a) by Sec. 1391(c) which authorizes suit against a corporation in any judicial district in which it is incorporated or licensed to do business or is doing business. 134 It is doubtful whether the last clause of this paragraph, which declares that such judicial district shall be regarded as the residence of such corporation, has any application to plaintiff corporations; but it seems clear that it ought not to be regarded as amending Sec. 1402(a).

Dismissal and Nonsuit—Effect upon Jurisdiction: The United States Court for the Eastern District of Tennessee, Southern Division, rendered judgment declining to take jurisdiction of plaintiff's action because he had had ample opportunity to begin the action in the United States Court either in admiralty or for a maritime tort at common law and had deliberately chosen to try out his action in the state court, where he had taken a voluntary dismissal when the state court was about to direct a verdict against him. The district judge pointed out that under these circumstances, he could not have been permitted to take a non-suit without prejudice in the United States District Court because to allow him to do so would have deprived the defendant of the benefit of a decision in his favor. It is abundantly clear that the court's action could not have been based upon Federal Rule 41, which provides that a notice of the dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim. In the case at bar there was only one dismissal, and under the Tennessee statute the plaintiff had an absolute right to dismiss without prejudice and to bring an action at any time within one year thereafter, notwithstanding the expira-

tion of the statute of limitations either while the action was pending or before the end of the ensuing year. The judge points out that the action was begun more than three years after the cause arose, but it is too well settled to admit of dispute that the state law governs with reference to the applicability of the statute of limitations in a common law action. The judge expressed his disapproval of the practice of shopping about for a favorable forum, but it is suggested that it is at least doubtful whether this can justify a United States District Court in refusing jurisdiction of a cause within its statutory jurisdiction.\footnote{135}

\textit{Judgment—Res Adjudicata:} Where an indemnitee notified his indemnitee to come in and defend an action, and the latter refused on the ground that the claim involved was not covered by the contract of indemnification because the claimant therein was an employee of the indemnitee, and the issue of employment was tried out, both the indemnitee and the indemnitee are bound by the judgment upon that issue in a later action by the indemnitee against the indemnitee.\footnote{136}

\footnote{135. Eager v. Kain, 158 F. Supp. 222 (E.D. Tenn. 1957).}